

State Household and Dependent Care Tax Credits to Support Personal Assistant Services[▽]

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Among the 280 million people over the age of five living in the United States,¹ 6.1 million (2.2%) reside in institutional settings and the majority of them have disabilities.² More specifically, people with disabilities comprise 97.5% of persons (2.1 million) living in skilled nursing facilities, 27.1% of persons (569,000) living in adult correctional facilities, and 65.9% of persons (1.3 million) living in other residual institutions.³ In comparison, persons who reside in non-institutional community settings (i.e., their homes) have a disability prevalence rate of 16.4% (44.9 million persons).⁴

In *Olmstead v L.C.* the Supreme Court ruled that under the American's with Disabilities Act (ADA), unnecessarily placing individuals with disabilities in nursing homes and other institutional residential settings was in violation of the law.⁵ The Court that Title II of the ADA contained an "integration mandate" requiring public agencies to provide services in community settings rather than in institutions.⁶ The Court explained that the states must administer programs

¹ U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009* (NST-EST2009-01) (2009), available at <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Oct. 5, 2010).

² Matthew W. Brault, *Disability Status of Adults in Institutional Group Quarters From the 2007 American Community Survey, Housing and Households Economic Statistics Division U.S. Census Bureau*, Presented at the Annual Meeting of the Population Association of America, Detroit MI, April 30–May 2, 2009, available at <http://www.census.gov/hhes/www/disability/disability-poster.pdf> (last visited Oct. 5, 2010); U.S. Census Bureau, *Characteristics of the Group Quarters Population by Group Quarters Type, 2007 American Community Survey 1-Year Estimates* (2007), available at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS

³ U.S. Census Bureau, *supra* note 2; Brault, *supra* note 2. Other residual institutions include juvenile facilities, psychiatric hospitals, and specialized settings such as state schools for the blind. Shawn Fremstad, *Half in Ten: Why Taking Disability into Account is Essential to Reducing Income Poverty and Expanding Economic Inclusion* 14 (Ctr. for Econ. & Pol'y Research, Sept. 2009), available at <http://www.cepr.net/documents/publications/poverty-disability-2009-09.pdf> (last visited Oct. 5, 2010).

⁴ Brault, *supra* note 2.

⁵ *Olmstead v L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999).

⁶ *Id.* at 598; 28 C.F.R. § 35.130 (2009).

in the most inclusive setting appropriate to the needs of the individual with a disability.⁷ The Court held that integration is required when: (1) the state determines community placement is appropriate; (2) the individual does not oppose the less restrictive setting; and (3) “the placement can be reasonably accommodated taking into account the resources available to the State and the needs of others with ... disabilities.”⁸

Olmstead articulated the moral consideration that no individual with a disability should be forced to trade the right to live with family and friends for the right to receive necessary services. This ruling is of particular importance to institutionalized persons and to those who are aging or with disability in the United States, however, it does not guarantee community-based services to all persons. The Court balanced the integration mandate with the reality that states have limited resources.⁹ Thus, as states move to implement *Olmstead* they are generally successful before the courts defending placement decisions if: (1) they have a comprehensive working plan for placing people with disabilities in less restrictive settings; (2) “a waiting list that move[s] at a reasonable pace”; and (3) decisions are not influenced by attempts to keep institutions fully populated.¹⁰

Unfortunately the ‘lack of resources’ rationale, embodied in the third prong of the *Olmstead* test, continues to leave thousands of persons institutionalized, even when they wish to live in the community and could do so if given the appropriate supports.¹¹ As states confront severe budget shortfalls, individuals with disabilities face the risk of losing home-based supports

⁷ 28 C.F.R. § 35.130(d).

⁸ *Olmstead*, 527 U.S. at 607.

⁹ *Id.* at 603–604.

¹⁰ *Id.* at 605–606.

¹¹ Nat’l Council on Disability, *From Privileges to Rights: People Labeled with Psychiatric Disabilities Speak for Themselves* 5-8 (Jan. 20, 2000), available at <http://www.ncd.gov/newsroom/publications/2000/pdf/privileges.pdf>.

(such as optional *Olmstead* waiver programs), and being institutionalized under Medicaid services that States are mandated to provide.¹² Although providing services in the home is less expensive on a per person basis than providing services in institutions, there is continued reliance on conventional wisdom that institutions provide a means to centralize services in an efficient manner.¹³ These issues create a perceived fiscal incentive for States to provide services in institutional settings.¹⁴

The Obama administration demonstrated its commitment to *Olmstead* enforcement symbolically when it declared 2009 the Year of Community Living.¹⁵ The President has followed this declaration with practical efforts: filing amicus briefs and law suits against states; enters into consent decrees; fostering agency collaboration to improve infrastructure supports; and perhaps most importantly expanding funding for housing and community services.¹⁶

¹² John Leland, *Cuts in Home Care Put Elderly and Disabled at Risk*, N.Y. TIMES (Jul. 21, 2010), at A11.

¹³ *Amicus Curiae Brief of 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities*, *Olmstead v L.C.*, 1999 WL 143935, at *13–21 (1999).

¹⁴ For an overview of Medicaid as it applies to community living, see Independent Living Research Utilization at TIRR, *Olmstead and Community: Implementing the New Freedom Initiative*, Facilitator's Guide, at Module 5 (2004), available at http://www.ilru.org/html/publications/olmstead/IL_NET/2-Facilitator_Final.pdf (last visited Oct. 5, 2010).

¹⁵ Press Release, White House, *President Obama Commemorates Anniversary of Olmstead and Announces New Initiatives to Assist Americans with Disabilities* (June 22, 2009), available at http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/ (last visited Oct. 5, 2010).

¹⁶ Testimony of Assistant Attorney General Thomas E. Perez Before the Senate Committee on Health, Education, Labor, and Pensions on the ADA and *Olmstead* Enforcement, Washington D.C. (June 22, 2010), available at <http://www.justice.gov/crt/opa/pr/testimony/2010/crt-testimony-100622.html> (last visited Oct. 5, 2010).

Progress under these initiatives, however, is threatened by demographic issues that point to a large increase in populations requiring services.¹⁷

Our society faces an added challenge as we move into a period where the ‘Baby Boom’ generation—the estimated 78.3 million Americans born between 1943 and 1964—ages with or into disability. Disability prevalence is at its highest (41%) among persons ages 65 and older; and the percentage of Americans over 65 is projected to grow to 18% of the U.S. population by 2020 and to 25% by 2050.¹⁸

One important service that can assist persons with disabilities to live in the communities of their choice is the provision of Personal Assistant Services (PAS).¹⁹ PAS are “people or devices that assist a person with a physical, sensory, mental, or cognitive disability with tasks that the person would perform for him or herself if he or she did not have a disability.”²⁰ These services can include help dressing, showering, toileting, taking medication, or with mobility. Often assistance with these seemingly simple tasks means the difference between integration and isolation.²¹

¹⁷ Grayson Vincent & Victoria Velkoff, *The Next Four Decades The Older Population in the United States: 2010 to 2050* (U.S. Census Bureau, May 2010), available at http://www.aoa.gov/aoaroot/aging_statistics/future_growth/DOCS/p25-1138.pdf (last visited Oct. 5, 2010).

¹⁸ Population Division, U.S. Census Bureau, *Projections of the Population by Selected Age Groups and Sex for the United States: 2010 to 2050 (NP2008-T2)*, at tbl. 2 (Aug. 14, 2008).

¹⁹ Press Release, Statement of Senator Tom Harkin, *Harkin Introduces Bipartisan Resolution Celebrating the 20th Anniversary of the Americans with Disabilities Act* (July 22, 2010), available at <http://harkin.senate.gov/press/release.cfm?i=326603> (last visited Oct. 5, 2010).

²⁰ Office of Disability Employment Pol’y, U.S. Dep’t of Labor, *ODEP - Ed Kit 1997 - Personal Assistance Services in the Workplace*, available at <http://www.dol.gov/odep/pubs/ek97/personal.htm> (last visited Oct. 5, 2010).

²¹ Andrew Batavia, *A Right to Personal Assistance Services: “Most Integrated Setting Appropriate” Requirements and the Independent Living Model of Long-term Care*, 27 AMER. J. LAW & MED. 17, 20 (2001).

Significantly, the Internal Revenue Code provides a Household and Dependent Care Services Credit that is applicable to covering some of the costs of PAS. This credit allows a reduction in the total income tax owed, based on a percent of employment related expenses for dependent care services.²² Thus, a dependent family member who needs PAS in order to permit a taxpaying family member to go to work, can receive PAS and allow the costs to the taxpayer to be subsidized by the credit.

The Household or Dependent Care Credit is imperfect. For example, it does not help low income families who do not earn enough to have income tax liability. The credit cannot be used if the person with a disability is not a dependent of a wage earner.²³ Using a sliding scale, the law allows a 35% tax credit against employment-related care expenses. The credit declines (“but not below 20%”) as the taxpayer’s Adjusted Gross Income (AGI) rises, so that with each \$2,000 by which AGI for an individual exceeds \$15,000 the credit drops by one percent.²⁴ The credit is the applicable percentage of the employment-related expenses, and these expenses are limited to \$3,000 in the case of one or more qualifying individuals (care recipients), \$6,000 in the case of two or more.²⁵ Thus, the maximum credit is \$2,100 (or 35% of \$6,000), or \$1,050 for a household with one qualifying dependent.²⁶

Regardless of these limitations a taxpayer who needs PAS services for a family member should certainly take advantage of whatever benefit the credit can offer. In addition to the Federal credit, twenty three states and the District of Columbia have credits that parallel the

²² 26 U.S.C. § 21 (2006).

²³ *Id.* § 21(b)(1).

²⁴ *Id.* § 21(a)(2).

²⁵ *Id.* § 21(c).

²⁶ For a comprehensive review of eight tax provisions that cover PAS, see Steve Mendelsohn, Michael Morris & William N. Myhill, *Tax Subsidization of Personal Assistance Services: Opportunities in Current Law and Recommendations for Reform* (manuscript on file with authors).

Federal tax credit, but function to reduce state income tax liability. The table below provides the status of these credits in each applicable state.

In conclusion, as the American population ages and ages into disability at higher rates than previously experienced, resources to assist their successful community living are essential to comply with the goal and spirit of *Olmstead*. The Federal and state tax codes can offer credits and deductions to offset the expenses of PAS and related care costs.²⁷

²⁷ *Id.*

Table: Comparison of State Household and Dependent Care Tax Credits

NA No household or dependent care services credit
 * No state income tax
 ∞ Income tax on dividends and interest income only

State	Statute	Provision
Federal Gov't	26 U.S.C. § 21	A taxpayer is granted a tax credit for “employment-related expenses” of household and dependent care services, which are necessary for gainful employment, when there is one or more dependent or spouse who is physically or mentally incapable of caring for himself or herself (qualifying individual). The credit amount is 35% of the expense, but is reduced by 1% for each \$2000 above \$15,000 in adjusted gross income, to a minimum of 20%. The maximum credit available is \$3000 for 1 qualifying individual and \$6000 for 2 or more qualifying individuals.
Alabama		NA
Alaska*	AK ST § 43.20.013(b)	A resident individual is entitled to a tax credit equal to 16 percent of the credit claimed on the federal income tax return for household and dependent care services necessary for gainful employment. ²⁸
Arizona		NA
Arkansas	AR ST § 26-51-502	Grants a tax credit for household and dependent care expenses, necessary for gainful employment, equal to 20% of the federal credit allowed under the Internal Revenue Code § 21.
California	West's Ann. Cal. Rev. & T.Code § 17052.6	Grants a tax credit (the percentage of the credit is determined by the individuals adjusted gross income applied to the table in subsection (b)(2)) for employment related expenses within the meaning of Internal Revenue Code § 21 if the care was provided within the state.
Colorado	C.R.S. 39-22-119	Allows a tax credit for child care but does not extend credit to dependents with disabilities. Amount of credit adjusted to income. (50% if \$25,000 or less, sliding scale as income increases).
Conn.		NA

²⁸ Although Alaska ostensibly has a Household and Dependent Care Credit, the credit is not usable because Alaska has no state income tax. AK ST § 43.20.013(b); Retirement Living Info. Ctr., *Taxes by State*, available at <http://retirementliving.com/RLstate1.html#ALASKA> (last visited Oct. 6, 2010).

Delaware	30 Del.C. § 1114	Grants a credit for child and dependent care expenses in the amount of 50 percent of the credit allowable for federal income tax purposes.
District of Columbia	DC ST § 47-1806.04	Grants a credit for household and dependent care expenses necessary for gainful employment equal to 32% of the credit allowed under the Internal Revenue Code § 21
Florida*		NA
Georgia	Ga. Code Ann., § 48-7-29.10	Grants a credit for qualified child and dependent care expenses equal to 30% of the credit allowed under the Internal Revenue Code § 21.
Hawaii	HI ST § 235-55.6	Allows a tax credit for “employment-related expenses” if they are incurred to enable the taxpayer to be gainfully employed. Employment-related expenses include the care of dependents and/or a spouse who is physically or mentally incapable of caring for oneself. The tax credit is equal to 25% of the employment-related expenses; but is reduced by 1% for each \$2,000 of adjusted gross income above \$22,000 to a minimum of 15%.
Idaho	I.C. § 63-3022D	Where an individual maintains household including one or more qualifying individual under IR Code sec 21(b)(1), deduction of employment related expenses paid during taxable year allowed. (sec 21(b)(1)(B) dependent who is not physically or mentally capable of taking care of him or herself)
Illinois		NA
Indiana		NA
Iowa	I.C.A. § 422.12C	Grants a state income tax credit equal to a percentage of the federal tax credit for tax payers with net income less than \$45,000
Kansas	KS ST § 79-32,111a	Tax credits allowed for dependent care expenses. The tax credit is in the amount of 25% of the federal tax credit under the Internal Revenue Code § 21.
Kentucky	KY ST § 141.067	Tax credit allowed for household and dependent care service expenses necessary for gainful employment. The tax credit is in the amount of 20% of the federal credit under the Internal Revenue Code § 21.
Louisiana	LSA-R.S. 47:79	Credit of \$1,000 against net income allowed for each dependent who is “blind or deaf, has sustained the loss of one or more limb, or is mentally retarded.” Dependent must have received at least half of his/her financial support from taxpayer in the taxable year and be a family member (statute defines family broadly to include “step-relatives”, “half-relatives”, and ancestors of parents as well as descendants of brother and sister of parents. Some limitations of non- citizenship (except residents). Students who are sons or daughters or step-

		sons/daughters “will not be taken into account” in determination whether individual received more than half of support from taxpayer. If taxpayer would not be head of household except for the fact that there exist dependents for whom he would be entitled credits in this section, credit will not be allowed for one dependent.
Maine	36 M.R.S.A. § 5218	Grants a resident individual a tax credit in the amount of 25% of the federal tax credit allowable for child and dependent care expenses. A non-resident is allowed a 25% tax credit multiplied by the ratio of the individual’s Maine adjusted gross income to the individual’s federal adjusted gross income up to a \$500 maximum. Part year residents have a similar allowance.
Maryland	MD Code, Tax – Gen. § 10-716	A credit is allowed for expenses paid related to dependant and child care. The amount of the credit is equal to the lesser of 32.5% of the federal tax credit under the Internal Revenue Code § 21, or the amount of the state income tax. The 32.5% is reduced by 10% for every \$1,000 above \$41,000 in gross income.
Mass.		NA
Michigan		NA
Minn.	MN ST § 290.067	A taxpayer may take a credit against tax due in an amount equal to the federal dependent care credit under Internal Revenue Code § 21, but not to exceed \$720. The maximum credit of \$720 is reduced with income over \$18,040.
Miss.		NA
Missouri		NA
Montana		NA
Nebraska		NA
Nevada*		NA
N.H. ∞		NA
New Jersey	NJ ST §54:8A - 15.1	A tax credit is allowed for dependent care services necessary for gainful employment. The amount of the tax credit is 20% of the federal tax credit under the Internal Revenue Code § 21.
New Mexico	NM ST §7-2-18.1(B)	Tax credit (40% of the actual compensation paid, not to exceed \$480 for an individual or \$1200 for a household) is allowed for dependent day care expenses to enable the resident.... to be gainfully employed. This credit is “for expenses for dependent child day care necessary to enable gainful employment to prevent indigency.” “Qualified dependants” must be under the age of 15 (7-2-18.1(A)(6).

New York	McKinney's Tax Law § 606(c)	Tax credits are allowed for certain household and dependent care services necessary for gainful employment. Generally, the amount of the credit is a percentage of the federal tax credit under the Internal Revenue Code § 21 multiplied by a fraction as defined by section c.
North Carolina	NC St. § 105-151.11	A tax credit is allowed for dependent care and employment related expenses, as defined under the Internal Revenue Code § 21, equal to the percentage defined in subsection (a1) but not to exceed \$3000 for an individual or \$6000 for a household.
North Dakota	ND ST § 57-38-01.20	Tax credits allowed for qualified care expenses. The percentage is based upon income as applied to criteria in subsection 4 and 5. A qualifying family member must have a taxable income of no more than \$20,000 or if married, \$35,000 and must be related to the taxpayer by blood or marriage.
Ohio	OH ST § 5747.054	A tax credit for dependent care services is allowed for taxpayers with adjusted gross income of less than forty thousand dollars the credit is 25% of the federal dependent care credit under § 21 of the Internal Revenue Code.
Oklahoma		NA
Oregon	OR ST § 316.078	A tax credit is allowed for a percentage of dependent care service expenses necessary for employment. The percentage is determined on the basis of federal taxable income as applied to the table in OR ST § 316.078(1).
Penn.		NA
Rhode Island	RI ST § 44-30-2.6	(c)(K)(2) Any taxpayer entitled to a federal tax credit for child and dependent care services is also entitled to a credit against the Rhode Island tax. (c)(M)The amount of the credit is 25%.
South Carolina	SC ST § 12-6-3380	A tax credit is allowed for child and dependent care expenses related to employment. The of the credit is 7% of the employment related expenses that are directly attributable to items of South Carolina gross income.
South Dakota*		NA
Tenn. ∞		NA
Texas*		NA
Utah		NA
Vermont	32 V.S.A. § 5822	(d) A taxpayer shall be entitled to a credit against the Vermont state tax imposed, in the amount of 24 percent of each of the credits allowed against the taxpayer's federal income tax for: “permanently totally disabled credit”, and “child care and dependent care credits.

Virginia	VA ST § 58.1 - 322	(D)(3) Allows a deduction equal to the amount of employment-related expenses upon which the federal credit is based under § 21 of the Internal Revenue Code for household and dependent care service expenses necessary for gainful employment.
Wash.*		NA
West Virginia		NA
Wisconsin		NA
Wyoming*		NA