



# Supporting Community Living: *Olmstead* and Money Follows the Person

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## Introduction

People with disabilities are often faced with living in settings that are segregated from the general community. Many of these individuals can live in more integrated settings, but barriers exist, including lack of affordable or integrated housing options, insufficient or inadequate service models, and outdated clinical thinking that the individual cannot succeed in a less restrictive environment.

However, in the landmark *Olmstead v. L.C.* decision (1999), the U.S. Supreme Court held that “unjustified isolation” of persons with disabilities is a form of discrimination in violation of Title II of the Americans with Disabilities Act (ADA), and that states have an affirmative obligation to ensure that individuals with disabilities live in the least restrictive, most integrated settings possible. Since 1999, many states have worked, and often struggled, to find solutions to implement the *Olmstead* decision.

The Money Follows the Person program and *Olmstead* related activities in states have a similar goal, which is to afford people with disabilities the opportunity to live in integrated community-based settings. Administered by the Centers for Medicare and Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS), “the “Money Follows the Person” Rebalancing Demonstration Program (MFP) helps States rebalance their long-term care systems to transition people with Medicaid from institutions to the community.”<sup>1</sup> Thus, activities occurring as part of the MFP program naturally compliment and support the work a state may be engaged in under *Olmstead*. This brief is designed to provide MFP Program Directors and other MFP staff with a basic understanding of the *Olmstead* decision and how it intersects with the MFP program.

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<sup>1</sup> Center for Medicaid Services: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Support/Balancing/Money-Follows-the-Person.html>

### What effect is *Olmstead* having in states?

Under Title II of the ADA, which covers public services and programs, “...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity or be subjected to discrimination by any such entity.”<sup>2</sup> The regulations implementing Title II further describe the requirement for public entities to, “administer services, programs, and activities in the **most integrated setting**<sup>3</sup> **appropriate to the needs of qualified individuals with disabilities.**”<sup>4</sup> This section of the Title II regulations is often referred to as the “integration mandate.” The regulations also define what is considered an integrated setting, describing it as one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”<sup>5</sup>

In its decision, the Supreme Court stated that if a state had a “...**comprehensive, effectively working plan** for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the state’s endeavors to keep its institutions fully populated, the reasonable modification standard [of

the ADA] would be met.” For an *Olmstead* Plan to serve as a reasonable defense against legal action it must include, “...concrete and reliable commitments to expand integrated opportunities...and there must be funding to support the plan.”<sup>6</sup> Since 1999, several states have proactively designed *Olmstead* Plans to establish the policy, programmatic, and financing mechanisms to support people with disabilities in integrated settings.

Other states have been forced to comply with *Olmstead* through litigation threats and settlement agreements, often initiated by the U.S. Department of Justice’s (DOJ) Civil Rights Division or state Protection and Advocacy organizations. States often cite resource limitations for services and housing as barriers to implementing the reforms necessary to comply with *Olmstead*. However, in its decision, and subsequent decisions by other courts, the Supreme Court held that funding limitations do not exempt states from complying with *Olmstead* or indemnify them from litigation. In addition to states with *Olmstead* Plans, where there have been litigation or settlement agreements, states have dedicated new resources for services and housing, made changes to their Medicaid plan or waivers, and adopted innovative service delivery models.

At the federal level, *Olmstead* has been a driver for establishing programs like MFP and other federal funding initiatives (e.g. the Balancing Incentives

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<sup>2</sup> 42 U.S.C. § 12132.

<sup>3</sup> The most integrated setting is defined in the regulation as one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”

<sup>4</sup> 28 C.F.R. § 35.130(d)

<sup>5</sup> 28 C.F.R. § Pt. 35, App. A (2010) (addressing § 35.130)

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<sup>6</sup> U.S. Department of Justice. (n.d) 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.* Washington, D.C. Author.

Program, Real Choice System Change grants within HHS, the Department of Housing and Urban Development (HUD) Section 811 Supportive Housing for Person with Disabilities Project Rental Assistance Demonstration) aimed at supporting persons with disabilities in integrated settings. Many states are taking advantage of these opportunities and incorporating them as part of their *Olmstead* implementation efforts.

### How can MFP play a role in *Olmstead* activities?

In a 2010 letter to State Medicaid Directors<sup>7</sup> reaffirming its commitment to community living, the CMS highlighted MFP as a critical tool states can use to assist them in meeting their obligations under *Olmstead*. For states with *Olmstead* litigation/settlement agreements, as well as states trying to comply with the intent of *Olmstead* through pro-active strategies, MFP can be a key resource states can leverage to help them address the unnecessary segregation of people with disabilities in institutional settings. In many states, *Olmstead* has served as a catalyst for the expansion of community-based long-term care services and supportive housing for people with disabilities, all of which can facilitate MFP programs efforts to transition people out of institutions.

For states that are creating or implementing an *Olmstead* plan, MFP is one concrete strategy a state can include as part of its plan to promote

opportunities for people to live in integrated community settings. Transitions occurring as part of MFP are a clear way for a state to demonstrate its commitment to community-living. MFP provides enhanced match and the flexibility that allows states to pilot test and move to implement opportunities to support people moving out of institutions. These opportunities include:

- » The ability to reinvest funding from institutional settings into community-based services and infrastructure;
- » Supporting staff positions focused on helping people transition to the community;
- » Flexible funding needed to support transitions, e.g. start-up funds for security deposits, furniture and furnishings, etc.;
- » Providing a framework for systems change and planning housing initiatives;
- » The ability to convene non-traditional partners and forge new relationships;
- » Development of evidence-based or innovative programs;
- » Workforce training and development activities;
- » Person-centered planning and service delivery approaches; and
- » Building quality monitoring and performance improvement systems.

States have flexibility in identifying who the MFP target populations are, and can align these with *Olmstead* efforts. MFP may also help states remediate an *Olmstead* issue, as it can be used to help support transitions of people who have been identified in an *Olmstead* complaint as being discriminated against because of unwarranted

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<sup>7</sup> U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services. (2010, May). SMDL # 10-008.

segregation in an institution. However, it is important to keep in mind that the population of focus under an *Olmstead* lawsuit or settlement does not always align with the population(s) served by a state's MFP program. For example, in some states<sup>8</sup>, people with serious mental illnesses in Institutions for Mental Diseases (IMDs) are the subject of the *Olmstead* complaint, but individuals coming out of IMDs are typically excluded from the MFP program.<sup>9</sup> Also, in some states *Olmstead* complaints have arisen from the segregation of people with mental illnesses in large adult board and care homes, which do not qualify as an "inpatient facility" under the MFP Demonstration. However, MFP can be used to transition persons with serious mental illnesses aged 65 and older and youth under age 21 out of qualified institutions such as hospitals, nursing homes, or psychiatric residential treatment facilities for youth under 21.<sup>10</sup>

## How are some states using MFP in their *Olmstead* activities?

Several states are using MFP to support their *Olmstead* activities. For example, MFP is fully incorporated into Texas' comprehensive *Olmstead* planning process as a tool to move people who have mental illness and are living in nursing facilities and people with intellectual and developmental disabilities who are residing in medium or large intermediate care facilities for persons with mental retardation into community settings. Since 2001, *The Texas Promoting Independence Plan* has guided the state's planning and implementation efforts to support individuals in the most integrated settings. The Money Follows the Person Advisory Committee reports into the Promoting Independence Advisory Committee and has a number of related sub-committees (e.g. Housing and Transportation, Nursing Facilities Transitional Services).

The MFP Behavioral Health Pilot in Bexar County (San Antonio) helps individuals with co-occurring physical and mental health/substance abuse conditions leave nursing facilities to live independently in the community.<sup>11</sup> According to the Texas Plan,

...two pilot services, Cognitive Adaptation Training (CAT) and substance abuse

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<sup>8</sup> In *Williams vs. Quinn* (Illinois), the plaintiffs alleged that they were unnecessarily segregated and institutionalized in IMDs. See Consent Decree at <http://www.dhs.state.il.us/page.aspx?item=51836>

<sup>9</sup> The IMD exclusion does not permit for federal Medicaid reimbursement for services provided to individuals between the ages of 22 and 64 in facilities greater than 16 beds and where more than 50% of all the patients in the facility have "mental diseases." MFP rules require that an individual have received at least one day of Medicaid reimbursable services prior to discharge. As a result, most individuals in IMDs are ineligible for MFP.

<sup>10</sup> MFP can be used to transition youth out of PRTF only to the extent that medical assistance is available under the State Medicaid Plan for services provided in a PRTF.

<sup>11</sup> 2010 Revised Texas Promoting Independence Plan; <http://www.dads.state.tx.us/providers/pi/piplan/2010revised/2010revisedpiplan.pdf>

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counseling, are currently provided by the local mental health authority. CAT is an evidence-based service designed to empower participants who have been dependent and institutionalized to improve or regain skills in managing daily activities. Examples of Pilot participants' increasing independence include obtaining paid employment; volunteering at the nursing facility where the participant formerly resided; obtaining a GED; attending exercise or computer classes; and working towards a college degree.

Under the terms of the 2010 *Olmstead* Settlement Agreement<sup>12</sup> in Georgia, the state agreed to transition all people with developmental disabilities from its State Hospitals to the most integrated setting appropriate to their needs by July 1, 2015. It is important to note these are not IMDs, but state hospitals for people with developmental disabilities that are using MFP funds. The state's MFP project, which had been used to transition people with developmental disabilities since 2008, was identified as a critical resource that could be used to support the state's efforts to comply with the *Olmstead* Settlement Agreement. Under Georgia's MFP project, Demonstration Services such as utility deposits, life skills coaching, caregiver outreach and education, moving expenses, transportation, and peer community support, facilitate transitions required under the Agreement. The 750 Medicaid

waiver slots created under the terms of the Agreement specifically for people with developmental disabilities living in its State Hospitals ensure that individuals have access to Medicaid supports and services following the end of the MFP Demonstration period. MFP funding has also played a part in the state's larger *Olmstead* Initiative, as it has been used to develop a tracking system to monitor community transitions and supported the hiring of Transition Coordinators. To ensure that activities under MFP and the state's *Olmstead* Plan are coordinated, the Deputy Chief of Medicaid (to whom the MFP Project Director reports) serves on the state's *Olmstead* Planning Committee.

Under the *Colbert v. Quinn* Consent Decree,<sup>13</sup> thousands of people with disabilities, including those with mental illness, living in nursing homes in Cook County, Illinois will be afforded the opportunity to live in integrated community settings. Illinois' MFP project, Pathways to Community Living, is an important component of the state's plan to implement the terms of the *Colbert* Consent Decree.<sup>14</sup> The state intends for all *Colbert* Class members who are eligible for MFP to be, "counted as MFP participants." By including MFP as part of its plan to transition people out of nursing homes, Illinois is able to leverage the

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<sup>13</sup> Consent Decree for *Colbert v. Quinn* (Illinois): <http://www2.illinois.gov/hfs/PublicInvolvement/Colbert%20v%20Quinn/Pages/default.aspx>

<sup>14</sup> Illinois Department of Healthcare and Family Services. (2012) *Colbert* Consent Decree Draft Implementation Plan. Retrieved on November 20, 2012 from: <http://www2.illinois.gov/hfs/SiteCollectionDocuments/071312n.pdf>

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<sup>12</sup> Settlement Agreement (2010) between the US Department of Justice and Georgia: [http://www.justice.gov/crt/about/spl/documents/georgia/US\\_v\\_Georgia\\_ADAsettle\\_10-19-10.pdf](http://www.justice.gov/crt/about/spl/documents/georgia/US_v_Georgia_ADAsettle_10-19-10.pdf)

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resources available under MFP to pay for transition costs and demonstration services not available under the state's existing waivers. In addition, because the state receives an enhanced federal matching rate for services provided during the MFP transition period, these additional dollars which are placed in a "rebalancing fund" can be used to expand home and community-based services, thus helping more people live in the community as opposed to institutions.

Specific strategies for promoting community living identified in Massachusetts Community First *Olmstead* Plan such as, creating new Medicaid home and community-based waiver services for people with developmental disabilities and acquired brain injuries; expanding funding for the state's rental assistance program for non-elderly people with disabilities; and promoting training and education of the personal care attendant workforce, established a solid foundation for the implementation of its 2011 MFP award. The MFP grant in turn furthers the goals established in the Commonwealth's *Olmstead* Plan by expanding access to comprehensive transition services and supports for people moving to qualified residences in the community, implementing two new home and community-based services waivers for people not currently eligible for one of the Commonwealth's existing waivers, and includes funding and staffing for housing coordination and search activities. In addition, MFP staff collaborated with staff from the

Executive Office of Health and Human Services and the Department of Housing and Community Development, on the submission of an application for funding made available as part of the HUD's new Section 811 Project Rental Assistance Demonstration (PRA Demo), which increases community-based permanent supportive housing options for extremely low-income people with disabilities. If Massachusetts is awarded funding under the PRA Demo, MFP participants would be one of the populations prioritized to receive the 811 units.

### How can I keep informed about *Olmstead* related activity?

Several states are actively engaged in *Olmstead* activity, either through planning and implementation, and/or litigation or settlement agreements. The DOJ maintains a website with up-to-date information about DOJ participation in *Olmstead* cases, including those where the U.S. is a party in litigation as well as those cases where the federal government has an interest in an *Olmstead* related case but is not a litigant in the matter. Letters to states detailing the DOJ's findings following investigations into alleged violations of the integration mandate of Title II of the ADA are also available. The DOJ *Olmstead* website is located at: <http://www.ada.gov/olmstead/index.htm>

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The Center for Personal Assistance Services (PAS) also maintains a website with links and summary information to state *Olmstead* plans and litigation at: <http://www.pascenter.org/olmstead/olmsteadcases.php>.

This brief was prepared by Kevin Martone and Kelly English of the Technical Assistance Collaborative. Editorial assistance was provided by Steve Day and Emily Cooper. For additional information and related resources, visit <http://www.tacinc.org/>.