

Orchid's National Report on Selected
Systemic Issues resulting in:

State Failure to Comply with Olmstead (cognitive disabilities*) 2020

***Mental Illness, Brain Injury, Disability
as a Result of Substance Use, and
Developmental Disability**

The crying need to bring:

- **Supportive Housing**
- **Intensive Services**
- **Supported Employment, and**
- **Placements**

TO SCALE –

**To avoid Homelessness and
Incarceration**



ADVOCACY

Protests for Justice



"Michael Marshall is dead because he was **Black**. Michael Marshall is dead because he was **poor**. Michael Marshall is dead because he was **suffering from mental illness**. Michael Marshall is dead because he was **homeless**. Four of those things are the reason why Michael Marshall is dead and we are here today."

BrotherJeff.com: SAY IT LOUD!

Black Lives Matter

Denver MLK Parade 2016: Why is Michael Marshall Dead

This Report supports:

- **calls to "Defund the Police -- Re-Allocate Resources to Services People Need" and**
- **the DESPERATE NEED for States to Comply with a 20-year old U.S. Supreme Court decision protecting the rights of people with disabilities: OLMSTEAD.**

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I. Executive Summary

In today's US Society, people with Cognitive Disabilities are particularly vulnerable to Homelessness and/or Incarceration.

Further, Incarceration and Homelessness are the primary risks of Institutionalization and Great Risk of Institutionalization for People with Cognitive Disabilities.

This call for State Olmstead Compliance is coming amid a Covid-19 pandemic that is impacting people of color much more than whites in the United States and national and global protests for Racial Justice.

Further, in the United States and Around the Globe, we are moving to:

- A Public Health Approach to Criminal Justice, and
- Recognition of the Importance of the Social Determinants of Health and Health Inequities such as access to Housing.

Primary Needs of People with Cognitive Disabilities to Prevent Homelessness and/or Incarceration are:

- Supportive Housing
- Intensive Services
- Supported Employment
- "Placements" where necessary

States, individuals and families need FEDERAL ADMINISTRATIVE SUPPORT and FEDERAL ADMINISTRATIVE ENFORCEMENT of OLMSTEAD.

After 20 years, lawsuits have been too cumbersome and expensive to sufficiently address widespread state non-compliance with the Olmstead decision.

Further, States, individuals and families need something much more PRACTICAL to ensure Olmstead Compliance.

Much like the individuals States are trying to serve – States need INTENSIVE SUPPORT to comply with Olmstead through relevant Technical Assistance Centers & Efforts.

Further, we must have practical and effective ADMINISTRATIVE ENFORCEMENT. With SUFFICIENT FEDERAL ADMINISTRATIVE SUPPORT, we think the need for FEDERAL ADMINISTRATIVE ENFORCEMENT will likely be rare.

Currently, many Americans with cognitive disabilities of the greatest need are suffering the harm and irreparable harm of HOMELESSNESS and INCARCERATION.

There are many ways to address the EMERGENCY of IRREPARABLE HARM suffered by Americans with cognitive disability with the greatest need.

Most practically, IMMEDIATE federal and state administrative enforcement of FAIR HOUSING LAWS to provide Medicaid assisted living or nursing home placements for individuals pending SUPPORTIVE HOUSING or other more appropriate PLACEMENT.

WHAT HASN'T WORKED, & ISN'T WORKING IS THE STATUS QUO.

II. Brief Overview of Olmstead

The U.S. Supreme Court's 1999 decision *Olmstead v. L.C.* held that unnecessary institutionalization of people with disabilities amounts to **DISCRIMINATION** under Title II of the Americans with Disabilities Act.

The challenges for people with cognitive are sometimes more complicated than for “physical disabilities” – even as “cognitive disabilities” are physical.

Further, many people with one “cognitive disability” may have other cognitive disabilities as well as do many who are homeless and or incarcerated.

Those primary cognitive disabilities tend to be combinations of brain injury, mental illness, cognitive disability as a result of substance use and developmental disability.

Further, there are individuals who are struggling with all four issues.

By and large, states have tried to provide less expensive services to individuals with disabilities who may not even be covered by Olmstead because those individuals are not institutionalized or at great risk of institutionalization.

While many of those services are important and may satisfy other legal obligations, States have failed to comply with Olmstead, especially with respect to cognitive disability.

For those individuals with cognitive disability the primary institution is the JAIL and/or PRISON. The great risk of institutionalization is HOMELESSNESS.

Most states can say they are doing “something” and often at great expense for this population of people with cognitive disabilities with the greatest need.

Having said that, most states do NOT have a Comprehensive, Effectively Working Olmstead Plan with Measurable Goals, Reasonable Time Frames and Funding to Support the Plan.

THAT MATTERS.

Most importantly it matters to individuals with cognitive disabilities with the greatest need who are most subject to incarceration and homelessness.

Further, it matters to often desperate family members.

And it matters to the communities they live in.

Selected Legal Resources	
www.ada.gov	<p><u>United States Department of Justice</u> <u>Civil Rights Division</u></p> <p><u>Information & Technical Assistance on</u> <u>the Americans with Disabilities Act</u> <u>(ADA)</u></p>
<u>Olmstead: Community Integration for Everyone</u>	
<u>US Department of Justice (DOJ) Technical Assistance on Olmstead</u>	
<u>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.</u>	

- **See No. 7** “A state’s obligations under the ADA are independent from the requirements of the Medicaid program.”
- **See No. 12:** “ 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.”

[Ensuring Equality in the Criminal Justice System for People with Disabilities](#)

[2010 Delaware DOJ Findings Letter](#)

p. 8: A state’s obligation to provide services in the most integrated setting may be excused only where a state can prove that the relief sought would result in a “fundamental alteration” of the state’s service system. Olmstead, 527 U.S. at 603-4. Because it is not a fundamental alteration to expand existing community programs to include currently institutionalized individuals, see, e.g., DAI, 653 F. Supp.2d at 305, Delaware cannot meet its burden of proving the fundamental alteration defense.¹

Within their service array, Delaware’s existing community system is already providing services such as Assertive Community Treatment programs (“ACT”) and scattered site supported housing that are essential to achieving the requirements of Olmstead. **Thus, in most respects, what is needed is not new to the system, but rather a phasing out of dated models to be consistent with appropriate practices and bringing to scale those community programs that are already providing effective integrating services. Accordingly, providing community services individuals in or at risk of entering DPC would work only a “reasonable modification” of the State’s program. Olmstead, at 603.**

p. 9: Moreover, a state cannot prove this affirmative defense [Fundamental Alteration Defense] unless it can show that is has developed and is implementing a comprehensive and

¹ Moreover, general allegations of short-term costs or budgetary constraints alone are insufficient to establish the defense. Pa. Prot. and Advocacy, 402 F.3d at 380; Frederick L., 364 F.3d at 495.

effective plan to move individuals with disabilities into the community, with any individuals waiting for services moving at a reasonable pace. Olmstead, 527 U.S. at 584; Frederick L. v. Dept. of Public Welfare, 422 F.3d 151 (3rd Cir. 2005) (“[A] comprehensive working plan is a necessary component of a successful ‘fundamental alteration’ defense.”); Pa. Prot. and Advocacy, Inc. v. Dept. of Public Welfare, 402 F.3d 374, 381 (3rd Cir. 2005) (“[T]he only sensible reading of the integration mandate consistent with the Court’s Olmstead opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA.”).

Delaware’s own admission that individuals languish for years longer than necessary at DPC, Delaware Memorandum of Agreement Compliance committee Report at 8, is evidence that it is not implementing a working Olmstead plan, with a waiting list moving at a reasonable pace. Accord DAI, 563 F. Supp.2d at 302-305.

p. 10: “Unnecessary institutionalization, particularly when protracted, is itself an irreparable harm.”

p. 17: . “To promote the community integration of the target population, the State should increase community capacity by expanding the following services to the target population: assertive community treatment (“ACT”), supported housing, supported employment, family and peer support services, community crisis services, and appropriate case management services.”

2010 DOJ Settlement Agreement with the State of Georgia involving Services and Housing for over 9,000 individuals with developmental disabilities, including those being released from incarceration.

- “For individuals with mental illness, the agreement provides that Georgia will serve in the community 9,000 individuals with serious and persistent mental illness who are currently served in State Hospitals; frequently readmitted to State Hospitals; frequently seen in emergency rooms; **chronically homeless and/or being released from jails or prisons.**”

Minnesota’s Jensen Case in which Federal Judge Donovan Frank insisted on “Precision Goals” in the State’s Olmstead Plan.

- **Star Tribune: Federal judge rebukes Minnesota on plan to reform disability services -- State faces sanctions over too vague Olmstead plan**

- [Minnesota's Landmark Jensen Case on the Civil Rights Litigation Clearinghouse](#)

III. Housing

- Failure of Medicaid (HUD, the States) to Fully Fund Supportive Housing and Medicaid's well-intentioned prohibition of funding "Institutes of Mental Disease" amount to De Jure and De Facto Discrimination against People with Cognitive Disabilities.
- The people who pay the price for this DISCRIMINATION are people with significant cognitive disabilities who are subject to gross neglect and abuse in this country and their often-desperate families.
- By and large there is an understanding of Supportive Housing -- the provision of it is just not to SCALE.
- There is the POTENTIAL for a Large Harm Reduction Role for the Country's Nursing Homes and Assisted Living Residences.
- Our proposal is to utilize assisted living and nursing homes as TRANSITIONAL PLACEMENTS pending SUPPORTIVE HOUSING where desired to avoid HOMELESSNESS. That needs to come with some REASONABLE but STRICT TIME FRAMES for transition to SUPPORTIVE HOUSING or other more desired PLACEMENT.
- [This implicates not only Olmstead, but Fair Housing as well]

Supportive Housing & Fair Housing Resource Table

[Corporation for Supportive Housing \(CSH\)](#)

[DISABILITY DISCRIMINATION IN LONG-TERM CARE:
USING THE FAIR HOUSING ACT TO PREVENT ILLEGAL SCREENING IN
ADMISSIONS TO NURSING HOMES AND ASSISTED LIVING FACILITIES](#)

Eric Carlson with the Long Term Care Law Project @ the Senior Citizens Law Center: Notre Dame Journal of Law, Ethics & Public Policy

[See also “Fair Housing” on the Orchid website](#)

IV. Intensive Services

[Assertive Community Treatment \(ACT\)](#)

- Provided by multidisciplinary team
- A blend of treatment, rehabilitation, therapeutic, and supportive services
- Directed to persons with a serious mental illness who require intensive services
- Offered on a time-unlimited basis and available 24 hours per day, 7 days per week, 365 days per year.

A. Assertive Community Treatment (Adult)



RainCity Housing and the Housing First / Assertive Community Treatment (ACT) models of care. (Canada)

Assertive Community Treatment (Adult) Resource Table

[Assertive Community Treatment \(ACT\) -- SAMHSA](#)

[ACT Institute for Recovery Based Practice](#) consults with ACT Programs in New York State @ the Center for Practice Innovations @ Columbia Psychiatry @ New York State Psychiatric Institute

B. Assertive Community Treatment (Youth)

Assertive Community Treatment (Youth) Resource Table

[Minnesota's Youth ACT](#)

[The effect of youth assertive community treatment: a systematic PRISMA review \(BMC Psychiatry 2017\)](#)

Conclusions

The current literature on youth-ACT is limited but promising. There are indications that youth-ACT is effective in reducing severity of psychiatric symptoms, improving general functioning, and reducing duration and frequency of psychiatric hospital admissions. The effect of youth-ACT may be comparable with the effect of ACT in adults. Similar as in adult ACT, the studies on youth-ACT found effects that vary from small to large. Randomized experimental research designs are needed to further corroborate effectiveness.

C. Flexible Assertive Community Treatment"

(FACT has been implemented in Canada, Norway, Belgium, Czech Republic, Moldavia, Poland and some other countries around the world)

Flexible ACT is a “flexible” form of ACT that is also less expensive and available for people who have cycling or other forms of episodic serious mental illness.

Flexible Assertive Community Treatment Resource Table

[The Centre for Public Impact: The Netherlands Flexible Assertive Community Treatment \(2019\)](#)

[Resources and Studies on the Orchid website](#)

V. Supported Employment



**Johnson & Johnson and the Dartmouth Psychiatric Research Center
--- Supported Employment (2009)**



UK: National Health Service (NHS) -- Individual Placement and Support (IPS) offers route to employment for people with severe mental illness (2018)

Supported Employment Resource Table

[SAMHSA's Supported Employment Evidence-Based Practices \(EBP\) KIT](#)

[JAN \(Job Accommodation Network\)](#)

[Cornell Employment and Disability Institute](#)

VI. Placements/Continuum of Care

[Understanding Continuum of Care as an Olmstead Issue]

Most people with cognitive disabilities, even significant cognitive disabilities, do not need “something” beyond Supportive Housing – but some do.

Assisted Living Residences are often a viable alternative.

Nursing homes sometimes do work as the next rung in the Continuum of Care and individuals appreciate a calmer environment and/or a respite until they can get someplace else.

However, nursing homes are INSTITUTIONS and are OFTEN disfavored by individuals and are the subject of Olmstead Litigation.

A COMPREHENSIVE CONTINUUM of CARE is particularly important to people with cognitive disabilities who may be subject to much longer periods of INSTITUTIONALIZATION, including INCARCERATION and the great risk of institutionalization inherent in HOMELESS, if intensive care is not available when needed.

Currently, intensive care is OFTEN not available for Americans with cognitive disabilities.

VII. The Need for a National Strategy to Provide SUPPORTIVE HOUSING and CONTINUUM OF CARE

[for Americans with Cognitive Disabilities with the Greatest Need]

- There have been efforts to loosen Medicaid's IMD rule (exclusion of Medicaid payment for “Institutes of Mental Disease”), we need to do the same for payment of Housing in SUPPORTIVE HOUSING, not just “housing-related activities.”
- We need CMS and HUD to coordinate with the States to do that and we need Congress to authorize that.
- Where we are now is that we have largely conceptualized the full legal responsibility for Housing for people with disabilities who are institutionalized or at great risk of institutionalization -- to be on the STATES.
- States are NOT providing HOUSING for people with disabilities who are institutionalized or at great risk of institutionalization at the SCALE needed.
- Further, the Federal Government is NOT providing the ENFORCEMENT needed, although important cases have been brought.
- We need a National Strategy for providing SUPPORTIVE HOUSING and CONTINUUM OF CARE to people with Cognitive Disabilities with the Greatest Need.

- **If states want to modify that and they still comply with the law, that should not be a problem.**
- **But the widespread State disregard for Olmstead's more rigorous requirements is leading to harm and irreparable harm to thousands if not millions of Americans with cognitive disabilities with the greatest need.**

VIII. DOUBLE V

[Economic Stimulus to recover from the economic effects of Covid-19 and provide for Supportive Housing]

Finally, we need to provide **Economic Stimulus** to cover SUPPORTIVE HOUSING and other needs of people with disabilities and others who have been disadvantaged.

It's a great time for a DOUBLE V – a Double Victory over Covid-19 and Discrimination in its many forms.



"Double V Campaign of WWII" --

Black History in 2 Minutes Hosted by Henry Louis Gates, Jr.

IX. Conclusion

State Failure to Comply with Olmstead and Federal Failure to Uniformly and Reliably Ensure Compliance has devastated many of the lives of Americans with cognitive disability.

- The Failure of States to provide sufficient Supportive Housing has been devastating to the lives of people with Cognitive Disability and the lives of their families.
- Enforcement Efforts have often been impressive, but they are NOT uniform. They are often ridiculously cumbersome and expensive.
- We need administrative technical assistance and enforcement to PRACTICALLY ensure compliance with these critical legal responsibilities.

Our Uncomfortable Reality

The Reality is Most States – Talk the Talk. Minnesota is the only state that we are aware of that has been forced to develop PRECISION OLMSTEAD GOALS.

Further, Minnesota has much work to do. Most States do everything they can to avoid the MEASURABLE GOALS demanded by Olmstead even as they are singing Olmstead's praises.

That kind of HYPOCRISY is NOT just ANNOYING, it's DANGEROUS.

Millions of Americans with Cognitive Disabilities are suffering its consequences.

What We Need

- Federal Administrative Support to States to Ensure Olmstead Compliance
- Federal Administrative Enforcement to Ensure Olmstead Compliance
- Housing, Services and Placements to SCALE to meet the NEED.
- Recognition of “Placements” and “Continuum of Care” as an Olmstead issue to prevent harsher or longer-term institutionalization or homelessness; and
- Immediate Federal and State administrative enforcement of Fair Housing Laws as they apply to Medicaid Assisted Living and Nursing Homes to prevent the IRREPARABLE HARM of Homelessness and/or INCARCERATION of people with cognitive disabilities.

X. Appendix

From Minnesota's Olmstead Implementation Office (2019)



**LA County Department of Human Services: Office of Re-Entry & Diversion –
SUPPORTIVE HOUSING**



New York's Medicaid Re-Design Team: Using Medicaid State Only Dollars to Fund Supportive Housing



Finland example for Ending Homelessness -- **PERMANENT HOUSING**



Juha Kaakinen
CEO, Y-Foundation

How a Housing First-approach reversed Finland's homelessness crisis and poised it to become one of the only European countries reducing and nearly eradicating homelessness within its border.



CAEH | ACMF
Canadian Alliance to End Homelessness | Alliance canadienne pour mettre fin à l'itinérance

Canada's Intensive Supervision Unit connected to the Criminal Justice System in Vancouver.



- [Canada's Rise Asset Development Program -- Entrepreneurial Support for Individuals recovering from mental health and substance issues.](#)