

“Fundamental Alteration Defense”

Taken from 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.* (2011)

https://www.ada.gov/olmstead/q&a_olmstead.htm

Formatting Changes & Some Notes Added

10. What is the fundamental alteration defense?

A: A public entity’s obligation under *Olmstead* to provide services in the most integrated setting is not unlimited.

A public entity may be excused in instances where it can prove that the requested modification would result in a “fundamental alteration” of the public entity’s service system.

A fundamental alteration requires the public entity to prove “that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons with [] disabilities.”¹⁸

It is the public entity’s burden to establish that the requested modification would fundamentally alter its service system.

11. What budgetary resources and costs are relevant to determine if the relief sought would constitute a fundamental alteration?

A: The relevant resources for purposes of evaluating a fundamental alteration defense consist of all money the public entity allots, spends, receives, or could receive if it applied for available federal funding to provide services to persons with disabilities.

Similarly, all relevant costs, not simply those funded by the single agency that operates or funds the segregated or integrated setting, must be considered in a fundamental alteration analysis. [Orchid Note: This is extremely important especially given the STATE COST SHIFTING to MUNICIPALITIES & COUNTIES for the Criminal Justice Involvement of people with cognitive disabilities due to State failure to provide adequate Housing, Placements & Services. BUT we maintain that as important as it is -- it is MOOT for Colorado State Government because Colorado State Government can't get to a FUNDAMENTAL ALTERATION DEFENSE at all due to its FAILURE to have a Comprehensive, Effectively Working Plan --- see below #12.]

Moreover, cost comparisons need not be static or fixed.

If the cost of the segregated setting will likely increase, for instance due to maintenance, capital expenses, environmental modifications, addressing substandard care, or providing required services that have been denied, these incremental costs should be incorporated into the calculation.

Similarly, if the cost of providing integrated services is likely to decrease over time, for instance due to enhanced independence or decreased support needs, this reduction should be incorporated as well.

In determining whether a service would be so expensive as to constitute a fundamental alteration, the fact that there may be transitional costs of converting from segregated to integrated settings can be considered, but it is not determinative.

However, if a public entity decides to serve new individuals in segregated settings ("backfilling"), rather than to close or downsize the segregated settings as individuals in the plaintiff class move to integrated settings, the costs associated with that decision should not be included in the fundamental alteration analysis.

12. What is an *Olmstead* Plan?

A: 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.

Instead, it must reflect an analysis of the extent to which the public entity is providing services in the most integrated setting and must contain concrete and reliable commitments to expand integrated opportunities.

The plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and there must be funding to support the plan, which may come from reallocating existing service dollars.

The plan should 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.

To be effective, the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan.

A public entity cannot rely on its *Olmstead* plan as part of its defense unless it can prove that its plan comprehensively and effectively addresses the needless segregation of the group at issue in the case.

Any plan should be evaluated in light of the length of time that has passed since the Supreme Court's decision in *Olmstead*, including a fact-specific inquiry into what the public entity could have accomplished in the past and what it could accomplish in the future.

13. What must a public entity show to establish a fundamental alteration defense based on an *Olmstead* plan?

A: A public entity raising a fundamental alteration defense based on an *Olmstead* plan must show that it has developed a comprehensive, effectively working *Olmstead* plan that meets the standards described above, and that it is implementing the plan. [Orchid Note: Colorado does not have this.]

A public entity that cannot show it has and is implementing a working plan will not be able to prove that it is already making sufficient progress in complying with the integration mandate and that the requested relief would so disrupt the implementation of the plan as to cause a fundamental alteration.