Implementing Olmstead in California

The Long-Term Care Fundamentals series is produced by The SCAN Foundation to highlight and describe the organization and financing of long-term care (LTC) in California. This LTC Fundamentals brief provides a background on the U.S. Supreme Court's Olmstead decision, its broader implications, and state implementation efforts.

What is *Olmstead*?

In 1999, the U.S. Supreme Court ruled in the case of *Olmstead v. L.C.*,[1] finding that the unnecessary institutionalization of people with disabilities is a violation of the Americans with Disabilities Act of 1990 (ADA).[2] The ADA is a law enacted by Congress to prohibit discrimination against individuals on the basis of disability. The case was brought on behalf of two women who were developmentally disabled and diagnosed with mental illness. Both women were voluntarily admitted at different times to Georgia Regional Hospital (GRH) for treatment in a psychiatric unit. After some time, both women expressed a preference to return to the community. Each of the women's treatment professionals eventually concluded that they could be cared for in the community with appropriate supports, but the state's lack of community-based services effectively confined them to GRH's psychiatric unit. The Atlanta Legal Aid Society represented both women in a lawsuit brought against the Georgia State Commissioner of Human Resources, Tommy Olmstead, alleging that the women's continued institutionalization violated their rights under the ADA to receive services in the most integrated setting.[3] This case was appealed to the Supreme Court.

The Supreme Court Decision

The U.S. Supreme Court's *Olmstead* decision centered on whether the plaintiffs had been discriminated against under Title II of the ADA (which is that portion of the ADA that applies to state and local governments) by being institutionalized instead of being provided community-based alternatives to institutional care by the state. One provision of Title II requires state and local governments to operate programs in the most integrated setting appropriate to the needs of individuals with disabilities. This is commonly referred to as the ADA's "*integration mandate*." According to this mandate, public entities must operate programs in the most integrated setting appropriate to the needs of individuals with disabilities.[4] A second critical element of Title II requires a state or local government to make "reasonable modifications" to avoid discrimination based on disability. The state would be exempt from making such modifications if they would "fundamentally alter the nature of the service, program, or activity."[5] The question came down to whether requiring the state to fund community-based services would constitute a reasonable modification or a fundamental alteration beyond the reach of the ADA.

"In 1999, the U.S. Supreme Court ruled in the case of Olmstead v. L.C., finding that the unjustified institutional isolation of people with disabilities is a violation of the Americans with Disabilities Act of 1990 (ADA)."

In *Olmstead*, the Supreme Court indicated that the determination of whether a program or service has been fundamentally altered is based on (1) the cost of providing services to the individual and similarly situated persons in the most integrated setting appropriate, (2) the resources available to the state, and (3) how the provision of services affects the ability of the state to meet the needs of others with disabilities.[5] The Supreme Court noted that states can meet this reasonable modification standard by developing a comprehensive, effectively working plan for increasing access to home- and community-based services (HCBS) and transitioning qualified individuals to less restrictive settings, as well as by establishing a waiting list for HCBS that moves at a reasonable pace.[6] The Supreme Court did not rule on the reasonableness of the modifications Georgia put in place; rather, the Court sent the case back to the lower courts to be reconsidered using the guidance the Supreme Court provided.*

Federal Guidance

After the Supreme Court issued its ruling in *Olmstead*, the federal Centers for Medicare and Medicaid Services (CMS, previously known as the Health Care Financing Administration) issued letters to State Medicaid Directors providing direction to states regarding the *Olmstead* decision, populations impacted, and guidance for implementation including the state's development of an "*Olmstead* plan" – a plan to increase availability of HCBS within the state.[7-11] CMS also clarified that while the Court's decision involved two women with developmental disabilities and mental illness, the principles set forth in the decision apply to all qualified individuals with disabilities protected from discrimination by Title II of the ADA. CMS also clarified that seniors and children are covered by *Olmstead*, while reiterating that the protections afforded by the decision are not based on a person's age, but on whether they meet the threshold definition of disability under the ADA.

Implications for States

The Supreme Court's ruling was significant because it clarified that a state or local government could be forced through litigation to modify or augment its programs to reduce unnecessary institutionalization.[12] It also reinforced and helped to accelerate a trend toward increasing Medicaid HCBS spending relative to institutional care.[13]

Medicaid represents the largest source of public financing for long-term care (LTC) services in both institutions and the community. While institutional care is an entitlement under federal Medicaid law, HCBS are still optional.[14] The *Olmstead* ruling did not alter this institutional bias in the Medicaid program.

Therefore, Medicaid law continues to provide an entitlement to institutional care, meaning that it must be made available to anyone who satisfies financial and clinical eligibility standards. The law provides no similar guarantees for HCBS since these services are optional. States have a choice as to how and to what extent to provide HCBS and, in practice, most states cobble together a patchwork of Medicaid "optional" State Plan services and waiver programs that provide limited community-based alternatives for some persons who would otherwise require care in a nursing facility or hospital.

*For a more complete discussion of the Olmstead decision and the progress made toward expanding home- and community-based options for individuals with disabilities, please see the special report "10-Plus Years After the Olmstead Ruling" by the National Senior Citizens Law Center at: http://www.thescanfoundation.org/sites/default/files/NSCLC_Olmstead.pdf.

"...public entities must operate programs in the most integrated setting appropriate to the needs of individuals with disabilities."

Olmstead Action and Related HCBS Expansion Activities in California

Since the Supreme Court issued its decision over ten years ago, California has initiated a number of efforts to comply with CMS guidance. In 2003, the state released the *California Olmstead Plan*, which included recommendations on how to build upon California's HCBS to meet the intent of the *Olmstead* decision.[15] While California's plan offered a solid first step toward a vision for improved HCBS access for those with disabilities, it did not delineate timeframes, specific deliverable action items, or a system-wide, long-range strategic plan to set priorities and maximize the use of limited state resources.

In 2004, Governor Schwarzenegger issued Executive Order S-18-04[16] affirming the state's commitment to provide services to people with disabilities in the most integrated setting. Through the Executive Order, the Governor directed the Secretary of the California Health and Human Services Agency (CHHS) to establish the Olmstead Advisory Committee,[17] consisting of LTC consumers and other stakeholders to inform the Administration's understanding of the current LTC system and future opportunities. A second Executive Order in 2008 (S-10-08)[18] re-affirmed the earlier Executive Order and established that the Secretary has the discretion to convene the advisory committee. The committee has met on a quarterly basis and provided recommendations to the Secretary on the implementation of the state's *Olmstead* plan and ways to improve LTC in California to meet the intent of the *Olmstead* decision. Given that the Olmstead Advisory Committee is convened at the discretion of the Secretary of CHHS, it is unclear at this time if the committee will continue to meet in the Brown administration.

In addition to this effort, CHHS administers the California Community Choices Project, which was established through a 2006 CMS Real Choice Systems Change Grant in partnership with the Olmstead Advisory Committee. The Choices Project is focused on developing California's LTC infrastructure to increase access to HCBS and to help divert persons with disabilities and older adults from unnecessary institutionalization. Among the project's accomplishments is the establishment of two of the state's seven Aging and Disability Resource Center (ADRC) sites, which serve for consumers as a single point of entry into the array of services available in the LTC system. Federal grants awarded to California in 2010 established the California Options Counseling Quality Improvement Project and the ADRC Evidence-Based Care Transition Programs Proposal, designed to further strengthen the ADRC model.[19,20] Additionally, the Choices Project developed *CalCareNet.ca.gov*, a web-based information system that provides up-to-date information on HCBS delivered within the state.[21] Another important product of the Choices Project was the LTC Financing Study, which details a number of recommendations for the management of funding for HCBS.[22]

Other state efforts to expand access to HCBS have focused on providing nursing home residents with the opportunity to return to the community. In January 2007, the California Department of Health Care Services (DHCS) was awarded federal funding to implement a Money Follows the Person Rebalancing Demonstration called "California Community Transitions" (CCT). CCT originally allowed eligible Medi-Cal beneficiaries who were receiving services in nursing or other inpatient health care facilities for six months or longer to transition to a community setting, if that was their preference (as a result of the Affordable Care Act, individuals are now eligible for CCT if they have resided in an institutional setting for at least 90 days).[23]

"The Supreme Court's ruling was significant because it clarified that a state or local government could be forced through litigation to modify or augment its programs to reduce unnecessary institutionalization."

The California Department of Health Care Services also received a $750,000 grant from the federal government to build capacity across the CCT Demonstration, the existing ADRCs, the Area Agencies on Aging (AAAs), and the network of Independent Living Centers (ILCs) to provide options counseling to further nursing home diversion efforts.[24]

Olmstead and the California Courts

People with disabilities who are institutionalized or at-risk of institutionalization continue to file *Olmstead*-related complaints in situations where it is alleged that a state or local government is failing to provide services in the most integrated setting. These cases are significant because they often set the standard for how states or local governments develop their HCBS infrastructure.

Two notable cases filed in California by institutionalized individuals with disabilities involve the Laguna Honda Hospital and Rehabilitation Center, a nursing home operated by the City of San Francisco that houses almost 1,000 residents. In 2000, a lawsuit was filed against Laguna Honda on behalf of its residents with mental illness, developmental disabilities, and physical disabilities.[25] The plaintiffs alleged that the City of San Francisco and State of California violated the integration mandate under *Olmstead* by unnecessarily institutionalizing them and by failing to properly inform them of, assess or offer HCBS in lieu of institutionalization. A partial settlement was reached in March of 2004 when the state agreed to modify the pre-admission screening program for individuals with psychiatric disabilities in order to identify community resources and assess capacity to live in the community. In addition, the city instituted a targeted case management unit to screen and assess the needs of Laguna Honda residents and potential residents, and provide discharge planning with linkages to community-based resources.

In 2006, six residents of Laguna Honda Hospital filed another lawsuit against the City and County of San Francisco, alleging that they were unnecessarily institutionalized.[26] The lawsuit sought to provide plaintiffs the ability to transition to the community with affordable and accessible housing and services. The case was settled in September 2008, with the city agreeing to enhance community-based services and housing, and provide residents the ability and support to transition from Laguna Honda to the community.

Two more recent cases concerning disabled persons at risk for institutionalization were brought before the courts in response to California's efforts to reduce community-based services in light of its current budget constraints. In the 2009 case of *Cota et. al. (Brantley) v. Maxwell-Jolly*,[27] a group of older and disabled individuals filed a class-action lawsuit to prevent the state from imposing cuts on its Adult Day Health Care (ADHC) program. A federal judge relied on the ADA and the *Olmstead* ruling to decide on two preliminary motions for injunction filed by the plaintiffs in the case – one to halt an across-the-board cut to Medi-Cal funding of ADHC visits from a maximum of five days a week to no more than three days a week, and a second to challenge new restrictive eligibility criteria that would have ended ADHC services for as many as 15,000 participants, increasing their risk for institutionalization. The U.S. District Court for the Northern District of California ruled in favor of the plaintiffs on both injunctions. The Court acknowledged that the plaintiffs "were likely to prevail on their claims that the new eligibility criteria violate the ADA, federal Medicaid law, and due process under the United States Constitution" and that they faced

"Even in light of California's budget challenges and their impact on program expansion, the state can still pursue efforts to improve the nature of HCBS."

"the loss of services that would be critical to avoid institutionalization."[28] The State of California has appealed the most recent injunction to the Ninth Circuit Court of Appeals and the injunction will remain in effect until the Ninth Circuit's ruling.

Similarly, *V.L. v. Wagner*[29] was brought before the U.S. District Court for the Northern District of California in 2009 in response to California's planned reduction in the number of individuals eligible for In-Home Supportive Services (IHSS) for people with disabilities. IHSS users and members of local unions filed the class action lawsuit claiming that an estimated 130,000 participants would be adversely affected. The court prohibited the state from implementing the service reductions and acknowledged that "individuals with mental disabilities who lose IHSS assistance to remind them to take medication, attend medical appointments and perform tasks essential to their continued health are at a severely increased risk for institutionalization."[30]

Conclusions

In the *Olmstead* decision, the Supreme Court established the right of individuals with disabilities to receive services in the most integrated setting. Despite the fact that overall spending on HCBS has increased and states such as California are spending more money on HCBS over institutional care,[31] the federal Medicaid law that mandates availability of institutional care but not community care still remains a barrier to consumers who prefer community-based alternatives. Additionally, in light of record budget deficits in states across the country, states face significant challenges to expand or even maintain what are currently "optional" Medicaid services; and as long as states are operating with large budget deficits, these services will continue to be vulnerable.

The question raised by *Olmstead* of whether requiring the state to make HCBS available constitutes a reasonable modification or a fundamental alteration beyond the reach of the ADA is a question that is continually being reviewed. Does this same question apply equally in court cases addressing states' obligations to provide services and in court cases addressing state action to cut existing services? This is a critical question in light of recent growing state budget deficits. Eventual determination of open cases will be informative of this body of law.

Even in light of California's budget challenges and their impact on program expansion, the state can still pursue efforts to improve the nature of HCBS. The National Senior Citizens Law Center's report on *Olmstead* offers an important recommendation for states to ensure adequate quality of care in HCBS settings.[14] There is little guidance in federal statute or CMS guidance to California and other states to ensure the quality of HCBS provided through federal waivers. Given the lack of federal guidance, states have the opportunity to help shape quality standards.

The Affordable Care Act provides some hope of progress given the options it provides to states to expand their HCBS offerings, some in exchange for incentives such as enhanced federal Medicaid match for HCBS.[32] Until states are required to make Medicaid-funded HCBS an entitlement, it appears challenging for the promise of *Olmstead* to be fully realized. To this end, individuals and the courts will continue to play an important role in setting the standard for access to publicly-supported services in the community over institutionalization.

References

1. *Olmstead* v. L.C., 527 U.S. 581 (1999).

2. P.L. 101-336, The Americans with Disabilities Act of 1990.

3. Judge David L. Bazelton Center for Mental Health Law. The *Olmstead* Decision 2010; http://bazelon.org.gravitatehosting.com/Where-We-Stand/Community-Integration/Olmstead-.aspx. Accessed September 21, 2010.

4. Terence N, Wong A, Harrington C. Home and Community-Based Services: Introduction to *Olmstead* Lawsuits and *Olmstead* Plans. 2009; http://www.pascenter.org/olmstead/. Accessed September 21, 2010.

5. Rosenbaum S, Teitelbaum J, Stewart A. The Americans with Disabilities Act and Community Integration: Understanding the Concept of "Fundamental Alteration". 2002; http://www.chcs.org/usr_doc/ADA_Integration.pdf. Accessed September 21, 2010.

6. Cornell University Law School, Legal Information Institute. *OLMSTEAD* V. L. C. (98-536) 527 U.S. 581 (1999) http://www.law.cornell.edu/supct/html/98-536.ZS.html. Accessed October 11, 2010.

7. Centers for Medicare and Medicaid Services (CMS). *Olmstead* Update No: 3. 2000; http://www.cms.gov/smdl/downloads/smd072500b.pdf. Accessed September 21, 2010.

8. Centers for Medicare and Medicaid Services (CMS). *Olmstead* Update No: 2. 2000; http://www.cms.gov/smdl/downloads/smd072500a.pdf. Accessed September 21, 2010.

9. Centers for Medicare and Medicaid Services (CMS). *Olmstead* Update No: 1. 2000; http://www.cms.gov/smdl/downloads/smd011400c.pdf. Accessed September 21, 2010.

10. Centers for Medicare and Medicaid Services (CMS). *Olmstead* Update No: 5. 2001; http://www.cms.gov/smdl/downloads/smd011001b.pdf. Accessed September 21, 2010.

11. Centers for Medicare and Medicaid Services (CMS). *Olmstead* Update No: 4. 2001; http://www.cms.gov/smdl/downloads/smd011001a.pdf. Accessed September 21, 2010.

12. The Kaiser Commission on Medicaid and the Uninsured. *Olmstead* v. L.C.: The Interaction of the Americans with Disabilities Act and Medicaid. 2004; http://www.kff.org/medicaid/upload/Olmstead-v-L-C-The-Interaction-of-the-Americans-with-Disabilities-Act-and-Medicaid.pdf. Accessed September 21, 2010.

13. Eiken S, Sredl K, Burwell B, Gold L. Medicaid Long-Term Care Expenditures in FY 2009. 2010; http://www.hcbs.org/files/193/9639/2009LTCExpenditures.pdf. Accessed November 15, 2010.

14. National Senior Citizens Law Center (NSCLC). 10-Plus Years After the *Olmstead* Ruling: Progress, Problems, and Opportunities 2010; http://www.federalrights.org/about-us/nsclc-in-the-news/NSCLC%20Olmstead%20Report%20-large%20text.pdf. Accessed September 27, 2010.

15. California Health and Human Services Agency. California *Olmstead* Plan. 2003; http://www.chhs.ca.gov/initiatives/Olmstead/Documents/01Section%20I%20-%20V%20combined.pdf. Accessed October 11, 2010.

16. Office of the Governor. Executive Order S-18-04 2004; http://gov.ca.gov/executive-order/3364/. Accessed September 21, 2010.

17. California Health & Human Services Agency. *Olmstead* Advisory Committee. http://www.chhs.ca.gov/initiatives/Olmstead/Pages/default.aspx. Accessed September 21, 2010.

18. Office of the Governor. Executive Order S-10-08. 2008; http://gov.ca.gov/executive-order/10606. Accessed September 21, 2010.

19. State of California, Health and Human Services Agency. ADRC Evidence-Based Care Transition Programs Proposal. 2010; http://www.healthcare.ca.gov/Portals/2/NewsAndInformation/Documents/Part%20D%20CA%20Care%20Transitions%20Proposal%20Narrative.pdf. Accessed December 20, 2010.

20. State of California, Health and Human Services Agency. California Options Counseling Improvement Project. 2010; http://www.healthcare.ca.gov/Portals/2/NewsAndInformation/Documents/Part%20B%20CA%20Options%20Counseling%20Proposal%20Narrative.pdf. Accessed December 20, 2010.

21. California Community Choices. http://www.communitychoices.info/overview.html. Accessed September 21, 2010.

22. Mollica R, Hendrickson L. Home and Community-Based Long-Term Care: Recommendations to Improve Access for Californians. 2009; http://www.hcbs.org/files/162/8057/FINANCE_REPORT_FINAL.pdf. Accessed September 9, 2010.

23. California Department of Health Care Services. California Community Transitions Project. 2007; http://www.dhcs.ca.gov/services/ltc/Pages/CCT.aspx. Accessed October 11, 2010.

24. California Option C. ADRC Nursing Home Transition and Diversion Program Grant Application Project Narrative. 2010; http://www.healthcare.ca.gov/Portals/2/NewsAndInformation/Documents/Option%20C%20Grant%20App%207%2030%2010.pdf Accessed December 20, 2010.

25. Protection & Advocacy, Inc. Summary of Davis v. CHHSA Settlement. 2004; http://www.disabilityrightsca.org/advocacy/DavisvLHH/DavisSummaryOfSettlement11-04.pdf. Accessed October 11, 2010.

26. Disability Rights California. Chambers v. City and County of San Francisco. 2009; http://www.disabilityrightsca.org/advocacy/LHH/summary_of_lawsuit_2009-05-22.htm. Accessed September 21, 2010.

27. Cota v. Maxwell-Jolly, 688 F. Supp. 2d 980 (N.D. Cal. 2010); Brantley v. Maxwell-Jolly, 656 F.Supp.2d1161, 1170 (N.D. Cal. 2009).

28. Disability Rights California. Cota et. al. (Brantley) v. Maxwell-Jolley, Director of California Department of Health Care Services. 2010; http://www.disabilityrightsca.org/advocacy/Cota-v-Maxwell/index.htm. Accessed September 23, 2010.

29. V.L. v. Wagner, 669 F.Supp.2d 1106, 1119 (N.D. Cal.2009).

30. Disability Rights California. V.L. et. al. v. John A. Wagner, Director of the California Department of Social Services, et. al. 2010; http://www.disabilityrightsca.org/advocacy/V.L.-v-Wagner/index.htm. Accessed September 23, 2010.

31. Eiken S, Sredl K, Burwell B, Gold L. Medicaid Long Term Care Expenditures FY 2009: Table V Distribution of Medicaid LTC Expenditures, Aging/Physical Disabilities. 2010; http://www.hcbs.org/files/193/9641/FY2009InstitutionCommunityRankings.pdf. Accessed October 8, 2010.

32. Shugarman L. Health Care Reform and Long-Term Care: The Whole is Greater than the Sum of its Parts. *National Academy on Aging Society Public Policy & Aging Report*. 2010;20(2):3-7.

The SCAN Foundation
3800 Kilroy Airport Way, Suite 400
Long Beach, CA 90806
(888) 569-7226
www.TheSCANFoundation.org
info@TheSCANFoundation.org

This Long-Term Care Fundamentals Brief was co-authored by Keyla Whitenhill, MPH, Policy Analyst at The SCAN Foundation, Sarah Steenhausen, MS, Senior Policy Advisor to The SCAN Foundation, and Lisa R. Shugarman, Ph.D., Director of Policy at The SCAN Foundation. The SCAN Foundation would like to thank Megan Juring and Eric Carlson for their careful reviews of the material in this brief.