

ALERT

**HCFA Dear State Medicaid Director Letter Provides Guidance
on *Olmstead* Decision Regarding Individuals with Disabilities**

DEPARTMENT OF HEALTH & HUMAN SERVICES Administration

Center for Medicaid and State Operations, Baltimore, MD 21244-1850

January 14, 2000

Dear State Medicaid Director:

The recent Supreme Court decision in *Olmstead v. L.C.*, 119 S.Ct. 2176 (1999), provides an important legal framework for our mutual efforts to enable individuals with disabilities to live in the most integrated setting appropriate to their needs. The Court's decision clearly challenges us to develop more opportunities for individuals with disabilities through more accessible systems of cost-effective community-based services.

This decision confirms what this Administration already believes: that no one should have to live in an institution or a nursing home if they can live in the community with the right support. Our goal is to integrate people with disabilities into the social mainstream, promote equality of opportunity and maximize individual choice.

The Department of Health and Human Services (DHHS) is committed to working with all affected parties to craft comprehensive, fiscally responsible solutions that comply with the Americans with Disabilities Act of 1990 (ADA). Although the ADA applies to all State programs, Medicaid programs play a critical role in making community services available. As a consequence, State Medicaid Directors play an important role in helping their States comply with the ADA. This letter conveys our initial approach to *Olmstead* and outlines a framework for us to respond to the challenge.

The Olmstead Decision

The *Olmstead* case was brought by two Georgia women whose disabilities include mental retardation and mental illness. At the time the suit was filed, both plaintiffs lived in State-run institutions, despite the fact that their treatment professionals had determined that they could be appropriately served in a community setting. The plaintiffs asserted that continued institutionalization was a violation of their right under the ADA to live in the most integrated setting appropriate. The *Olmstead* decision interpreted Title II of the ADA and its implementing regulation, which oblige States to administer their services, programs, and activities "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (28 CER 35.130(d)). In doing so, the Supreme Court answered the fundamental question of whether it is discrimination to deny people with disabilities services in the most integrated setting appropriate. The Court stated directly that "Unjustified isolation. . . is properly regarded as discrimination based on disability." It observed that (a) "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated

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are incapable or unworthy of participating in community life," and (b) "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."

Under the Court's decision, States are required to provide community-based services for persons with disabilities who would otherwise be entitled to institutional services when: (a) the State's treatment professionals reasonably determine that such placement is appropriate; (b) the affected persons do not oppose such treatment; and (C) the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others who are receiving State-supported disability services. The Court cautioned however, that nothing in the ADA condones termination of institutional settings for persons unable to handle or benefit from community settings. Moreover, the State's responsibility, once it provides community based treatment to qualified persons with disabilities, is not unlimited.

Under the ADA, States are obliged to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." (28 CFR 35.130(b)(7)). The Supreme Court indicated that the test as to whether a modification entails "fundamental alteration" of a program takes into account three factors; the cost of providing services to the individual in the most integrated setting appropriate; the resources available to the State; and how the provision of services affects the ability of the State to meet the needs of others with disabilities. Significantly, the Court suggests that a State could establish compliance with title II of the ADA if it demonstrates that it has:

- a comprehensive, effectively working plan for placing qualified persons with disabilities in less restrictive settings, and

- a waiting list that moves at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated.

Olmstead and the Medicaid Program

Olmstead challenges States to prevent and correct inappropriate institutionalization and to review intake and admissions processes to assure that persons with disabilities are served in the most integrated setting appropriate. Medicaid can be an important resource to assist States in meeting these goals. We want to work closely with States to make effective use of Medicaid support in your planning and implementation *Olmstead*. As an example of the

interface between *Olmstead's*
explanation of the State's ADA obligation and your Medicaid program we would point to the
State's responsibility, under Medicaid, to periodically review the services of all residents in
Medicaid-funded institutional settings. Those reviews may provide a useful

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component of the State's planning for a comprehensive response to *Olmstead*. States must also
be responsive to institutionalized individuals who request that their situation be reviewed to
determine if a community setting is appropriate. In such a case the State has a duty to redress
the situation, subject to the limits outlined by the Court and the ADA. As another example,
States may choose to utilize their Medicaid funds to provide appropriate services in a range of
settings from institutions to fully integrated community support.

Comprehensive, Effectively Working Plans

As we have noted, the Supreme Court in *Olmstead* indicated that a State may be able to meet
its obligation under the ADA by demonstrating that it has a comprehensive, effectively working
plan for placing qualified persons with disabilities in the most integrated setting appropriate, and
a waiting list that moves at a reasonable pace not controlled by a State's objective of keeping its
institutions fully populated. The Department believes that comprehensive, effectively working
plans are best achieved with the active involvement of individuals with disabilities and their
representatives in design, development and implementation.

The Court's *Olmstead* decision regarding the integration requirement applies to all individuals
with disabilities protected from discrimination by title II of the ADA. Although

Olmstead
involved two individuals with mental disabilities, the scope of the ADA is not limited only to such
individuals, nor is the scope of

Olmstead
limited to Medicaid beneficiaries or to services financed by the Medicaid program. In addition,
the requirement to provide services in the most integrated setting appropriate applies not only to
persons already in institutional settings but to those being assessed for possible
institutionalization.

The enclosure to this letter offers some recommendations about key principles and practices for States to consider as they develop plans. We recognize that there is no single plan that is best suited for all States, and accordingly that there are many ways to meet the requirements of the ADA. We certainly hope States and people with disabilities will expand and improve on these ideas. Although these plans encompass more than just the Medicaid program, we realize the important role played by State Medicaid Directors in this area. As just one example, Federal financial participation will be available at the administrative rate to design and administer methods to meet these requirements, subject to the normal condition that the changes must be necessary for the proper and efficient administration of the State's Medicaid program. Because of your significant role, we have taken this opportunity to raise these issues with you.

The principles and practices contained in the accompanying technical assistance enclosure also serve as an important foundation for the DHHS Office for Civil Rights' (OCR) activities in this area. As you know, OCR has responsibility for investigating discrimination complaints involving the most integrated setting issue. OCR also has authority to conduct compliance

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reviews of State programs and has already contacted a number of States to discuss complaints. OCR strongly desires to resolve these complaints through collaboration and cooperation with all interested parties.

Next Steps for the Department of Health and Human Services

Consultation- We have begun consultation with States (including State Medicaid Directors and members of the long term care technical advisory group, who share responsibility for Medicaid) and with people with disabilities. We look forward to building on this start. Many States have made great strides toward enabling individuals with disabilities to live in their communities. There is much that we can learn from these States. We are interested in your ideas regarding the methods by which we might accomplish such continuing consultation effectively and economically.

Addressing Issues and Questions Regarding *Olmstead* and Medicaid: As we move forward, we recognize that States may have specific issues and questions about the interaction between the

ADA and the Medicaid program. In response to the issues and questions we receive, we will review relevant federal Medicaid regulations, policies and previous guidance to assure that they (a) are compatible with the requirements of the ADA and the *Olmstead* decision, and (b) facilitate States' efforts to comply with the law.

Technical Assistance: In response to any issues raised by the States, the DHHS working group will develop a plan to provide technical assistance and information sharing among States and stakeholders. Responses to questions and technical assistance materials will be published on a special website. We are also funding projects in a number of States to assist with nursing home transition. Finally, we seek your ideas on the additional focus of technical assistance you would find most helpful for home and community-based services and conferences for State policy makers. We will use your suggestions to facilitate the implementation of the integration requirement. We invite all States and stakeholders to submit questions and recommendations to our departmental workgroup co-chaired by the Director of HCFA's Center for Medicaid and State Operations and the Director of the DHHS Office for Civil Rights. Please send such written correspondence to:

DHHS Working Group for ADA/*Olmstead*
c/o Center for Medicaid and State Operations
HCFA, Room S2- 14-26. DEHPG
7500 Security Blvd.
Baltimore, MD 21244-1850

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Conclusion

The Administration and DHHS have a commitment to expanding home and community-based services and offering consumers choices in how services are organized and delivered. Over the past few years, DHHS has focused on expanding and promoting home and community-based services, offering support and technical assistance to States, and using the flexibility of the Medicaid program. The *Olmstead* decision affirms that we are moving in the right direction and we intend to continue these efforts.

We recognize that this interim guidance leaves many questions unanswered; with your input, we expect to develop further guidance and technical assistance. We recommend that States do the following:

- Develop a comprehensive, effectively working plan (or plans) to strengthen community service systems and serve people with disabilities in the most integrated setting appropriate to their needs;
- Actively involve people with disabilities, and where appropriate, their family members or representatives, in design, development and implementation;
- Use the attached technical assistance material as one of the guides in the planning process; .
- Inform us of questions that need resolution and of ideas regarding technical assistance that would be helpful.

We look forward to working with you to improve the nation's community services system.

Sincerely,

/s/

Timothy M. Westmoreland
Director
Center for Medicaid and State Operations
Health Care Financing Administration

/s/

Thomas Perez Director
Office for Civil Rights

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cc:

All HCFA Regional Administrators

All HCFA Associate Regional Administrators
Division of Medicaid and State Operations

American Public Human Services Association

National Association of State Directors of Developmental Disabilities Services

National Association for State Mental Health Program Directors

National Conference of State Legislatures

National Governors' Association

Enclosure

Developing Comprehensive, Effectively Working Plans
Initial Technical Assistance Recommendations

In ruling on the case of *Olmstead v. L.C.*, the Supreme Court affirmed the right of individuals with disabilities to receive public benefits and services in the most integrated setting appropriate to their needs. The Supreme Court indicated that a State can demonstrate compliance with its ADA obligations by showing that it has a comprehensive, effectively working plan for placing qualified persons with disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated.

We strongly urge States to increase access to community-based services for individuals with

disabilities by developing comprehensive, effectively working plans for ensuring compliance with the ADA. There is no single model plan appropriate for all States and situations. In developing their plans, States must take into account their particular circumstances. However, we believe there are some factors that are critically important for States that seek to develop comprehensive, effectively working plans. Our intent in this enclosure is to identify some of the key principles, including the involvement of people with disabilities throughout the planning and implementation process. These principles also will be used by the Office for Civil Rights as it investigates complaints and conducts compliance reviews involving "most integrated setting" issues. We strongly recommend that States factor in these principles and practices as they develop plans tailored to their needs.

Comprehensive, Effectively Working Plans

Principle: Develop and implement a comprehensive, effectively working plan (or plans) for providing services to eligible individuals with disabilities in more integrated, community-based settings. When effectively carrying out this principle:

- The State develops a plan or plans to ensure that people with disabilities are served in the most integrated setting appropriate. It considers the extent to which there are programs that can serve as a framework for the development of an effectively working plan. It also considers the level of awareness and agreement among stakeholders and decision-makers regarding the elements needed to create an effective system, and how this foundation can be strengthened.

- The plan ensures the transition of qualified individuals into community-based settings at a reasonable pace. The State identifies improvements that could be made.

- The plan ensures that individuals with disabilities benefit from assessments to determine how community living might be possible (without limiting consideration to what is currently available in the community). In this process, individuals are provided the opportunity for informed choice. The plan evaluates the adequacy with which the State is conducting thorough, objective and periodic reviews of all individuals with disabilities in institutional settings (such as State institutions, ICFs/MR, nursing facilities, psychiatric hospitals, and residential service facilities for children) to determine the extent to which they can and should receive services in a more integrated setting.

- The plan establishes similar procedures to avoid unjustifiable institutionalization in the first place.

Plan Development and Implementation Process

Principle: Provide an opportunity for interested persons, including individuals with disabilities and their representatives, to be integral participants in plan development and follow-up. When effectively carrying out this principle:

- The State involves people with disabilities (and their representatives, where appropriate)

in the plan development and implementation process. It considers what methods could be employed to ensure constructive, on-going involvement and dialogue.

- The State assesses what partnerships are needed to ensure that any plan is comprehensive and works effectively.

Assessments on Behalf of Potentially Eligible Populations

Principle: *Take steps to prevent or correct current and future unjustified institutionalization of individuals with disabilities. When effectively carrying out this principle* :

- The State has a reliable sense of how many individuals with disabilities are currently institutionalized and are eligible for services in community-based settings. The plan considers what information and data collection systems exist to enable the State to make this determination. Where appropriate, the State considers improvements to data collection systems to enable it to plan adequately to meet needs

- The State evaluates whether existing assessment procedures are adequate to identify institutionalized individuals with disabilities who could benefit from services in a more integrated setting.

- The State also evaluates whether existing assessment procedures are adequate to identify individuals in the community who are at risk of placement in an unnecessarily restrictive setting.

- The plan ensures that the State can act in a timely and effective manner in response to the findings of any assessment process.

Availability of Community-Integrated Services

Principle: *Ensure the Availability of Community-integrated Services. When effectively carrying out this principle:*

- The plan identifies what community-based services are available in the State. It assesses the extent to which these programs are able to serve people in the most integrated setting appropriate (as described in the ADA). The State identifies what improvements could be accomplished, including in information systems, to make this an even better system, and how the system might be made comprehensive.

- The plan evaluates whether the identified supports and services meet the needs of persons who are likely to require assistance in order to live in community. It identifies what changes could be made to improve the availability, quality and adequacy of the supports.

- The State evaluates whether its system adequately plans for making supports and services available to assist individuals who reside in their own homes with the presence of other family members. It also considers whether its plan is adequate to address the needs of those

without family members or other informal caregivers.

- The State examines how the identified supports and services integrate the individual into the community.

- The State reviews what funding sources are available (both Medicaid and other funding sources) to increase the availability of community-based services. It also considers what efforts are under way to coordinate access to these services. Planners assess the extent to which these funding sources can be organized into a coherent system of long term care which affords people with reasonable, timely access to community-based services.

- Planners also assess how well the current service system works for different groups (e.g. elderly people with disabilities, people with physical disabilities, developmental disabilities, mental illness, HIV-AIDS, etc.). The assessment includes a review of changes that might be desirable to make services a reality in the most integrated setting appropriate for all populations.

- The plan examines the operation of waiting lists, if any. It examines what might be done to ensure that people are able to come off waiting lists and receive needed community services at a reasonable pace.

Informed Choice

Principle: Afford individuals with disabilities and their families the opportunity to make informed choices regarding how their needs can best be met in community or institutional settings. When effectively carrying out this principle:

- The plan ensures that individuals who may be eligible to receive services in more integrated community-based settings (and their representatives, where appropriate) are given the opportunity to make informed choices regarding whether -and how- their needs can best be met.

- Planners address what information, education, and referral systems would be useful to ensure that people with disabilities receive the information necessary to make informed choices.

Implications for State and Community Infrastructure

Principle: *Take steps to ensure that quality assurance, quality improvement and sound management support implementation of the plan. When effectively carrying out this principle:*

- Planners evaluate how quality assurance and quality improvement can be conducted effectively as more people with disabilities live in community settings.
- The State also examines how it can best manage the overall system of health and long term care so that placement in the most integrated setting appropriate becomes the norm. It considers what planning, contracting and management infrastructure might be necessary to achieve this result at the State and the community level.