



US Department of Justice on ---

The Fundamental Alteration Defense

Questions 10, 11, 13, 14



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.

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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.”

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.

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.

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.

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.

14. What is the relevance of budgetary shortages to a fundamental alteration defense?

A. Public entities have the burden to show that immediate relief to the plaintiffs would effect a fundamental alteration of their program.

Budgetary shortages are not, in and of themselves, evidence that such relief would constitute a fundamental alteration.

Even in times of budgetary constraints, public entities can often reasonably modify their programs by re-allocating funding from expensive segregated settings to cost-effective integrated settings.

Whether the public entity has sought additional federal resources available to support the provision of services in integrated settings for the particular group or individual requesting the modification – such as Medicaid, Money Follows the Person grants, and federal housing vouchers – is also relevant to a budgetary defense.