

**Testimony on LB 570
Before the Health and Human Services Committee
Nebraska Legislature**

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Good afternoon Senator Howard and members of the Health and Human Services Committee. For the record, my name is Dianne DeLair, spelled D-I-A-N-N-E D-E-L-A-I-R, and I am the senior staff attorney for Disability Rights Nebraska, the designated protection and advocacy system for the State of Nebraska. I'm here to provide testimony in support of LB 570.

In order to understand why LB 570 is so important, it is necessary to provide some legal and historical context.

On April 18, 2016, Gov. Ricketts signed LB 1033, legislation that required the State of Nebraska to create and implement an Olmstead Plan for the State of Nebraska. What is an Olmstead Plan? It is a plan for systems change.

The Meaning of Olmstead and the Integration Mandate

In 1990, a bipartisan Congress passed the Americans with Disabilities Act (ADA), and it was signed into law by President George H.W. Bush. The ADA is a universal ban of discrimination on the basis of disability in employment, transportation, telecommunications, public accommodation, and public services. Title II specifically prohibits state and local government agencies, along with other public entities, from discriminating against people with disabilities in their programs, services, and activities.¹ To accomplish these goals, the ADA charged the Department of Justice (DOJ) with the responsibility to promulgate rules and regulations consistent with the ADA, as well as to enforce its provisions.

¹ 42 U.S.C. §§ 12131 through 12134 (Part A).

The DOJ regulations that implement Title II require a public entity to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.² The “most integrated setting appropriate” has been defined as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”³ This is the Integration Mandate.

In 1999, the United States Supreme Court issued its landmark opinion in *Olmstead v. L.C.* The central issue was the meaning of the Integration Mandate and what it requires of states. The Court’s decision made clear that the Integration Mandate requires public entities to ensure services provided to qualified individuals with disabilities are administered in the most integrated settings appropriate to their needs.

Olmstead extends not only to those institutionalized, but also to persons at serious risk of institutionalization or segregation and is not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity’s failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual’s eventual placement in an institution.⁴

In light of the *Olmstead* decision, President George H.W. Bush made it a high priority for his Administration to tear down barriers to equality and to expand opportunities available to Americans living with disabilities. In 2001, he launched the “New Freedom Initiative.” It affirmed the nation’s commitment to the provision of publicly-financed community-based services and supports to individuals with disabilities to foster independence and community participation.

² 28 C.F.R. § 35.130(d).

³ 28 C.F.R. § 35, App. A, (1998).

⁴ U.S. Department of Justice, *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.* (June 22, 2011) (“DOJ *Olmstead* Guidance”), available at http://www.ada.gov/olmstead/q&a_olmstead.htm (last visited February 26, 2019). See also Appendices describing *Olmstead* matters involving “at-risk” populations.

The federal government's commitment to ensure the right of people with disabilities to live, work and receive services in integrated community settings was reaffirmed by President Obama when he declared 2009 to be "The Year of Community Living" and directed the Department of Justice (DOJ) and other federal agencies to "vigorously enforce the civil rights of Americans with disabilities." This Executive Order went further and President Obama made clear that states could no longer shirk their duties to people with disabilities and made *Olmstead* a top priority.⁵ As an enforcement measure, the *Olmstead* Division was created within the Department of Justice and has been very active in the last decade.

What *Olmstead* Means Today

In the years since *Olmstead*, the ADA's integration mandate has been applied to a wide variety of contexts and has been the subject of substantial litigation.

For example, a state's reliance on segregated private institutions puts that state at risk of litigation:

[A] public entity may violate the ADA's integration mandate when it: (1) directly or indirectly operates facilities and/or programs that segregate individuals with disabilities; (2) finances the segregation of individuals with disabilities in private facilities; and/or (3) through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs.⁶ *Olmstead* has also been applied to:

Nursing homes;

Day programs and sheltered workshops;

Adult homes and assisted-living facilities;

Skilled nursing facilities;

ICF/DDs;

⁵ *Id.*

⁶ *Id.* See also Appendices describing the segregated settings challenged in *Olmstead* matters.

Institutions for Mental Diseases;

Children with significant medical needs in nursing homes;

Children in psychiatric facilities or who may be at risk of institutionalization;

Students in special education classrooms or more restrictive educational settings;

Individuals frequently readmitted to state psychiatric hospitals, frequently seen in emergency rooms, chronically homeless, and/or those being released from jails or prisons.⁷

Nebraska has not addressed any of these areas. In each of these cases, the DOJ has told states what they will do. Instead of being told what to do, Nebraska has an opportunity to decide what will work best for itself. To do so, Nebraska must develop a comprehensive *Olmstead* plan.

The Department of Justice states:

An *Olmstead* plan is a public entity's plan for implementing its obligation to provide individuals with disabilities opportunities to live, work, and be served in integrated settings. 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.⁸

Instead, an *Olmstead* plan must:

- Reflect an analysis of the extent to which the public entity is providing services in the most integrated setting;

⁷ For a listing of DOJ *Olmstead* settlement agreements and their terms, see U.S. Department of Justice, *Olmstead: Community Integration for Everyone, Olmstead Enforcement*, available at http://www.ada.gov/olmstead/olmstead_enforcement.htm (last visited February 28, 2019).

⁸ U.S. Department of Justice, *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. (June 22, 2011)* ("DOJ *Olmstead* Guidance"), available at http://www.ada.gov/olmstead/q&a_olmstead.htm (last visited February 26, 2019).

- Contain concrete and reliable commitments to expand integrated opportunities;
- Have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable;
- Have funding to support the plan, which may come from reallocating existing service dollars; and
- Include commitments for each group of persons who are unnecessarily segregated (such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs).⁹

This was the message delivered to the Nebraska Department of Health and Human Services in 2014 from its own consultant that was hired to examine Community Integration in Nebraska:

Community integration – and, more specifically the civil right of individuals to live in the most integrated settings possible – is the law, and state government collectively, not just singular agencies, should affirmatively plan and ensure that individuals with mental illness and other disabilities are afforded these opportunities. In order for Nebraska to meet its requirements under the ADA and Olmstead and minimize litigation risks, it will need to initiate an actionable planning process that results in an effectively working plan.¹⁰

⁹ *Id.*

¹⁰ Technical Assistance Collaborative, *Nebraska Division of Behavioral Health Community Integration in Nebraska's Behavioral Health System* at 20. (April 2014), available at http://www.disabilityrightsnebraska.org/file_download/84651d49-204b-4e4e-8c80-20789ce4957c.

A plan alone, however, is insufficient. Minnesota was in federal court for a second time recently because it failed to develop precise and measurable goals to implement its *Olmstead* plan.¹¹

Nebraska has no *Olmstead* plan whatsoever, and has failed to create one for nearly two decades. Nebraska's consultants issued an additional report in August of 2016, referring to the State's passage of LB 1033, as it outlined short-term and long-term recommendations for supportive housing.¹² Initiate and lead an *Olmstead* planning process that leads to the development of a working '*Olmstead* Plan' was the first strategic goal recommended in the report.¹³

Nebraska is at significant risk of litigation because of this failure. No longer can singular divisions and agencies hide behind piecemeal strategic plans and initiatives. LB 1033 has brought together the entities, agencies and divisions necessary to work together to develop a comprehensive *Olmstead* plan. The State must now be committed to actually develop and implement the plan.

Nebraska Has No *Olmstead* Plan

Nebraska has been afforded opportunities time and again to develop an *Olmstead* plan, and has been told to do so. Nebraska has said time and again that it is doing things that are in compliance with *Olmstead*. This is simply not the case.

¹¹ [Chris Sierres, *Federal judge rebukes Minnesota on plan to reform disability services*, Star Tribune \(May 7, 2015\) available at <http://www.startribune.com/federal-judgerebuked-minnesota-on-plan-to-reform-disability-services/302812441/> \(last visited February 28, 2019\).](http://www.startribune.com/federal-judgerebuked-minnesota-on-plan-to-reform-disability-services/302812441/)

¹² Technical Assistance Collaborative, *Nebraska Supportive Housing Plan* (August 4, 2016), available at http://dhhs.ne.gov/behavioral_health/Documents/TACFinal2016.pdf (last visited February 28, 2019).

¹³ *Id.*

The Nebraska Department of Health and Human Services develops strategic plans, long-term care studies and various other planning activities. Simply put, these are not Olmstead plans, and no federal court will consider them as one.

In 2008, the U.S. Department of Justice issued its letter of findings following the investigation into BSDC.¹⁴ The letter of findings explicitly states that Nebraska did not have a written Olmstead plan. More recently, the Nebraska Department of Health and Human Services hired a consultant from the Technical Assistance Collaborative to examine community integration with respect to people with mental illness in our state. The consultant issued the report in April 2014,¹⁵ with alarming language warning the state:

However, Nebraska does not have an Olmstead plan that addresses the community integration needs of people with mental illness, and Nebraska's state government could do more to support the community integration of people with psychiatric disabilities. As a result, the state faces some exposure to Olmstead litigation absent a collective and coordinated planning and implementation process.¹⁶

¹⁴ "Indeed, throughout our visit, BSDC staff acknowledged that persons with developmental disabilities generally can benefit from community placement. In spite of this, the State has not yet developed a written "Olmstead Plan," which most states have developed to foster placement of persons with developmental disabilities to more integrated community settings." Grace Chung Becker, U.S. Department of Justice, Letter re: *CRIPA Investigation of the Beatrice State Developmental Center, Beatrice, Nebraska*, at 32 (March 7, 2008), available at http://www.ada.gov/olmstead/documents/nebraska_findings.pdf (last visited February 28, 2019).

¹⁵ Technical Assistance Collaborative, *Nebraska Division of Behavioral Health Community Integration in Nebraska's Behavioral Health System* (April 2014). http://www.disabilityrightsnebraska.org/file_download/84651d49-204b-4e4e-8c80-20789ce4957c. (last visited February 28, 2019).

¹⁶ *Id.* at 9 .

Indeed, “Nebraska does not have an *Olmstead* plan that addresses any disability group.”¹⁷

What is clear is the DOJ and federal government take *Olmstead* very seriously. Most states have not been afforded the opportunity to develop their own *Olmstead* plans because they have waited too long. At that point it is too late, and the DOJ tells states what they will do. Nebraska has a unique opportunity to address these issues now without facing the time and costs of multiple lawsuits. If Nebraska does not pass this legislation, and does not finish the development of an *Olmstead* plan and begin implementation, the question will not be whether Nebraska will be in federal court; the question will be when.

We have waited nearly two decades for Nebraska to comply with federal law, and Nebraskans with disabilities cannot wait any longer.

The time for change is now, which is why Disability Rights Nebraska respectfully asks for this Committee’s support of LB 570.

¹⁷ *Id.* at n. 9.