Olmstead Implementation

By Kevin Martone, Executive Director, Technical Assistance Collaborative, Inc.

INTRODUCTION

On June 22, 1999, the U.S. Supreme Court issued its decision in *Olmstead v. LC*, a lawsuit against the State of Georgia that 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 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 on ways 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*. Such facilities are known by a variety of names (e.g., adult care homes, residential care facilities, boarding homes, nursing homes, assisted living), but share 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 Kentucky, Illinois, New York, and North Carolina, have been sued for over-reliance on such facilities, and are now implementing settlement agreements with DOJ and/or state P&A agencies to correct for these issues.

Agreements, for example in New Hampshire and Oregon, 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* website,[2] DOJ defines the most integrated setting as:

> "a setting that enables individuals with disabilities to interact with nondisabled 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, just 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 nondisabled 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 working to expand access to integrated permanent supportive housing opportunities for people with significant and long-term disabilities. *Olmstead*-related settlement agreements typically require significant numbers of new permanent supportive housing opportunities. It is important to note, however, that several of these states are struggling to meet supportive housing compliance targets due to lack of resources for housing assistance and services.

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 only 20% of median income nationally. The recent *Priced Out* (December 2017) report by the Technical Assistance Collaborative points out that an individual on SSI would have to pay an average of 113% of their income nationally to afford a one-bedroom apartment at the fair market rent.[3] As federal housing assistance is so difficult to obtain, several states (e.g. Georgia, Mississippi, New Jersey, North Carolina, and Oregon) 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, but often come at the expense of funding that could have been used for also necessary services.

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.[4] 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

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://www.tacinc.org/knowledge-resources/priced-out-findings/

4 https://archives.hud.gov/news/2013/pr13-086.cfm

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 regulations require that HUD and its 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 if they are related to *Olmstead* implementation.

OLMSTEAD ACTIVITY IN 2017

Several states continued to address *Olmstead* in 2017 as a result of proactive planning and implementation, investigations, and settlement agreements. Key highlights from across the country are described below:

- Delaware and New Jersey both successfully resolved *Olmstead* settlement agreements this year for the mental health population and resulted in thousands of additional supportive housing units and expanded service capacity within their systems.
- New *Olmstead* litigation was filed in South Carolina[5] and Iowa[6] by state P&A agencies. Both cases allege that individuals with disabilities are unnecessarily segregated in institutional settings or are being placed at risk of institutionalization as a result of cuts in community-based services.
- There is unresolved litigation or settlement negotiations in several states, including in Mississippi, Louisiana, South, Dakota and New York. Louisiana, South Dakota, and New York involve individuals with disabilities in nursing homes who wish to live in community-based settings.
- A class action lawsuit by individuals in nursing homes in Washington, DC, who want to live in more integrated settings was rejected by a U.S. District court.
- In August 2017, the Centers for Medicare and Medicaid Services (CMS), HUD, and the Substance Abuse and Mental Health Services Administration kicked off a second round of technical assistance (TA) to 8 states through the Innovation Accelerator Program for community integration.[7] The TA is designed to support the efforts of states to increase access to integrated supportive housing by strengthening relationships between Medicaid and other state services and housing agencies. The states include Alaska, Massachusetts, Michigan, Minnesota, Nebraska, Texas, Utah, and Virginia.
- States awarded HUD Section 811 Project Rental Assistance (PRA) continued making new units available in integrated multifamily developments (see article in this Guide). States also began accessing National Housing Trust Fund allocations to support the availability of rental housing for extremely low income (ELI) households for the production, preservation, rehabilitation, and operation of rental housing, primarily for ELI households; many states prioritized permanent supportive housing for these funds.
- State Medicaid agencies and their Mental Health and Intellectual/Developmental Disabilities continue implementation of their approved Home- and Community-Based Services (HCBS) transition plans to ensure compliance with the HCBS Final Rule. States have a strong interest in achieving compliance with the Final Rule, as a substantial amount of Medicaid HCBS funds are used by states to reimburse services provided to individuals living in integrated settings, thereby reducing the high costs of serving persons with disabilities in institutional settings.[8] However, CMS recently extended the compliance deadline from 2019 to 2022 due to the complex nature of complying with the rule. Only persons living in community-integrated settings as defined in the rule will be eligible for HCBS funded services beginning in 2022.

5 http://www.pandasc.org/what-we-do/advocacy/

6 http://disabilityrightsiowa.org/resources/managed-care/managed-care-class-action-lawsuit/

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

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

FORECAST FOR 2018

Title II of the ADA is the law, upheld by the Supreme Court in *Olmstead v. L.C.* States will continue to be responsible for ensuring that all individuals with disabilities have the civil right to live in integrated, community-based settings. Complying with *Olmstead* is not a one-time exercise, and states need to plan and implement integration strategies actively.

Disability stakeholders have interpreted recent actions from Congress and leadership of the USDOJ as signals of decreasing attention to *Olmstead* enforcement. For example, the Fairness in Class Action Litigation Act of 2017 intends to limit the ability of groups to bring class action lawsuits. For people with disabilities, class action lawsuits have been a successful vehicle to push states to create systems that support integrated community living.

Due to tremendous opposition from key advocates and constituents, efforts to repeal the Affordable Care Act , including Medicaid expansion, and on converting Medicaid to a block grant or per capita-based program have been unsuccessful to date. However, President Donald Trump and the Republican-controlled Congress remain intent to make these changes, and advocates are deeply concerned that cuts to services and housing assistance will place individuals with disabilities at risk of institutionalization, homelessness and incarceration.

Housing affordability is predicted to continue to be a problem in 2018, especially for persons with disabilities with extremely low income households. The FY17 federal budget provided funds for new vouchers including $10 million for "mainstream" vouchers for ELI people with disabilities. Although this is the first expansion of mainstream vouchers since Non-elderly Disabled vouchers were expanded in 2009, continued threats to the HUD budget only perpetuate the housing crisis for people with disabilities. The HUD Section 811 PRA program - designed to create integrated affordable housing for people with disabilities - has not received funding for new units since 2014. The exceptions have been new permanent supportive housing for people who are homeless (through the **Homeless Emergency Assistance and Rapid Transition to Housing Act**) including homeless veterans (Veterans Affairs Supportive Housing).

The housing advocacy community is also very concerned about funding for those affordable housing programs available to low income households including (but not targeted to) people with disabilities. Because of rising rents, even level funding for the Housing Choice Voucher (HCV) program, for example, means fewer units, and any cuts in or caps imposed on the federal budget will mean another step backward. In addition, as described elsewhere in this Guide, any changes Congress makes to the government-sponsored enterprises (i.e., Fannie Mae, Freddie Mac) is likely to impact the National Housing Trust Fund. Reductions to federal housing assistance will impede states in their ability to provide individuals with disabilities the opportunity to live in community-integrated settings.

Most *Olmstead* activity will continue to occur in states with active settlement agreements or litigation. Among these activities include expanding PSH and services such as Assertive Community Treatment (ACT), community support services, supported employment and integrated treatment. Other states will engage in activities consistent with community integration, such as implementation of HCBS transition plans, HUD Section 811 PRA, Money Follows the Person programs, state strategic supportive housing plans, Medicaid high cost utilizer cost savings initiatives, and local Continuum of Care supportive housing initiatives for the chronically homeless. Nebraska's legislature passed a law in 2016 requiring state agencies to develop a cross disability *Olmstead* plan by December 2018.[9]

Several states have created state-funded housing assistance programs that resemble the federal Housing Choice Voucher program, but these generally do not create enough affordable housing opportunities for people with disabilities who are stuck in institutional settings, such as psychiatric hospitals, developmental centers, nursing homes, or correctional facilities.

WHAT TO SAY TO LEGISLATORS AND SOME ACTIONS TO TAKE

States are legally obligated to ensure that all individuals with disabilities have the civil right to live and work in integrated, community-based

9 http://nebraskalegislature.gov/laws/statutes.php?statute=81-6,122&print=true

settings. With access to housing assistance and comprehensive health care services and supports, people with mental illness, intellectual or developmental disabilities, and physical or sensory disabilities can live and thrive in the community. There is a growing body of research that links access to safe, decent housing and adequate health care to positive health outcomes with reduced health care costs. Conversely, individuals with unstable housing and inadequate health care are high utilizers of costly services, and are likely to have poor health outcomes. States are beginning to realize the benefits from innovative initiatives that integrate physical and behavioral health care for individuals who have multiple chronic conditions. Reducing federal support for housing and health care may provide initial budgetary relief, but will end up swelling costs overall by increasing uncompensated health care, increasing unnecessary reliance on nursing facilities, further stressing the criminal justice and child welfare systems, and adding to homelessness in communities.

Stakeholders should also increase advocacy with national and state organizations on *Olmstead*. Groups such as state P&A organizations and other legal rights groups can provide leverage with state agencies to comply with *Olmstead*, and initiate litigation against states when necessary. For information on state protection and advocacy networks, see the National Disability Rights Network at http://www.ndrn.org/index.php

FOR MORE INFORMATION

Technical Assistance Collaborative, Inc. (TAC), 617-266-5657, www.tacinc.org