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Panel Presented by the Georgetown University Law Center's Supreme Court Institute

Olmstead v. L.C.: The Supreme Court Case

Samuel Bagenstos, Irv Gornstein,
Michael Gottesman, and Jennifer Mathis*

SAMUEL BAGENSTOS (MODERATOR): I'm really thrilled to be the moderator on this panel about the *Olmstead* case.

You have an incredible luxury here at Georgetown Law. You have faculty who are engaged in the world like two of my colleagues on this panel. To my immediate left is Professor Michael Gottesman (Georgetown University Law Center) who argued the case on behalf of Lois and Elaine, and to my next far left, Professor Irv Gornstein (Georgetown University Law Center) who argued the case on behalf of the United States. Between them is Jennifer Mathis (The Bazelon Center for Mental Health Law) who has spent, I think, most of her career at the Bazelon Center litigating, and organizing, and helping to coordinate folks on *Olmstead*-related issues. She played an important role in this case as it proceeded to the Supreme Court.

I'm not going to say much in this panel. My goal is to hear from the folks who were deeply involved in this case. It was a huge case at the time. I went to the argument and benefited a lot from watching the argument. But these are three people from whom I have learned a lot throughout my career. And I hope to give you all the benefit of their wisdom, so I am mostly going to ask them questions.

To situate the *Olmstead* case in the history of the law surrounding mental health, disability, and institutionalization: *Olmstead*¹ was decided in 1999, nine years after the Americans with Disabilities Act (ADA) was adopted. It was decided around the same time the Supreme Court was starting to hear a bunch of cases involving the ADA. The ADA was adopted in 1990. The Supreme Court heard no cases on the statute until 1998, and then heard a succession of ADA cases over the next several years. Most of those cases turned out badly for the disability rights movement. Then *Olmstead* came to the Supreme Court.

When you listen to the arguments or read the briefs, at the Supreme Court the question in *Olmstead* is: What does disability discrimination mean? How is

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1. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

institutionalization understood as discrimination? Those are the issues that really motivated the justices when they were deciding the case, if you go by the way the opinions were written and the way the questions at oral argument went.

If you think about *Olmstead* in terms of its effect on the world, though, I think the best way of thinking about it was as marking a new era of deinstitutionalization litigation. In the 60's, and most of the 70's and 80's, this area of litigation was really focused on constitutional challenges to institutionalization. These cases rested on negative rights kinds of arguments, mostly under the Due Process Clause. The argument was that if states are locking people up, they ought to do some things for the folks they are locking up. The litigators thought that if they won these cases, the courts' rulings would impose pressure on states to move people into high-quality community systems. It would be too expensive to satisfy the constitutional requirements otherwise.

This was a largely successful strategy in terms of moving people out of large state-operated institutions both in the developmental disability and the mental health worlds, and it was a largely unsuccessful strategy in terms of promoting high-quality community services around the country. Of course, the fact that this litigation overlaps with the rise of property tax revolts, and then Reaganism, et cetera, had something to do with it. Also, the structure of a negative rights claim had something to do with it. If the claim is "you can't lock someone up without doing something for them," then the state can say "Ok, great. We won't lock them up, and we won't do anything for them."

So *Olmstead* in my view represents the beginning of a different kind of strategy toward institutionalization, which is to say, you have to do it in a way that is providing services in the most integrated setting. That new strategy created a bunch of levers for expanding community-based services. I hope by the end we get into some of that.

But I want to begin by talking about where the case came from. So, Jennifer, this is the issue you have focused on for most of your career. Once the ADA was adopted, how were the folks in the national disability rights community thinking about the ADA as a potential tool in the deinstitutionalization?

JENNIFER MATHIS: As you alluded to, we had a long history of people trying to get at deinstitutionalization in other ways. We had the Pennhurst case² that went up to the Supreme Court. The Pennhurst case involved the Developmental Disabilities Assistance and Bill of Rights Act,³ which had language that basically said that "thou shalt serve people with intellectual and developmental disabilities in the least restrictive setting" and the Supreme Court said "Congress didn't really mean that you have to do that. That language is merely aspirational; it's precatory words."⁴ And then there were a series of due process cases challenging the conditions of institutional confinement, some of which were aiming at ultimately getting people out of institutions, closing down institutions and getting people in the community, but they weren't addressing what the community system looks like.

2. Pennhurst St. Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

3. 42 U.S.C. § 15001 et seq. (2000).

4. Quotations in this sentence are Mathis' paraphrasing of the laws; neither is a direct quote from the Act or a Supreme Court opinion.

With the ADA, I think people were certainly thinking about these issues from the beginning. There were some old 504 cases where people had tried to argue that Section 504⁵ had an integration mandate; in fact, including the Pennhurst case, which was brought in the 1970s. David Ferleger brought this case⁶ with DD Act claims that also included constitutional claims and 504 claims that were based on the integration mandate. So, it was certainly something that people were thinking about. After the ADA was enacted, we started to see some litigation that was brought under both the ADA and constitutional claims. People didn't give up on bringing those constitutional claims for a long time. I think at some point, it became clear that the ADA would be a better vehicle and you saw that the constitutional claims really drop off.

In 1991, Tim Cook wrote an article⁷ that set out a vision of the ADA's integration mandate. Tim Cook was a former Justice Department lawyer and colleague of Bob Dinerstein's, who very publicly resigned from the Justice Department. The article laid out some thinking about the integration mandate and how it might apply under the ADA.

And then you had some early cases starting with *Helen L.*,⁸ which I think was the case that launched a thousand *Olmstead* cases. It came out of Pennsylvania. We would rarely see this today, but *Helen L.* involved several different plaintiffs who were in different types of institutions. Actually, the first plaintiff was someone in a psychiatric hospital, and then plaintiffs added who were at nursing homes who had physical disabilities, and it was brought by Steve Gold and the Pennsylvania Protection and Advocacy System. They got a good decision from the Third Circuit in 1995. And then the Supreme Court denied cert in 1995. I think seeing that case and seeing a court say for the first time that it's a form of disability discrimination under the ADA to needlessly institutionalize people with disabilities started a tide.

A bunch of other folks and organizations around the country tried to bring similar cases. One of those was Atlanta Legal Aid. Sue Jamieson, who came to Atlanta Legal Aid shortly before then, was very focused on institutional advocacy and making institutions better, but particularly getting people out of institutions rather than improving their conditions. Mostly she was trying to figure out how to get people out and they had brought some individual cases with constitutional theories.

Then Steve Caley, the legal director at Atlanta Legal Aid, said, "let's do one of these *Helen L.* cases." He found Lois Curtis and later found Elaine Wilson in one of the Georgia state psychiatric hospitals. Both Lois and Elaine had intellectual disabilities and psychiatric disabilities and Georgia State psychiatric hospitals treated both systems. So, they were actually sort of a test case, with the cleanest possible sets of facts. They were looking for folks where there was no dispute that they were ready for discharge, and their treatment teams and doctors agreed that they were appropriate for community services, meaning that the only reason they

5. 29 U.S.C. § 794 (2015).

6. *Halderman v. Pennhurst State Sch. & Hosp.* 446 F. Supp. 1295, 1312 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), *judgment reinstated on other grounds on remand*, 673 F.2d 647 (3d Cir. 1982), *rev'd*, 465 U.S. 89 (1984).

7. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L.R. 393 (1991).

8. *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995).

were sitting in the hospital—in Lois's case for maybe two, or two and a half years past when she was deemed by the treatment team as ready to leave—was that the state didn't have enough community services. She just had to wait. Elaine's case was similar in that she was waiting over a year.

That is really how *Olmstead* got started. They brought that case and it ended up in the Eleventh Circuit. And they got a good decision there as well, similar to *Helen L.* The decision is a little different from what the Supreme Court did. The Eleventh Circuit decision has a different cost defense. It does have some cost defense in its analysis, but it doesn't look at the whole system the way *Olmstead* would and doesn't have a defense where the remedy would fundamentally alter the state service system. The Eleventh Circuit was looking at the cost, and they were looking at fundamental alteration, but the way that they analyzed it was looking at the cost to serve the person in the community versus the cost to serve the person in the institution. Period. And so, they did a different analysis than the Supreme Court.

So that is how we ended up with *Olmstead* in the Supreme Court. I think the disability rights legal community wasn't that focused on that particular case because there were few of these cases that had been decided and nobody expected this to get taken by the Supreme Court that early. The Bazelon Center was involved in the Eleventh Circuit briefing and everybody ended up getting involved as soon as the Court took cert. Cert was granted in December 1998 and I came to The Bazelon Center in January 1999, and I spent my first six months working just on *Olmstead*. That was the time of the emergence of the disability rights community's focus in a more coordinated way on this issue.

SAMUEL BAGENSTOS: When the disability community started to focus on the issue, after cert was granted, what was the goal of the disability rights community at that point? Obviously, there was this case, they had lawyers, what were all the other lawyers who did disability rights work who focused on national issues thinking was their role at this point?

JENNIFER MATHIS: Interestingly, I would say, there was as much focus on coordinating with a grassroots effort as there was for devising a legal strategy. You have to remember that this was before we had [email] list servs and communication was not as easy as it is today. I looked through my files and I found that we were sending letters and formal memos to people saying “would you talk with me about this.” We had a very intensive coordination effort, which does not always happen at the Supreme Court. Lots of times you have briefs where people have not talked to others extensively before filing and they say the same or contradictory things. It was a really impressive effort involving lots of different sectors of the disability community and the legal community as well as the non-legal community including the ADAPT⁹ folks, with Steve Gold's involvement too. We had particularly strong communication between the grassroots activist community and the legal community because Steve Gold was the institutional counsel for ADAPT (I don't mean institutional in the institution sense).

9. ADAPT is a national grassroots organization that coordinates activists to engage in nonviolent protests related to disability rights. See ADAPT, www.adapt.org (last visited Feb. 21, 2020).

But it was a really interesting addition to all of the legal briefs that were filed, because there was a significant effort—and I'm not sure it's ever been paralleled except possibly in the effort to fight the repeal of the Affordable Care Act and the destruction of Medicaid—by state-based cross-disability coalitions that were developed in every state. And they had a legal focus. You had people meeting with states' attorneys general. You had ADAPT folks chaining themselves to state capitols. And you had whole different sets of folks trying to meet with attorneys general, trying to meet with the governors to say two things: One was to withdraw from the amicus brief filed by states supporting cert. When Georgia had sought cert in the Supreme Court, there were twenty-two states that filed an amicus brief saying, "oh my God, the sky is falling, the sky is falling, we could never do this. We have very complex systems of healthcare. And it would just blow up the systems if we had to suddenly, immediately discharge everybody into the community. What would we do?"

They also argued that Medicaid was already the default system for all of these health services and Medicaid is a separate law and has different flexibilities within it. They said that is really the scheme that we need to follow: Medicaid says we can have institutions and Medicaid says we can limit community services. And so, interpreting this civil rights law in this broad way would be catastrophic, they said.

So with twenty-two states coming to the Supreme Court saying, "the sky is falling, the sky is falling," obviously people were very concerned about what impact that would have on the Court. So, part of the grassroots effort was to get states to withdraw from the Georgia brief.

I never really saw that done in another case in the same way. Ultimately fifteen of the twenty-two states sent notices saying, "We withdraw ourselves from this brief." And then there was an effort to try to get the states to remain neutral on the merits, and not join one of these briefs from the states that said the sky is falling. That was a stunning effort on a grassroots level.

For the legal briefs filed, we had former commissioners and mental health commissioners and intellectual disability service commissioners. We had Dick Thornburgh, who had been the attorney general when the ADA regulations were adopted. We had ADAPT and TASH¹⁰ and NCIL (National Council on Independent Living) and we had the National Council on Disability which had been part of developing a blueprint for the ADA in the first place. And we had a variety of other groups, and it was a really well-coordinated effort. The former Commissioners were saying, "Hey, it doesn't cost what you think. It's actually cheaper to serve folks in the community than it is to serve people in institutional settings for the most part. This is where the field is going." And the advocates were saying, "Community integration is good. And here is what it means to us."

There was a mental health consumers group, as it was called then, filing a brief with individual stories, doing the story telling of how their lives had changed since they got out of being hospitalized and started living in their own homes. In some cases, they lived in group homes, but a lot of them lived in their own homes.

There were some interesting fights about the amicus strategy. For example, Steve Gold said the briefs need to talk about people in nursing homes or the Court

10. "TASH" was previously an acronym for "The Association for Persons with Severe Handicaps," but the group discontinued use of the full name and now uses only the abbreviation.

will not address the folks in nursing homes who don't need to be there. Others raised concerns that this would highlight the potential breadth of the integration mandate in unhelpful ways. In the end, ADAPT filed its own brief talking about nursing homes, but did not highlight the application of the integration mandate to older people in nursing homes. At the time it was less understood that many younger people with disabilities were in nursing homes. Reading the brief, judges weren't necessarily thinking about the large number of older folks in nursing homes and the Olmstead implications of that.

I also remember getting calls from someone in the mental health community saying, "We understand there is this consumer brief." There were lots of politics in the mental health community about the term "consumer" and many people don't like it and prefer other terminology. This caller objected to the term and said if you get this brief filed that says it's on behalf of "consumers," then we are going to file 2,000 amicus briefs on behalf of 2,000 people in nursing homes, and then no one is going to read anything. So, there were a lot of interesting fights about what might be considered tangential issues, but it was really a massive coordination effort both on the level of people filing the legal briefs but also the people doing all the grassroots strategy, which truly made all the difference in the world.

SAMUEL BAGENSTOS: And you are the person who brought Mike Gottesman into the case.

JENNIFER MATHIS: The Bazelon Center was trying to identify a Supreme Court litigator. That is a strategy the disability community has employed when some ADA cases have gone up to the Supreme Court, but sometimes that is a battle because the people who have been working on a case are very attached to the case, and they have worked on it for a long time. If it gets taken by the Supreme Court they want to do the argument; it's not that often that they would get to do a Supreme Court argument. For that reason, it's often very difficult for people to agree to give that up.

But in the case of *Olmstead*, Steve Caley, the Atlanta Legal Aid Litigation Director, said, "Absolutely," and totally was on board with the idea that we needed somebody who understood the Supreme Court. We needed someone who was focused on how each justice thinks and what their history has been and what motivates them. Mike Gottesman had been my colleague Mary Giliberti's law professor; he had been my law professor; and I think at the time he had done seventeen arguments in the Supreme Court and won most or all of them. Which is a stunning record. We—Mary and I—reached out to Mike. And I think I wrote fifty memos for Mike in the next couple of months.

SAMUEL BAGENSTOS: Mike, let's turn to you. You had not been a disability lawyer before. Most of your cases had either been labor or tort cases. When you saw this case, how did you think about it? How did you think about what the issues would be in the case, and how did you approach it?

MICHAEL GOTTESMAN: You are absolutely right, I had never been involved with the mental health community, or any of the issues or the litigation that Jennifer has described. I did have some familiarity with the ADA, because Title I deals with

discrimination in employment and I was primarily an employment lawyer, so I had filed briefs in a lot of cases involving that. But the issues that are posed in the *Olmstead* case are unlike anything that arises under Title I of the ADA. This idea that you are entitled to be in the most integrated setting just isn't a concept under Title I. Discrimination under Title I is discrimination in the ordinary, general sense and the way that three justices on the Supreme Court in *Olmstead* thought about discrimination—that is, that you are being treated differently from another person when the only difference between the two of you is that one of you is disabled.

My first thought when I got called by Jennifer to be involved in this and she told me that she and Mary had persuaded others that I should be involved, was what a reversal of roles this was: that we as professors are always trying to find jobs for our students, and here the students were finding a job for me!

And the second thing I thought was that this was an area I knew nothing about. Yes, I knew about the Supreme Court and how to argue cases there. But I didn't know the subject matter that was going to be the crux of this case. And here, as Jennifer described, not only was there a reversal of roles in getting jobs, there was also a role reversal in teaching. Jennifer taught me all about Title II and the ADA and the entire history that she has just described of litigation in this area. As I learned more and thought about this more, it seemed to me that the one and only issue that the state of Georgia was asking the Supreme Court to decide was whether it is discrimination to keep people in institutions rather than in the community. Georgia's argument was that to have discrimination, you have to have two people, two like people, who are being treated differently, only because of disability.

And there was an attenuated argument that we were able to come up with that, even under that definition, this would be a violation. But that wasn't going to be the main line of the argument. It was clear when you read this statute on its face and when you read the legislative history of it that Congress had very much in mind that keeping people unnecessarily in institutions and depriving them of getting their treatment in the most integrated setting, we will declare that itself is discrimination. Never mind what we normally think about discrimination, never mind the normal meaning of those words—this is a statute that is saying that is discrimination. So that was the centerpiece of our argument. And if you asked what my expectations were, I thought it was likely we would get five justices who would embrace that view.

In the actual drafting of the brief, there were a number of points to be made. Number one: On the face of the statute, Congress made several findings. First, the finding that there is segregation that is unnecessary, that institutionalization of people who don't need to be institutionalized is unacceptable.

And then another thing was in the statute. The Rehabilitation Act was passed before the ADA was enacted. Congress directed the Justice Department to develop regulations under Title II of the ADA and in doing so, to incorporate the regulations that had been adopted under the Rehabilitation Act. And one of those regulations was the integration regulation saying that you can't keep people unnecessarily segregated when they could be served in the community. So the nature of our brief was largely to look at the face of the statute.

Even more importantly, Congress directed the Justice Department to adopt this regulation. It's not like the Justice Department on its own was thinking, "Would this be a good idea? Is this what the statute means?" Congress *told them* to adopt

this regulation. That's why I felt pretty confident that we could establish that this was discrimination within the meaning of the ADA.

I was struck by the fact that, when I read over the briefs in anticipation of being here today, my argument and Irv Gornstein's brief for the government were essentially identical on this issue, and we had not consulted with each other. The analysis was quite clear as to why this should have been discrimination under the ADA, so that wasn't what the concern was. I think the concern we all recognized was, will the Supreme Court be concerned about the burdens that this will put on the state? Are the states up to it? What will this mean? The statute and the regulations that the Justice Department promulgated did include a defense for states. The accommodations had to be reasonable. But more importantly, they said that nothing that would require a "fundamental alteration" of the state services would be required. So that seemed to us to be a very big issue.

But that was not the issue that Georgia had asked the Supreme Court to decide. When you file a cert petition, you have questions presented. The only question they presented was: Was it discrimination? They didn't present an issue about what the remedy should be or what would be a fundamental alteration. Nonetheless, we knew that even though the Court wasn't being asked to address that issue, they were probably going to want to know what the answer to that issue was before they would be prepared to pull the plug and say "yes, [this is discrimination]." They weren't going to want to unleash this fury without any idea what the impact on the states would be.

Inevitably we had to brief the question, "Under what circumstances will the state have a defense that says this is too much, we can't do it"? The literature at that point was absolutely clear that it's cheaper to serve people, when they're up to it, in group settings in the community than it is to keep them in institutions. But there was one problem. That assumed that you did not have to factor in the cost of the state maintaining the institutions. The institutions were already there, employees were already there. Assuming they were not going to close the institutions because some people needed to be served in them, this was going to be an add-on cost. So, there was that problem and the problem of whether the states might respond with dumping into the community all the people who really needed institutional care. If they had to move some of them to the community, why keep others? Our principal argument on that, and here the Justice Department took a slightly different tack, was that the solution was to close those institutions that you don't need. The number of vacant spaces in the Georgia institutions at that time should be such that they could have just closed down some of the institutions and moved the people who needed to be there into the other institutions. But that of course might not necessarily be true in every state, and the Supreme Court was making a decision that would apply nationwide. So, that was a real problem to address and I think the government spent more of their time on that so maybe they were the ones to address that.

SAMUEL BAGENSTOS: I have been assigned to do the segue to Irv Gornstein now. Irv, you were working in the Solicitor General's (SG) office when *Olmstead* came before the Court. Of course, you had been an appellate lawyer in the DOJ Civil Rights Division for a number of years before that. And you had some experience with civil rights laws and with the ADA. So how were you thinking

about this case, and was it different from the way that Mike and Jennifer were thinking?

IRV GORNSTEIN: The first thing I thought about the case was that we had regulations on point so I knew we would be defending the regulations. That is sort of a starting point. The second thing is that I knew I would be hearing from not just the Civil Rights Division, but also the Department of Health and Human Services (HHS). That is typical in the Solicitor General's office: You hear from everybody who has an interest, and so, as far as possible, you try to accommodate the interests of all parts of the government. Insofar as not, then the Solicitor General (SG) has to make a call and you, as the Assistant, make a recommendation and the SG makes the call if there is that kind of debate. So, the first thing you try to do is hear from everybody and see if you can get agreement or consensus around something. And so the Civil Rights Division had one perspective and HHS had a slightly different one, because the HHS has Medicaid and so had quite a lot of involvement in it, and so part of the task is to try to see how to get everybody to come together on something that everybody can live with, even if they don't one hundred percent embrace it.

And for me, my perspective after that was just how do I count to five? Unlike Mike, I was not confident that we would get five justices; I was looking at two justices only at the time, Justice O'Connor and Justice Breyer.

It's a different Court today than it was then. Now, people are used to talking about the Chief Justice [Roberts] being like the median justice. For a long time, Justice Kennedy was the median justice. But at that time, the median justice was Justice O'Connor. And so, I thought that if I didn't get Justice O'Connor, then we were losing the case. I also worried about Justice Breyer because he is a very practical man. Mike talked about the discrimination issue. I didn't worry about the discrimination issue because I didn't think my two target justices were going to care about that much, as long as I gave them some kind of plausible story about why it was discrimination, I thought that would be fine if you could satisfy them about everything else. And we had more than a plausible story. Although I have to tell you, every time before we did arguments in the Supreme Court, we would do two moot courts and I did not get a single moot court justice to agree with me that there was discrimination. So if you were not versed in the ADA and you did not buy into the view that hey, Congress just decided to have a completely different definition of discrimination here than in every other civil rights statute, then it was a very tough uphill sled to convince you that there actually was discrimination. But as I said, I never had any actual concern about that. We had a strong argument that there was discrimination. But more than that, I knew that if I could satisfy Justice O'Connor and Justice Breyer on things they would care about, then they would be fine with the reading of the discrimination language.

To me, the big problems as I thought about the case were these: When one walked around downtown D.C. at the time, one would see people who I thought the justices would think belonged in institutions, not in community settings. One might say: "I don't want to see more of that." So, one big concern that I had was that they would fear that the consequence of ruling in favor of the integration regulation would be that there would be a lot of people on the streets who seemed

like they should not be on the streets. The second big concern I had was the one that Mike discussed: How was this going to shake out for the states?

There were two things that we specifically did in the brief in an effort to deal with those two problems. Justice O'Connor has a lot of concern about flexibility for states and she also had concerns about disabled people getting the best treatment possible. I knew she would want to address both of those concerns, so I wanted to be able to serve up something that would allow her to do that, as well as satisfy the concern I anticipated Justice Breyer would have about people being out who shouldn't be out.

So we had two issues: one was to what degree of deference should be given to the state, to the person in the state who is recommending whether someone should be in or out [of an institution.] I thought that unless there was some degree of deference to that judgment, we would have trouble bringing Justice O'Connor around. You could have debated that issue either way, but there was a 504 case called *Arline*¹¹ in which there was some measure of deference given. So, I thought, "well that's number one what I want to do."

The second thing that was a big issue was managing costs. As Mike said, if you close down institutions or leave only one open and fill everybody in there, then it would be cheaper in the long run. But in the short run, at least in some places, HHS had advised us that there would be increased cost and could even be substantial increased cost. So I knew the Court was going to hear that and I knew we would need an answer for Justice O'Connor on that.

I can't remember who came up with the idea first, me, HHS or the Civil Rights Division, or whether we came up with it together, but there was this idea of a plan that did not require everybody to be moved at once, but allowed the state to say, "We have a plan for moving people who are found to be able to appropriately benefit from community treatment and here is our plan and it's a reasonable plan and making us switch from that would either be a fundamental alteration or it would be an unreasonable modification of state policy." That was the idea we surfaced in the brief to help states manage their cost.

We thought that in the long run, that the costs are manageable and there will be no justification for not moving almost everybody, eventually, into the community. But we wanted to give the states a way to deal with the short-term upticks in costs and other administrative concerns. There were some additional practical concerns. For example, there were people in the institutions who were employed, who would have to be fired eventually, and there definitely was going to be a lot of resistance to that. So we thought as a practical matter it would be good, and not damaging in the long run, if we proposed that states have a plan that provides for prompt but still manageable movement of people who belong in the community into the community, while still allowing people who needed institutional treatment to remain.

I gather there is a sense today that nobody needs to be in an institution, but at that time there was still somewhat of a consensus that some people needed institutional treatment, and would be allowed to remain in an institution.

That was pretty much the brief. As I say, nobody in the SG's office thought we would win. They all thought we would lose. And I thought we were going to

11. *See* Sch. Bd. of Nassau Cty. v. *Arline*, 480 U.S. 273 (1987).

get, at most, five justices. It turned out we had five and a half because if you read Justice Kennedy's opinion he was halfway there.

SAMUEL BAGENSTOS: It's very interesting—and I think this says something about the culture of the SG's office—that the culture of the SG's office is very taken by formalist arguments. But you were making a very non-formalist argument. You are telling a story about what discrimination means but the story wasn't that discrimination means comparing two people, treating similar people differently. For fundamental alteration you said you were going to make up this defense that if they had a plan and if they were moving people at a reasonable pace that's good enough, even though that appears nowhere in the statute. And the deference to the treatment professionals is in a completely different provision of the statute that has nothing to do with this case. But you are sort of pulling stuff from everywhere. This is what lawyering is. To any of the students in the audience, don't let anyone tell you that lawyering is just what Justice Scalia said lawyering is. You have to appeal to multiple kinds of justices and sometimes you pull stuff from a bunch of different places and you get to the median justice and get the results. So, in light of that, and obviously foreshadowing that Irv was a better predictor than his colleagues in the SG's office about this: Was there anything that surprised either of you, Mike or Irv, about the argument or the decision?

MICHAEL GOTTESMAN: Not big surprises. But there were a couple of things. There was one place where we each divided. We each got the same question: suppose the state had no group houses and the only thing they had were institutions, does this require them to have group homes for those who did not need to be in the institution? Not surprisingly, as I was representing the disability community, I said, "Yes it does. The statute says you have to be served in the least restrictive way. The regulation said the state doesn't have to make fundamental alterations, but building a group home is not what they meant as a fundamental alteration. Now, the question was hypothetical because at this point there was no state that didn't have at least some group homes. It's not as if the question actually involved any state. But hypothetically we would say that a state can't just say, "Sorry we will stick with institutions."

The same question was asked of Irv and he said on behalf of the government, "We think it would be a fundamental alteration to require a state to initiate group homes when they never had one before." And since, of course, he had invented this whole planet as it has been described, they wanted to know what his view about that was as well. Now they did not address that in the opinion.

The one other thing about the opinion that surprised me a bit is that the Court embraced the government's idea that states have to have a plan to claim a fundamental alteration defense. One of the things we had argued is "Look at the reason why Georgia is dragging its feet on moving people. These are reasons totally unrelated to cost. Instead they are related to wanting to preserve jobs in the institution." It was a bit hard for me to make this argument as a union lawyer, but I remembered who my client was. But, the administrators said there was some evidence that the person who was head of one of the Georgia institutions said, "My job is to make sure all the beds are full." That showed that there were a lot of motivations unrelated to what you would regard as legitimate concerns. In

adopting the government's proposed formula, the opinion did build that in, but states are not allowed to consider institutional concerns unrelated to the treatment of the patient in formulating your plan. So, we were very pleased with that.

IRV GORNSTEIN: As far as the argument went, I thought the questions that came seemed like predictable questions to me. I knew the right side of the Court was going to be on this discrimination business. But the thing was, they focused on that while Mike was on. And by the time I got up, I can't even remember, maybe they did ask me about it. But I always felt we had a very strong response, if you were not stuck in the world of how you usually think about discrimination because as Mike said, we were armed with the findings that basically said that segregation in the form of institutionalization is discrimination. And so, the statute can say black is white and it is white. It can certainly say that something like segregation which has a lineage in discrimination law and in racial segregation is discrimination. It is true discrimination usually involves dissimilar treatment of persons who are similarly situated, but the way we structured the brief, as Mike said, we had provided a backup argument.

The main argument was that this is just how Congress defined discrimination: segregation in the form of unnecessary institutionalization is discrimination. But underneath that, I had an argument about why Congress considered this as discrimination. That included or embraced a kind of dissimilar treatment argument which was, that (a) nondisabled people could get medical services in the community whereas disabled people could not; and (b) if you think about all the other services that states had a duty to provide equally to disabled and nondisabled people, like parks and libraries or anything else like that; the effect of institutionalization was to deprive these disabled persons of access to those public services and not deprive nondisabled persons.

So, we did have that. Not as the main argument but just as one or two of the reasons that Congress thought about this as discrimination. We also had the idea that segregation stigmatizes and that is a form of discrimination that has been recognized. Segregation stigmatizes disabled persons as not being able to live in the community or not fit to live in the community, and you are not doing that to nondisabled persons. So, in each case underneath the idea that Congress had just identified unnecessary institutionalization as discrimination, I felt very good about all of those arguments. So, I was not at all worried. I figured that—because I had been through two moot courts—I was not going to persuade anybody who was not already persuaded by it. But I knew we were on firm ground. So, I did not feel weak. I don't remember, I may have gotten one of those questions. But not much. One of the questions I did get was the community placement question: whether a state that did not offer community place had to establish a community placement program.

As to that, the Justice Department had already taken a position before I ever got into this case. The DOJ's position was that it would be a fundamental alteration to require the state to offer community services if they had not before. So when I was doing the brief, I thought we had two choices. First, we could back off of what we had said before, which is never going to win you any friends, but, if you have to, then you do it. My thinking was that everybody already had community services, so it was low-cost to say "yes, it's a fundamental alteration, but in the real

world that is not going to matter at all because everybody already has community services.” So that seemed like a cost-free concession to me and because we had already taken that position, I didn’t want to undo it. Because that costs you credibility when you back away from a position the government has been taking.

And the other main question I anticipated I would get, because I got it over and over again at the moot courts, was “What if somebody needs one-on-one treatment? Does the state have to provide that to everybody?” In the moot courts I went back and forth on how to answer that particular question. I ended up deciding and basically planning to say that this was not a fundamental alteration question, it’s a question about whether it’s unreasonably costly, which we had actually separated out from fundamental alteration. Unreasonable cost would have made it an unreasonable change in policy. That’s not actually how the Court ended up thinking about it, but that’s how we were thinking about it at the time. And so I said that is just a question about whether it’s unreasonable cost. I told them that there was a statute that wasn’t in this part of the ADA but a different part of the ADA that talked about when costs are unreasonable.

MIKE GOTTESMAN: It’s in Title III.

IRV GORNSTEIN: I said to them to take a look at Title III, this would tell you the kind of factors to consider in deciding whether the costs are unreasonable. I was not going to give them an answer because I was not aware of all the facts on the ground, but that would have been the inquiry and they were fine with that. I actually thought the argument had gone reasonably well. I mean, Justice Breyer was all over Mike with the dumping problem.

MICHAEL GOTTESMAN: Yes. And Justice O’Connor on what are the burdens on the state.

IRV GORNSTEIN: The other thing I remember, of course, is that right side justices want to tell you there is no room in the statute to do anything reasonable—“Where is it in the statute that you can take the professional judgment of the state into account? That is not in the statute.” Of course, their goal is not to say they should not defer to it, the goal is to say there should not have been this obligation at all. And I did get asked that question too and I gave my *Arline* answer and that seemed to be fine. I was only looking at Breyer and O’Connor, and it seemed to be fine with them. I knew it would not satisfy the rest of the right side of Court.

MICHAEL GOTTESMAN: There was no hope going in of getting the votes of Justices Scalia, Thomas, or Rehnquist—that was a nonstarter. We anticipated getting questions from them on this issue of discrimination because they wanted to end the case there. They were not asking, as a practical matter, about how burdensome this would be to the state. They were just all over this issue of whether it’s discrimination to keep people in an institution. One other thing we had done to appeal to the left or middle of the Court was to ask why these people were in institutions to begin with. The answer was that it was the result of a long history of real discrimination, wanting to get these people out of the community, hide them in institutions. Georgia of course was all wrapped up with the eugenics movement,

and indeed still had laws about this in the 1970s. That really is at its root of the discrimination that created this problem in the first place. Why didn't they think of community homes in the first place? Because they wanted to get these people out of the community. And we suggested that that may, in addition to the concerns of the unions and the people, be something some people in the state would still be thinking about. And obviously there is no room for that under the ADA. So that was why it was very helpful that the majority opinion said that you cannot take account of any of these other considerations in formulating your plan. The only thing you are supposed to be thinking about is how can we feasibly and at an appropriately rapid pace move people from institutions to the community?

One of the problems we had specific to this case—and the Court dealt with it in its opinion—was, assuming the state has a limited number of openings at the moment in community based settings, why should it be the people that bring the lawsuit who get those slots? Or should people who have been there even longer than them and have been certified by the professional staff as appropriate for movement be the ones to get those slots? Why should it be only the people who brought a lawsuit? Should the state have some type of waiting list of priority? The Court dealt with this in its opinion. It said that the plan was supposed to address this too. The plan for the state is supposed to have a waiting list and move people off of it so that whoever brings a lawsuit doesn't affect who gets into the community first.

JENNIFER MATHIS: I would just point out that this “fundamental alteration” defense was injected into the integration mandate because of the creative lawyering on the part of folks in Pennsylvania who had litigated *Helen L.* The integration regulation doesn't say anything about fundamental alteration or cost. The thinking was if we just go to the court to say the integration regulation means that you have to serve people in the most integrated setting, always, period, end of the story, then there is no way we were ever going to win and there needed to be some kind of limiting principle, some kind of way of cabining the obligation. So, the fundamental alteration regulation was read into the complaint in the first place. And I think the other plaintiffs followed suit. And sometimes people have said to me: Why is fundamental alteration in there anyway? It doesn't belong, it's not part of the integration regulation. Query whether we would be where we are if the strategy was not to incorporate some kind of defense.

IRV GORNSTEIN: I had that problem at the outset when I read the regulation . . . I thought there was this regulation which talks about reasonable modifications and no fundamental alterations. And then later comes the integration regulation, that doesn't say, “subject to this other regulation there's an integration duty.” Instead, it just describes an integration duty and I always felt like this was an analytical problem. I never thought this was going to be a practical problem because I was just going to tell them this is how we interpreted it. And I can't remember if *Auer v. Robbins*¹² had been decided yet.

SAMUEL BAGENSTOS: About two years before.

12. 519 U.S. 452 (1997).

IRV GORNSTEIN: The bigger problem, which I haven't mentioned at all, and it was a part of my argument, was the question of whether we would get *Chevron* deference, which is another modern issue. Back then, the problem was that Justice Scalia didn't think we were entitled to *Chevron* deference because he had said so in the last ADA case and Justice Kennedy wrote an opinion in that other case that was ambiguous on whether there was *Chevron* deference. And the problem is that, in Justice Scalia's view, for those of you who are not familiar with *Chevron* deference, it's the agency who is responsible for administering an act. The agency's interpretation of the statute is entitled to respect as long as it is reasonable, and as long as the statute was ambiguous. I knew this was going to be an uphill struggle on *Chevron*. I wanted to argue the case, at least in the argument, solely on the statute and just forget about *Chevron* deference. That was my plan in argument, but of course right at the beginning of my argument Justice Scalia wanted to get into an argument about whether there was *Chevron* deference. Of course, I had to defend our position that there was. And the reason he didn't think there was is that just because you get authority to write regulations doesn't mean you get *Chevron* deference. You actually have to have adjudicative authority. And the Department of Justice did not have any authority to adjudicate violations. So probably the first five minutes of my ten minutes was spent thinking, "I really don't want to talk about this, but if you make me talk about it I will." And just as I was ready to move on—I told them my view, that some earlier case had settled it in our favor—Justice Kennedy, who had written the decision, said, "Wait a minute, now, I wrote that decision and I don't think that's what I said."

SAMUEL BAGENSTOS: But that's exactly what Justice Kennedy said! It was *Bragdon v. Abbott*.¹³ He said: "Because the justice department has regulatory authority, it is entitled to deference. See *Chevron*." But then the next year they totally forgot it.

MICHAEL GOTTESMAN: My view on this was that the Justice Department did not have deference. Instead, they had to adopt the Rehab regulation¹⁴ which already said this thing. So, we didn't get into it in our brief at all. And they didn't ask me questions because it was much more entertaining to ask the government these questions. But our view was that thinking about deference, this is not the typical kind of case. You rarely see a case that Congress on the face of the statute says you shall adopt these regulations. So, you know, the regulation they adopted is the one that the Congress told them to. It is as if Congress incorporated the regulation into this statute.

13. 519 U.S. 624 (1998).

14. The ADA directed the government to adopt regulations consistent with certain existing regulations implementing Section 504 of the Rehabilitation Act, including a regulation requiring covered entities to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d). This legislative direction to use the "most integrated setting" regulations promulgated under the Rehabilitation Act informed the *Olmstead* court's analysis of the integration mandate. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591–92 (1999).

SAMUEL BAGENSTOS: Let me turn back to you, Jennifer. When the decision came out, it basically followed the lines that people have been talking about just now. Justice Ginsburg wrote the decision for the Court, which said people whose treating professionals find they can handle and benefit from community-based services, but are not getting them, then they have at least a presumptive right to be served in the community subject to this fundamental alteration defense. And the state establishes a “plan defense” if it has a plan to move people at a reasonable pace into community-based settings and the pace is not controlled by its desire to keep institutions fully populated.

Kennedy concurs only in the judgment and says, in a part joined by Breyer, “We have to be really concerned about not de-institutionalizing too fast because people will die,” essentially. Thomas dissented.

Jennifer, when you read that opinion, as someone in the disability community who had sort of brought all of these people in and had been thinking about this case as the test of this new theory, what did you think?

JENNIFER MATHIS: I thought this could really play out so many different ways. This “fundamental alteration defense” as they have articulated it, could potentially swallow up the *Olmstead* case.¹⁵ It was very unclear what they were going to do with this. And I remember that, in the early days after *Olmstead* when we were going around speaking about what the decision meant, I had a conversation with Ira Burnim, our legal director, about what I was going to say and as soon as I said, “Well, you know there are all these questions and it’s sort of unclear how this plan defense will play out and what that means.” He said: “Do not say that! We do not want that to be out there. We have to control the narrative about what this means. It’s very important that people be careful on pieces of paper and what they say about how we interpret this, how we think it will be interpreted.”

After that, I would say I was pretty careful to make sure that all those expressions of uncertainty didn't get out there. What we did do, since we didn't know what this plan defense would mean, was have a big convening shortly after the decision came down. I think you, Mike, were there. We all ended up agreeing we would give it one year to see what would happen. Nobody wanted to file a case right away, and get a decision saying “Well, they have a plan” or “They are working on a plan and you lose because they are working on a plan.”

And so, we decided to give it one year and if by the time a year goes by and they have a plan, then we will see what it looks like and assess the viability of claims. If they don't have a plan after *a year*, then we thought we were going to be on pretty good footing with any “plan” defense. We waited for what felt like a long time, with everyone focused on plans and with what these plans were going to look like.

The plans turned out to be nothing spectacular. They tended to be pieces of paper that were very generic and recitations of all the good work states have already done in this general direction. But they were not concrete about when or what they would do in the future and how they would move people and how it would happen or be financed or anything like that. After a while, we sort of moved past plans. But that was the initial phase: the uncertainty, and cautious optimism,

15. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

but with this whole fixation on plans. I think if you look at how we think about *Olmstead* now, it's far, far less focused on this whole planning process.

SAMUEL BAGENSTOS: So that's the next question. How do you think about *Olmstead* now? *Olmstead* started in your hands and those of people like you shortly after, and then became a much more aggressive tool in expanding community-based services. Talk about how that happened.

JENNIFER MATHIS: I think we are in a very different place now. The law has developed well. That's not to say that the world has developed as well. But the law has had a very significant impact on how state service systems think about people with disabilities, talk about people with disabilities, and treat people with disabilities. We certainly have had a lot of evolution since the decision came down. You know, a big piece of that frankly was DOJ's decision to get involved. Because of Sam coming in and making it a top priority.

For years we were litigating about preliminary issues and there were a lot of "reverse *Olmstead*" cases as we called them. These cases asked, "does *Olmstead* give you a right to stay in the institution if you want to do that?" This came up when there were plans to close institutions or transition folks. We didn't really get to the meat of what *Olmstead* meant in most of the cases. It did not happen for another almost ten years.

So then, in 2009 and 2010, the Justice Department started litigating these cases. They started investigations. They started negotiating. They entered settlements. And I think the way that states perceived their obligations changed after that. I remember going to early meetings with state folks where it was very clear that they did not think *Olmstead* necessarily meant a whole lot. They certainly did not think it meant anything like what we thought it meant in the earlier days. And then come 2011 and 2012, it was a very different picture. While I say it hasn't changed the world, as much as it might or should or could, it certainly has changed the goals and expectations of service systems.

The reason *Olmstead* hasn't changed the world as much as it might have is that it turns out to be really, really hard work to transform service systems that have operated a certain way with a certain set of presumptions for decades. We win cases, we enter settlement agreements that have good and strong provisions and strong obligations, and yet it turns out to be really hard to get every level of the system—from reviews and assessments of people in institutions, to service providers, and more—to change. Systems have typically operated for so many years with the premise that if you look like this, you belong in a place like this, or if you look like that, you belong in a place like that. And there is often a belief that systems operate along a linear continuum where you move from one setting to another setting, to another setting, and you have to prove yourself so you can graduate from each setting, and in one hundred years you graduate from being in an institution to being in your own apartment. The work of undoing those attitudes is really a long haul.

But *Olmstead* was hugely significant in giving us the foundation for that, giving us the tools. It is hard work actually implementing those tools and maximizing them. Things have also shifted in terms of how people see *Olmstead*'s application. In the beginning, people thought it was about state hospitals and state

institutions, but that was it. Then we brought a case against New York that was an *Olmstead* case challenging the state's reliance on private institutions (which is increasingly the case, as the states' service systems have relied more on private providers rather than running their own facilities). We said the basis for the claim is not the actions of the private institutions—they're not discriminating under the integration mandate. Rather, it's the state that is planning and funding and administering a system that looks like this and that gives people only the "choice" to live in an institution and not the choice to live in their own home. That and other similar cases that followed certainly shifted what *Olmstead* meant to people. When we first brought that case, many people were skeptical and thought *Olmstead* didn't apply in that circumstance. Now, of course, everybody thinks it does.

Now you have evolving understandings of the integration mandate, as other folks have suggested earlier in this conference, and it has been applied to employment and education and criminal justice systems and pretty much everything that Title II applies to, meaning state and local government services. So, the understanding of the law really is, always evolving and always changing and that is sort of the gift of the ADA. In some ways it's such a broad statute and there are so many applications of it that people had not really anticipated or thought deeply about before. You are always discovering. You can go back and develop new law. It really is just a critical foundation and has evolved in ways that really weren't specifically anticipated that are really positive.

SAMUEL BAGENSTOS: I think if the justices, the five justices who voted for Lois Curtis and Elaine Wilson, knew what would happen, they might not have all voted the same way. Certainly Justice O'Connor might have had some questions.

To me, the crucial move was thinking about the administration of the state service system as something that has to be done in the most integrated setting. That came in the New York adult homes case which was the first really big successful systemic *Olmstead* case. There were some others that had some more mixed success before that.

Then also Steve Gold, whom you mentioned before, was going around the country challenging various Medicaid rules that subtly forced people into nursing homes, for instance, a rule that said, "we will cover more prescription drugs for people in nursing homes than we will cover outside of nursing homes under Medicaid." And that would move people into the nursing homes. Those cases started to get some success. And then there was a wave of cases in the Great Recession when states had massive budget problems and were cutting their Medicaid budgets—because Medicaid is a fifth of the average state's budget. The only thing they could cut was community-based services. So, you had a bunch of folks—including both the disability rights groups and the labor unions that were representing workers who were supporting people with disabilities in the community—who went to court.

You started to see all these ways in which *Olmstead* could be used as a general tool to challenge rules adopted by states that led to segregation. And then it sort of exploded from there. That was certainly when the Obama administration took this on as a project. That was the way we thought about it: let's find all the places this works and use the bully pulpit of the United States to get states to change and maybe that will work.

All right. Any questions? I know this is a whole lot of ground we covered.

AUDIENCE QUESTION: I was a mother of a man with significant disabilities. I know thousands of people who are family members around the country. I was in the Clinton administration and the Obama administration. The problem is this: When there is a state plan, the family of a person with a disability is trapped forever in the state where they get the support. So, a young family can't move to take a job opportunity. And a retirement age family cannot move to retire to warmer place. And, worst, the family typically thinks, when we die then our son or daughter will move to live with their sister in a different state, and they can't. Is there any way to use *Olmstead* to get at interstate portability?

MICHAEL GOTTESMAN: So, the problem of moving is if they go to the other state, they go back to the waiting list.

JENNIFER MATHIS: And you're not eligible for Medicaid right away.

SAMUEL BAGENSTOS: A lot of this has to do with the ridiculous way we do healthcare in this country. And the way Medicaid was constructed on a state-by-state basis. I know this is a problem. I hear this from a lot of people. I have a number of close friends who are stuck and have all kinds of reasons why they really need to move and cannot move. And I also have had folks who have dealt with the issue of dying parents. The problem is everyone else on the waiting list has a claim to an integrated service too. So, there might be opportunities to use *Olmstead* for this, but I think it is a hard argument under *Olmstead* to do that. It is really a major problem.

JENNIFER MATHIS: I remember there was legislation that was contemplated, but I don't know if it was ever introduced.

SAMUEL BAGENSTOS: Also, community-based services under waivers, not just HCBS waivers. But all kinds of waivers. So, each state has different waivers and has different services, so I think it's really hard.

SAMUEL BAGENSTOS: I know it's a huge problem.

AUDIENCE QUESTION: I don't have a question, but a comment about the argument. I took [a class of students] to the argument. That year I had a deaf student in my class. I wrote the marshal to say, "We would like to come to the argument and will bring a sign language interpreter, just want to let you know." The marshal said, "That's fine, that's terrific, we can accommodate you."

So, I went to the argument and I was sitting in the Supreme Court bar section and my students were in the back. After the argument we reconnected to say, "What did you think?" The interpreter said, "I'm outraged what happened here." I said, "What do you mean?"

The interpreter said, "Well I situated myself with the student to whom I was providing interpretation and immediately the marshals came over and said you cannot sit with your back to the court." Which is how she wanted to sit in order to

sign. The marshal said they were concerned sitting in that way would either distract the Court or it would create a security problem. I think they had some thought that maybe by signing that the interpreter was going to be all over the place. In any event they made her sit to the side which meant the student had to keep looking to her and then also looking at the Court which is very inconvenient.

So she told me about this. The next thing she did she didn't tell me, but I learned about later. She wrote a letter to each justice of the Court to complain about the way her client was treated and the irony of this being in an argument about access of people with disabilities. And I got a call later in the week from the marshal saying, "What went on? I thought we took care of this." And I said, "I thought we did too but apparently this is what happened." But the marshal said that it was coming up at conference on Friday for the justices to talk about this. Also, that day, that Thursday, Justice Breyer called one of my colleagues, who was a friend of his, and said "What happened with your students at this argument?" Anyway, that happened, and as far as I know the justices never responded to the interpreter. I think the marshals thought they were accommodating. But, as we talked about today, perspectives on whether you are being appropriately accommodated depend on your circumstance.

AUDIENCE QUESTION: I am a student here at Georgetown. And my question is more of a basic functional question as to how *Olmstead* works in the courts today. That New York adult homes case almost sounded like a systemic class action case seeking injunctive relief. But, how are *Olmstead* claims being brought in courts today? When *Olmstead* cases are brought in the courts, what are the remedies they are asking for now?

JENNIFER MATHIS: That is a great question, I think in part because of the way the fundamental alteration defense has been articulated and interpreted, you almost have to bring these as systemic cases rather than as individual *Olmstead* cases. We have brought individual *Olmstead* cases in specific circumstances. Typically, it's either a class action case or a case with an associational plaintiff and you're talking about a sizable amount of folks where you can achieve cost savings or be cost neutral if you develop community services for folks and close down institutional beds behind them.

The remedies, typically, involve a multiyear process. It's a plan basically. A plan to transition folks out of institutions; the plan has goals and typically annual goals, benchmarks, that the state is agreeing to meet. There are some parameters. I think one of the things that we always look for more than anything else are some parameters on the assessment process because if you don't dictate something about how the assessments of people are conducted—assessments of where people should live or what the most integrated setting is, where people should be educated, whatever the context is—if you don't define how those assessments have to work, then they will work the way they always worked and nobody will get out, nobody's services will change. There are a lot of different components and I think there are a couple of basic formulas that the settlement agreements tend to fall into. Justice Department has a model. We have a model. There are others in the middle. But, really, it's a multiyear plan with somebody overseeing the process, usually a court

monitor, because judges are not going to be able to figure out all this stuff themselves.

SAMUEL BAGENSTOS: At DOJ, mostly drawing from the experience that folks like the Bazelon Center had, we kind of developed this model of the settlement agreement identifying who is the targeted class of people that will get services. For instance, people with severe mental illness who are in or at risk of being placed in state psychiatric hospital or nursing home or something. It would depend on the case.

We would usually say, “There are 10,000 people in this class and in year one you will create 800 new supported housing slots plus a certain number of community treatment teams, and you will do things to make sure those work. And you will have a new assessment process so that when people are moving out, you are actually making good assessments. And we are going to have a court monitor who will review the whole thing.”

I always like having numbers as the benchmark. If you could agree on the numbers ahead of time, then it wasn't like a court making its own decision about what the numbers would be, but plaintiffs and defendants would work it out. And you'd usually have a lot of arguments in the negotiations about how many people actually can move out and about how quickly they can do it and how do you do it. That was sort of the model that we always followed.