

Olmstead Implementation

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INTRODUCTION

June 22, 2019 marked the twentieth anniversary of the U.S. Supreme Court’s decision in *Olmstead v. LC*. The lawsuit against the State of Georgia 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 ADA and *Olmstead* compliance. Other federal agencies, including 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). In recent years, 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.

Since *Olmstead*, several states have been threatened with litigation by DOJ or P&A's for over-reliance on such facilities and insufficient community-based services that place people at risk of institutionalization and are now implementing settlement agreements to correct for these issues. These states include Connecticut, Illinois, Kentucky, Louisiana, New Hampshire, and North Carolina. Other states, for example, Mississippi and New York, opted to defend themselves in trial. Both states were found to be in violation of the ADA (note: on appeal, the New York case was overturned because the court found that the plaintiffs lacked standing. However, the state subsequently entered into a settlement with DOJ rather than re-litigate the case).

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.

SUMMARY

Although the current administration rescinded guidance on *Olmstead* and employment services, the 2011 DOJ *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.* that defines integrated and segregated settings remains.

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 Technical Assistance Collaborative's biannual Priced Out reports repeatedly demonstrate that in no housing market in the country can an individual on SSI afford the fair market rent. As federal housing assistance is so competitive, several states have created or expanded state-funded rental subsidies directly related to their *Olmstead* efforts (see <http://www.tacinc.org/knowledge-resources/publications/reports/state-funded-housing-assistance-report/> and <https://www.huduser.gov/portal/periodicals/cityscape/vol20num2/ch4.pdf>). 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 other 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. 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 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 2019

Olmstead activity continued in several states in 2019. Key highlights from across the country are described below:

- Following a trial in Mississippi federal court, U.S. District Court Judge Carlton Reeves issued a **decision** in 2019 that the State of Mississippi is violating the civil rights of persons with disabilities. The USDOJ was able to prove that the state relied on institutional care for too many people who could be served in integrated community-based settings if the services existed. It is expected that the court will issue an order in 2020 that the state will have to comply with expanding community-based services and integrated housing opportunities.
- The state of New York **defended itself** in court this past summer against litigation filed by a transitional adult home (TAH). TAHs are congregate facilities with a certified bed capacity of 80 beds or more in which 25% or more of the resident population are persons with serious mental illness. Consistent with its *Olmstead* settlement and plan, the state issued the regulation to minimize the number of people with SMI living in segregated settings populated primarily by people with SMI. The state is currently implementing a **2013 settlement** with DOJ to move persons with SMI from TAH's to supported housing. The TAH alleged that the state is violating the fair housing rights of people with SMI by limiting the number of people with SMI who can live in a transitional adult home. A decision is expected in early 2020.
- For the twentieth anniversary of the Supreme Court decision, the Technical Assistance Collaborative (TAC) facilitated an *Olmstead* symposium in March 2019 to address the incarceration of persons with mental illness. TAC convened top civil rights attorneys, national associations, and stakeholders from around the country to discuss the issue within

an *Olmstead* context and issued a report with recommendations for public entities to address criminalization in *Olmstead* planning.

- HUD continues to implement roughly \$400 million for the Section 811 Mainstream Voucher program and \$82.6 million for the Section 811 program that was budgeted in federal fiscal year 2018. This significant investment of resources for people with disabilities should produce roughly 50,000 new affordable housing opportunities for people with disabilities and aligns with states' *Olmstead* efforts. Information about both the Mainstream Voucher and the Section 811 programs are available elsewhere in this Guide.
- Nebraska is in the process of completing its first *Olmstead* plan. Nebraska's legislature passed a law in 2016 requiring state agencies to develop a cross disability *Olmstead* plan by December 2019.
- Several states continued to implement settlement agreements in 2019, including Connecticut, Georgia, Illinois, Kentucky, Louisiana, New York, New Hampshire, and North Carolina.
- The successful CMS Money Follows the Person (MFP) Program that provides enhanced federal matching funds to help persons with disabilities and seniors transition from institutions to community settings is set to expire on December 31, 2019. MFP has helped 90,000 people in 44 states between 2007 and 2018. As of writing, reauthorization by Congress is not yet final. Twenty percent of MFP states will have exhausted their current funds by the end of 2019, and most of the remaining states are expected to do so during 2020. Over one-third of MFP states identified a range of services that they expect to discontinue if federal funding expires, with community transition services most often cited. States also expect that they will not be able to maintain staff and activities focused on enrollee outreach and community housing,

which are financed with enhanced federal matching funds.

FORECAST FOR 2020

Title II of the ADA is the law, upheld by the Supreme Court in *Olmstead v. L.C.* The recent ruling in the Mississippi *Olmstead* case reinforces the obligation of states and other public entities to ensure that individuals with disabilities live in the most integrated settings possible. Complying with *Olmstead* is not a one-time exercise, and states need to plan and implement integration strategies actively. Most *Olmstead* activity will continue to occur in states with active settlement agreements or litigation, but all states should be engaging in *Olmstead* activities. These activities include expanding PSH and services such as Assertive Community Treatment (ACT), community support services, supported employment, and integrated treatment. Other activities might include implementation of Home and Community Based Services transition plans, HUD Section 811 Project Rental Assistance, 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.

Key states to watch in 2020 include Mississippi, Nebraska, Minnesota, Georgia, New York, Illinois, North Carolina, and New Hampshire. In Mississippi, the court will be issuing a ruling on the remedy to correct for violations of the ADA and *Olmstead*. Georgia's settlement, after several amendments, was scheduled to expire in 2018 but the court monitor has not found the state compliant yet. Minnesota has an updated plan and is proactively working on *Olmstead*, and Nebraska will be implementing its first *Olmstead* plan. The pending decision in the New York transitional adult home case will affect the state's ability to regulate the density of persons with SMI living in segregated settings.

Housing affordability remains a crisis heading into 2020, especially for persons with disabilities in extremely low-income households. However, the FY17 and FY18 federal budgets included

funds for new HUD Mainstream Vouchers and Section 811 Project Rental Assistance creating roughly 50,000 new affordable housing opportunities for extremely low-income people with disabilities over the next couple of years. public housing agencies (PHAs) will administer the vouchers and will be required to work with service providers to ensure that tenants can access needed services. Providers and advocates should be working with PHA's to ensure that these vouchers are implemented effectively. PHA's that have been awarded vouchers can be found on HUD's [website](#). This new housing assistance can certainly support state *Olmstead* efforts.

STAKEHOLDER ACTIONS WITH POLICY MAKERS

Stakeholders should educate elected officials and policy makers on their obligations under the ADA and Olmstead. States and other public entities are legally obligated to ensure that all individuals with disabilities have the civil right to live and work in integrated, community-based 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 often high utilizers of costly services and likely to have poor health outcomes. 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 encourage national and state organizations to ensure that Olmstead is leveraged as a policy priority that can strengthen

arguments to increase affordable housing and community-based services. Reinforcing the HUD Mainstream Voucher and Section 811 PRA programs will create new affordable housing opportunities, and advocacy around the MFP program should continue into 2020. 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 <https://www.ndrn.org/>.

States are increasingly recognizing the benefits of integrated physical and behavioral health care for individuals with multiple chronic conditions and are beginning to include tenancy support services into their Medicaid programs. Stakeholders should work with their state Medicaid agencies to include these service delivery strategies into their Medicaid program so that people with disabilities have access to services that can help them maintain their housing and succeed in integrated, community-based settings.

FOR MORE INFORMATION

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