



Issue Brief



A Quick Look at the *Olmstead* Decision for Kansas Policymakers

By Susan W. Kannarr, J.D.

POLICY IMPLICATIONS FOR KANSAS

- Non-compliance with the *Olmstead* decision could cost states millions of dollars in federal civil rights settlements, the loss of federal funding, or lawsuits by individuals.
- The decision has major implications for the design and funding of state Medicaid programs.
- To be compliant with the *Olmstead* decision, Kansas policymakers must ensure that their programs for people with disabilities treat all members of the population equally while maximizing community integration and avoiding unnecessary institutionalization.

Introduction

More than 400 complaints — at least one from Kansas — and a growing number of lawsuits have been filed against states regarding community integration of persons with disabilities, highlighting the importance for state policymakers of the U.S. Supreme Court's 1999 *Olmstead v. L.C.* decision.

In the *Olmstead* decision, the U.S. Supreme Court expanded the reach of the Americans with Disabilities Act (ADA) by finding that unnecessary institutionalization is a form of discrimination because it requires persons with disabilities to receive care in institutions while persons without disabilities can receive care in the community. The Court ruled that the ADA prohibits states from unnecessarily institutionalizing persons with disabilities and failing to serve them in the most integrated setting appropriate to their needs, if the provision of community services represents a reasonable accommodation.

Unfortunately, there is no clear picture of what compliance looks like. Judging from previous integration decisions, such as *Brown v. Topeka Board of Education*, clarity about the practical implications is likely to be years away. States still must attempt to comply or potentially face serious consequences for failure, both to state financing and to the people who need services.

This Issue Brief provides Kansas policymakers with information about the *Olmstead* decision and discusses compliance issues with the goal of helping them to understand the issues and design programs that comply with the decision.

More information

Questions or requests for more information should be directed to the author at 785-233-5443 or skannarr@khi.org. This Brief and other KHI publications can be found online at www.khi.org.

Olmstead planning issues addressed by states

- Availability of appropriate housing
- Access to transportation
- Assessment and collection of data on persons with disabilities
- An adequate work force to provide services
- Education about service options to individuals and their families
- Availability of community-based services
- Assurance of quality of care in community-based services
- Arrays of services based on the wants and needs of consumers

Source: National Conference of State Legislatures

Impact on States

Prior to *Olmstead*, states like Kansas had begun the process of deinstitutionalizing people with disabilities and expanding community-based services, largely through Medicaid Home- and Community-Based Services (HCBS) waivers. Although *Olmstead* concerns all public programs, Medicaid has been a focal point of analysis, as it is the largest public funder of long-term care services and makes up about 15 percent of state budgets. Depending on the current status of a state's integration activity and its plan for serving people in the least restrictive setting, additional efforts may be needed to further expand community-based services to comply with the decision.

In analyzing the design of their long-term care programs post-*Olmstead*, states are addressing a wide variety of issues. A partial list of issues is included in the box on this page.

The variation in state programs and the unique environments in which they operate make comparisons across states or assessments difficult. This difficulty is exacerbated by the lack of clarity about what the decision really means.

Federal Activities and Oversight

The U.S. Department of Health and Human Services (HHS), Office of Civil Rights (OCR) is charged with ensuring state compliance with the *Olmstead*

decision. In addition to receiving complaints regarding ADA violations, OCR also conducts compliance reviews of and provides technical assistance to states. The ADA allows people to file civil lawsuits in federal court alleging discrimination, using *Olmstead* as a precedent. No such lawsuits have been filed in Kansas to date.

The Centers for Medicare and Medicaid Services and OCR have issued guidelines to states for developing plans that can be used to demonstrate compliance. The principles included in this guidance, shown in the box on the facing page, serve as a foundation for OCR oversight and enforcement activities.

In February 2001, President Bush announced the New Freedom Initiative, a comprehensive plan to help people with disabilities integrate into communities. As a part of this initiative, HHS has initiated the "Systems Change Grants for Community Living" program. The Kansas Department of Social and Rehabilitation Services received a \$1.4 million grant in 2002 to help design and implement improvements in community-based systems. A \$725,000 grant to improve consumer-focused personal assistance services was awarded to the University of Kansas Center for Research.

Measuring Compliance

The Supreme Court's decision was not intended to be an open-ended requirement for states to provide community-based services for everyone who requests them. States are required to make *reasonable modifications* to accommodate community placements, but are not required to make *fundamental alterations* to the nature of their services or programs. The Court suggested that states can show compliance by demonstrating they have a comprehensive, effectively working plan for placing qualified persons with disabilities in less

restrictive settings and a waiting list for community services that moves at a *reasonable pace*.

The Court recognized that states must maintain an array of services and facilities for a range of disabilities and that they have an obligation to administer services equitably across the entire population of people with disabilities.

Unfortunately, the practical implication of key terms used by the Court to define the states' obligations under the ADA is not clear. Subsequent court decisions will determine the full impact of the decision on state programs.

A March 2000 report from the Kaiser Commission on Medicaid and the Uninsured suggests four ways to measure compliance with the court decision, although the report proposed no benchmarks for achieving compliance.

- The proportion of people in institutions for whom an assessment of the appropriateness of community placement has not been completed.
- The length of a waiting list, compared to the need and the length of the wait.
- The number of people in the community who are determined to be receiving services appropriate to their needs.
- The proportion of people who need institutional services who are able to receive them there.

Reasonable Accommodation vs. Fundamental Alteration

The Supreme Court was clear that the needs of people with disabilities who are able to be placed in the community must be balanced against the needs of people who require institutional services. A state may be able to defend against an *Olmstead* suit by showing that moving individuals or group of individuals into a community setting would harmfully reduce services to other persons with disabilities who need institutional care.

Reviews of litigation suggest a few emerging principles courts will use to

Key principles in *Olmstead* planning for states

- Developing and implementing a comprehensive, effectively working plan for providing appropriate community services to eligible individuals with disabilities
- Providing opportunities for all interested persons to be integral participants in plan development and follow-up
- Correcting and preventing unjustified institutionalization
- Ensuring the availability of community-integrated services
- Affording individuals with disabilities and their families opportunities to make informed choices about service settings

Source: Letter to State Medicaid Directors, from the Health Care Financing Administration (now the Centers for Medicare and Medicaid Services), Jan. 14, 2000

determine whether a requested program change alters the basic character or an essential feature of a program, a *fundamental alteration*, or modifies a more peripheral aspect, a *reasonable accommodation*. These principles are:

- The potential state cost of a program change requested by an individual or group will not, by itself, determine whether the change will be required. Courts will generally look at all available resources, the needs of other persons with disabilities and the state's history in funding community services in making a judgement.
- Courts are likely to require that all federally approved slots in HCBS Medicaid waivers are funded but will not require the state to add slots to accommodate a request for services.
- Courts are not likely to order changes to eligibility criteria if they are determined to be an integral part of the character of a program. If exceptions have been made in the past, then courts are more likely to order modifications.
- Whether states are required to add new services to programs or expand programs that would facilitate community integration is not uniformly decided at this point. However, decisions imply that states must reasonably fund the services they currently provide.

Community services must be provided for people otherwise eligible for institutional placement when:

- State treatment professionals have determined that community placement is appropriate;
- Transfer from institutional to community-based care is not opposed by the individual; and
- Placement can be reasonably accommodated, taking into account the state's resources and the needs of other individuals with disabilities.

- Inadequate state funding is not generally a defense for delaying community services. However, if adding additional funding would cause a fundamental alteration of the entire waiver program or violate the cost neutrality of the Medicaid waiver, the defense may be successful.
- Substantial waiting lists may be allowed if the state is funding all of the slots authorized in their federal Medicaid waiver.
- States need to show they are making reasonable modifications toward achieving integration.
- A state's plan to move people into the most integrated setting may include time limits on the length of wait that is reasonable.

Reasonable Pace

There is no accepted definition of what qualifies as moving at a *reasonable pace* in implementing community integration. In defining reasonable pace, federal courts have relied not only on the *Olmstead* decision but also on court decisions concerning similar issues and Medicaid law. In particular, courts have used Medicaid provisions requiring services to be provided with "reasonable promptness." Courts look at the particular circumstances of each case and the need to balance integration goals with the availability of public resources to fund a full range of services. There appear to be some general boundaries established by courts thus far:

Conclusion

The long-term effect of the *Olmstead* decision on Kansas is unclear. Analysis of what the decision means will continue to unfold in court decisions for many years to come. For now, Kansas is presented with both challenges and opportunities to engage in comprehensive discussions with stakeholders to design a system of care that balances the needs and desires of persons with disabilities with the state's ability to provide services.



The Kansas Health Institute is an independent, non-profit health policy and research organization based in Topeka, Kansas. Established in 1995 with a multi-year grant from the Kansas Health Foundation, the Kansas Health Institute conducts research and policy analysis on issues that affect the health of Kansans.

KANSAS HEALTH INSTITUTE
212 S.W. Eighth Avenue, Suite 300
Topeka, Kansas, 66603-3936
Telephone (785) 233-5443
Fax (785) 233-1168
www.khi.org

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NUMBER 14 • OCTOBER 2002

Current happenings

A lawsuit filed on behalf of service providers on October 4, 2002 alleges that Kansas is improperly reimbursing them for services to persons with disabilities in violation of state and federal laws. The case also alleges violation of constitutional equal protection rights and discrimination against providers and their clients as compared to state institutions.

This is not an *Olmstead* case. However, allegations that clients are denied community services in tandem with waiting lists for HCBS services could raise *Olmstead*-based claims that consumers are being put at risk of unnecessary institutionalization or being forced to remain in institutions due to a lack of community services.