Olmstead Implementation

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SUMMARY

In its 1999 *Olmstead v. L.C.* decision, the United States 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)." Since *Olmstead*, states have made different amounts of progress on supporting people with disabilities in the most integrated settings possible.

Prior to the declaration of a public health emergency due to the COVID-19 pandemic in 2020, several states were in the process of implementing "Olmstead Plans," *Olmstead*-related settlement agreements, or other related activities — such as Medicaid reform — that would improve access to services and supports intended to assist individuals with disabilities to succeed in integrated, community-based settings. Unfortunately, state social service systems are still struggling to rebound from the impact of the pandemic on the economy, the workforce, and access to affordable housing. These challenges have diverted many states' attention away from *Olmstead* and other federal and state priorities, with a negative impact on transitions to integrated community settings.

Significant national efforts are underway to strengthen and expand behavioral health crisis services, intended to divert people from entering restrictive, acute care settings and to provide them with more and better "upstream" services. The launch of the national 988 Suicide and Crisis Lifeline, implementation of "American Rescue Plan Act" (ARPA)-funded mobile crisis response, and states' utilization of their five-percent increase to the Community Mental Health Services Block Grant (MHBG) to support infrastructure for additional crisis services should, in theory, reduce unnecessary hospitalizations. However, an inadequate workforce, diminished access to support services, and lack of affordable housing units are resulting in an emerging trend of states returning to reliance on more institutional and restrictive, congregate community-based settings.

Despite these challenges, some states have pressed forward with *Olmstead* activity, and the U.S. Department of Justice (DOJ) has continued to initiate new *Olmstead*-related activity. The Biden Administration's commitment to tackle the national mental health crisis resulted in $300 million awarded to states in September 2022 for new and existing Certified Community Behavioral Health Clinics (CCBHCs), which offer community-based mental health and substance use treatment, including crisis services, 24 hours a day, 7 days a week. An additional $15 million in planning grants was announced in October as part of the implementation of the "Bipartisan Safer Communities Act." Opportunities continue for states to expand home and community-based services and to provide rental assistance to support people with disabilities in independent living. Access to "upstream" services such as permanent supportive housing, case management, outpatient treatment, and supported employment will be necessary to prevent unnecessary inpatient admissions.

Stakeholders should continue advocating for these funds to be directed toward gaps in community-based services and supports. This chapter identifies strategies for states to reinvigorate their community-based services. Chapter 4 identifies strategies to increase access to rental assistance for people with disabilities. These strategies are essential for states to fulfill their responsibilities under *Olmstead*.

ADMINISTRATION

DOJ is the federal agency charged with enforcing ADA and *Olmstead* compliance. Other federal agencies, including the U.S. Department of

Housing and Urban Development (HUD) and the Health and Human Services (HHS) department, hold 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. The court said 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). In recent years, there has been increasing scrutiny of 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 many residents with disabilities, insufficient or inadequate services, restrictions on personal affairs, and housing that is contingent upon compliance with services. Furthermore, the reduction in state hospital beds that began in the 1960s, combined with inadequate investment in comprehensive community-based mental health systems (including treatment for co-occurring mental health and substance use disorders), has resulted in the trans-institutionalization of people with psychiatric conditions in prisons and jails (Insel, Healing, 2022).

IMPLEMENTATION

Since 1999, states have made varied amounts of progress on supporting people with disabilities in the most integrated settings possible. Prior to the declaration of the COVID-19 public health emergency in 2020, several states were in the process of: implementing "Olmstead Plans" that expand community-based supports, including new integrated permanent supportive housing opportunities; implementing *Olmstead*-related settlement agreements that require the creation of thousands of new integrated permanent supportive housing opportunities in conjunction with the expansion of community-based services and supports; or implementing other related activities, such as Medicaid reform, that will increase access to services and supports intended to help individuals with disabilities to succeed in integrated, community-based settings. Unfortunately, many states never developed plans, have outdated plans, or are doing very little to comply with *Olmstead* specifically.

In 2011, DOJ issued the *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* Included in that Statement are the definitions for integrated and segregated settings that remain in place

today. Guidance issued in June 2020 by the federal Centers for Medicare and Medicaid Services (CMS) advised states of their ongoing responsibility "for compliance with the integration mandate of Title II of the [Americans with Disabilities Act] and the 1999 *Olmstead v. L.C.* decision to avoid subjecting persons with disabilities to unjustified institutionalization or segregation."

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 prior to the pandemic, several of these states were already struggling to meet supportive housing compliance targets due to lack of resources for housing assistance and services. Now, states are faced with even greater challenges due to the direct services workforce crisis and unprecedented increases in rental costs.

Implementation efforts have largely focused on expanding community living options and services that support transitions to, and successful tenancy in, community-based housing, with less attention paid to integrated employment or other activities. Several *Olmstead* plans do address competitive, integrated employment, and there have been limited actions on employment in some states such as Rhode Island and Oregon regarding persons with intellectual and developmental disabilities who have been unnecessarily segregated in "sheltered workshops" and related day activity service programs. Supported employment is an evidence-based approach to vocational rehabilitation for people with serious psychiatric disorders and is often paired with permanent supportive housing to promote sustained housing stability in the community. The nation's record low unemployment rate creates more opportunities for people with disabilities, as employers struggle to find workers to fill positions. In September 2022, the unemployment rate for people with disabilities was 7.3 percent, and 3.1 percent for people without disabilities; labor force participation was at 23.2 percent and 67.8 percent, respectively (U.S. Department of Labor, Office of Disability Employment Policy). In addition, the dramatic shift to e-commerce and remote working may make previously unattainable jobs available to people with mobility and other disability-related challenges.

The growing crisis in housing affordability is a challenge for both people with disabilities and

for government agencies working to comply with ADA requirements. The cost of housing continues to skyrocket nationwide, with the median rent of a two-bedroom apartment increasing nearly 18 percent between the first quarter of 2021 and the first quarter of 2022 (*Out of reach: The high cost of housing, 2022)*. Lack of access to affordable housing forces many people with disabilities into costly and segregated nursing facilities, state hospitals, or homelessness. Most people with disabilities living in restrictive settings qualify for federal Supplemental Security Income (SSI) payments that average $875.41 per month nationally (*Priced out: The housing crisis for people with disabilities*). The average monthly rent for a basic one-bedroom apartment is $1,111, or 127 percent of the income of a person living on SSI. Even before the pandemic, the Technical Assistance Collaborative's biannual *Priced Out* repeatedly demonstrated that in no housing market in the country could an individual on SSI afford the fair market rent.

Several states have created or expanded state-funded rental subsidies directly related to their *Olmstead* efforts (State funded housing assistance programs). These 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 other necessary services. Housing subsidy holders are increasingly unable to find units to rent within HUD's payment standards because the value of their subsidies has not kept pace with extreme rent increases. As a result, HUD used private sector data to set the Fair Market Rent (FMR) for fiscal year 2023, thus reducing the gap between its payment standards and actual market conditions. Still, the tight rental market and low vacancy rates are making it even harder to identify landlords willing to take rental subsidies, provide units for supportive housing, or accept referrals for vulnerable people with disabilities in general. As a result, more national, state, and local resources are being directed toward housing navigation and landlord engagement and recruitment efforts for housing programs serving people with disabilities who are experiencing homelessness.

CMS is also supporting efforts by states to rebalance their health care systems from institutional to community-based care. Many of Medicaid's highest-cost members are individuals with complex and co-occurring health and behavioral health conditions who are experiencing homelessness or housing crises (Linkins, K., Brya, J., & Chandler, D. (2008). *Frequent users of Healthcare Initiative: Final Evaluation Report*. Falls Church, VA: The Lewin Group). People with disabilities have historically faced multiple barriers in Medicaid to receiving community-based long-term services and supports, such as inadequate support for self-direction and person-centered planning, lack of housing and transportation, and the lack of a streamlined process for hospital discharges to the community, to name a few. A growing list of states are utilizing Medicaid waivers to provide evidence-based housing supports that improve housing stability and stop the revolving door of emergency departments, hospitalizations, detox, and other acute and crisis services for populations with chronic and disabling conditions.

OLMSTEAD ACTIVITY IN 2022

States' social service systems are still struggling to rebound from the impact of the COVID-19 pandemic. Provider capacity is strained nationwide as direct service workforce shortages continue at crisis proportions. Behavioral health systems are overextended, attempting to respond to the increased demand for treatment and services for people with mental illnesses and substance use disorders (SUDs) (*The implications of COVID-19 for mental health and substance use*).

Significant national efforts to strengthen and expand behavioral health crisis services are intended to divert people from restrictive, acute care settings by providing them with more upstream services. Implementation of the national 988 Suicide and Crisis Lifeline has amplified attention to the availability of immediate telephonic response for individuals in crisis, but states lack the human resources to create adequate mobile response and

ready access to follow-up treatment. The implementation of ARPA-funded mobile crisis has just started, with Oregon the first state to be approved by CMS and several other states expressing interest. Many states are using their five-percent increase to the MHBG to support infrastructure for additional crisis services, which in theory should decrease unnecessary hospitalizations. However, the inadequate workforce, reduced access to support services, and lack of affordable housing units are resulting in an emerging trend of states returning to reliance on more institutional and restrictive, congregate community-based settings. In New York City, Mayor Adams' recent announcement of plans to address treatment and service needs for people with mental illness includes a policy of involuntarily hospitalizing more people with mental illness (*New York City to involuntarily remove mentally ill people from streets*). California recently enacted CARE Courts that will compel people with untreated schizophrenia and other serious mental illnesses into housing and treatment (*CARE Court will change how California addresses serious, untreated mental illness. Here's how*).

Despite these challenges, some states have pressed forward with *Olmstead* activity. North Carolina issued a cross-disability Olmstead Plan in January and is moving forward with implementation. Minnesota continued implementing and refining its Olmstead Plan. Other states have worked to comply with settlement agreement implementation, including North Dakota and Rhode Island.

DOJ opened new Olmstead investigations in 2022, including in Kentucky (*Justice Department launches civil rights investigation into Kentucky's mental health service system*) and Oklahoma (*Justice Department launches investigation of Oklahoma's mental health service system and Oklahoma City's and Oklahoma Police Department's response to mental health crises*). The investigations will focus on whether these systems fail to provide integrated community-based mental health services, leading to unnecessary institutionalization and encounters with law enforcement. A DOJ investigation in Colorado found that the state is unnecessarily segregating adults with physical disabilities in nursing facilities, and failing to ensure that individuals have a meaningful opportunity to live in community-based settings appropriate to their needs (*Information and technical assistance on the Americans with Disabilities Act: Olmstead enforcement*). In May 2022, DOJ issued a Statement of Interest in support of a New York State regulation intended to reduce reliance on Adult Homes. Finally, a recent and unprecedented DOJ investigation found that Alameda County's mental health system is violating the ADA by forcing people with psychiatric disabilities to cycle between institutions and jails due to the lack of access to proven community-based services.

Stakeholders should be aware of recent state-initiated activity in Mississippi that could affect *Olmstead* enforcement in the future. Following a trial in 2019, a Federal Judge ruled in favor of DOJ that Mississippi was in violation of Title II of the ADA. In 2022, Mississippi's Solicitor General filed an appeal with the 5th District Court, arguing that "The remedies provided under Title II are to persons," and that alleged violation would need to be on behalf of an individual, not a class action filed by the United States (*Federal ability to enforce ADA's mental health protections at risk in Mississippi case*).

In October, judges for the 5th U.S. Circuit Court of Appeals in New Orleans responded critically to DOJ's arguments in favor of federal intervention in Mississippi's mental health care system. A ruling in favor of the State of Mississippi could affect the ability of the federal government to intervene in state disability systems across the nation under the ADA's Title II. After the 5th Circuit issues a ruling, the case could go to the U.S. Supreme Court, where a judgment in favor of Mississippi could fundamentally alter the authority of the federal government to intervene in similar future cases nationwide.

FORECAST FOR 2023

State budgets have received significant federal relief to mitigate the economic impact of the pandemic, however some states have used these

funds to address shortfalls more broadly, and less to shore up critical housing and services that support people with disabilities in integrated community settings. The Biden Administration's commitment to tackle the national mental health crisis resulted in $300 million awarded to states in September 2022 for new and existing Certified Community Behavioral Health Clinics that offer community-based mental health and substance use treatment, including crisis services, 24 hours a day, 7 days a week, regardless of ability to pay. An additional $15 million in planning grants was announced in October as part of the implementation of the "Bipartisan Safer Communities Act."

The expansion of home-and-community-based services and a more robust behavioral health and crisis response have the potential to reduce reliance on institutional and congregate care settings. However, realizing this potential will continue to be a struggle absent aggressive strategies to address the workforce shortage crisis. Increased funding to states must be passed on through rate increases, and in turn used to raise direct service staff wages, or providers will continue to struggle to maintain staffing to perform this critical work. Wages must be increased equally across systems to avoid disparities in pay and benefits that will cannibalize workers from one system to another. States may also look to expanded employment opportunities for individuals with lived experience and to paying family members as caregivers.

In the coming months, states will continue to focus on planning for the unwinding of the public health emergency, which is currently in effect through January 11, 2023. CMS is encouraging states and health care providers to plan for the end of emergency waivers and other flexibilities as soon as possible and to begin reestablishing previous standards. The continuous coverage requirement protecting nearly all Medicaid enrollees will expire with the end of the public health emergency, and states will have up to 12 months to return to previous eligibility and enrollment operations. However, some emergency measures will remain in place, such as the expansion of telehealth for the diagnosis, evaluation, and treatment of mental health disorders codified through the "Consolidated Appropriations Act of 2021."

Several states will continue *Olmstead*-related planning, and others will continue to implement *Olmstead* settlement agreements that should result in additional community living opportunities despite state budget limitations. Such states include Louisiana, Minnesota, New York, North Carolina, and North Dakota. Many states have also made modifications to service delivery to sustain access. Several states have institutionalized the expanded use of telehealth to serve as an important tool to provide treatment and support services to people with disabilities. A growing handful of states have submitted new and amended 1115 Medicaid waivers to address social determinants of health, including stable housing. The expansion of community-based crisis services could further divert people from more restrictive settings, but access to upstream services, such as permanent supportive housing, case management, outpatient treatment, and supported employment, will be needed.

STAKEHOLDER ACTIONS WITH POLICYMAKERS

Though states have already determined how they will use increased allocations to the Substance Abuse Prevention and Treatment Block Grant and the MHBG awards, which must be expended by 2025, stakeholders should continue advocating for these funds to be directed to filling gaps in community-based services and supports to both divert and transition individuals from institutional and other segregated care settings.

Paramount to successful tenure in integrated housing is access to flexible and intensive support services. Advocates should learn about the opportunities afforded to states in using Medicaid programs, such as 1115 demonstration waivers to address social determinants of health and must monitor the demonstrated outcomes. Oregon, Wisconsin, Massachusetts, and Arkansas are moving forward with using Medicaid to

help support transitions to independent living, including through the provision of bridge rental assistance.

Stakeholders must press policymakers and funders to pursue any and all remedies to address the direct care workforce crisis. Funding is one important tool, as long as increases are passed along to the direct care workers. Additional approaches to pursue include providing increased training and supervision to staff, professionalizing the workforce, establishing pathways for career advancement, expanding job opportunities for people with lived experience, paying family members as caregivers, and expanding the use of technology to alleviate the strain on staff resources.

In addition, the *Olmstead* planning lens requires intentional state efforts to address the ongoing overrepresentation of individuals with mental health and co-occurring mental illness and SUDs in the criminal justice system, along with equity strategies for people with disabilities from racially and ethnically diverse communities.

June 2022 marked the 32nd anniversary of the ADA. After more than three decades of affording individuals with disabilities the right to live, spend meaningful time and engage in social activities as fully included members of the community, we cannot allow current challenges, no matter how great, to drive states back to relying on institutional and segregated settings.

FOR MORE INFORMATION

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