JA

DEPARTMENT OF HEALTH & HUMAN SERVICES

200 Independence Avenue, SW
Washington, D.C. 20201

Olmstead Update No: 2
Subject: Questions and Answers
Date: July 25, 2000

Dear State Medicaid Director:

This letter provides answers to some of the questions received by the DHHS Working Group for ADA/Olmstead.

In our January 14, 2000 letter to you we conveyed our initial approach to compliance with the decision in Olmstead v. L.C., 119 S.Ct. 2176 (1999) and outlined a framework for us to respond to the challenge of crafting comprehensive, fiscally responsible solutions that comply with the Americans with Disabilities Act. As that letter indicated, the Olmstead decision challenges States to prevent and correct inappropriate institutionalization of persons with disabilities and to review intake and admissions processes to assure that persons with disabilities are served in the most integrated setting appropriate. We indicated our willingness to work closely with States to make effective use of Medicaid support in your planning and implementation of Olmstead. In that letter we also recognized that States may have specific issues and questions about the interaction between the ADA and the Medicaid program and we invited you to submit your comments to the DHHS Working Group for ADA/Olmstead.

Since the issuance of that letter we have received numerous questions from States and the disability community. We have begun to review, analyze and develop responses to those questions. Attached to this letter are some of the questions we have received along with our responses.

We urge you to continue to submit your questions and recommendations to us so that we may assist you. Such written correspondence may be sent to:

DHHS Working Group for ADA/Olmstead
c/o Center for Medicaid and State Operations
HCFA, Room S2-14-26, DEHPG
7500 Security Boulevard
Baltimore, MD 21244-1850

or e-mailed to:

ADA/Olmstead@hcfa.gov

This letter, as well as future questions and answers, will be posted on the Health Care Financing Administration's ADA/Olmstead website. That site can be found at http://www.hcfa.gov/medicaid/olmstead/olmshome.htm.

We look forward to continuing our work with you to improve the nation's community service system.

Sincerely,

Timothy M. Westmoreland
Director
Center for Medicaid and State Operations
Health Care Financing Administration

Thomas Perez
Director
Office for Civil Rights

Enclosure

cc:
All HCFA Regional Administrators
All HCFA Associate Regional Administrators
for Medicaid and State Operations
American Public Human Services Association
Association of State and Territorial Health Officials
National Association of State Alcohol and Drug Abuse Directors, Inc
National Association of State Directors of Developmental Disabilities Services
National Association of State Mental Health Program Directors
National Association of State Units on Aging
National Conference of State Legislatures
National Governors' Association

Olmstead/ADA Questions and Answers

On January 14, 2000, the Department of Health and Human Services issued a letter to State Medicaid Directors discussing the Supreme Court's decision in Olmstead v. L.C., 119 S.Ct. 2176 (1999). In Olmstead, the Supreme Court affirmed that the unjustified segregation and institutionalization of people with disabilities constitutes unlawful discrimination in violation of the Americans with Disabilities Act (ADA). The January 14 letter sets out a process for technical assistance and information sharing, and indicated that questions and recommendations sent to the departmental workgroup would be posted on a special website. Accordingly, the following set of Qs&As has been posted on the site (see http://www.hcfa.gov/medicaid/olmstead/olmshome.htm).

QUESTIONS ABOUT COMPLAINT INVESTIGATION AND DEVELOPING "COMPREHENSIVE, EFFECTIVELY WORKING" PLANS

Q1. Since the Supreme Court's ruling, the Department of Health and Human Services (DHHS) has received over 150 complaints from individuals and organizations alleging that States are not providing services to qualified individuals with disabilities in the most integrated setting. How is DHHS addressing these complaints?

A. DHHS' Office for Civil Rights (OCR) is responsible for investigating complaints alleging discrimination on the basis of disability by public entities related to health and human services, and by entities receiving funds from DHHS. OCR's first objective is to work promptly and cooperatively with all parties involved, including States and individuals with disabilities, to obtain voluntary compliance whenever possible that reflects the balanced approach outlined in Olmstead.

The Olmstead v. L.C. decision indicates that a court might find a State in compliance with the ADA integration mandate if it can demonstrate that it has a "comprehensive, effectively working plan[s]" for providing services to individuals with disabilities in the most integrated setting, and a waiting list that moves at a reasonable pace not motivated by a desire to keep institutions full. While the court did not require States to undertake planning, we believe planning is a prudent and very practical recommendation for moving forward.

In appropriate cases, therefore, OCR is urging States to bring all relevant stakeholders together to develop and implement comprehensive and effective working plans for providing services to all qualified individuals with disabilities in the most integrated setting. OCR also is working with States to cooperatively resolve complaints filed on behalf of individuals. Only if OCR cannot

Q2. What is the Federal government doing to aid States in developing these plans, and to help States increase their capacity to provide community-based treatment and supports for people with disabilities?

A. DHHS is providing technical assistance to promote effective implementation of its longstanding policy of facilitating care and service provision in the most integrated setting. Specifically, OCR is working with the Health Care Financing Administration (HCFA) to provide technical assistance regarding individual State's compliance with the ADA. Also, Federal financial participation is available at the administrative rate to design and administer plans to serve individuals with disabilities in the most integrated setting, subject to the normal condition that the changes must be necessary for the proper and efficient administration of the State's Medicaid program.

Even more significantly, DHHS is reviewing its own policies, programs, statutes and regulations to identify ways to enhance and improve the availability of community-based services. The Department recognizes that key programs, such as Medicaid, may sometimes present difficulties for people with disabilities to have access to quality care in the community. The Department is developing and will implement its own comprehensive plan to eliminate these barriers. Recognizing that housing is a critical need, we are also working with the Department of Housing and Urban Development (HUD) to improve affordable, accessible housing opportunities for people with disabilities (see Q17 below). DHHS is committed to working with States to increase community-based alternatives to institutional care.

Q3. What recommendations does DHHS have regarding the elements of a comprehensive, effectively working plan?

A. HCFA and OCR have developed a set of plan recommendations which were attached to the January 14, 2000 State Medicaid Director letter and we encourage States to follow them. Listed below are some of the principles underlying the recommendations contained in the letter. For complete information regarding how to effectively carry out each principle, please consult the January 14 letter.

- **Comprehensive, Effectively Working Plans**

  Principle: Develop and implement a comprehensive, effectively working plan (or plans) for providing services to eligible individuals with disabilities in more integrated, community-based settings.

- **Plan Development and Implementation Process**

  Principle: Provide an opportunity for interested persons, including individuals

with disabilities and their representatives, to be integral participants in plan development and follow-up.

- **Assessments on Behalf of Potentially Eligible Populations**

  Principle: Take steps to prevent or correct current and future unjustified institutionalization of individuals with disabilities.

- **Availability of Community-Integrated Services**

  Principle: Ensure the Availability of Community-Integrated Services.

- **Informed Choice**

  Principle: Afford individuals with disabilities and their families the opportunity to make informed choices regarding how their needs can best be met in community or institutional settings.

- **Implications for State and Community Infrastructure**

  Principle: Take steps to ensure that quality assurance, quality improvement and sound management support implementation of the plan.

Q4. Does the Olmstead decision require States to have plans to provide services to people with disabilities in the most integrated setting?

A. The decision does not require a State to have such a plan. However, developing and implementing a comprehensive plan or supplementing existing plans to address unmet needs is an important way States may be able to demonstrate that they are in compliance with ADA requirements and actively address discrimination.

The decision indicates that a court might find a State in compliance with the ADA integration mandate if it can demonstrate that it has a "comprehensive, effectively working plan[s]" for providing services to individuals with disabilities in the most integrated setting.

Ideally, all people with disabilities would already be provided with services in integrated settings, thereby eliminating the need for planning. As a practical matter, however, many States--including those that have made significant investment in the development of community-based services--still face unmet needs. Developing and implementing the kind of plan described by the Supreme Court in Olmstead is a recommended step towards addressing these needs.

Q5. If a State already has a plan, does it need to develop a new one?

A. It depends on how comprehensive and effective the existing plan is. Ultimately, States must be able to demonstrate that their existing plans are comprehensive and effectively working. States are encouraged to evaluate their existing plans using the Recommendations attached to DHHS' January 14 letter, supplement existing plans as necessary, and monitor them to ensure that they are being implemented.

Q6. Why should a State engage in planning activity undertaken in response to an OCR complaint? Will it protect the State from other investigations or litigation?

A. Regulations issued under title II of the ADA direct OCR to investigate complaints against health and human service-related State and local government entitles. OCR has informed States against which it has received Olmstead-type complaints of its desire to try and resolve complaints by helping the State convene stakeholders to develop a comprehensive, effectively working plan to serve individuals with disabilities in the most integrated setting appropriate to their needs. Where States or other "respondents" (entities against which OCR has received complaints) engage in planning processes in good faith and at a reasonable pace, OCR may determine it is possible to allow plan development to proceed in lieu of investigation. Where a State or other respondent evinces no intent to undertake planning, or where delays in doing so evidence a lack of good faith, or where States or other respondents utterly fail to involve stakeholders in plan development, OCR may determine it necessary to commence full-blown investigation. Following investigation, if a violation is found and no resolution is reached, cases may be referred to DOJ for litigation.

The next question concerns the effect of such planning efforts upon legal claims brought by private litigants, or by non-OCR government actors, such as the DOJ. An agreement between a State and OCR would not have any direct impact on pending and future title II litigation brought by a private party or DOJ unless the private parties or DOJ enter into explicit agreements with the State that incorporate OCR's agreement, either in whole or in part.

That said, although there is no direct linkage between OCR complaint investigations and resolution activities and pending investigations or litigation brought by other private parties and DOJ, there may be situations where creating linkages may result in opportunities to bring all parties to the table to resolve pending claims through negotiation.

Q7. If a State decides to develop a comprehensive plan, what form must it take? Must there be only one plan, or can there be multiple plans?

A. The precise form of the plan is best determined by those who are responsible for developing and implementing it. That said, if OCR has a complaint against a State, and OCR has determined it possible as a preliminary matter to address the complaint by allowing plan development to proceed, OCR may require the State to have a framework that pulls together the essential elements of the various plans. In other words, to address a complaint filed with OCR, the State typically will be asked to demonstrate the pace at which services to people with disabilities are

being provided in the most integrated setting, even if more detailed planning documents are developed as "subplans."

Q8. In its letter to State Medicaid Directors dated January 14, 2000, DHHS recommends that States "actively involve people with disabilities in the planning process." Does this mean the Department believes that groups should be involved in medical treatment decisions?

A. The Department strongly encourages States to provide an opportunity for interested persons, including individuals with disabilities and their representatives, to participate in the State's overall plan development process. All stakeholders, including advocacy organizations, should participate in the plan development process to ensure that any plan is comprehensive, works effectively and is designed to meet the needs and concerns of all people with disabilities. Consumer directed organizations, such as independent living centers, often have specific expertise in helping people with disabilities transition from nursing homes and institutions into the community which States may wish to utilize. Decisions regarding the treatment and specific placement of an individual with a disability must be made by that individual in conjunction with the individual's treating professionals.

QUESTIONS ABOUT WHO IS AFFECTED BY OLMSTEAD V. L.C.

Q9. The decision in Olmstead v. L.C. involved two women with mental retardation and mental illness. Is the decision limited to people with similar disabilities?

A. No. The principles set forth in the Supreme Court's decision in Olmstead apply to all individuals with disabilities protected from discrimination by title II of the ADA. The ADA prohibits discrimination against "qualified individual(s) with a disability." The ADA defines "disability" as:

(A) a physical or mental impairment that substantially limits one or more of an individual's major life activities;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

To be a "qualified" individual with a disability, the person must meet the essential eligibility requirements for receipt of services or participation in a public entity's programs, activities, or services. For example, if the program at issue is open only to children, and that eligibility criterion is central to the program's purpose, the individual must satisfy this eligibility requirement.

Q10. To meet the definition of disability under the ADA and Section 504, a physical or mental impairment must be serious enough to limit a major life activity. What kinds of life activities are considered "major," and when does an impairment "substantially limit" a major life activity?

A. Examples of major life activities include caring for oneself, walking, seeing, hearing, speaking, breathing, working, performing manual tasks, and learning. They also include such basic activities as thinking, concentrating, interacting with others, and sleeping.

An impairment "substantially limits" a major life activity when the individual's important life activities are restricted as to the conditions, manner, and duration under which they can be performed in comparison to most people. Some examples of impairments which may, even with the help of medication or devices, substantially limit major life activities are: AIDS, alcoholism, blindness or visual impairment, cancer, deafness or hearing impairment, diabetes, drug addiction, heart disease, and mental illness. The determination whether an impairment "substantially limits" a major life activity must be made on a case-by-case basis.

Q11. What do the other two prongs of the definition, "record of" or "regarded as having" a disability mean?

A. The ADA also protects people who are regarded by others as having a substantially limiting physical or mental impairment, and people who have a record of a substantially limiting physical or mental impairment. For example, a person who is discriminated against based on his or her history of a serious seizure disorder is protected by the ADA, even if he or she no longer experiences seizures. Likewise, a person with a very mild seizure disorder that does not substantially limit any major life activity and is completely controlled by medication that has no side effects is protected by the ADA if he or she is discriminated against because he or she is perceived as, or "regarded as," having a disability.

Q12. What about elderly people and children? Are they covered?

A. No matter what specific impairment or group of people is at issue--including elderly people and children--each must meet the same threshold definition of disability in order to be covered by the ADA. The question is: "Does the person have an impairment, have a record of impairment, or is he or she being regarded as having an impairment, that substantially limits a major life activity?"

With respect to elderly people, age alone is not equated with disability. However, if an elderly individual has a physical or mental impairment that substantially limits one of more of his or her major life activities, has a record of such an impairment, or is regarded as having such an impairment, he or she would be protected under the ADA.

Q13. Are people with substance abuse problems covered by the ADA?

A. People with substance abuse problems, except for those currently using illegal drugs, are covered by the ADA if they have a disability that substantially limits a major life activity. This

means that people who have alcoholism, people who are addicted to non-controlled substances and people who have a history of drug addiction are covered by the ADA if important life activities are restricted as to the condition, manner, and duration under which they can be performed in comparison to most people. In addition, although current illegal drug users are not covered by the Act, persons who use illegal drugs may still be covered if they are discriminated against based on another disability, such as a mental or physical impairment that substantially limits a major life activity.

Q14. What is the relationship between the ADA and Section 504 definition of a person with a disability and the definition of disability used to establish eligibility for entitlement programs such as SSDI/SSI?

A. The definitions of disability used by entitlement programs are not the same as that used by the ADA and Section 504. Thus, the fact that an entitlement program such as SSDI/SSI or Medicaid has determined that a person is not disabled does not mean that they are not covered by the ADA or Section 504. That said, the fact that someone has been found disabled for purposes of an entitlement program, while not conclusive, is usually good evidence to support a finding of disability under the ADA and Section 504.

ADDITIONAL QUESTIONS
[SECTION 504; HUD AND DHHS]

Q15. What, if any, relationship does Olmstead v. L.C. have to Section 504 of the Rehabilitation Act of 1973 (Section 504)?

A. Section 504, which was enacted some seventeen years before the ADA, prohibits discrimination on the basis of disability by entities which receive Federal funding. Section 504 and the ADA use the same definition of disability. Title II of the ADA extends Section 504's prohibition of discrimination in Federally assisted programs to all activities of State governments, including those that do not receive Federal financial assistance. Although the Olmstead decision interpreted the ADA, unjustified segregation by a Federally funded program would also constitute disability discrimination under Section 504. A State program receiving Federal funds must comply with both Section 504 and title II of the ADA.

Q16. What about the Department of Housing and Urban Development? Is HUD involved in the Federal government's Olmstead implementation efforts?

Historically, the lack of accessible, affordable housing and necessary community based services has been a major barrier to the integration of people with disabilities. Access to affordable housing is frequently a necessary but missing prerequisite for moving out of a nursing home or other institutional settings. HHS and HUD are strongly committed to assisting States to develop

comprehensive working plans to strengthen community service systems and to actively involve people with disabilities and their families in the design, development and implementation of such plans. In some States HUD's "community builders" are aiding plan development, and we urge States to take advantage of the opportunity to call upon the expertise of our Federal partners, including HUD, in developing home and community-based infrastructure. Partnerships among housing, health and human services agencies and other key stakeholders in the disability and aging communities will prove central to a State's success.

Q17. We have many questions regarding the impact of this decision and how we can come into compliance with the law. Who should we talk to at HHS?

A. States should direct any questions or requests for technical assistance regarding their ADA and Section 504 obligations in response to the Olmstead decision to the OCR regional office that handles complaints filed in that State. A list of regional contacts – local staff designated to handle "most integrated setting" issues in each region – may be found at the conclusion of this document. Questions regarding Medicaid or Medicare policy should be directed to your HCFA regional office.

OCR REGIONAL OLMSTEAD CONTACTS

REGION I	Peter Chan	(617) 565-1353
		(617) 565-3809 fax
REGION II	Patricia Holub	(212) 264- 4997
		(212) 264 -3039 fax
REGION III	Ed Lewandowski	(215) 861- 4445
	Paul Cushing (Backup)	(215) 861- 4441
		(215) 861- 4431 fax
REGION IV	Mildred Wise	(404) 562-7866
	Roosevelt Freeman	(404) 562-7886
		(404) 562-7881 fax
REGION V	Michael Kruley	(312) 886-5893
	Al Sanchez	(312) 353-5531
		(312) 886-2301 fax
REGION VI	George Bennett	(214) 767- 4546
	Ralph Rouse (Backup)	(214) 767- 4056
		(214) 767- 0432 fax
REGION VII	Jean Simonitsch	(816) 426 - 6513
	John Halverson	(816) 426 - 7236
	Peter Kemp (Backup)	(816) 426 - 7236
		(816) 426 - 3686 fax
REGION VIII	Andrea Oliver	(303) 844- 4774
	Jean Lovato	(303) 844- 7835
	Velveta Golightly-Howell	(303) 844- 5101
		(303) 844- 6665 fax
REGION IX	Mario Sagatelian	(415) 437- 8326
	Monica Eskridge	(415) 437- 8324
		(415) 437- 8329 fax
REGION X	Bennett Prows	(206) 615- 2621
	Carmen Rockwell	(206) 615 -2288
		(206) 615- 2297 fax