



**Fact Sheet**  
***Olmstead* Plans and Fundamental Alteration:  
Litigation Strategies for these  
Connected Defenses**

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I. Introduction

Title II of the Americans with Disabilities Act (ADA) creates a federal right to live in the most integrated setting.<sup>1</sup> In enforcement actions, plaintiffs must be prepared to prove that the state or other public entity fails to provide sufficient and appropriate services in integrated settings and to propose reasonable

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<sup>1</sup> For the purposes of this fact sheet, as in the earlier series of Q & As and fact sheets, an *Olmstead* case is one designed to increase the availability of truly integrated community-based services for people with disabilities who are in segregated programs, institutions, or other facilities. This fact sheet presumes an understanding of *Olmstead* litigation and the strategy considerations outlined in an earlier series of TASC publications including the following: Part I, Prior to Filing (Aug 2010) available at [http://tascnw.com/tasc/images/Documents/Publications/Q\\_A/TASC\\_0810\\_Strategy-Considerations-Litigating-Olmstead-Pt1.pdf](http://tascnw.com/tasc/images/Documents/Publications/Q_A/TASC_0810_Strategy-Considerations-Litigating-Olmstead-Pt1.pdf); Part II, Preparing the Complaint (Oct.2010) available at [http://tascnw.com/tasc/images/Documents/Issues/Community\\_Integration/TASC\\_Strategy-in-Preparing-Litigating.pdf](http://tascnw.com/tasc/images/Documents/Issues/Community_Integration/TASC_Strategy-in-Preparing-Litigating.pdf); Part III, Emerging Issues: Strategies to Challenge New Institutions (Dec. 2010) available at [http://tascnw.com/tasc/images/Documents/Publications/Q\\_A/TASC\\_1210-Olmstead-Part3.pdf](http://tascnw.com/tasc/images/Documents/Publications/Q_A/TASC_1210-Olmstead-Part3.pdf); Part IV, Emerging Issues; Strategies for Challenging the Development and Location of Community Programs on Institutional Property (Jan. 2010) available at [http://tascnw.com/tasc/images/Documents/Publications/Q\\_A/2011/TASC\\_QA0111Olmstead-IV.pdf](http://tascnw.com/tasc/images/Documents/Publications/Q_A/2011/TASC_QA0111Olmstead-IV.pdf); Part V, Proving the Facts (Feb. 2011) available at [http://tascnw.com/tasc/images/Documents/Publications/TASC\\_PUBLICATIONS/FACT\\_SHEETS/TASC\\_CI\\_Strategy-in-Prep-Litig.pdf](http://tascnw.com/tasc/images/Documents/Publications/TASC_PUBLICATIONS/FACT_SHEETS/TASC_CI_Strategy-in-Prep-Litig.pdf); Part VI, The ADA Claims (Mar. 2011) available at [http://tascnw.com/tasc/images/Documents/Publications/TASC\\_PUBLICATIONS/FACT\\_SHEETS/TASC\\_CI\\_Olmstead\\_Part\\_VI\\_ADA\\_Claims\\_FINAL.pdf](http://tascnw.com/tasc/images/Documents/Publications/TASC_PUBLICATIONS/FACT_SHEETS/TASC_CI_Olmstead_Part_VI_ADA_Claims_FINAL.pdf); Part VII, Fundamental Alteration (May, 2011) available at [http://www.tascnw.com/tasc/images/Documents/Publications/Q\\_A/2011/TASC\\_Strategy\\_Considerations.pdf](http://www.tascnw.com/tasc/images/Documents/Publications/Q_A/2011/TASC_Strategy_Considerations.pdf).

modifications to the defendant's service system that will remedy this failure.

In defending against *Olmstead* cases, the state can rely on the affirmative defense of fundamental alteration.<sup>2</sup> Fundamental alteration, described in more detail below, is a defense based in regulation.<sup>3</sup>

The Supreme Court in *Olmstead*<sup>4</sup> also created a separate but related defense known as the *Olmstead* plan defense. Inspired by concerns in the *Olmstead* case with "line jumping" by plaintiffs -- that plaintiffs who filed ADA integration lawsuits, like the two women who brought the *Olmstead* case, would somehow unfairly receive priority treatment over others who were unnecessarily segregated but who did not initiate litigation -- the *Olmstead* plan defense affords states flexibility "[t]o maintain a range of facilities and to administer services with an even hand."<sup>5</sup> Under this defense, to the extent the state has proactively developed a plan to address unnecessary segregation by providing an orderly plan to transition all individuals who are unnecessarily institutionalized in a reasonable timeframe, the state can use the plan to undermine the plaintiff's case.

The Supreme Court's plurality opinion in *Olmstead* juxtaposes, but does not clearly delineate, these two defenses or the relationship between them:

To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.<sup>6</sup>

Since *Olmstead*, the Third and the Ninth Circuits, respectively, have set forth very different articulations of the *Olmstead* plan defense and its relationship to fundamental alteration. In addition, other courts of appeal have not weighed in definitively on the inter-relationship or the relative parameters of these two defenses. This leaves very few clear answers to guide litigation in the vast majority of the circuits, demanding a great deal of caution in navigating and adjusting to these defenses, both at the outset and as cases proceed.

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<sup>2</sup> Fundamental alteration is referred to as an affirmative defense which means "a defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal liability or civil liability, even if it is proven that the defendant committed the alleged acts." [https://www.law.cornell.edu/wex/affirmative\\_defense](https://www.law.cornell.edu/wex/affirmative_defense).

<sup>3</sup> 28 C.F.R. § 35.130(b)(7).

<sup>4</sup> *Olmstead v. L.C. ex. Rel. Zimring*, 527 U.S. 581 (1999).

<sup>5</sup> *Olmstead*, 527 U.S. at 605.

<sup>6</sup> *Olmstead*, 527 U.S. at 605-606.

Anticipating and responding to these defenses is very challenging, due in significant part to the difficulty in predicting how these two defenses will be defined and applied, independently and relative to each other.

Plaintiffs need to understand each of these inter-related defenses in order to obtain necessary discovery, identify relevant experts, obtain information for expert reports and opinions, and describe remedies that concomitantly and effectively anticipate and defeat both defenses. This fact sheet outlines the key legal components of the *Olmstead* plan and fundamental alteration defenses, as well as the plaintiff's burden to articulate needed reasonable modifications, and then sets out strategic considerations in preparing cases to address these two defenses.

## II. Reasonable Modification

### A. The Law

A required element of any *Olmstead* case is to show that the modification of the defendants' service delivery system proposed by plaintiff is reasonable and readily achievable. "Public entities are required to 'make reasonable modifications' to avoid 'discrimination on the basis of disability'".<sup>7</sup> A plaintiff may meet this burden by showing the existence of a plausible accommodation. Whether plaintiff's proposed modification is reasonable is determined by whether the change that plaintiff proposes is consistent with the larger purpose and basic requirements of the defendants' service or program: the proposed modification must be consistent with and not significantly change the benefit, program, or service being challenged.<sup>8</sup> In addition, it cannot be so broad in scope as to negatively impact other people being served.<sup>9</sup>

### B. Strategic Considerations

Plaintiffs need to articulate proposed reasonable modifications necessary for compliance with the ADA and accepted professional standards without providing specific numerical benchmarks, particularly when defendants, not plaintiffs, are

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<sup>7</sup> *Steimel v. Wernert*, 823 F. 3d 902, 909 (7<sup>th</sup> Cir. 2016)(quoting 28 C.F.R. § 35.130(b)(7)).

<sup>8</sup> The determination of what is the program, benefit, or service that is being challenged often is complex, subjective, and outcome determinative – that is, how plaintiffs define the benefit or program often predicts whether the proposed modification will be considered reasonable. For instance, if personal care services are defined as a person-directed service, a challenge to an eligibility criteria that excludes individuals with intellectual disabilities who cannot self-direct support staff might not be considered a reasonable modification of that service. On the other hand, if the same service is defined as a personal care attendant and self-direction is one goal or method for providing the service, affording this service to individuals with IDD might well be reasonable.

<sup>9</sup> See generally *Olmstead*, 527 U.S. at 603.

generally privy to such data. Plaintiffs should pursue discovery of data and funding related to the reasonableness of any proposed modification, including evidence that the proposed modification is efficient compared to other services already provided, or that defendants have failed to utilize existing appropriations. In meeting their burden to show plausible reasonable accommodation, plaintiffs need not go so far as to articulate and quantify the details of the modification so as to provide the facts that can be used to support the defendants' affirmative fundamental alteration defense, as discussed in more detail below.<sup>10</sup> In other words, plaintiffs must meet the burden of showing that a proposed modification is reasonable without going so far as to articulate for defendant the contours of the fundamental alteration defense.

### III. *Olmstead* Plan Defense

#### A. The Law

As a defense to an *Olmstead* case, defendants may prove that they have a "comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings."<sup>11</sup> Such a defense, if successful, will likely defeat the plaintiff's case, since the plan is, in effect, a reasonable modification of the defendant's program or system.<sup>12</sup> In fact, the development and implementation of an *Olmstead* plan is often a proactive strategy used by states to avoid even the threat of an *Olmstead* case.

"[T]here is wide-spread agreement that one essential component of an 'effectively working' plan is a measurable commitment to deinstitutionalization."<sup>13</sup> The commitment must be more than "[g]eneral assurances and good-faith intentions," which "are simply insufficient guarantors in light of the hardship daily inflicted upon [individuals] through unnecessary and indefinite institutionalization."<sup>14</sup> Accordingly, a public entity must prove, "at a bare minimum," either that it developed and is implementing an *Olmstead* plan that demonstrates a specific and measurable commitment to action, including goals, benchmarks, and timeframes for which the entity can be held accountable,<sup>15</sup> or that it has made significant progress in reducing the number of individuals living

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<sup>10</sup> For more detailed discussion of this strategic consideration, see Q & A Plaintiffs Need Not Delineate the State's Fundamental Alteration Defense in *Olmstead* Litigation (2018) available at [https://www.tascnow.com/wp-content/uploads/2019/03/QA\\_Fundamental\\_Alteration\\_Defense\\_CPR.pdf](https://www.tascnow.com/wp-content/uploads/2019/03/QA_Fundamental_Alteration_Defense_CPR.pdf).

<sup>11</sup> *Frederick L. v. Dep't of Pub. Welfare of Pa. (Frederick L. III)*, 422 F.3d 151, 155-59 (3d Cir. 2005); see also *Olmstead* at 605-606.

<sup>12</sup> *Olmstead* at 605-606.

<sup>13</sup> *Day v. District of Columbia*, 894 F. Supp. 2d 1, 28 (D.D.C. 2012) (collecting cases).

<sup>14</sup> *Frederick L. III*, 422 F.3d at 158.

<sup>15</sup> *Id.* at 158-160.

in segregated settings.<sup>16</sup> Significantly, there is no case that explicitly holds that there must be a single document labeled as the “Olmstead plan”, or even a series of written documents constituting, in the aggregate, a state’s Olmstead plan.

A key inquiry as to whether a jurisdiction has a comprehensive, effectively working *Olmstead* plan is whether it actually moves the affected people from institutional to integrated settings at a reasonable pace. Courts have considered a static or only slightly declining census of the relevant group of individuals in particular facilities as evidence that a jurisdiction does not have an effectively working *Olmstead* plan.<sup>17</sup> And, in cases finding that states have a comprehensive, effectively working *Olmstead* plan, courts have relied on a significant decrease in the institutionalized population and evidence that the state is “genuinely and effectively in the process of deinstitutionalizing disabled persons ‘with an even hand.’”<sup>18</sup> Some courts, and particularly those in the Ninth Circuit, have focused primarily on the issue of “effectively working,” as evidenced by a significant historical decrease in the institutionalized population, to support an *Olmstead* plan defense, even if the state lacks documents that contain detailed goals, benchmarks, and timelines. Of particular concern, the Ninth Circuit has held that when the needs of individuals make placement challenging, continued decreases in the institutional population may not be reasonable.<sup>19</sup>

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<sup>16</sup> *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 620-22 (9th Cir. 2005) *see also* *Jensen v. Minn. Dept. Human Svcs.*, 138 F. Supp. 3d 1068, 1071 (D. Minn. 2015).

<sup>17</sup> *See, e.g., Day*, 894 F. Supp. 2d at 28 (considering the number of individuals with disabilities who transitioned from nursing facilities in assessing the effectiveness of jurisdiction’s *Olmstead* plan where putative class was individuals with disabilities housed in nursing facilities).

<sup>18</sup> *See Arc of Wash. State Inc.*, 427 F.3d at 620-22 (quoting *Olmstead*, 527 U.S. at 605-06); *Day*, 894 F. Supp. 2d at 28 (citing, *inter alia*, *Frederick L. III*, 422 F.3d at 157; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381; *Williams v. Quinn*, 748 F. Supp. 2d 892, 897-98 (N.D. Ill. 2010)); *Frederick L. III*, 422 F.3d at 157-59 (rejecting a state’s proffered *Olmstead* plan that did not have such specific and measureable targets where plan included closing “up to 250 [institutional] beds a year,” and noting that “[g]eneral assurances and good-faith intentions neither meet the federal laws nor a patient’s expectations. Their implementation may change with each administration or Secretary of Welfare, regardless of how genuine . . . .”); *see also Frederick L. v. Dept. Public Welfare*, 364 F.3d 487, 500-01 (3d Cir. 2004)(*Frederick L. II*); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 383-85; *Jensen*, 138 F. Supp. 3d at 1071-74 (*Olmstead* plan “must contain concrete, reliable, and realistic commitments, accompanied by specific and reasonable timetables, for which the public agencies will be held accountable” and approving plan where there was “concrete baseline data and specific timelines to establish measurable goals,” where goals were “not only measurable, but strategically tailored to make a significant impact in the lives of individuals with disabilities across the state,” and where the state “provides a rationale for each of the metrics used, explains why each metric was chosen, and explains how each metric will adequately reflect improvement over time”).

<sup>19</sup> *Sanchez v. Johnson*, 416 F.3d 1051, 1064-67 ((9th Cir. 2005). Arguably, this portion of the *Sanchez* opinion is dicta, and, in any event, arose in a context not likely to be

In addition, to demonstrate that a plan is comprehensive and effectively working, a state “must prioritize its allocation of funding to meet and achieve the *Olmstead* Plan’s goals.”<sup>20</sup> The state may not rely on the excuse of insufficient funding to avoid following through on the important commitments it has made in [its] *Olmstead* plan.<sup>21</sup>

A public entity’s *Olmstead* plan should track transitions of particular groups of people who are unnecessarily segregated, such as people residing in nursing facilities, and an effective plan should demonstrate actual reductions of those groups.<sup>22</sup> Courts have rejected even substantiated examples of past progress as insufficient evidence of an *Olmstead* plan.<sup>23</sup>

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repeated. The plaintiffs in *Sanchez*, which included both individuals with intellectual and developmental disabilities as well as service providers, brought both Medicaid and an ADA claims seeking increased rates for service providers. The rate increase was allegedly necessary to allow the providers to serve more persons who were institutionalized in state facilities in the community. The state moved for summary judgment on both claims. The district court held that the plaintiffs did not have a private right of action to enforce the Medicaid provisions, 42 U.S.C. § 1396a(a)(30), and that the accommodation sought under the ADA – a significant rate increase – was not reasonable. Viewing the lawsuit as mostly a rate case, the Ninth Circuit affirmed, noting that:

First, the court held that “[e]ven if unjustified institutionalization is occurring, [Sanchez and the Providers] have failed to show that an increase in wages and benefits for community-based direct care workers would remedy the alleged violation.” Second, the court held that the relief proposed by Sanchez and the Providers is not a “reasonable modification” of California’s current policies and practices because the \$1.4 billion of extra expenditure they request would represent a forty percent increase in the State’s budget for developmentally disabled services. Third, the court held that California already has in place an acceptable plan for deinstitutionalization, the disruption of which would involve a fundamental alteration of the State’s current policies and practices in contravention of the Supreme Court’s instructions in *Olmstead*. If we uphold any one of these conclusions, then the state officials must prevail.

*Id.* at 1062

<sup>20</sup> *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 380; see also *M.R. v. Dreyfus*, 663 F.3d 1100, 1118-19 (9th Cir. 2011), amended by 697 F.3d 706 (9th Cir. 2012) (same); *Fredrick L. II*, 364 F.3d at 495; *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 995 (N.D. Ca. 2010).

<sup>21</sup> *Jensen*, 138 F. Supp. 3d at 1074.

<sup>22</sup> See, e.g., *Day*, 894 F. Supp. 2d at 28-29 (considering the number of people with disabilities who transitioned from nursing facilities in assessing the effectiveness of jurisdiction’s *Olmstead* plan where putative class was people with disabilities housed in nursing facilities).

<sup>23</sup> *Fredrick L. II*, 364 F.3d at 500 (it is “unrealistic (or unduly optimistic) [to] assum[e] past progress is a reliable prediction of future programs.”); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 383-84 (past success discharging individuals “does not amount to a sufficient deinstitutionalization plan”).

The Ninth Circuit has used the general standard of “comprehensive, effective and moving at a reasonable pace” to assess a state’s plan, relying on evidence summarized as follows:

The record reflects that Washington's commitment to deinstitutionalization is as “genuine, comprehensive and reasonable” as the state's commitment in *Sanchez*. Washington's HCBS program is substantial in size, providing integrated care to nearly 10,000 Medicaid-eligible disabled persons in the state. The waiver program is full, and there is a waiting list that admits new participants when slots open up. Unlike in *Townsend*, all Medicaid-eligible disabled persons will have an opportunity to participate in the program once space becomes available, based solely on their mental-health needs and position on the waiting list.

Further, the size of Washington's HCBS program increased at the state's request from 1,227 slots in 1983, to 7,597 slots in 1997, to 9,977 slots beginning in 1998. The annual state budget for community-based disability programs such as HCBS more than doubled from \$167 million in fiscal year 1994, to \$350 million in fiscal year 2001, despite significant cutbacks or minimal budget growth for many state agencies. During the same period, the budget for institutional programs remained constant, while the institutionalized population declined by 20%. Today, the statewide institutionalized population is less than 1,000.

The Department's Division of Developmental Disabilities (DDD) has also seen its biennial budget grow steadily from \$750 million in 1995 to over \$1 billion in 1999, making it one of the fastest growing budgets within the Department. Family support services, given to families of DDD clients living at home, have grown even faster, benefitting from a 250% budget growth over five years. There is thus no indication that the state is neglecting its responsibilities to the HCBS program relative to other programs.<sup>24</sup>

This Ninth Circuit analysis is more amorphous and less prescriptive than the detailed and rigorous list of requirements the Third Circuit set forth for a successful *Olmstead* plan defense.<sup>25</sup> It not only accepts, as the basis for an *Olmstead* plan defense, historical progress in reducing the number of institutionalized persons, it even allows for exceptions to such progress and the lack of any specific or general documents that, taken together, describe a plan to transition individuals from segregated to integrated settings. The Third Circuit, on the other hand, has required demonstrated, specific and measurable commitment to action, including goals, benchmarks, and timeframes for which a

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<sup>24</sup> *Arc of Wash. State Inc. v. Braddock*, 427 F.3d at 621 (citations to cases and record omitted).

<sup>25</sup> *Frederick L. III*, 422 F. 3d at 158-159.

public entity can be held accountable.<sup>26</sup> Additionally, the Third Circuit requires that the plan clearly identify and focus on specific groups of people who are in each type of segregated setting, and include specific, measurable goals and benchmarks for each group.<sup>27</sup> Significantly, none of the other circuits have directly addressed the standard for assessing an *Olmstead* plan defense, creating both opportunities and risks for litigating *Olmstead* cases in most jurisdictions.<sup>28</sup>

The *Olmstead*'s plurality opinion, which first articulated the *Olmstead* plan defense, did not appear to view it as part of the affirmative defense of fundamental alteration, but instead, as a proactive strategy a state could take to avoid potential litigation under the ADA.<sup>29</sup> If a state can show that it has a

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<sup>26</sup> *Id.*

<sup>27</sup> This discussion does not specifically address the special case of *Olmstead* plans developed in anticipation of litigation or after litigation is filed, which is the subject of another fact sheet: *Litigation Strategies to Avoid Olmstead Defenses – Part II: Olmstead Plans, Q & A – July 2016* [https://www.tascnow.com/wp-content/uploads/2019/03/FS\\_Olmstead\\_Litigation\\_Strategies\\_to\\_Avoid\\_Olmstead\\_Defenses\\_Part\\_2\\_CPR\\_FINAL.pdf](https://www.tascnow.com/wp-content/uploads/2019/03/FS_Olmstead_Litigation_Strategies_to_Avoid_Olmstead_Defenses_Part_2_CPR_FINAL.pdf). But when states first develop or dramatically enhance their *Olmstead* plans *only after* being sued for a violation of the ADA's integration mandate, such plans rarely serve a proactive goal of demonstrating a reliable and effective commitment to integration and almost never could meet the Supreme Court's test for "effectiveness."

<sup>28</sup> The DOJ's guidance aligns more with the Third than the Ninth Circuit in setting forth these more stringent requirements for an *Olmstead* plan. See 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.*, [https://www.ada.gov/olmstead/q&a\\_olmstead.htm](https://www.ada.gov/olmstead/q&a_olmstead.htm) ("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.").

<sup>29</sup> *Olmstead*, 527 U.S at 605-606.



comprehensive and effectively working *Olmstead* plan, the fundamental alteration defense would become irrelevant: the state can undermine a plaintiff's *prima facie* case without ever needing to reach the affirmative defense of fundamental alteration. Thus, if defendants can prove that they have a comprehensive, effectively working *Olmstead* plan, they have demonstrated that further modifications are neither reasonable nor necessary. As a result, no additional proof of a fundamental alteration is necessary.

At least one circuit court and the Department of Justice determined that the “failure to articulate a commitment in the form of an adequately specific comprehensive plan for placing eligible [people] in community-based programs by a target date places the ‘fundamental alteration defense’ beyond [defendant’s] reach.”<sup>30</sup> Under this interpretation of *Olmstead* and the ADA, a defendant first must prove that it has a “comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings” in order to avail itself of the fundamental alteration defense.<sup>31</sup>

The Third Circuit is the only circuit court that has required proof of an effectively working *Olmstead* plan as a pre-condition to assertion of a fundamental alteration defense. However, even in the Third Circuit, there is confusion regarding the relationship between the two defenses.<sup>32</sup> This confusion provides good reason for plaintiffs to be prepared to undermine any fundamental alteration defense, regardless of whether or not defendants have a comprehensive and effective *Olmstead* plan.

## B. Strategic Considerations

Under either judicial application of the defense, plaintiffs must attack the state’s

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<sup>30</sup> See *Frederick L. III*, 422 F.3d at 158-59; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82; DOJ *Olmstead* statement; see also *Hampe v. Hamos*, 917 F. Supp. 2d 805, 821-22 (N.D. Ill. 2013).

<sup>31</sup> See *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381 (“[T]he only sensible reading of the integration mandate consistent with the Court’s *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA . . . .”); see also DOJ *Olmstead* statement. But see *Disability Advocates Inc. v. Paterson*, 598 F.Supp.2d 289, 336-339 (E.D.N.Y. 2009) (DAI I)(deciding that *Olmstead* plan not required for fundamental alteration defense).

<sup>32</sup> *Frederick L. III* conceptualizes the *Olmstead* plan defense as part of the fundamental alteration defense, rather than as a separate defense unique to cases brought under the ADA’s integration mandate. Similarly, other courts have reflected this confusion. For example, in *Day v. District of Columbia*, 894 F. Supp. 2d at 6-7, the court described an *Olmstead* plan as a means for a state to meet its burden under the affirmative defense of fundamental alteration. See also *id.* at 27, n. 55. Given the confusion stemming from the unclear and unresolved relationship between these two defenses, parties cannot assume that a comprehensive and effectively working *Olmstead* plan automatically meets or renders irrelevant the defendant’s burden of proving a fundamental alteration.

*Olmstead* plan with data and expert opinion to establish that the plan is not comprehensive and is not effective. Discovery, data, and expert opinion should address the following: 1. relevant population data; 2. service capacity data; 3. eligibility data (how many individuals are qualified for community programs); 4. data on needs and preferences of the target population; 5. analysis of the data in connection with the stated targets and goals of the plan; 6. funding; 7. service planning process, standards, and outcomes with respect to the target population; 8. adjustments to service capacity based on data and analysis; 9. monitoring and implementation; and, 10. outcomes. If the state lacks this information, or an analysis of this information does not support its claim that the plan is detailed and effective, the defense should fail. Expert opinion on deficiencies in the scope and implementation of the plan are critical to convince a court that, regardless of the judicial test used, the plan does not meet the Supreme Court's goal of a demonstrated commitment to integration that results in transitioning all individuals who are unnecessarily segregated into the community at a reasonable pace.

A defendant's failure to analyze the number of people in institutions who could be served in alternate settings or who wanted to live in the community will help undermine the *Olmstead* plan defense. Plaintiffs must obtain data to identify the relevant institutionalized census and then seek expert opinions to determine if that census has increased, decreased or is flat as well as the rate of any decline over the time the plan has been in effect. Evidence that the relevant census has not declined or only slightly declined will help establish that an *Olmstead* plan is not effectively working for the population relevant to the litigation. Demonstrating a lack of long term goals for deinstitutionalization and specific benchmarks or timelines for these goals will also undermine the *Olmstead* Plan defense.

Where states rely upon actual progress, rather than documented goals, benchmarks, and timelines, as evidence to support their *Olmstead* plan defense, they also may seek to explain limited progress by pointing to the complexity of the needs of some institutionalized individuals. Plaintiffs need to be prepared to rebut these explanations for why progress may be stymied. Where defendants claim that the census remaining in the relevant institution reflects a needier residual population, plaintiffs must show comparable levels of need between those people remaining in the institutions and those living in the community.<sup>33</sup> Discovery and expert analysis of the defendant's data on service planning, enrollment, monitoring and outcomes can provide a basis for rebutting a defendant's rationale for lack of movement.

Plaintiffs should look beyond what may be an effectively working *Olmstead* plan for other individuals in other facilities, but which is not working or not effective for the population at issue in a given case. If defendants are able to move these

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<sup>33</sup> Cf. *Sanchez*, 416 F. 3d at 1066 (citing support in record for district court's finding that decline in community placements attributable to more severe disabilities of those remaining in institutions).

other individuals from institutions and provide them with the necessary community based services and supports, plaintiffs can assert that the *Olmstead* plan is not comprehensive because it does not affect the relevant population.

When the defendant has a comprehensive plan and presents evidence of implementation, it is critical to have expert and fact witnesses prove that the defendant's assertions are not based on the reality experienced by individuals and representative stakeholders. While experts can critique the scope of the plan (comprehensiveness), its goals, benchmarks, and timelines (adequacy); and its outcomes (effectiveness), fact witnesses, like parents, advocates, and stakeholders, are often the most persuasive witnesses in challenging the deficiencies and limited impact of the plan on the real lives of real people who remain unnecessarily segregated.

#### IV. Fundamental Alteration

##### A. The Law

Under the ADA, the public entity may assert fundamental alteration as an affirmative defense, which must be pled and proven by defendants. The fundamental alteration defense only becomes relevant after plaintiffs meet their *prima facie* burden of describing the reasonable modifications to the public entity's service system to allow all qualified individuals to receive services in the most integrated setting. The defendants have the burden to show that the proposed modification would constitute a "fundamental alteration" of its services, programs, or activities.<sup>34</sup>

There are two prongs to the fundamental alteration defense: First, the state can assert that the proposed accommodation amounts to a fundamental alteration to its service delivery system in terms of the benefits, services or programs of that system.<sup>35</sup> Second, the state can assert that the cost of the proposed accommodation, as compared to the cost of the existing segregated service, would require a fundamental alteration of its service system and negatively impact other recipients of that system.<sup>36</sup> Proposed modifications as to the type or quality of service tend to fall under the first prong and modifications as to scope or quantity tend to come under the second prong. Proposed modifications can be challenged under one or both prongs.

The ADA does not require states to create entirely new programs and services that are not already provided to other persons with disabilities.<sup>37</sup> But some adjustment, adaptation, or modification to a service may be required in order to

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<sup>34</sup> *Olmstead*, 527 U.S. at 603-06; *Henrietta D.*, 331 F.3d at 280-81; *Frederick L. II*, 364 F.3d at 492 n.4.

<sup>35</sup> *DAI I*, 598 F. Supp. 2d at 335-336.

<sup>36</sup> *Id.* at 349-354.

<sup>37</sup> *Id.* at 335-337 (citing *Rodriguez v. City of New York*, 197 F.3d 611, 619 (2d Cir.1999)).

allow the individual to participate in, and have equal access to, the entity's program, benefit, or service.<sup>38</sup> Plaintiffs need to show that any proposed modification is necessary for transitioning people from segregated facilities to integrated settings and that it is consistent programmatically and fiscally with the defendant's overall program of delivering services. With respect to the services prong of fundamental alteration, the further the proposed modification is from the services, program or activities already offered by the state, the easier it is for the state to show fundamental alteration.<sup>39</sup>

When a state already offers community services to some people in or similar to those in the plaintiff class, providing those same services to additional people generally is not a fundamental alteration of the state's service system, at least with respect to the service prong of the defense.<sup>40</sup> However, a defendant might still be able to demonstrate that the proposed modification, in terms of either the intensity or additional components of the service, runs afoul of the cost prong of the fundamental alteration defense.

In proving that the proposed modification would require the state to deprive other persons of needed services (not treat them "with an even hand"), the defendant has the burden to identify and prove that specific programs will be cut if the reasonable modification is implemented and that these cuts relate to the services at issue: "The state must make a more particularized showing of harm to others in the disabled community in order to eliminate serious questions on the merits

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<sup>38</sup> The line between a reasonable modification and a fundamental alteration can be elusive, and depends mostly on the level of generality or specificity in which the inquiry is conducted. For instance, providing additional staff or staff with additional training that is necessary to allow an individual to use a service likely would be considered a reasonable modification to that service. But changing the eligibility criteria to a home and community based waiver program in order to allow a different population or group of individuals to obtain waiver services likely would be considered a fundamental alteration to that waiver program.

<sup>39</sup> *DAI I*, 598 F.Supp. 2d at 335-336.

<sup>40</sup> See *id.* ("Where individuals with disabilities seek to receive services in a more integrated setting—and the state *already provides* services to others with disabilities in that setting—assessing and moving the particular plaintiffs to that setting, in and of itself, is not a 'fundamental alteration.'"); *Townsend v. Quasim*, 328 F.3d 511, 518-19 (9th Cir. 3003) ("*Olmstead* did not regard the transfer of services to a community setting, without more, as a *fundamental* alteration. Indeed, such a broad reading of fundamental alteration regulation would render the protection against isolation of the disabled substanceless."); see also *Fisher v. Oklahoma Health Care Authority*, 335 F. 3d 1175, 1183 (10th Cir. 2003) ("Plaintiffs are simply requesting a service for which they would be eligible under an existing state program, unlimited medically necessary prescriptions, be provided in a community-based setting rather than a nursing home"); *Radaszewski v. Maram*, 383 F. 3d 599, 611-612 (7th Cir. 2004) (requiring state to provide service in community setting that it already provides in institutional setting does not amount to new service). Cf. *Rodriguez v. City of New York*, 197 F. 3d 611, 618-619 (2d Cir. 1999) (safety monitoring service was not required: "ADA does not mandate the provision of new benefits").

concerning the validity of the fundamental alteration defense.”<sup>41</sup>

With respect to the cost prong of the fundamental alteration defense, some additional cost – and certainly some interim or temporary cost – related to the provision of integrated services does not, in and of itself, amount to a fundamental alteration.<sup>42</sup> Critical to assessing whether remedial costs will fundamentally alter the state system is a determination of the relevant program and budget that is used as a comparison for the requested modification.<sup>43</sup> Proposed modifications will almost always involve some more cost either because of additional services, new locations, higher intensity of service, or larger numbers of people receiving the services.<sup>44</sup>

Whether or not the additional cost is a fundamental alteration or not will depend on what level of analysis the court will apply:

On the one hand, a “substantial [ ] increase” in the cost of a few of plaintiffs’ services should not “defeat [a] Title II claim.” Such a holding would eviscerate the integration mandate. On the other hand, looking only at the cost of changing the plaintiffs’ care would be unfair to the state and fail to give it the leeway for which Justices Kennedy and Breyer called. “If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State’s entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail.”

By specifying that both the “resources available to the State” and “the needs of others with mental disabilities” must be taken into account, the plurality’s test allows for a sensitive balance between the interests of the state and the interests of the developmentally disabled persons. The test also prevents a state from describing a program at such a specific level of detail that literally any change would result in a “fundamental” alteration. In the end, the question under the ADA is a simple one: what effect will changing the state’s practices have on the provision of care to the developmentally disabled, taking into account the

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<sup>41</sup> *M.R. v. Dreyfus*, 697 F. 3d at 737 (citing *Frederick L II.*, 364 F.3d at 497; *Townsend*, 328 F.3d at 520).

<sup>42</sup> *Pashby v. Delia*, 709 F. 3d 307, 323-324 (4th Cir. 2013)(collecting cases).

<sup>43</sup> *DAI I*, 598 F. Supp. 3d at 349-350 (discussing *Olmstead* and subsequent cases and then concluding “that the relevant budget is the “mental health budget,” which includes any money the State receives, allots for spending, and/or spends on mental health services and programs”).

<sup>44</sup> Again, the line between some incremental expense – which would not constitute a fundamental alteration – and a significant increase in cost --which would satisfy the defense – is elusive and depends mostly on what budget or current expenditures the additional cost is compared to.

resources available to the state and the need to avoid discrimination?

The evaluation of whether a change would fundamentally alter the nature of a program should be holistic.<sup>45</sup>

Vague or abstract claims of fundamental alteration do not satisfy defendant's burden.<sup>46</sup> Rather, the defendant must provide concrete data and other evidence of the actual costs of current services and the projected costs of the remedy and modifications requested by plaintiffs.

## B. Strategic Considerations

It is essential that P&As anticipate the state's fundamental alteration defense and ensure, at every juncture in the litigation process, that they do not provide support for, or information that can be used to prove, the defense. This focus should begin with drafting the complaint. The complaint, including the facts and the requested relief, should avoid any specific numerical projection of the number of individuals who qualify for and do not oppose transition from an institutional to a community setting. In addition, the complaint should consistently describe the public entity's program or benefit in the broadest possible terms – such as the state's disability and long term system, so as to provide for an expansive basis for comparing the current conditions of segregation to the requested ones for integration.

A similar focus should inform the pre-trial schedule for all litigation activities. The schedule should include a fact cut-off date that would preclude the use of information concerning the implementation of any Olmstead plan after a given date, so as to prevent last minute actions that are not subject to careful discovery. It should provide for mutual exchange of expert reports, and rebuttal

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<sup>45</sup> *Steimel v. Wernert*, 823 F. 3d at 915 (citations including *Olmstead* plurality and *Radaszewski*, 383 F.3d at 614 omitted); see also *Disability Advocates Inc. v. Paterson*, 653 F. Supp. 2d 184, 269 (E.D.N.Y.) (DAI II) (“In considering the resources available to the State, the relevant budget is the ‘mental health budget,’ which includes any money the State receives, allots for spending, and/or spends on services and programs for individuals with mental illness.”). *DAI I*, 598 F.Supp.2d at 350. Under that standard, for purposes of this case, the resources available to the State include funds that OMH, DOH, the Governor, or the Legislature spends on persons with mental illness. The analysis includes not only current spending on mental health services and programs, but also savings that will result if the requested relief is implemented. *Id.* (citing *Olmstead*, 527 U.S. at 604–07, 119 S.Ct. 2176). Courts have required states to provide a “specific factual analysis” to demonstrate that the requested relief would constitute a ‘fundamental alteration.’ *DAI I*, 598 F.Supp.2d at 335 (citing *Fisher*, 335 F.3d at 1183 (refusing to accept fundamental alteration defense absent specific evidence that the costs of providing the requested relief would ‘in fact, compel cutbacks in services to other Medicaid recipients’ or be inequitable to others with disabilities); *Townsend*, 328 F.3d at 520”).

<sup>46</sup> *Hamp v. Hamos*, 917 F. Supp. 2d 805, 822 (N.D. Ill. 2013).

reports, on the same date, so that the defendants are not afforded additional information and opportunities to analyze the impact of the plaintiffs' proposed modifications. And it should allow broad discovery, with an enlarged number of depositions, so that the plaintiffs can explore that information and data maintained by the public entity that it will use to support its defense, such as the number of individuals who oppose placement or the cost of providing services in an integrated setting.

If defendants base their fundamental alteration defense on the first prong – a substantial change to the eligibility, type, or nature of the service – plaintiffs will need to present expert testimony to demonstrate: (1) that the requested modification is not such a significant change to the program or service as to alter its basic purpose or design; and/or (2) the requested modification is reasonable and necessary to allow individuals to access the program or service. To provide the basis for this expert opinion, plaintiffs should seek, through requests for production and interrogatories, all documents, data, and other information on the type, scope, location, design, staffing, provision, utilization, and cost of all relevant existing services and programs that serve similarly situated persons with disabilities. This discovery should also include contention interrogatories that specifically ask for all details and documents supporting any fundamental alteration defense, as well as requests for admission that the requested modifications would not require a fundamental alteration of current services. When arguing that these services are already provided, be mindful of the numbers: to how many is the service provided? for how many more are these services being proposed? If these numbers are disproportionately large, defendants may be able to prove a fundamental alteration defense. Here again, focusing on a relatively larger system for comparison can be a helpful strategy.

More likely, the defendants' affirmative fundamental alteration defense will focus on showing that costs of integration are higher than cost of institutionalization. Even if plaintiffs can show that there is the same or approximately the same per person cost for providing services in an integrated rather than a segregated setting, plaintiffs need to be aware that defendants will try to add other costs to the fundamental alteration calculation, including the cost of maintaining the institutional beds or facilities for other persons, even if integration has moved people out of institutions. Plaintiffs need to be prepared to undermine defendants' claims that costs will continue to include the cost of running the institutions, even if less beds are occupied.<sup>47</sup> Plaintiffs also need to make sure that the institutional cost includes all costs of providing legally required services (e.g. active treatment costs).

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<sup>47</sup> When federal law creates an entitlement to institutional services, like nursing facilities or Intermediate Care Facilities, this argument is quite challenging, and would require statistical data on projected decreased demand or utilization. Similarly, where states have waiting lists for certain types of institutional services, like psychiatric hospital beds or residential programs, data will be necessary to show how integrated alternatives can also reduce waiting lists for segregated services.

A challenge to a fundamental alteration defense based upon cost will almost certainly require a fiscal expert. To provide the basis for their expert's opinion, plaintiffs need to seek all documents, data, and other information related to the cost of all relevant services currently provided, or that is otherwise needed by the requested modification to the state's program or system. Again, contention interrogatories should ask for the basis and all supporting information for the state's claim of fundamental alteration. Similarly, requests for admission should address each element of the defense.

Finally, it is critical for the plaintiffs to develop a proactive strategy to address, undermine, or rebut the state's fundamental alteration expert. In addition to the traditional approach of challenging the state's expert's analysis and conclusions, the plaintiffs should develop strategies to limit the basis and reliability of the state's expert's opinion. Specifically, plaintiffs should make every effort not to provide the specific numbers of individuals who could transition to the community, as well as the type, scope, intensity, and frequency of services necessary to live and work in integrated settings. Plaintiffs should ensure that in drafting the complaint, proposing all pre-trial activities for the pre-trial order, conducting and responding to discovery – and especially responses to contention interrogatories – they avoid offering information that the state can use to develop its fundamental alteration defense.

## V. Conclusion

In the aftermath of *Olmstead*, a comprehensive and effectively working *Olmstead* plan either: (1) renders fundamental alteration irrelevant; (2) is a necessary element of fundamental alteration; or (3) is a wholly separate but related defense available to public entities. For now, P&As should be mindful of strategic considerations for both defenses, regardless of their overlap or lack thereof in any given jurisdiction. In doing so, they need to draft pleadings, schedule pre-trial activities, plan discovery, retain experts, respond to defendants' discovery, draft pre-trial motions, and prepare for trial based upon careful consideration of the state's fundamental alteration defense. Strategies to defeat *Olmstead* plan and fundamental alteration defenses will depend on the context and very specific analyses of the facts and data. Regardless of whether litigation is in the Third Circuit, where it has been conclusively determined that the defense of fundamental alteration is not available to defendants who do not have an effectively working and comprehensive *Olmstead* plan, or in circuits with less definitive guidance, strategies to defeat the both defenses, which intertwine and overlap, are necessary.