

# CHCS

Center for  
Health Care Strategies, Inc.

## Consumer Action Series

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### WORKING PAPER

#### **Defining "Reasonable Pace" In the Post-Olmstead Environment**

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By Sara Rosenbaum, Alexandra Stewart,  
and Joel Teitelbaum, Center for Health  
Services Research and Policy, The George  
Washington University

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## Introduction

This Working Paper is the second in a series that explores the central policy issues that arise from the United States Supreme Court's decision in *Olmstead v. L.C.*<sup>1</sup> The *Olmstead* case represents the Court's first analysis of the Americans With Disabilities Act (ADA)<sup>2</sup> as it applies to qualified persons with disabilities who have been determined to be in medically unnecessary institutional placements.

While *Olmstead* underscores the legal right not to be discriminated against in the provision of community services, the decision is complex, particularly in its articulation of when discrimination actually exists as well as the extent of public agencies' legal obligations to remedy existing discrimination. Two of the most complex—and related—concepts that are integral to the case are “reasonable pace” and “fundamental alteration.” This Working Paper considers the concept of reasonable pace. A subsequent Working Paper will examine the meaning of “fundamental alteration.”

For many people, the term “reasonable pace” brings to mind the Supreme Court's use of the term “with all deliberate speed” in its landmark decision in *Brown v. Board of Education of Topeka*,<sup>3</sup> which ordered the desegregation of the nation's public schools. Like “deliberate speed,” the concept of “reasonable pace” is highly contextual and is shaped by the circumstances under consideration, the facts of particular cases, and the courts' efforts to weigh the ADA's fundamental goal of community integration against the level of public resources available to provide the full range of services necessary to the support of persons with disabilities. In short, the cases to date suggest that there is no fixed definition of what level of effort is needed to achieve a “reasonable pace.” At the same time, the community integration decisions reviewed in this Working Paper suggest certain markers that courts will look to in deciding if the reasonable pace standard of performance is met.

## The *Olmstead* Decision and the Concept of Reasonable Pace as a Defense to a Claim of Discrimination

*Olmstead v. L.C.* concerned the meaning of discrimination under the ADA, as well as the extent to which public agencies must modify existing standards and practices in cases in which discrimination is found in order to meet the law's community integration requirements. Those requirements, found in implementing regulations to Title II of the ADA, provide that “a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>4</sup>

In *Olmstead*, the Court held that persons with disabilities have a right not to be discriminated against in the provision of publicly funded community services when certain conditions are met: 1) the state's treatment professionals determine that community placement is appropriate; 2) the affected individual does not oppose community treatment; and 3) the placement can be reasonably accommodated, after considering the state's resources as well as the needs of other disabled individuals.<sup>5</sup> While the Court did not define the term “reasonable pace,” it did indicate that a public agency could successfully defend against a claim of discrimination if it could demonstrate that it was making reasonable modifications in its programs and services to achieve community integration – that is, that individuals requiring community-based services were placed on a “waiting list that moved at a reasonable pace not controlled by the state's endeavors to keep its institutions fully populated.”<sup>6</sup> By implication, the very establishment of a reasonable pace standard for measuring when the state is acting in a lawful manner even though all needs are not met immediately amounts to a validation of the concept of waiting periods. As long as a waiting list for community care is moving at a reasonable pace, which, as the cases below show, is measured against the totality of circumstances, a wait is not inherently unreasonable.

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<sup>1</sup> 527 U.S. 581 (1999).

<sup>2</sup> 42 U.S.C. §§ 12101 et. seq.

<sup>3</sup> 74 S.Ct. 686 (1954).

<sup>4</sup> 28 C.F.R. §35.130(d).

<sup>5</sup> *Olmstead*, 527 U.S.

<sup>6</sup> *Id.* at 606.

## Reasonable Pace Litigation: An Overview of the Cases<sup>7</sup>

### Introduction

All of the states involved in the litigation analyzed for this Working Paper<sup>8</sup> offer community-based services financed through Medicaid, both as a state plan benefit and as part of a home- and community-based waiver program.<sup>9</sup> Medicaid is a means-tested program that provides federal financial assistance to participating states operating approved medical assistance plans to qualified individuals. Federal financing is open-ended and participating states are entitled to payments up to the full level of their approved plans, without aggregate upper limits.<sup>10</sup> Medicaid represents more than 15 percent of national spending on personal health care in the United States and is the single largest source of financial support for essential community health providers. Medicaid also is notable for the individual legal entitlement that inures to program beneficiaries.

Medicaid makes federal funds available to support community services for persons with disabilities in two basic ways. First, as part of its basic state plan for medical assistance, a state can (and in the case of certain services and populations, must) cover many types of medical assistance services essential to community care. Examples of services covered under all state plans in the case of children,<sup>11</sup> and most in the case of adults, are personal care, durable equipment, home health services, clinical services, and transportation. Second, a state can obtain special “waivers” of certain federal legal restrictions to offer specified services as part of a special benefit package for particular disabled populations and the elderly. This special and cumulative approach to home care services is known as the Medicaid “waiver program,”<sup>12</sup> because inclusion in the state plan turns on the granting of waivers by the Secretary of the U.S. Department of Health and Human Services.

The home and community care waiver program in Medicaid<sup>13</sup> gives states added flexibility in coverage in several critical respects. First, under a waiver, states can qualify for federal financial assistance to support services that otherwise do not qualify for federal contributions. Second, states can target these supplemental services to distinct populations (e.g., adults with retardation) without violating Medicaid’s basic rule that services be comparable for all mandatory and optional categorically needy coverage groups.<sup>14</sup> Third, a state may cap the total number of community care waiver slots with aggregate upper limits on the number of qualified persons who can use the service. States use aggregate caps in order to control overall growth in long-term care spending, since for every institutional placement that becomes available as the result of a waiver slot given to a person who qualifies, another individual who needs institutional care conceivably might move into the now-empty bed.

Waiver programs also take away an important type of flexibility available to states through the imposition of a budget neutrality cap that requires that expenditures for waiver recipients be no more expensive on average than per capita expenditures for institutional placements for comparable populations. This per capita budget neutrality test does not exist for state plan services.

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<sup>7</sup> Two tables accompany this paper in an appendix. The first summarizes how courts have responded to the various waiting periods required of individuals before community services were made available; the second table provides case information and an overview of the arguments made by the states in defense of their community service programs.

<sup>8</sup> Reviewed cases originated in the following states: Florida, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, and West Virginia.

<sup>9</sup> Pursuant to 42 U.S.C. §1396n(c). Upon State request, the Secretary of the U.S. Department of Health and Human Services may authorize exceptions to the usual state Medicaid plan requirements and permit a state to implement creative programs or activities on a time-limited basis. These exceptions are subject to specific safeguards for the protection of recipients and the program. States may forgo requirements pertaining to statewideness, comparability of services among population subgroups, and income and resources. 42 U.S.C. §1396n(c)(3).

<sup>10</sup> Payments are calculated under a federal formula linked to state wealth and ranging from 50 percent to more than 80 percent of approved state medical expenditures.

<sup>11</sup> The Medicaid Early and Periodic Screening, Diagnostic, and Treatment program requires states to cover all medically necessary care for children enumerated in the federal definition of medical assistance, regardless of whether the benefit is covered under the state’s plan for adults.

<sup>12</sup> *Understanding Medicaid Home and Community Services: A Primer*. U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, October 2000.

<sup>13</sup> 42 U.S.C. §1396n(c)(3); 42 C.F.R. §441.180

<sup>14</sup> 42 U.S.C. §1396a(a)(10).

Of importance to reasonable pace litigation, once a state's waiver request is approved, the slots become part of the state's plan, and are subject to all of the state plan requirements that pertain to other state plan services. Equally important, there are a number of circumstances in which community services that are included as a state plan element and not as a waiver service cannot be limited in the same fashion as in the case of waivers. For example, personal attendant services are mandatory for all severely disabled children who need the service as a basic state plan requirement under Medicaid's Early and Periodic Screening, Diagnostic, and Treatment program. In furnishing such a service, federal rules against discrimination in the provision of required services would prevent a state from confining personal attendant services only to children with physical disabilities.<sup>15</sup>

The *Olmstead* case presented a specific example of a state practice that every court—both before and after *Olmstead*—has found unlawful under both Medicaid principles and the ADA. In *Olmstead*, the state of Georgia had secured approval for coverage of 2,100 waiver slots as part of its state Medicaid plan. The state then failed to finance all of its state plan services, funding only 700 of the 2,100 slots. This failure to fund its program was recognized by the Court as a major factor in the state's failure to move into the community women whose institutional placement was determined to be medically unnecessary.<sup>16</sup> In other words, the state's failure to fund community slots in its state plan was prima facie evidence of moving at an unreasonable pace. However, had the state only obtained 700 approved slots to begin with, the failure to cover more would not have been a violation of the reasonable pace requirement, since modification of an insurance plan is considered a "fundamental alteration" of a program or activity and thus lies beyond the legal limits of what the ADA requires.

### **A Review of Post-*Olmstead* Cases**

Approach and Scope of Review. In order to prepare this Working Paper, we conducted an on-line search of all cases and decisions since June 1999 (the date of the *Olmstead* decision) in which the concept of reasonable pace was discussed in the context of community integration claims. We found that to date, eight federal courts have addressed the meaning of "reasonable pace." Because Medicaid is so intertwined with community service litigation under the ADA, many of these cases raise a parallel Medicaid "reasonable promptness" claim; that is, a claim that benefits and services covered under a state's Medicaid plan (either as a basic state plan service or as a supplemental waiver service) were not furnished with reasonable promptness, as is required under Medicaid law.<sup>17</sup>

Our analysis of the cases indicates that when confronted with defining "reasonable pace," courts seek guidance from three sources: the *Olmstead* decision itself and its interpretation of the ADA; federal Medicaid law (both statutes and regulations);<sup>18</sup> and other court decisions that have considered similar issues. Also, the discussion of "reasonable pace" and "reasonable promptness" concepts in these cases takes place in various phases of the lengthy litigation process that surrounds these types of lawsuits. Thus, some of the reviewed decisions are preliminary rulings, some represent final judgments by trial courts, and others are appellate decisions.

Furthermore, the cases analyzed generally arise from similar fact patterns. For example, 90 percent involve plaintiffs with mental disabilities (mental retardation, developmental disability, mental illness, or traumatic brain injury).<sup>19</sup> In most cases the plaintiffs are adults, but children are named as plaintiffs as well.

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<sup>15</sup>In the case of adults ages 21 and older, personal care attendant services are optional. As a result, federal "amount, duration, and scope" requirements would appear to permit states to target optional services by diagnosis so long as the targeting is not arbitrary. 42 C.F.R. §440.230.

<sup>16</sup>*Olmstead*, 527 U.S. at 601.

<sup>17</sup>42 C.F.R. §435.930.

<sup>18</sup>For example, ". . . the agency must . . . furnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. §435.930.

<sup>19</sup>States use waiver services and community programs extensively for individuals with mental disabilities, which may explain why that group is so frequently identified in the plaintiff class.

Furthermore, upon a finding of eligibility for services in a community setting, the state defendants placed the plaintiffs on waiting lists (both for waived services and for services that actually were covered for certain plaintiffs as a state plan matter) for periods of time ranging from three months to over 10 years.

In some cases, these waiting lists have included several hundred individuals. In other cases, the magnitude of the waiting list was not clear because the state had no process for identifying persons who conceivably could benefit from a community placement, for evaluating the individual, or for getting the individual onto a waiting list. Thus, the implicit waiting list in some cases could have been in the thousands if the lack of a process also were factored in.

Findings. Our analysis yielded a series of findings that underscore the complexity of the cases and the fact that no particular set of facts is a predictor of how a court will resolve a reasonable pace claim.

- In half of the cases, courts issued preliminary or final decisions in favor of the plaintiffs, when courts found violations of the Medicaid statute, the ADA, or considered the question worthy of investigation and permitted the issue to proceed to trial.
- Once a state includes a waiver service in its state plan, courts are likely to determine that the service must be administered in accordance with federal statutes and regulations, including the reasonable promptness requirement. Home- and community-based services are “medical assistance” under the Medicaid law, and once incorporated into the state plan, must be provided to all eligible individuals with reasonable promptness.
- Courts will generally reject a defense based on alleged inadequate funding as the cause of delayed community services once the state has instituted a waiver program, particularly when the waiver satisfies Medicaid’s cost neutrality requirement. However, if the state can show under the ADA that the additional funding needed to support increased community services would result in a fundamental alteration of the entire waiver program, or a violation of the cost-neutrality principle, the argument could be successful.
- When a court employs only a Medicaid analysis regarding the design of the state’s program, states are relatively likely to be found in full compliance with the law, and courts are more likely to permit long waiting lists. But where a court undertakes an analysis of the facts under both Medicaid and the ADA, it is more likely to find that program administration leading to long waiting lists fails to satisfy the integration mandate contained in the ADA.
- Courts have been willing to permit states to maintain long waiting lists for waiver services once state programs have reached the federally approved maximum population limit. This is because, as noted, Medicaid law permits a maximum population limit on the number of individuals allowed admittance into a waiver program that, once achieved, renders all other applicants ineligible until a slot becomes available.
- Courts have been willing to permit long waiting lists when a state can show that changes requested by the plaintiffs would result in a fundamental alteration of the program.

In considering the concept of reasonable pace in the context of a community services case involving Medicaid, courts seem prepared to define “reasonable pace” by analogizing to the Medicaid program’s use of the term “reasonable promptness,” which, as noted, requires states to provide services without any delay caused by the agency’s administrative procedures. States have defended their administration of home- and community-based waiver programs by presenting several arguments asserting that they have not violated the reasonable pace (or reasonable promptness) requirement. Each argument is outlined on the next page.

**1. Courts are unable to quantifiably define “reasonable pace” and therefore cannot adjudicate individual claims or require state action within a specified time period.** In four cases,<sup>20</sup> states have maintained that the term “reasonable pace” is too imprecise for courts to categorically determine. Courts have had little trouble rejecting this argument, generally finding that plaintiffs’ rights to reasonably prompt medical assistance, including waiver services, is not so vague and amorphous that it cannot be enforced by the courts.

Courts have noted that placing qualified individuals on waiting lists for several years presented facts that “are egregious enough that the reasonableness requirement does not strain judicial competence.”<sup>21</sup> In *Boulet v. Cellucci*, the court observed, “the requirement is not too vague for judicial assessment. Certain periods of time, like the three to ten or more years plaintiffs have been waiting, are ‘far outside of the realm of reasonableness’ – a conclusion which a court is perfectly capable of reaching.”<sup>22</sup> Further, a “case-by-case analysis is not required to determine a time frame that is reasonably prompt. In all cases, waiting periods of many years are outside of the zone of reasonableness.”<sup>23</sup>

At the same time, the case of *Doe v. Bush* shows that in order to fully define state responsibilities in this area, courts may have to do more to develop the reasonable pace requirement than simply count the number of days between application and service provision. In *Doe*, the plaintiffs obtained an injunction that ordered the state to establish a reasonable waiting list time period, not to exceed 90 days, for individuals who are eligible for Medicaid services. In response, the state implemented a two-step review process for determining eligibility that allowed for 90 days from the date of the initial request for services to determine eligibility, plus an additional 90 days to actually provide the services. The district court held the state in contempt, finding that it had “unreasonably interpreted the order as allowing two successive 90-day time periods in which to determine eligibility for and then ensure the provision of services.”<sup>24</sup>

The state appealed the contempt order. The 11th Circuit Court of Appeals held that the state was not in contempt, and accepted the state’s interpretation that the original order was ambiguous, and that it failed to address the question of when the 90-day waiting period is triggered, or how long the state had to determine who is eligible.

**2. The failure to provide waiver services in compliance with the reasonable pace/reasonable promptness standard is due to insufficient funding.** In five cases, states claimed that they lacked sufficient funding to move individuals off waiver program waiting lists at a reasonable pace,<sup>25</sup> and that inadequate funding is a permissible reason for long waiting lists.

In three of the five cases, courts rejected the argument that insufficient funding was alone a proper reason for excessive waiting times to receive community services. In *Benjamin H. v. Ohl*, the district court noted that “[t]he defendant cannot escape liability by a conclusory declaration that no more money will be provided to meet the State’s obligations under the Medicaid Act or the ADA. The defendant will have to show more than that the State has not appropriated enough funding.”<sup>26</sup> The court in *Boulet* echoed that sentiment, writing, “Inadequate funding does not excuse failure to comply with the reasonable promptness requirement.”<sup>27</sup>

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<sup>20</sup> *Boulet v. Cellucci*, 107 F. Supp.2d 61; *DeLong v. Houston*, Civil Action No. 00-CV-4332; *Doe v. Bush*, 261 F.3d 1037; *Lewis v. N.M.Dept. of Human Ser.* 96 F. Supp.2d 1217.

<sup>21</sup> *Lewis*, 96 F. Supp.2d at 1235.

<sup>22</sup> *Boulet*, 107 F. Supp.2d at 72.

<sup>23</sup> *Id.*

<sup>24</sup> *Doe*, 261 F.3d at 1047.

<sup>25</sup> *Benjamin v. Ohl*, Civil Action No. 3:99-0338 (D. WV); *Boulet*, 107 F. Supp.2d.; *Bryson v. Shumway*, Civil Action No. 99-558-M (D. NH); *Lewis*, 96 F. Supp.2d; *Makin v. Hawaii*, 114 F. Supp.2d 1017.

<sup>26</sup> *Benjamin*, Civil Action No. 3:99-0338 at 22.

<sup>27</sup> *Boulet*, 107 F. Supp.2d at 80.

In the two other cases, however, courts indicated a willingness to accept the insufficient funding argument where the state could show that providing waiver services at a faster clip to those on the waiting list would require states to expend additional resources in violation of either the ADA's "fundamental alteration" regulation or Medicaid's cost-neutrality requirement.<sup>28</sup>

In *Lewis v. New Mexico*, the plaintiffs alleged that the state failed to 1) plan for budget increases in the waiver programs, and 2) submit budget requests with sufficient funds so that individuals could be removed from its waiting list with reasonable promptness.<sup>29</sup> The State countered by claiming that placing the plaintiffs in the least restrictive settings would "impermissibly require the state to expend funds" in violation of "established principles of federalism."<sup>30</sup> The court, employing the reasonable modification/fundamental alteration analysis, held that the right to integrated placements is limited by a state's resources, and that a cost analysis must be conducted to determine whether the plaintiffs' demands could be satisfied through the adoption of reasonable modifications. As a result, the state would have to show in a future trial that the necessary cost analysis resulted in a showing that increased funding would impermissibly alter its health care program.

The *Bryson* court recognized that the reasonable promptness requirement could be limited by the Medicaid cost-neutrality requirement. "While defendants are statutorily obligated to provide . . . waiver services with reasonable promptness, the concept of reasonable promptness must take into account defendants' statutory obligation not to violate the basic cost-neutrality requirement of the waiver program. Thus, if defendants' delays in providing plaintiffs . . . waiver services are attributable to adherence to the cost-neutrality requirement, these delays cannot be unreasonable."<sup>31</sup>

**3. Medicaid provisions regarding population limits on waiver services permits waiting lists of more than 90 days.** Medicaid requires the U.S. Secretary of Health and Human Services to approve the number of waiver slots requested by each state (and assure that each program include a minimum of 200 slots). Three states have asserted that Medicaid contemplates that waiver services will be limited to a certain number of individuals, and that there can be no right to such services beyond the designated number of slots.

Basing their rulings on the Medicaid statute<sup>32</sup> and regulations,<sup>33</sup> the courts in *Makin* and *Boulet* accepted this argument, noting that it is permissible for a state to limit the size of a waiver program and that waiver services are not available to additional individuals when all waiver slots are filled. However, the court in *Lewis* rejected the argument, holding that "[Medicaid] envisions a floor for waiver services . . . and that the state applies for a waiver for a certain number of individuals does not prevent the state from applying for a waiver to serve enough persons such that it can provide waiver services to all eligible applicants with 'reasonable promptness'."<sup>34</sup>

**4. Services offered under waiver programs are not entitlements and are not subject to the reasonable promptness requirement.** Four states have argued that the reasonable promptness requirement applies only to mandatory Medicaid services.<sup>35</sup> According to this argument, because states initiate and administer waiver programs at their option, individuals have no legal entitlement to such services, and they may not demand that the services be furnished with reasonable promptness.

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<sup>28</sup> See explanation of cost neutrality supra page 4.

<sup>29</sup> *Lewis*, 96 F. Supp.2d at 1222.

<sup>30</sup> *Id.* at 1238.

<sup>31</sup> *Bryson v. Shumway*, Civil No. 99-558-M, at 47.

<sup>32</sup> 42 U.S.C. §1396n(c)(2)(C)(c)(9) states: "In the case of any waiver under this subsection which contains a limit on the number of individuals who shall receive home or community-based services, the State may substitute additional individuals to receive such services to replace any individuals who die or become ineligible for services under the State plan."

<sup>33</sup> 42 C.F.R. §441.303(6) states: "The State must indicate the number of unduplicated beneficiaries to which it intends to provide waiver services in each year of its program. This number will constitute a limit on the size of the waiver program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment."

<sup>34</sup> *Lewis*, 96 F. Supp.2d at 1234.

<sup>35</sup> *Boulet*, 107 F. Supp.2d.; *Bryson*, Civil Action No. 99-558-M; *Lewis*, 96 F. Supp.2d; *Makin*, 114 F. Supp.2d 1017.

The courts in *Boulet*, *Bryson*, and *Lewis* rejected this argument, concluding that when a state chooses to provide optional waiver programs, the services become part of the state's Medicaid plan and eligible individuals are entitled to both program services and the associated protections of the Medicaid Act, including the reasonable promptness requirement. The courts further reasoned that Medicaid's requirement that the federal government approve a waiver plan only if that plan provides satisfactory assurances that qualified individuals are informed of feasible alternatives<sup>36</sup> would mean little if individuals were not entitled to these alternatives.

In *Boulet*, the state argued that it was satisfying the reasonable promptness requirement by providing waiver services that were different from those requested, and that qualified individuals who were on waiting lists were not entitled to the specific service of their choice with reasonable promptness. The court rejected this argument because the specific requested services were included in the state's plan, and, as a result, all eligible individuals up to the approved population limit were entitled to receive the specific services, as long as settings existed for the delivery of such services.

In *Boulet* and *Bryson*, all qualified individuals who had applied for services had been deemed eligible within 90 days, but were then placed on waiting lists for years. The states asserted that the *finding of eligibility* was all that was needed to satisfy the reasonable promptness requirement, since "reasonable promptness" applies only to administrative delay surrounding the determination of eligibility, not to undue delay in the actual provision of services. Relying on the plain language of the Medicaid statute, the courts rejected this claim, finding that the duty of reasonable promptness applies both to the "administrative aspect" of benefit delivery and the actual delivery of services.

Only the *Makin* court found that individuals are not entitled to services obtained through an optional waiver program, and that as a result waiver service recipients could be subjected to a lengthy waiting list. According to the court, the state was permitted under the Medicaid statute to limit the number of individuals who were to receive waiver services, and therefore qualified individuals were not entitled to the waiver services unless open slots existed within the population limits.

**5. Requiring states to provide waiver services with reasonable promptness would result in a fundamental alteration of the Medicaid program.** The *Olmstead* Court held that under the ADA, states must administer their waiver programs in the most integrated setting appropriate to the needs of qualified individuals, unless a state could prove that the requested integration modifications would fundamentally alter the program.

Two states made such an argument. The court in the *Makin* case rejected the argument, after Hawaii claimed that the requested modification to its waiver program would fundamentally alter the program by requiring the state to either terminate the entire program if it were forced to serve all qualified individuals (due to budget constraints) or decrease funding for other programs for the disabled. The court ruled that the state failed to show how funding restrictions would necessarily shift the requested service changes from being mere reasonable modifications to fundamental alterations. The court noted that the plaintiff "simply requests that the state be required to responsibly develop the program in such a way that will allow the . . . wait list to move at a reasonable pace,"<sup>37</sup> and that the state had failed to present any evidence that the needs of persons on the waiting list were being addressed at a reasonable pace.

On the other hand, the court in *Williams v. Wasserman*<sup>38</sup> held that Maryland was not required to immediately shift additional program resources to the type of services the plaintiffs requested, since doing so would have resulted in a fundamental alteration of its waiver program under *Olmstead*. The state convinced the court

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<sup>36</sup> U.S.C. § 1396n(c)(2)(C).

<sup>37</sup> *Makin*, 114 F. Supp.2d at 1035.

<sup>38</sup> CIV.CCB-94-880 (Md. 2001).

that substantial efforts had already been undertaken to provide appropriate community services throughout the state, and that significant gains had been realized by shuttering several institutions and shifting the resources to the expansion of the number and range of community-based treatment programs. Furthermore, the court believed that the plaintiffs exhibited a set of particularly “difficult behaviors,” and that the state had provided plaintiffs with multiple opportunities for community placements, without success. The Court reasoned that the state could not be expected to immediately develop additional programs for such hard-to-manage individuals without a fundamental alteration of the entire program.

## **Conclusion**

The law surrounding the definition of reasonable pace/reasonable promptness is developing with each new judicial decision. The recent cases show that courts will not hesitate to determine what is “reasonable” state action, based on developing interpretations of *Olmstead*, Medicaid law, and the ADA.

Courts have been able to reach general agreement about the basic parameters of the term “reasonable pace.” Under both Medicaid and the ADA, disabled individuals who are qualified to receive waiver services have an enforceable right to receive those services within a reasonable length of time. States are obligated to assure that a qualified beneficiary actually receives covered services that are included in the state plan within a reasonable time period. Barring a strong showing of the possibility of fundamental alteration of the state’s program, or a violation of the Medicaid statute, a reasonable time period may be 90 days. The 90-day time period may begin to toll when the individual first applies for the specific services under review.

As part of the *Olmstead* planning process, states should carefully scrutinize their existing programs to remove any possible discriminatory administration and identify resources for the development of new services. If a state outlines a program in its health services plan, every attempt should be made to ensure that the program receives sufficient funding to support the number of individuals described.

## Appendix

**Table 1: How Courts Define “Reasonable Pace/Reasonable Promptness”**

<b>Case</b>	<b>Length of Time Plaintiffs Were on Waiting Lists</b>	<b>Courts Analysis of the Reasonableness of Waiting Lists</b>
<b><i>Benjamin H. v. Ohl</i></b> 07/15/99 West Virginia	From almost one year to more than eight years	The state “clearly fails to provide [service] with reasonable promptness.” The court did not define what would be a reasonable time period to wait.
<b><i>Boulet v. Cellucci</i></b> 07/14/00 Massachusetts	From over three years to more than 10 years	The state should be able to provide requested services within 90 days if the applicant is eligible, the services are feasible, and settings are available for the delivery of these services.
<b><i>Bryson v. Shumway</i></b> 10/23/01 New Hampshire	From five months to seven years	A reasonable time period depends on the state’s ability to show that the waits were caused by adherence to the cost-neutrality requirement of the Medicaid waiver program.
<b><i>DeLong v. Houston</i></b> 10/25/00 Pennsylvania	No specific time period stated. Court is awaiting additional information through the discovery process, when more facts will be revealed.	Court will attempt to develop an adequate measuring tool for reasonable promptness through the discovery process.
<b><i>Doe v. Bush</i></b> 08/14/01 Florida	For approximately 10 years	Ninety-day time period outlined by the lower court was “ambiguous.”
<b><i>Lewis v. New Mexico</i></b> 04/24/00 New Mexico	From two – seven years	It may be difficult to determine exactly what is meant by reasonable promptness, but remaining on a waiting list for two – seven years is not reasonable.
<b><i>Makin v. Hawaii</i></b> 11/26/99 Hawaii	From over 90 days to more than two years	Any time period is permissible once the waiver program has satisfied the federally mandated population limit.
<b><i>Williams v. Wasserman</i></b> 09/27/01 Maryland	Up to five years	Three to five years was acceptable if the state was in the process of shifting resources to include more community arrangements, considering the need to maintain a minimum number of hospital placements.

**Table 2: Overview of Post-Olmstead Litigation/Defenses Regarding “Reasonable Pace” Claims**

Case	Resolution	STATE DEFENSE: “Reasonable Promptness” Is Too Vague To Define	STATE DEFENSE: Inadequate Funding	STATE DEFENSE: Population Limits Placed on Medicaid Waiver Programs	STATE DEFENSE: Entitlement Status of Waiver Services	STATE DEFENSE: Fundamental Alteration
<u>Benjamin H. v. Ohl</u> (07/15/99) West Virginia. Plaintiffs Request for Preliminary Injunction. Plaintiffs were mentally retarded or developmentally delayed individuals who were eligible for Medicaid benefits, and claimed that the state violated the Medicaid statute, constitutional due process, and the ADA by not providing services.	For $\pi$ s	The state must be able to show why additional funding was not available to meet the state’s obligations under Medicaid. Failure to appropriate sufficient funds was inadequate.	The state failed to explain why waiver program funds had been returned to the state treasury.	The Medicaid statute required maximum population limits to be placed on the services provided through the waiver program.	The requested waiver services were entitlements.	
<u>Makin v. Hawaii</u> (11/26/99) Hawaii Plaintiffs’ and Defendants’ Motions for Partial Summary Judgment. Plaintiffs were mentally retarded individuals living at home while on a waiting list for services from the State’s HCBS-MR program, but have not received the services because of lack of State funding.	For $\Delta$ s (pop. limits) For $\pi$ s (ADA)				The otherwise eligible beneficiaries were not entitled to the waiver services once the population limit had been satisfied.	There were material questions of fact regarding whether reasonable modifications should be made to the state program. The question survived the state’s request for Summary Judgment.
<u>Lewis v. New Mexico</u> (04/24/00) New Mexico Defendants’ Motion to Dismiss. Plaintiffs were disabled institutionalized individuals who were eligible for Medicaid services, and placed on long waiting lists for community services.	For $\pi$ s	The term is not too vague to define.	The state must conduct a cost analysis to determine whether the additional expenditure of funds needed to satisfy the plaintiffs’ requests would violate the ADA’s reasonable modification requirement.	The State was able to request a population limit high enough to satisfy the number of eligible individuals who requested the waiver services, and was not limited by the population limit provision in Medicaid law.	Since the waiver program was included in the State plan, the program held the status of an entitlement, identical to the mandatory Medicaid services.	

**Legend:**  $\pi$  = Plaintiffs  $\Delta$  = Defendants

continued

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<u>Boulet v. Cellucci</u> (07/14/00) Massachusetts Defendants' and Plaintiffs' Motions for Summary Judgment. Plaintiffs were mentally retarded adults who live with their parents and were eligi- ble to receive Medicaid serv- ices, and placed on long waiting lists.	For $\pi$ s	The term is not too vague to define.	Inadequate funding does not excuse failure to comply with the rea- sonable promptness requirement.	The Medicaid provision that limits the population of a waiver program may permit the existence of waiting lists, until slots that are under the population limit are available.	Eligible individuals are enti- tled to services provided by waiver programs that are included in the state plan.	
<u>DeLong v. Houston</u> (10/25/00) Pennsylvania Defendant's Motion to Dismiss Complaint. Plaintiffs were mentally retarded individuals who requested community-based mental retardation services under the state's waiver pro- gram.	For $\pi$ s	The term is not too vague to define.				
<u>Doe v. Bush</u> (08/14/01) Florida State appealed from the District Court's decision to hold the state in contempt for their failure to comply with the injunctive relief ordered in a final judgment involving the state's Medicaid program. Individuals who were eligible for Medicaid services, and placed on long waiting lists for community services.		Requiring the state to establish a wait- ing list time period not to exceed 90 days was ambigu- ous.				

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<u>Williams v. Wasserman</u> (09/27/01) <u>Maryland</u> Decision after trial. Plaintiffs were adults who are either traumatically brain injured, or non-retarded developmentally disabled, who claimed the State kept them inappropriately institutionalized and failed to provide them with community treatment.	For As					The State had made substantial efforts to maximize community options for eligible individuals. The State is not required to immediately transfer additional resources to the community programs.
<u>Bryson v. Shumway</u> (10/23/01) <u>New Hampshire</u> Class Action, Cross Motions for Summary Judgment. Plaintiffs were individuals with acquired brain disorders who requested community-based services. They are eligible for the services, are on a waiting list, and are likely to be placed in institutions due to a lack of available services.	Denied for As and Ms. Issue will be decided at trial.		The state's adherence to the Medicaid cost-neutrality requirement was an acceptable limiting factor for reasonable promptness.		The entitlement status attaches to the actual provision of waiver services, and not only to the finding of eligibility for the services.	

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