

# Olmstead Implementation

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## SUMMARY

In its 1999 decision in *Olmstead v. L.C.*, 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). States have made variable progress on supporting people with disabilities in the most integrated settings possible.

Going into 2020, several states were 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. Unfortunately, many states never developed *Olmstead* plans, have outdated plans, or are doing very little on *Olmstead* specifically.

The COVID-19 pandemic has diverted attention away from *Olmstead* and other federal and state priorities and has impacted transitions to integrated community settings. This comes at a time when the impact of the pandemic has been deadly for people in congregate settings. The most [recently available data](#) show long-term care facilities account for 8% of all coronavirus cases but more than 40% of all COVID-19 deaths. Residents in facilities that serve a relatively large share of Black and Hispanic residents have been [affected disproportionately](#) by the coronavirus. Data indicates a disproportionate impact for people with disabilities in other [congregate](#)

[settings](#) as well.

The impact to *Olmstead* implementation will continue into 2021 as states focus on the public health emergency and are likely to reduce spending on services and affordable housing due to the weak economy. Depending on where you are in the country, provider capacity is strained and many have had to limit face to face contact due to staffing shortages and lack of personal protective equipment (PPE). Congregate facilities, such as nursing homes and psychiatric hospitals, have limited external visitors such as transition workers, especially in areas where COVID numbers are high.

Some *Olmstead* activity has continued in states, however, and an increasing number of providers are using telehealth and other emergency strategies to provide transition and tenancy sustaining services.

## 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.

## IMPLEMENTATION

Since 1999, states have made variable progress on supporting people with disabilities in the most integrated settings possible. Going into 2020, several states were 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. Unfortunately, many states never developed *Olmstead* plans, have outdated plans, or are doing very little on *Olmstead* specifically.

Although the Trump 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.

Implementation efforts have largely focused on expanding community living options and services that support them in their housing as opposed to integrated employment or other activities. Several *Olmstead* plans do address 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 unnecessarily segregated in “sheltered workshops” and related day activity service programs.

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/cityscpe/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 2020

In 2020, the COVID-19 pandemic diverted attention away from *Olmstead* and other federal and state priorities, and impacted transitions to integrated community settings as states focused on the public health emergency. This comes at a time when more than 40% of all COVID-19 deaths are from residents in long-term care facilities. Depending on where you are in the country, provider capacity is strained as many have

experienced staffing shortages and have had to limit face to face contact due to shortages of personal protective equipment (PPE). Congregate facilities, such as nursing homes and psychiatric hospitals, have limited external visitors such as transition workers, especially in areas where COVID numbers are high, creating barriers to timely transitions.

Despite the severe strain on systems due to the pandemic in 2020, *Olmstead* activity did continue in some states through planning (e.g. North Carolina, Minnesota) and settlement agreement implementation. Most states submitted and received approval for a number of emergency waivers and state plan amendments from the Center for Medicare and Medicaid Services (CMS) to increase flexibility and coverage of services. An increasing number of providers are now using telehealth strategies to maintain access to services, including for transition and tenancy sustaining services. As providers have secured PPE, they have increased their ability to work with individuals in community-based settings.

## FORECAST FOR 2021

The COVID-19 pandemic will be a primary focus for the Biden Administration and at the state level as federal and state agencies work to mitigate the virus, distribute the vaccine, and push economic recovery. State budgets are in bad shape due to the economic impact of the pandemic, and budget cuts to critical housing and services that support people with disabilities in integrated community settings are likely, including critical supports that facilitate transitions from institutional settings. Providers will continue to struggle to maintain staffing to perform this critical work.

On the positive side, several states continue *Olmstead*-related planning, and several continue to implement *Olmstead* settlement agreements that should result in additional community living opportunities despite state budgets. Among these include Louisiana, Minnesota, New York, and North Carolina. Many states have also made modifications to service delivery to sustain access. Telehealth has become an important

tool to provide treatment and support services to people with disabilities, and CMS has approved multiple waivers that make the use of telehealth and other service coverage provisions more flexible.

## STAKEHOLDER ACTIONS WITH POLICY MAKERS

There is an opportunity to reinvigorate *Olmstead* activity with the Biden Administration, and advocates should make the case that supporting people with disabilities in integrated community settings is important public policy and aligns well with COVID mitigation and recovery plans. 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.

According to NLIHC and the Consortium for Citizens with Disabilities Housing Task Force, Congress addressed the COVID-risk of people experiencing homelessness in congregate shelters in the CARES Act, but failed to address what has been a more deadly risk of those living in other congregated settings such as nursing facilities, group homes and institutions. Congress must clarify that people in nursing facilities, intermediate care facilities, state psychiatric facilities and other congregate settings are eligible for ESG-funded programs, regardless of length of stay.

Moreover, Congress must ensure that people with disabilities coming from congregate settings and institutions are be eligible for any emergency rental assistance, housing, and homelessness resources that may be included in any coronavirus relief packages. In the long-term, permanent affordable housing solutions and supports are key to ensuring people with disabilities can remain in the community and successfully transition from congregate settings. Congress must increase investments in proven solutions, including targeted programs such as Mainstream Vouchers and Section 811 Supportive Housing, as well as Housing Choice

Vouchers, the National Housing Trust Fund, and other programs.

Advocates should encourage the Biden Administration to make supportive housing a priority in any fiscal year 2022 budget actions and in the fiscal year 2023 budget. Funding allocations should support those programs that have proven successful in helping people with disabilities, including those experiencing homelessness, to move into integrated, affordable, accessible housing with access to voluntary supports. Among these include the following:

- HUD Section 811 Project Rental Assistance (PRA) Program: Responses to recent HUD funding opportunities have demonstrated a strong demand from states for PRA funding in contrast to a lack of interest in the development of congregate settings through the capital advance program. The Administration should focus on successful PRA implementation and include a request for new funds in the Administration's FY23 Budget Request.
- Mainstream Vouchers: HUD should focus on successful implementation of recent Mainstream awards and Mainstream funds should be requested in the FY23 Budget.
- Affordable housing programs: One of the most efficient ways to create integrated housing for people with disabilities is through incentives in affordable housing programs such as the National Housing Trust Fund, HOME and Low Income Housing Tax Credit. The Section 811 PRA program has demonstrated how to leverage these programs for efficient development of affordable, accessible housing including in rural areas.

Advocates should advise states against short-sighted budget cuts to disability programs, and resume *Olmstead* planning and implementation. 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. Advocates should also encourage states to use FEMA funds to de-congregate nursing facilities and other institutional settings.

## FOR MORE INFORMATION

Technical Assistance Collaborative, Inc. (TAC), 617-266-5657, [www.tacinc.org](http://www.tacinc.org).