

NEVADA'S OLMSTEAD REPORT

2016

Executive Summary

The 1999 Olmstead decision by the U.S. Supreme Court established that the unnecessary segregation of people with disabilities in institutions is a form of discrimination under Title II of the Americans with Disabilities Act of 1990 (ADA) and gave the responsibility to states to provide services to individuals with disabilities in the most integrated setting appropriate to their needs.

The purpose of this report is to provide an update to the 2003 Nevada Olmstead Plan, which was included in the Strategic Plan for People with Disabilities, and create a separate plan that applies to all of the people in Nevada with physical, developmental, and mental disabilities. This report includes a review by consultant Tony Records of Nevada's compliance with the Olmstead decision, a review of current legal perspectives regarding the inclusion of older persons in Olmstead planning, and additional recommendations for Nevada's Olmstead planning.

Context of the Report

The state's Olmstead Plan provides the framework through which it intends to comply with the obligation to ensure people with disabilities have access to opportunities to live, work and receive supports in integrated settings. The integration mandate obligates the state to:

- Furnish supports and services to individuals with disabilities in integrated settings that offer choices and opportunities to live, work and participate in community activities along with individuals without disabilities at times and frequencies of the person's choosing.
- Afford choice in their activities of daily life and the opportunity to interact with non-disabled persons to the fullest extent possible.
- Provide individuals with an assessment of their needs and the supports necessary for them to succeed in integrated settings by professionals who are knowledgeable about the variety of services available in the community.
- Enable people with disabilities to make informed choices by furnishing information about the benefits of integrated settings, facilitating on-site visits to community programs and providing opportunities to meet with other individuals

with disabilities who are living, working and receiving supports in integrated community settings, with their families, and in other arrangements.

- Protect people with disabilities from the risk of institutionalization resulting from service or support reductions or reconfigurations as a result of state funding reductions through the provision of support alternatives that do not result in institutionalization.

In 2015, the Aging and Disability Services Division formed an Olmstead Subcommittee for the purpose of updating the 2003 Olmstead Plan. The subcommittee is a collaboration of members of the Commission on Aging and the Commission on Services for Persons with Disabilities. The goal is to make the Olmstead Plan a key component of achieving a more comprehensive plan for integrating people with disabilities into the community, and fulfilling the obligations set forth in the Olmstead decision. These obligations include:

1. The opportunity and freedom for meaningful choice, self-determination, and increased quality of life through opportunity for economic self-sufficiency and employment options; choices of living location and situation; and having supports needed to allow for these choices.
2. Readily available information about rights, options, risks and benefits of the options, and the ability to revisit choices over time.
3. Systemic change to support these changes including funding, availability of choice and quality service providers, and providing enough service to keep waiting time for services as nominal as possible.

Recommendations of the Olmstead Subcommittee

The Olmstead Subcommittee has added the following recommendations to Mr. Records' recommendations in order to provide more detail as to the ages and abilities of the person being served, and to the manner in which Nevada can be compliant with the current obligations under Olmstead:

- Eliminate all inappropriate out-of-state placements by seeking remedies to keep people in the least restrictive setting that is person-centered within their own communities. All out-of-state placements should be reviewed on a regular basis (e.g. quarterly) with the intent of returning the person to Nevada.
- Wait lists must move at a reasonable pace. Services and support that are not provided at the time the need is identified can lead to costly chronic illnesses.

- Services that keep people from forced institutionalization must not be denied due to budget cuts. This is an Olmstead violation.
- Additionally, elimination of Medicaid services because they are optional in the state plan will put people at a risk of institutionalization and is also an Olmstead violation.
- Olmstead requires that a person who is able to move into a community setting and wishes to do so must be given the proper support to accomplish this transition.
- The state is obligated to coordinate efforts with Medicaid to ensure access to Long Term Services and Supports (LTSS) and to disseminate knowledge about access to LTSS, habilitation and rehabilitation options to community providers, individuals needing services, family members and primary support providers.

Legal Cases Supporting the Expansion of State Obligations Under Olmstead Decision

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The Americans with Disability Act of 1990 (ADA) prohibits discrimination against what it terms a “qualified person with a disability.” The term “disability” means, with respect to an individual: “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.¹

The legal requirements of the ADA and the United States Supreme Court Olmstead decision of 1999, which is based on the ADA, contain no exclusions based on age. While the Olmstead decision was about a case involving institutionalization of two people who were in a mental health institution, the decision does not pertain only to mental health issues and developmental disabilities. It specifically requires states to provide integrated community services and supports for people with disabilities who are otherwise entitled to segregated services under the definition contained on page one of Mr. Records’ report entitled “Nevada and Olmstead – A Continuous Examination.”

Therefore, Nevadans of any age who require assistance in their daily activities due to a disability are entitled to those services required by the Olmstead decision, and must be included in any Olmstead planning that is required by the federal government.

Additionally, since 1999 courts have been finding that Olmstead applies to individuals living in the community who are at risk of institutionalization. A federal appellate court decision from the 10th Circuit held that the protections in Olmstead would be meaningless if men and women with disabilities, “were required to segregate themselves by entering an institution before they could challenge an allegedly

¹ ADA.gov website: US Department of Justice, Civil Rights Division

discriminatory law or policy that threatens to force them into segregated isolation.” In that case, the individuals stated that they would rather die than enter nursing facilities.²

Following are cases involving older people that were brought by the United States Department of Justice, Civil Rights Division: ³

United States v. Marion County Nursing Home District - (E.D. Mo. 2013)

On March 14, 2013, the parties in *United States v. Marion County Nursing Home District d/b/a Maple Lawn Nursing Home* filed a Settlement Agreement. The Agreement addresses whether residents of the nursing home are being served in the most integrated setting appropriate to their needs. The Agreement also addresses basic elements of residents' care and treatment. Maple Lawn is required to develop numerous improvement measures. An independent monitor has been selected to monitor the Settlement Agreement.

Darling v. Douglas – 09-CV-3798 – (N.D. Cal. 2009) (Formerly Cota v. Maxwell-Jolly)

The United States filed a Statement of Interest on July 12, 2011 and October 31, 2011 in support of Plaintiffs' challenge to the manner in which the State plans to eliminate the Adult Day Health Care (ADHC) service, which enables elderly individuals and individuals with physical and mental disabilities to live in the community and avoid hospitalization and institutionalization. The United States argued that the State's plan to eliminate ADHC without ensuring sufficient alternative services are available will place thousands of individuals who currently receive ADHC services at serious risk of institutionalization, in violation of the ADA. Approximately 35,000 Californians would be affected by the proposed ADHC elimination. A settlement agreement was reached in 2012, which reversed the elimination of ADHC, re-named it to Community-Based Adult Services, and put some restrictions on who was eligible. (See AARP Litigation Foundation and subsequent motions).

Hiltbran v. Levy – 10-CV-4185 – (W.D. Mo. 2010)

In a suit brought by individuals who need incontinence supplies to live in the community, the court issued an order on June 24, 2011 requiring the State of Missouri to provide Medicaid-funded incontinence supplies to individuals who need those supplies to prevent their placement in nursing facilities. The United States filed a Statement of Interest supporting Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment arguing that Missouri's policy not to provide the necessary supplies placed individuals at risk of institutionalization in violation of the ADA.

Lee v. Dudek – 4:08-CV-26 – (N.D. Fla. 2008)

This class of plaintiffs—consisting of all Medicaid-eligible adults with disabilities who currently, or at any time during the litigation, are unnecessarily confined to a nursing facility and desire to and are capable of residing in the community—claims that the State of Florida's refusal to provide services in the community to these individuals violates the ADA's integration mandate.

In a 2011 case in Georgia, the U.S. Department of Health and Human Services Office for Civil Rights (OCR) investigated a complaint filed by Atlanta Legal Aid on the part of an “Affected Party,” and concluded that the Department of Community Health (DCH) violated Title II of the ADA based on its failure to place a 79 year old person in the most integrated setting appropriate to this person’s needs and its refusal to make reasonable modifications in its policies, practices or procedures to avoid discrimination on the basis of disability. A synopsis of the facts:

² Disability Integration Project; OlmsteadRights.org; “From Olmstead to the Present.”

³ ADA.gov website: US Department of Justice, Civil Rights Division

The affected party was admitted to a nursing facility for rehabilitation services 17 years before the complaint was filed. This person never intended to stay there, and has persistently sought to leave the facility and live in a community setting. This person has left-side paralysis which affects speech. A February 2011 medical assessment found the person oriented to person, place and time of day, able to self-feed with supervision, and to propel the wheelchair using the right leg and arm. This person did not need skilled nursing other than medication administration.

In 2009, DCH had noted the resident's longstanding desire to move into the community, but noted that there might not be a personal care home able to care for the resident because the reimbursement for such homes was only \$12,789.60 a year. All nine providers declined to accept the resident for various reasons, including that the reimbursement rate does not match the level of service required.

OCR found that DCH violated the ADA based on its failure to place the affected party in the most integrated setting appropriate to needs and its refusal to make reasonable modifications in its policies, practices or procedures to avoid discrimination on the basis of disability. The full text of the findings and recommendations can be found at the U.S. Department of Health and Human Services website (link below).⁴

Nevada and Olmstead – A Continuous Examination by Mr. Tony Records

See attached.

⁴ U.S. Department of Health & Human Services; Office for Civil Rights; OCR Olmstead Enforcement Success Stories; "Georgia Department of Community Health" Letter of Findings
<http://www.hhs.gov/ocr/civilrights/activities/examples/Olmstead/successstoriesolmstead.html>