



**NCCD**

Nebraska Consortium for Citizens with Disabilities

THE NEED FOR A COMPREHENSIVE *OLMSTEAD* PLAN IN  
NEBRASKA

Policy Brief on *Olmstead*

By

Nebraska Consortium for Citizens with Disabilities

## **The *Olmstead* Decision**

In its 1999 decision *Olmstead v. L.C.*,<sup>1</sup> the Supreme Court of the United States held that the unjustified isolation of individuals with mental disabilities constitutes discrimination on the basis of disability. The court's holding was premised on the reasoning that the "unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability" in violation of Title II of the Americans with Disabilities Act (ADA).

The *Olmstead* plaintiffs were two women with intellectual disabilities who had been treated and placed in institutional settings. L.C., who had a schizophrenia diagnosis in addition to an intellectual disability, entered an institutional treatment setting voluntarily in May 1992; although she had stabilized and her treatment professionals determined that a community-based program would be appropriate by May 1993, L.C. remained institutionalized until February 1996. Similarly, the other plaintiff in the case, E.W., who had a diagnosis of personality disorder in addition to an intellectual disability, entered voluntary institutional treatment in February 1995; her treatment professional determined that she could receive appropriate care in a community setting by 1996, but she remained institutionalized until 1997.

The *Olmstead* court identified two major points related to its finding that the unjustified isolation of individuals with disabilities is a form of discrimination. First, isolating people in institutional settings when they could in fact benefit from living in the community stems from the incorrect assumption that those isolated individuals are not capable or worthy of being part of the community. Second, unjustified confinement diminishes the lives of institutionalized individuals in many areas of their lives, including their family and social relationships, work and educational opportunities, ability to achieve financial independence, and participation in the culture of the community.

The court ultimately held that pursuant to Title II of the ADA, states must provide community-based placements—as opposed to isolation and institutionalization—for individuals with mental disabilities when the following three conditions are met: 1) when services in the community are deemed appropriate by the individuals' treatment professionals, 2) when the individuals with disabilities do not oppose community-based services, and 3) when community-based services can reasonably be provided, given states' resources and the needs of other individuals with disabilities.

## **Responses of States to *Olmstead* Requirements**

In 2001, two years after the *Olmstead* decision, the National Conference of State Legislatures (NCSL) surveyed all fifty states to determine the initial planning responses to the decision, given

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<sup>1</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999), available at <https://supreme.justia.com/cases/federal/us/527/581/case.pdf>

the Supreme Court's holding that states must provide for placement in the community for individuals with mental disabilities.<sup>2</sup>

The NCSL found that by 2001, thirty-seven states had established task forces to develop comprehensive plans to establish public policy in compliance with *Olmstead*, with a handful of states having already finalized their plans at that time. Some states already had implemented planning processes for care in home- and community-based settings prior to the *Olmstead* decision.

As early as 2001, the NCSL determined that Nebraska's approach to *Olmstead* was different from those of other states. At that time, the position of the state of Nebraska was that the Supreme Court's *Olmstead* decision required a plan for each individual with a disability rather than an overall plan for the state; furthermore, Nebraska state officials claimed that the then-current system met those requirements. The governor at the time had requested increased spending for home- and community-based services for individuals with developmental disabilities and mental illness.

### **The Position of the Department of Justice**

An *Olmstead* plan sets forth a state's comprehensive plan to fulfill the legal requirement of providing opportunities for people with disabilities to live, work, and receive services in community-based settings. According to the Department of Justice:

A comprehensive, effectively working plan must do more than provide vague assurances of future integrated options or describe the entity's general history of increased funding for community services and decreased institutional populations. Instead, it must reflect an analysis of the extent to which the public entity is providing services in the most integrated setting and must contain concrete and reliable commitments to expand integrated opportunities. The plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and there must be funding to support the plan, which may come from reallocating existing service dollars. The plan should include commitments for each group of persons who are unnecessarily segregated, such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs. To be effective, the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan.<sup>3</sup>

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<sup>2</sup> The Forum for State Health Policy Leadership. (2001). "The States' Response to the *Olmstead* Decision," available at <http://www.ncsl.org/Portals/1/documents/health/forum/olmsreport2001.pdf>

<sup>3</sup> U.S. Department of Justice, Civil Rights Division. (2011). "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.*," available at [https://www.ada.gov/olmstead/q&a\\_olmstead.pdf](https://www.ada.gov/olmstead/q&a_olmstead.pdf)

The Department of Justice has been clear that full compliance with the integration mandate of the ADA and *Olmstead* is in the best interest not only of individuals with disabilities in Nebraska, but of the state itself. Individuals can file lawsuits against the state for violations of the ADA, and the *Olmstead* decision made clear that unjustified institutionalization constitutes clear discrimination under the ADA.

It's important to note that the Supreme Court in *Olmstead* concluded that the unnecessary institutionalization of individuals with disabilities amounts to discrimination per se, with no requirement that a plaintiff show facial discrimination by demonstrating that a class of similarly situated individuals were treated more favorably.

Generally, states can raise a "fundamental alteration" defense to such lawsuits by claiming that requested modifications—such as treatment placements in community settings—would require that a state fundamentally alter its service system. However, the Department of Justice has issued guidance stating that a state can raise such a defense *only if* it already has a comprehensive, well-implemented *Olmstead* plan in place.

The state of Nebraska leaves itself vulnerable to lawsuits and also creates difficulties in defending itself against such complaints as long as it does not have an effective *Olmstead* plan in place. Moreover, it is worth noting that the Department of Justice has stated that a budget shortage is not sufficient evidence that increased community-based options would require fundamental alteration of a state's programs.

Remedies in response to violations of *Olmstead* and the ADA include requirements that a state expand the availability of community-based settings by a specified amount during an established time period.

### **Nebraska's Prior Lack of an *Olmstead* Plan**

In 2012, Nebraska was one of a minority of states that had yet to develop an *Olmstead* plan. In response to an inquiry from the United States Senate Committee on Health, Education, Labor, and Pensions regarding all states' compliance with the ADA and provision of services in community-based settings for people with disabilities, the then-chief executive officer of the Nebraska Department of Health and Human Services stated in part:

Although Nebraska does not have a document labeled as a formal *Olmstead* plan, the DDD and the DBH emphasize home and community-based services. If an individual who resides in an Intermediate Care Facility for Intellectual Disabilities, a nursing facility or psychiatric hospital and expresses a desire to transition, the DDD, as a matter of policy, prioritizes those individuals who are eligible for developmental disability services, according to state statute, for community-based funding.<sup>4</sup>

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<sup>4</sup> Letter from Nebraska DHHS to the United States Senate Committee on Health, Education, Labor, and Pensions. (2012), available at <https://www.help.senate.gov/imo/media/doc/Olmstead%20Responses%20from%20States%20July%2020131.pdf>

Instead of a loose collection of priorities for services, the development of a formal and well-implemented *Olmstead* plan would be the best way to ensure that individuals with disabilities who would prefer to live in their communities can do so.

### **Necessary *Olmstead* Goals for Nebraska**

In 2016, Nebraska State Senator Kathy Campbell and Disability Rights Nebraska worked together to develop LB 1033, which became law in April 2016 and requires the Nebraska Department of Health and Human Services to "develop a comprehensive strategic plan for providing services to qualified persons with disabilities in the most integrated community-based settings pursuant to the *Olmstead* decision." The law also required the creation of an advisory committee within the Department of Health and Human Services to assist with the development of an *Olmstead* plan.<sup>5</sup>

It is important to note that an *Olmstead* plan involves more than just establishing ways for people with disabilities to live in communities instead of in institutions. In addition to housing and community-based services, *Olmstead* has implications for transition services for individuals moving from institutional to community settings, employment, and education. An effective *Olmstead* plan should have clearly defined goals that include but are not limited to

- the planned number of individuals who will move from institutional to integrated, community-based settings,
- the planned number of individuals who will no longer be limited to sub-minimum wage, sheltered workshops and will achieve competitive integrated employment with appropriate vocational rehabilitation support services,
- the planned number of students with disabilities in public schools who will be educated in the least restrictive environment along with their nondisabled peers,
- the planned number of students with disabilities who will have matriculated in integrated post-secondary education programs following high school,
- and the planned number for decreased instances of restraint and seclusion of students with disabilities in public schools.

Disability Rights Nebraska has deemed *Olmstead* "the most important civil rights decision for people with disabilities in our country's history."<sup>6</sup> Disability Rights Nebraska has championed the discontinuance of the unjustified placement of people with disabilities in institutions as well as in congregated and isolated housing, where people are denied choices in even the most basic areas of their lives. This loss of choice can include individuals with disabilities being told when to get up or go to bed, what to eat and when to eat it, and with whom they must live and when

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<sup>5</sup> Nebraska Legislative Bill 1033. (2016), available at <https://nebraskalegislature.gov/FloorDocs/104/PDF/Slip/LB1033.pdf>

<sup>6</sup> Disability Rights Nebraska. (2018). "Nebraska *Olmstead* Plan Update!" available at [https://www.disabilityrightsnebraska.org/resources/news\\_archive.html/article/2018/08/06/nebraska-olmstead-plan-update-](https://www.disabilityrightsnebraska.org/resources/news_archive.html/article/2018/08/06/nebraska-olmstead-plan-update-)

they can have visitors. Unjustified isolation often extends to the places where individuals with disabilities are educated and employed.

The Nebraska Department of Health and Human Services has contracted with the Technical Assistance Collaborative (TAC) to develop an *Olmstead* Plan. Nebraska's *Olmstead* Plan should have the support of individuals with disabilities, their families and advocates, and the legislature. It is the position of the Nebraska Consortium of Citizens with Disabilities that the resulting plan must be comprehensive, cover all disabilities, and apply across the lifespan.