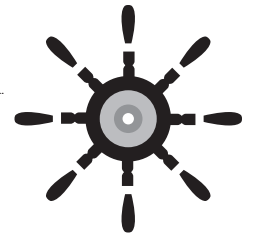


Olmstead Implementation



By Kevin Martone, Executive Director,
Technical Assistance Collaborative

INTRODUCTION

On June 22, 1999, the U.S. Supreme Court issued its decision in *Olmstead v. LC*, a lawsuit against the State of Georgia which questioned the state's continued confinement of two individuals with disabilities in a state institution after it had been determined that they were ready to return to the community. The Court described Georgia's actions as "unjustified isolation" and determined that Georgia had violated these individuals' rights under the Americans with Disabilities Act (ADA). Because of the *Olmstead* decision, many states are now in the process of: (1) implementing "Olmstead Plans" that expand community based supports, including new integrated permanent supportive housing opportunities; (2) implementing *Olmstead*-related Settlement Agreements that require thousands of new integrated permanent supportive housing opportunities to be created in conjunction with the expansion of community-based services and supports; or 3) implementing other related activities, such as Medicaid reform, that will increase the ability of individuals to succeed in integrated, community-based settings.

ADMINISTRATION

The U.S. Department of Justice (DOJ) is the federal agency charged with enforcing the ADA and *Olmstead* compliance. Other federal agencies, including the Departments of Housing and Urban Development (HUD) and Health and Human Services (HHS), have funding, regulatory and enforcement roles related to the ADA and *Olmstead*. Protection and Advocacy (P&A) agencies in each state are federally authorized and also have legal, administrative and other appropriate remedies to protect and advocate for the rights of individuals with disabilities.

HISTORY

In its 1999 decision in *Olmstead v. L.C.*, the Supreme Court found that the institutionalization of persons with disabilities who were ready to

return to the community was a violation of Title II of the Americans with Disabilities Act (ADA). In its decision, the court found that indiscriminate institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. The court also found that confinement in an institution severely diminishes everyday life activities, including "family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."

The court was careful to say that the responsibility of states to provide health care in the community was "not boundless." States were not required to close institutions, nor were they to use homeless shelters as community placements. The court said that compliance with the ADA could be achieved if a state could demonstrate that it had a "comprehensive and effectively working plan" for assisting people living in "restrictive settings," including a waiting list that moved at a "reasonable pace not controlled by the state's endeavors to keep its institutions fully populated."

Historically, 'community integration' was 'achieved' by moving people out of large, state run institutions into community settings — deinstitutionalization. But, in the past decade, there has been increasing scrutiny that certain types of large, congregate residential settings in the community are restrictive, have characteristics of an institutional nature, and are inconsistent with the intent of the ADA and *Olmstead*. These type of facilities are known by different names in states (e.g., adult care homes, residential care facilities, boarding homes, assisted living), but have similar characteristics, including a large number of residents primarily with disabilities, insufficient or inadequate services, restrictions on personal affairs, and housing that is contingent upon compliance with services. Some states, including North Carolina, Illinois, and New York, have been sued for overreliance on such facilities, and are now implementing settlement agreements with DOJ and/or state P&A agencies to correct for these issues. Recent *Olmstead* Settlement

Agreements, for example in New Hampshire and Delaware, also cover people with mental illness who are at-risk of institutionalization, such as those who are homeless or have insufficient services to support integrated community living. Advocacy groups and potential litigants are now also examining the lack of integrated employment opportunities in an Olmstead context. For example, settlement agreements now exist in Rhode Island and Oregon regarding persons with intellectual and developmental disabilities unnecessarily segregated in sheltered workshops and related day activity service programs.¹

SUMMARY

On its Olmstead website², DOJ defines the most integrated setting as:

“a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible. Integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual’s choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible. Evidence-based practices that provide scattered-site housing with supportive services are examples of integrated settings. By contrast, segregated settings often

have qualities of an institutional nature. Segregated settings include, but are not limited to:

1. congregate settings populated exclusively or primarily with individuals with disabilities;
2. congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals’ ability to engage freely in community activities and to manage their own activities of daily living; or
3. settings that provide for daytime activities

primarily with other individuals with disabilities.”

States with Olmstead litigation or Settlement Agreements, as well as states trying to comply with Olmstead through proactive strategies, are intently focused on expanding access to integrated permanent supportive housing opportunities for people with significant and long-term disabilities. Olmstead-related Settlement Agreements in Illinois, Georgia, North Carolina, Virginia, New Jersey, Delaware and New Hampshire could result in 30,000-40,000 new permanent supportive housing opportunities and the likelihood of future litigation in other states would increase these estimates.

Housing affordability is a critical issue for states working to comply with ADA requirements because most people with disabilities living in restrictive settings qualify for federal Supplemental Security Income (SSI) payments that average 20% of median income nationally. As federal housing assistance is so difficult to obtain, several states (including Georgia, Mississippi, New Jersey, and North Carolina) have created or expanded state-funded rental subsidies directly related to their Olmstead efforts. These state rental subsidies are typically designed as “bridge” subsidies to help people until a permanent HUD subsidy can be obtained.

In June of 2013, HUD issued Olmstead guidance to provide information on Olmstead, to clarify how HUD programs can assist state and local Olmstead efforts, and to encourage housing providers to support Olmstead implementation by increasing integrated housing opportunities for people with disabilities.³ HUD’s guidance emphasizes that people with disabilities should have choice and self-determination in housing and states that “HUD is committed to offering individuals with disabilities housing options that enable them to make meaningful choices about housing, health care, and long-term services and supports so they can participate fully in community life.”

HUD also advises that “For communities that have historically relied heavily on institutional settings or housing built exclusively and primarily for individuals with disabilities, the need for additional integrated housing options scattered through the community becomes more acute.” HUD 504

1 <http://www.justice.gov/opa/pr/department-justice-reaches-landmark-americans-disabilities-act-settlement-agreement-rhode>

2 http://www.ada.gov/olmstead/q&a_olmstead.htm

3 http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-086

regulations require that HUD and HUD's grantees/housing providers administer their programs and activities in the most integrated setting appropriate to the needs of individuals covered by the ADA. HUD's guidance does not change the requirements for any existing HUD program, but points out that requests for disability-specific tenant selection "remedial" preferences may be approved by HUD's Office of General Counsel (OGC) if they are related to Olmstead implementation.

FORECAST

Several states will continue to address Olmstead in 2016 as a result of proactive planning and implementation, investigations or settlement agreements, or other indirect reform activities that will support individuals in integrated community-based settings. However, while state budgets are generally in a better position since the recession to support Olmstead efforts, a lack of resources at the federal level will continue to challenge the ability of states to comply with Olmstead.

In February 2016, CMS, HUD and SAMHSA began implementation of technical assistance (TA) to states through the Innovation Accelerator Program (IAP) for community integration.⁴ This TA is intended to support the efforts of over 30 states to increase the capacity of states to use Medicaid to pay for housing-related services⁵ for vulnerable populations and to increase access to integrated supportive housing by strengthening relationships between Medicaid and other state services and housing agencies.

Also in February 2016, the United States Interagency Council on Homelessness (USICH) issued a brief on the alignment of Olmstead and homelessness.⁶ USICH highlights the importance of aligning policy and practices as a means to maximize access to supportive housing resources rather than fragmented approaches that address supportive housing for disability and homeless groups separately.

Implementation of the HUD Section 811 Project Rental Assistance (PRA) Program is now underway, and states with awards will continue making new units available in 2016 in integrated multifamily developments (see article in this Guide). States are also planning how to use the National Housing Trust Fund (NHTF) allocations to support the availability of rental housing for extremely-low-income (ELI) households. The enabling statute requires that at least 90 percent of funds from that program be directed to the production, preservation, rehabilitation, and operation of rental housing, primarily for ELI households; this presents a new opportunity for states to create integrated housing opportunities.

In addition, state Medicaid agencies continue to address the high costs of serving persons with disabilities in institutional settings by designing Medicaid programs to serve people in home and community based settings. The Centers for Medicare and Medicaid Services (CMS) final rule published in January 2014 regarding home and community based services (HCBS), seeks to ensure that Medicaid HCBS funds are used to reimburse services provided to individuals in integrated settings.⁷ States have submitted transition plans to CMS to ensure compliance with the final rule, and are in various stages of implementation.⁸ Only persons living in settings as defined in the rule will be eligible for HCBS funded services. The definition⁹ requires that the setting meet certain qualifications, including that it:

- is integrated in and supports full access to the greater community;
- is selected by the individual from among setting options;
- ensures individual rights of privacy, dignity and respect, and freedom from coercion and restraint;
- optimizes autonomy and independence in making life choices; and

4 <https://www.medicaid.gov/state-resource-center/innovation-accelerator-program/community-integration-ltss/ci-ltss.html>

5 Housing-related services are services designed to support successful tenancy in an integrated housing setting. Medicaid is statutorily prohibited from paying for actual housing costs such as capital and ongoing rental assistance.

6 https://www.usich.gov/resources/uploads/asset_library/Olmstead_Brief_02_2016_Final.pdf

7 The HCBS Rule, including its *settings* requirement, applies to Medicaid 1915(c), 1915(i), 1915(k) authorities only.

8 <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/statewide-transition-plans.html>

9 Final Rule and definition can be found at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Support/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>

- facilitates choice regarding services and who provides them.

The final rule also includes additional requirements for provider-owned or controlled home and community-based residential settings. These requirements include:

- The individual has a lease or other legally enforceable agreement providing similar protections;
- The individual has privacy in their unit including lockable doors, choice of roommates and freedom to furnish or decorate the unit;
- The individual controls his/her own schedule including access to food at any time;
- The individual can have visitors at any time; and
- The setting is physically accessible.

The final rule excludes certain settings as permissible settings for the provision of Medicaid home and community-based services. These excluded settings include nursing facilities, institutions for mental disease, intermediate care facilities for individuals with intellectual disabilities, and hospitals. The final rule also identifies other settings that are presumed to have institutional qualities, and do not meet the threshold for Medicaid HCBS. These settings include those in a publicly or privately-owned facility that provides inpatient treatment; on the grounds of, or immediately adjacent to, a public institution; or that have the effect of isolating individuals receiving Medicaid-funded HCBS from the broader community of individuals not receiving Medicaid-funded HCBS. If states seek to include such settings in Medicaid HCBS programs, a determination will

be made through heightened scrutiny, based on information presented by the state demonstrating that the setting is home and community-based and does not have the qualities of an institution.

WHAT TO SAY TO LEGISLATORS

Advocates should approach Members of Congress with the message that the extremely low income of people with the most significant and long-term disabilities who rely on SSI, combined with the scarcity of affordable housing and services, is one reason why states have difficulty supporting individuals in integrated, community-based settings. It is important to communicate to Members of Congress that the housing and service needs for persons who are living in institutions or are at-risk of institutionalization, such as those who are chronically homeless, are similar and do not conflict with each other. In addition to needing housing assistance, people living in restrictive settings covered by Olmstead, including people with mental illness, people with intellectual or developmental disabilities, and people with physical or sensory disabilities, need access to comprehensive long-term health care services. Increased federal support is needed to expand integrated permanent supportive housing options, to reduce reliance on expensive institutional care, and prevent and end homelessness among people with disabilities. Resources to produce and preserve affordable housing for the lowest income people, like those provided by Section 811 PRA and the National Housing Trust Fund, will make it possible for states to respond to the Olmstead decision.

FOR MORE INFORMATION

Technical Assistance Collaborative (TAC)
617-266-5657 • www.tacinc.org ■