TASC Training & Advocacy Support Center

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Fact Sheet
What Constitutes an Effectively Working Plan in *Olmstead* Cases

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I. Introduction

In Americans with Disabilities Act (ADA) community integration suits, states may assert that a requested accommodation would be a fundamental alteration of their system for serving people with disabilities. One way of establishing a fundamental alteration defense is to show that a state has an effectively working plan for moving individuals into the community. The determination of whether such a plan exists is fact-specific and individual to each state, time period, and type of plaintiffs at issue in a particular case. There are, however, some common factors that courts consider when determining whether a state has an effectively working plan.

This memo discusses the factors that the federal government and courts have considered relevant, highlighting pertinent cases. It also includes two charts breaking down the elements of an effectively working plan that courts have found relevant.

II. Background

Title II of the ADA makes it illegal for state governments to deny qualified individuals with disabilities the benefits of its programs, services or activities, or to otherwise discriminate against them.[1] A regulation implementing Title II mandates that state governments administer services "in the most integrated settings appropriate to the needs of qualified individuals with disabilities."[2]

In *Olmstead v. L.C*, the Supreme Court held that unjustified institutionalization of individuals with disabilities constitutes illegal discrimination on the basis of disability.[3] It also held, however, that the right to receive services in the least restrictive environment is not unqualified.

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[1] Americans with Disabilities Act § 202, 104 Stat. at 337 *codified at* 42 U.S.C. §§ 12131-34.
[2] 28 C.F.R. § 35.130(d) (2010). Section 504 of the Rehabilitation Act has nearly identical regulations that are interpreted similarly.
[3] 527 U.S. 581, 597 (1999).

Specifically, the Court held that the failure of a state agency to place an individual with disabilities in a community-based setting when it is medically appropriate and the individual so desires is a violation of Title II of the ADA unless the state can prove that providing a community-based setting for the individual would be a "'fundamental alteration."[4]

Notably, a majority of the Court could not reach agreement on the precise standard to be applied to determine whether community placement is required. Guidance can be found in the plurality decision. Significantly, four Justices stated that if the state can show that the requested accommodation, community placement, will be a "fundamental alteration" of the system for providing care for individuals with disabilities, it will not be required to make the accommodation. [5]

> Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.[6]

The four Justices also suggested that

> **if . . . the State were to demonstrate that it 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 State would not be in violation of the ADA.[7]**

III. What constitutes an effectively working plan?

Generally, a determination of whether a state has an effectively working plan necessitates considering the range of services that a state is already providing to individuals with disabilities. Thus, it is necessarily fact intensive and individual to the particular circumstances at issue in this case. The federal government and courts that have addressed this issue, however, have identified certain factors that they consider important.

A. Federal guidance

In 2000, the U.S. Department of Health & Human Services (DHHS) issued a letter to state Medicaid directors to assist them in implementing the *Olmstead* decision.[8] In that guidance, DHHS officials informed states that "there is no single model plan appropriate for all States and situations. . . . However, we believe that there are some factors that are critically important for

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[4] *Id.* at 603 (quoting 28 CFR § 35.130(b)(7) (1998)).
[5] *Id.* at 603.
[6] *Id.* at 604.
[7] *Id.* at 605–06.
[8] CMS, *Dear State Medicaid Director* (January 14, 2000).

States that seek to develop comprehensive, effectively working plans."[9]

Rather than articulating specific factors, however, DHHS lists "principles" to be considered during the planning and implementing process. The principles are: (1) developing a comprehensive, effectively working plan; (2) developing and implementing that plan; (3) assessments on behalf of potentially eligible populations; (4) availability of community-integrated services; (5) informed choice; and (6) implications for state and community infrastructure. According to DHHS, these principles should be "factor[ed] in" when states are developing plans.

Among other things, states should consider including the following:

- A means of ensuring the transition of qualified individuals into community based settings at a **reasonable pace;**
- An evaluation of whether the State is conducting adequate **periodic reviews** of all individuals with disabilities in institutional settings;
- Procedures to avoid **unjustifiable** institutionalization in the first instance;
- A means of ensuring that the state has a "reliable sense" of how many individuals with disabilities are institutionalized and eligible for services in community-based settings, including **data collection**;
- Evaluation of existing **assessment procedures** for individuals who are both in and at risk for placement in institutions and considering whether they are adequate;
- A means of ensuring that the state can **act in a timely and effective manner** in response to the findings of an assessment process;
- **Identification of** the **community-based services available** in the state and assessing their ability to serve people in the most integrated setting appropriate;
- A review of what **funding sources are available** (Medicaid and other) to increase availability of long-term care services;
- An examination of the operation of waiting lists "if any."

These criteria are quite general and the tone of the guidance advisory, rather than mandatory. DHHS does not suggest that the presence or absence of any one factor is critical to determining whether a state has a working plan. Significantly, however, this letter is more than a decade old. Thus, there may be an argument that while these factors were considered advisory shortly after *Olmstead* was decided, after a decade of guidance and time to implement plans, states should be far along.

B. Caselaw

Courts have identified a number of factors as key when determining whether states have "working plans" for de-institutionalization. The most specific guidelines as to what constitutes

[9] *Id.,* Enclosure, at 1.

an effectively working plan have come from the Third Circuit. In *Frederick L. v. Department of Public Welfare,*[10] a class of individuals living in a state mental health facility filed suit under Title II claiming unjustified segregation. Under the facts of that case, the court held that:

> a viable integration plan *at a bare minimum* should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.[11]

In another case, the Third Circuit has articulated more general guidelines, holding that, in order to satisfy the standard, the state must develop and implement a plan that at least consisted of a "commitment to action" so "that there will be ongoing progress toward community placement."[12]

Notably, while other courts have cited the Third Circuit cases with approval, no courts from other circuits have required states to have specific benchmarks and timelines in order to show that they have a working plan. For example, in *Disability Advocates, Inc. v. Paterson,* the court stated that "[w]hile the court need not determine whether an *Olmstead* plan must have the specific elements that the Third Circuit listed in *Frederick L.,* such as time frames for discharge and the approximate number of individuals during each period, at the very least [it] requires a reasonably specific and measurable commitment to deinstitutionalization for the which the state may be held accountable."[13] In *Crabtree v. Goetz,* the District Court for the Middle District of Tennessee also cited *Frederick L.* with approval when denying the state's motion to dismiss.[14] The court rejected the state's argument that a yet-to-be implemented law establishing new home and community-based alternatives constituted an effectively working plan because it had not yet been implemented and was aspirational. Thus, it was not necessary for the court to judge whether it met other standards articulated by *Frederick L.*[15]

A number of other courts have concluded that states did have working plans such that plaintiffs' requests for relief would constitute a fundamental alteration defense. The federal Court of Appeals for the Ninth Circuit held that California had successfully established such a defense in *Sanchez v. Johnson*.[16] The Court held that the State demonstrated that it had a working plan by showing "a successful record of personalized evaluations leading to a reasonable rate of deinstitutionalization and . . . that California has undertaken to continue and to increase its efforts to place current residents of [state institutions] into the community when

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[10] *Frederick L. v. Dep't of Pub. Welfare* (*Frederick L. III*), 422 F.3d 151 (3d Cir. 2005). The *Frederick L.* litigation resulted in a number of District Court and Court of Appeals decisions. *See also, e.g., Frederick L. v. Dep't of Pub. Welfare of Pa.* 364 F.3d 487 (3d Cir. 2004).

[11] 422 F.3d at 160.

[12] *Penn. Prot. & Advoc. v. Dep't of Pub. Welf.*, 402 F.3d 374, 381, 382 (3d Cir. 2005) (quoting *Frederick L. I*, 364 F.3d at 500).

[13] 653 F. Supp. 2d 184, 305 (E.D. N.Y. 2009) (on appeal).

[14] No. Civ. A 3:08-0939, 2008 WL 5330506 (M.D. Tenn. Dec. 19, 2009).

[15] *Id.* at *29.

[16] 416 F.3d 1051, 1068 (9th Cir. 2005).

such placement is feasible."[17] In addition, the Ninth Circuit held, in October 2005, that the State of Washington had established a fundamental alteration defense to a Title II integration claim because the State "had demonstrated it has a comprehensive, effectively working plan and that its commitment to deinstitutionalization was genuine, comprehensive and reasonable."[18] Among other factors, the Court noted that Washington had received approval from the federal government to offer home and community-based services through a waiver to 10,000 individuals and that already nearly that many were being served. The court also noted that the size of Washington's home and community-based waiver program had increased at the state's request, with the state's budget for community-based disability programs such as the home and community-based waiver more than doubling in seven years.[19] The California and Washington state "plans" will be discussed in more detail later in this Fact Sheet.

In another example, the federal court for the District of Utah rejected an ADA-based challenge by individuals with disabilities who were on waiting lists for home and community-based waiver services. In *M.A.C. v. Betit,*[20] the Court held that "Defendants have demonstrated that they have a comprehensive, effectively working plan for administering" the waiver with which plaintiffs' proposed plan would interfere.[21] The Court noted that the state Medicaid agency had regularly requested increases in funding to serve individuals who qualified for the waiver and that, each year, more individuals were served. In addition, the Court accepted the State's argument that requiring it to serve all individuals on the wait list would force it to make severe cuts in other programs for people with disabilities. The Court concluded that "the waiver is not administered in a way that encourages institutionalization, that slows the progress of de-institutionalization, or that it is motivated by a desire to keep institutions fully populated."[22]

More recently, a federal court for the District of New Hampshire ruled that the plaintiffs, a group of individuals with acquired brain disorders (ABD), failed to show that the state's administration of its waiver program for people with ABD violated Title II. In *Bryson v. Stephen,*[23] the court held that the state had an effectively working plan for integrating people with ABD.[24] The Court was convinced by the following factors: (1) the waiver had expanded significantly, growing from fifteen spaces in 1993 to 132 in 2006; (2) empty spaces were not intentionally maintained; (3) funds budgeted for the waiver had increased over the years and are generally spent; and (4) the State operated a waiting list that moved at a reasonable pace.[25]

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[17] *Id.* at 1068.
[18] *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 621 (9th Cir. 2005) (internal quotation marks omitted).
[19] *Id.*
[20] *M.A.C. v. Betit,* No. 2:02CV1395 (D. Utah Feb. 28, 2006) (Findings of Fact, Conclusions of Law, and Order).
[21] *Id.,* slip op. at 19.
[22] *Id.*
[23] *Bryson v. Stephen*, No. 99-CV-558-SM, 2006 U.S. Dist. LEXIS 71775 (D. N.H. Sept. 29, 2006).
[24] *Id.* at *15.
[25] *Id.* at **16–21.

III. Examples of states judged to have effectively working plans

After *Olmstead,* many states began developing plans aimed at facilitating integration of individuals into community-based settings. As of February 2004, twenty-nine states had developed an *Olmstead* plan or report.[26] Below are summaries of three courts' analyses of state plans that were judged to be effectively working.

A. Sanchez v. Johnson (CA)

The court in *Sanchez v. Johnson*[27] held that the defendants had demonstrated a working plan and that the remedy suggested by plaintiffs would work a fundamental alteration.[28] The following factors convinced the court that California was not in violation of Title II:

- The existence of the Lanterman Act, a 60 year-old California initiative that established regional centers - independent, private non-profit community agencies that coordinate services for developmentally disabled persons to live in the community. These regional centers serve 180,000 persons and fewer than 4,000 of those live in large, congregate institutions;[29]
- Many individuals living in the large institutions exhibit complex and difficult behaviors, making community placement difficult or even dangerous;[30]
- Between 1996 and 2000 California reduced its institutional population by 20 percent;
- The number of individuals in community-based settings increased 55 percent between 1991 and 2001, while the expenditures for community services increased 196 percent during the same period;[31] and
- California designated funds to develop 42 new community facilities and ten new ICF/MRs allowing it to reduce its state institutionalized population enough to close one of the seven remaining institutions by 2007.[32]

B. Arc v. Braddock (WA)

In holding that Washington had established a defense to a Title II ADA claim, the court in *Arc of Washington State, Inc. v. Braddock*[33] considered the following factors to be important:

- The state had a substantially sized HCBS program that provided integrated care to almost 10,000 Medicaid-eligible disabled persons;[34]

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[26] Wendy Fox-Grange et al., *The States' Response to the* Olmstead *Decision: A 2003 Update*, 2004 NAT'L CONF. ST. LEGIS. 1, *available at* http://www.ncsl.org/print/health/03olmstd.pdf.
[27] *Sanchez v. Johnson,* 416 F. 3d 1051 (9th Cir. 2005).
[28] *Id.* at 1068.
[29] *Id.* at 1064.
[30] *Id.* at 1066.
[31] *Id* at 1067.
[32] *Id.*
[33] *ARC of Wash. State, Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005).
[34] *Id.* at 621.

- The waiver program was operating at capacity;[35]
- The waiting list admitted all new Medicaid-eligible disabled individuals once slots became available;[36]
- The size of Washington's HCBS program increased at the state's request from 1,227 slots in 1983, to 7,597 slots in 1997, to 9,977 slots in 1998;[37] and
- Washington's Division of Developmental Disabilities Department (DDD) had a budget increase from $750 million in 1995 to over $1 billion in 1999 and the Family Support Services (given to families of DDD clients living at home) had a budget increase of 250 percent over the five years preceding the court's decision.[38]

C. Williams v. Wasserman (MD)

In *Williams v. Wasserman*,[39] Maryland successfully convinced the court that the plaintiff's requests would result in a fundamental alteration to the State's mental health program.[40] The court observed that "over the past ten or more years [the State] has been gradually closing institutions and expanding the number and range of community-based treatment programs it offers for people with severe disabilities."[41] In addition, the court took into account the following factors:

- The dramatic progress the state had made since the 1970s in expanding community-based services;[42]
- Maryland's efforts to expand its funding options by its participation in Medicaid waiver programs;[43]
- Maryland's status as a national leader in treatment services for some of the most severe cases of developmental disabilities;[44]
- Maryland's initiative in developing and funding community-based services and the state's costs of maintaining institutions while downsizing;[45] and
- The fact that many individuals served in institutions have behaviors that make it extremely difficult to serve them in the community.[46]

IV. Conclusions and Emerging Principles

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Williams v. Wasserman,* 164 F. Supp. 2d 591 (D. Md. 2001).
[40] *Id.* at 633.
[41] *Id.* at 634.
[42] *Id.* at 635.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 633–37.
[46] *Id.*

In sum, in determining whether states were complying with Title II's integration mandate, these courts took a fairly consistent approach. They applied similar factors in these cases; thus, it is likely that a court's evaluation of other states' systems for serving people with disabilities would follow a similar pattern. It is important to remember, however, these inquiries are necessarily fact-intensive and unique to each situation.

Courts have found that a history of moving people out of institutions and into community placements is significant and have accepted states' promises to continue community placements in the future. As discussed above, the *Arc, Sanchez,* and *Wasserman* all found it significant that states had a history of moving people into the community, had increased the size of the population served in the community while reducing the numbers in institutions, and had shifted funds toward community based services and away from institutions. It did not appear to affect the court's determination in these cases that the movement from community to institution had taken decades.

Whether there is a waiting list for community placements that moves at a reasonable pace is considered significant in some cases. In the *Olmstead* decision, the Court did not define the term "reasonable pace" nor directly address the issue of the waiting lists. Since *Olmstead,* however, a few courts have established some guidelines.

Makin v. Hawaii[47] concerned a class of more than 800 individuals with disabilities living at home with intellectual disability who were placed on a waiting list for community-based services because the state alleged it had inadequate state funding.[48] While the majority of those on the waiting list had been waiting for 90 days, some of the individuals had been on the waiting list for over two years.[49] The Court held that it was permissible for the state to have individuals on a waiting list if the population limit specified for the waiver had been reached, "so long as there is other appropriate treatment available to them under the Medicaid program."[50] But, the Court also found that the only evidence of any effort to decrease the wait list was an increase in "slots" over the next few years and that, alone, was not sufficient to establish a fundamental alteration defense, stating that: "[t]hat single piece of evidence . . . does not show that the State is complying with the ADA by acting responsibly."[51]

In addition, as discussed above, the *Bryson* decision held that New Hampshire operated a waiting list that moved at a reasonable pace.[52] The Court noted that the average waiting time was about one year from determination of eligibility to assignment on the waiver, which it found to be reasonable. It further noted that the number of individuals waiting had remained steady at about 25 for most of the duration of the waiver.[53]

Even if a state has an effectively working plan, that will not insulate the state from

[47] *Makin v. Hawaii*, 114 F. Supp. 2d 1017 (D. Haw. 1999)
[48] *Id.* at 1020.
[49] *Id.* at 1023.
[50] *Id.* at 1028.
[51] *Id.* at 1035.
[52] *Bryson v. Stephen*, No. 99-CV-558-SM, 2006 U.S. Dist. LEXIS 71775, at *24 (D. N.H. Sept. 29, 2006).
[53] *Id.* at **18–21.

liability if the plan does not benefit the plaintiff. It may do the state little good to show that it has an effectively working plan if it is not aimed at providing plaintiffs with more integrated services. For example, in *Disability Advocates, Inc. v. Paterson*, an advocacy group sued to obtain more integrated services for a class of adults with mental illness living in medium sized institutional settings known as "adult homes."[54] Plaintiffs contended that the state had failed to develop an effective plan to comply with the integration mandate and that they were therefore precluded from asserting a fundamental alteration defense. While the state put forth abundant evidence of the existence of plans, programs, and activities to provide community-based services in general, it failed to show that they focused on or assisted individuals living in adult homes.[55] And, though the state did prove that some services such as case management and peer support were directed at the plaintiff population, it failed to show that the services would help them secure community based housing and services.[56] Similarly, in *G. v. Hawaii,* the court stated that it was "abundantly clear" that the state had a comprehensive deinstitutionalization scheme and that it was "working to some extent," there was a question of fact as to whether the plan was working effectively with regard to one particular plaintiff. Thus, the issue was reserved for trial.[57]

When making a determination of whether states have working plans, courts have taken into account whether plans have specific benchmarks, such as time frames and target numbers for discharge, as well as the existence of particular eligibility criteria for community placement. Second, whether states have a history and pattern of moving individuals out of institutions and into community-based settings has been deemed significant. Third, courts have taken into account requests for increases in funding for community-based services including home and community-based waivers. Fourth, courts have noted the number of individuals served in home and community-based waiver programs in comparison with the numbers in institutions. However, there is no precise formula for making this determination.

[54] 653 F. Supp. 2d 184 (E.D. N.Y. 2009).
[55] 653 F. Supp. 2d at 267-82.
[56] *Id.* at 278.
[57] 676 F. Supp. 2d 1046, 1061 (D. Haw. 2009).

Decisions holding that state did not have effectively working plan

	***Frederick L.* (PA)**	***Crabtree v. Goetz* (TN)**	***Disability Advocates Inc. (DAI) v. Paterson* (NY)**
Type of decision	Trial	Preliminary Injunction	Trial
Size of institutional population	**Reduced** from 40K to 3K over 40 years, closed one state hospital	*Not discussed*	**Negligible** movement from adult homes to supported living
Size of HCB waiver program	*Not discussed*	*Not discussed*	Increased, but not explained how this affects plaintiffs
Budget for HCB services/waivers	*Not discussed*	*Not discussed*	Not related to plaintiffs
Is there a written working plan?	Yes, but not effective	Yes, but not implemented	**No**, not that relates to providing the adult home population services in the most integrated settings appropriate
Does it include time frames for moving individuals to community?	No	*Not discussed*	*Not discussed, but declined to reach the issue of whether this is required*
Does it specify numbers of individuals to be discharged at specific times?	No	*Not discussed*	*Not discussed, but declined to reach issue of whether this is required*
Is it specific and measureable?	No	*Not discussed*	No
Is there a means for holding the state/agency accountable?	No	*Not discussed*	No
Is there an announced commitment to deinstitutionalization?	Yes	Yes	*Not discussed*
Is there a waiting list? Move at reasonable pace?	No	*Not discussed*	No list for adult home population

Decisions holding that state had effectively working plan

	***Arc v. Braddock* (WA)**	***Sanchez v. Johnson* (CA)**	***Williams v. Wasserman* (MD)**	***Bryson v. Shumway (Valais)* (NH)**
Type of Decision	Summary Judgment	Summary Judgment	Trial	Trial
Increase in # of individuals living in the community	Yes	Increased by 55 % from '91 to '00	Yes, "dramatic" increase in past 25 years	Yes
Size of HCB waiver(s)	Increased from 1,227 slots in '83 7,597 slots in '97, 9,977 slots in '98	*(see above)*	Yes, "dramatic" increase in past 25 years	Yes, increased from 15 slots in 1993 to 132 in 2006
Are all slots filled in waiver(s)?	Yes	*Not clear*	*Not discussed*	Any empty slots not intentionally maintained
Size of HCB program budget	DD home-based services budget increased 250% in 5 years (proportional to/greater than budget of other state agencies	Increased by 196% from '91 to '01	Increased over two decade period	Increased from $6.6M to $11.2M and generally all spent
Size of population in institutions	*Not discussed*	Reduced by 20% from '96 & '00.	Reduced over two decade period	*Not discussed*
Proportion of population in institutions	*Not discussed*	"Only" 4K/180K living in large institutions	Decreased from daily pop of 7.7K in 1970 to 1.2K in 1997	*Not discussed*
Closure of institutions	*Not discussed*	Plan to close 1 of 7 large institutions	Yes, and others reduced in size	*Not discussed*
Characteristics of institutional population	*Not discussed*	Have difficult and complex behaviors, making placement difficult/dangerous	Have behaviors that make it difficult to serve them in the community	*Not discussed*
Waiting list moving at reasonable pace?	Yes waiting list with priorities, no discussion of pace of movement	*Not discussed*	Yes waiting list with priorities, no discussion of pace of movement	Yes (about one year wait period)
Is there a genuine commitment to deinstitution-alization?	Yes	Yes	Yes	Yes