TASC Training & Advocacy Support Center

TASC is sponsored by the Administration on Intellectual and Developmental Disabilities (AIDD), the Substance Abuse and Mental Health Services Administration (SAMHSA), the Rehabilitation Services Administration (RSA), and the Social Security Administration (SSA). TASC is a division of the National Disability Rights Network (NDRN).

Q & A
Plaintiffs Need Not Delineate the State's Fundamental Alteration Defense in *Olmstead* Litigation

Produced by Sandra J. Staub and Steven J. Schwartz
Center for Public Representation
with a grant from the Training and Advocacy Support Center

August 2018

Q. In response to our claims pursuant to Title II of the Americans with Disabilities Act (ADA), seeking to enforce its integration mandate, the State claims that the relief sought would fundamentally alter the nature of the defendant's service, program, or activity.[1] *See Olmstead v. L.C.*, 527 U.S. 581 (1999). In the course of discovery, defendants have served contention interrogatories, demanding that we delineate the details of the injunctive relief we are seeking, in order to allow them to assess their fundamental alteration defense. What level of detail do we need to include in the answers to these contention interrogatories?

A. Defendants in *Olmstead* cases want plaintiffs to assist them in articulating their fundamental alteration defense, using contention interrogatories relating to remedies as their tool. The best strategy for plaintiffs in response to these efforts is to decline the invitation to provide remedial details that defendants will use to argue that fundamental changes to defendants' system or prohibitive costs are necessary to provide the requested relief. Plaintiffs should seek to avoid, as much as possible, providing the specific details of their remedy, including the numbers of people to be served in the community and costs, at least if not clearly known. Instead, plaintiffs should respond to such contention interrogatories only after the completion of all discovery, and then only with general descriptions of actions and activities that should be included in the remedy, but without specifying numerical outcome requirements. The articulation of the remedy must be framed as a reasonable modification of defendants' existing service system that does not demand prohibitive costs.

[1] *Olmstead* 527 U.S. at 587, 607; 28 C.F.R. § 35.130(7)(i) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.")

I. Fundamental Alteration Defense

To establish a fundamental alteration defense, a State must prove that "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."[2] Defendants must show that the remedy requested either: (1) requires the State to provide a new or distinctly different type of service or level of benefits, thereby changing the fundamental service structure; or (2) requires an expenditure that will prevent the State from providing essential services to other eligible persons. However, integration that involves short term burdens and costs do not amount to fundamental alteration.[3] Defendants can only assert a fundamental alteration defense if they have a valid claim that they cannot provide relief to all members of the class without fundamentally altering their service systems in one of these two ways.

Defendants cannot claim that it would be a fundamental alteration to offer services in an integrated setting and to support eligible persons in the community when state policies and plans reflect a system that is intended to provide integrated services, and only would require simple modifications to accomplish the integrated remedy. Further, defendants cannot automatically presume that immediate relief is inequitable, in light of evidence that community based services are typically more cost-effective than segregated services.[4]

II. Challenges to Defendants' Arguments to Compel Plaintiffs to Delineate Numerical Remedies to Support Defendants' Fundamental Alteration Defense

Defendants' primary argument in support of seeking to compel *Olmstead* plaintiffs to delineate the type of integrated services and the number of persons needing those services is that this information is necessary (1) to determine if the requested services would require them to substantially modify their delivery system; and (2) to calculate the projected cost of providing the requested range and intensity of community services

---

[2] *Olmstead*, 527 U.S. at 604.

[3] *See generally Q & A Strategy Considerations in Preparing and Litigating and [sic] Olmstead Case Part VII – Fundamental Alteration*, at 7, available at http://www.tascnow.com/tasc/images/Documents/Publications/Q_A/2011/TASC_Strategy_Considerations.pdf (citing *Townsend v. Quasim*, 328 F. 3d 511 (9th Cir. 2003); *Rodriguez v. City of New York*, 197 F. 3d. 611 (2d Cir. 1999); *Fisher v. Oklahoma Health Care Authority*, 335 F. 3d 1175 (10th Cir. 2003); and *Frederick L. V. Department of Public Welfare*, 364 F. 3d 487 (3d Cir. 2004)); *see also Lane v. Kitzhaber*, 283 F.R.D. 587, 601-602 (D. Oregon 2012).

[4] As the Ninth Circuit has made clear, "[e]ven if extension of community-based long term care services to the medically needy were to generate greater expenses for the state's Medicaid program, it is unclear whether these extra costs would, in fact, compel cutbacks in services to other Medicaid recipients." *Townsend v. Quasim*, 328 F. 3d at 520.

to the number of institutionalized persons plaintiffs claim are qualified to move to the community. A secondary argument defendants put forth is that Federal Rule of Civil Procedure 65(d) requires that plaintiffs delineate the precise relief requested. These arguments misunderstand the fundamental alteration defense allowed under *Olmstead* and mis-apply the duties imposed by Federal Rule of Civil Procedure 65(d).

Rule 65(d) imposes obligations on a court entering an injunction, not on parties responding to discovery requests.[5] Moreover, while Rule 65(d) prohibits a court from granting "[a] general injunction which in essence orders a defendant to obey the law," it does not require "unwieldy" specificity.[6] Particularly in cases where the goal of the injunctive relief sought will involve a "complicated logistical task," an order requiring such relief need not "choreograph every step, leap, turn, and bow," and may "specif[y] the end results expected and allows the parties the flexibility to accomplish those results."[7]

Furthermore, prior to trial and a finding of liability, a party is not expected to set forth the requested injunction with the specificity required by Rule 65(d).[8] This is particularly true in cases seeking systemic relief, where the ultimate proof might shape the structure of a remedial plan.[9] Federal courts are required to tailor remedial measures, particularly in complex systemic injunctive cases, to the identified violations of federal law.[10] The nature and scope of the remedial measures plaintiffs seek, and the relief a court might order, are intricately intertwined with the "scope of violations established at trial" or perhaps later, in an enforcement proceeding.[11]

---

[5] Fed. R. Civ. P. 65(d) ("Every *order* granting an injunction . . . must . . . .") (emphasis added).

[6] An injunction must go beyond merely ordering a defendant to obey the law*. See, e.g., Meyer v. Brown & Root Constr. Co.,* 661 F.2d 369, 373 (5th Cir. 1981)*. "*[T]o comply with Rule 65(d) '[t]he district court's order granting the injunction must 'state its terms specifically' and 'describe in reasonable detail' the conduct restrained or required.'" Scott v. Schedler*,* 826 F.3d 207, 211 (5th Cir. 2016) *(quoting Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 586 (5th Cir. 2013)); *see also* Fed. R. Civ. P. 65(d)(1)(C) (requiring every injunction to "describe in reasonable detail—and **not by referring to the complaint or other document**—the act or acts restrained or required") (emphasis added).

[7] *See N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 917 (5th Cir. 1996).

[8] *Cf. Morrow v. Washington*, 277 F.R.D. 172, 198 (E.D. Tex. 2011) (finding that the precise terms of an injunction need not be decided at the class certification stage, only that injunctive relief is warranted and that an injunction can be crafted to meet the specificity requirements of Rule 65(d)).

[9] *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 689 n. 35 (9th Cir. 2014) (noting that an injunction must closely track the violations established by the evidence at trial); *Braggs v. Dunn*, 317 F.R.D. 634, 669 (M.D. Ala. 2016).

[10] *Milliken v. Bradley*, 418 U.S. 717, 737-38 (1974).

[11] *Lane v. Kitzhaber,* 2013 WL 6798470 *2 (D. Or. Dec.19, 2013) (ECF No.134).

In addition, out of respect for state sovereignty and in recognition of the reality that remedial plans are most effective when designed by the litigants and their experts, federal courts routinely afford the parties the first opportunity to design the remedy.[12] Thus, plaintiffs seek remedial measures that will be tailored, and perhaps determined, by a negotiation or mediation process that reflects a court's liability findings.[13]

In addition, the type, amount, intensity, and duration of services that are appropriate for class members in an *Olmstead* case are best determined not by a court, but instead by an individualized, professional service planning process. The process should be specified as part of the remedy without including in the remedy individual outcomes of that process, or speculation about the exact number of individuals who will are unnecessarily segregated and who choose to move to the community.[14] Thus, an adequate service planning process is part of the remedy but the outcomes of that process, which should reflect individual abilities and needs, as well as the professional judgment of treatment team members, need not and, in fact, cannot be identified prior to trial or prior to the actual service planning meeting.

The distinction between process and outcomes demonstrates why it is neither possible nor appropriate to compel plaintiffs to set forth detailed remedies. Ruling on motions to compel plaintiffs to respond to contention interrogatories on their integration remedy, at least two courts have decided that this detail is not required.[15]

---

[12] *See Rosie D. v. Romney,* 410 F. Supp. 2d 18, 54 (D. Mass. 2006) (directing parties to attempt to design an acceptable remedy); *Disability Advocates Inc. v. Paterson,* 653 F. Supp. 2d 184, 312-14 (E.D.N.Y. 2009) (same).

[13] *Rosie D. v. Romney,* 474 F. Supp. 2d 238 (D. Mass. 2007) (adopting remedial plan that reflects partial agreement of the parties and resolving remaining disputed issues).

[14] *Lane v. Kitzhaber,* 841 F. Supp. 2d 1199, 1207, 283 F.R.D. 587, 602 (D. Or. 2012).

[15] In *Lane*, a supported employment case under *Olmstead*, the state served interrogatories asking plaintiffs to provide the percentages or numbers of people that plaintiffs wanted in integrated employment for an average of at least 20 hours per week. The state argued that if plaintiffs were seeking a target for the number of people in supported employment, the cost would be relevant to the state's fundamental alteration defense. Plaintiffs resisted the demand and the state moved to compel plaintiffs to provide these numerical remedial details. At the hearing on the state's motion to compel, the state argued,

> And so the cost of the group and the percentage of the group that needs to meet certain targets, as we believe the plaintiffs will contend, is relevant, and if we're not even going to be able to hear that until after the liability phase is done, which I think is what plaintiffs' argument is, then basically how do we put on our fundamental alteration defense?

The Court rejected this argument:

> But I'm not seeing the fundamental alteration defense as such a trigger that I should require the plaintiffs to respond to your interrogatory by giving you a

In typical systemic *Olmstead* litigation, defendants already have or should have detailed information on the reforms that will be required to remedy their systemic violations of the ADA and Rehabilitation Act. At a minimum, they have the utilization and claims data necessary to calculate the cost of implementing the requested relief. They can easily use this information to create cost projections and simulations of remedial plans. Moreover, it is not plaintiffs' obligation to tell defendants or the court what defendants already know.[16]

To prove a fundamental alteration, defendants must show that if they modified their services to provide integrated services to eligible persons with disabilities, they could not afford to offer essential services to other eligible persons. That is, defendants can only assert a fundamental alteration defense if they have a valid claim that providing integrated services to eligible persons with disabilities who are in, or at risk of entering, institutions would fundamentally alter the State's service system. Since the defendants control, administer, and fund this service system, and have the best information on who is eligible for that system, they – rather than the plaintiffs – are in the best position to determine whether, or to what extent, eliminating unnecessary segregation would result in a denial of essential services to others.

Defendants cannot establish such a defense where their own policies, representations, budget requests, and data indicate that they have, and will continue, to offer information and opportunities for community living. If it is clear from available information that defendants are already providing information and opportunities for community living, it is not a fundamental alteration to require that these systems be rendered effective by including all qualified persons with disabilities. Defendants cannot credibly claim that

---

> percentage. It just doesn't seem necessary to me, or frankly even appropriate, given what the representations have been to the Court so far.

Official Court Transcript of Proceedings Filed Telephone Oral Argument held on 4/16/2015 at 9-25, *Lane v. Brown*, No. 3:12-cv-00138-AC (D. Or. April 22, 2015), ECF. 315; *see also Lane,* 2013 WL 6798470 * 2 (finding that plaintiffs do not intend to "ask[] the Court to issue injunctive relief that requires defendants to ensure that all members of the certified class achieve certain employment outcomes."). The Court also found that plaintiffs' discovery responses were consistent with permissible relief under the ADA. *Id.* Rather, plaintiffs' discovery responses properly permitted the Court to use integration criteria to assess whether employment services ordered after trial actually result in class members receiving services in integrated settings, consistent with the ADA. *Id.* ("Instead, they are offering a way to measure the success of the employment services offered"). Plaintiffs' answers were found to be not "in some material respect … incorrect or inaccurate". Fed. R. Civ. P. 26(e)(1)(A)).

In response to comparable arguments in support of a motion to compel in another *Olmstead* case, the motion to compel has been similarly denied. *See* 8/13/2018 Order Denying Motion to Compel, *Steward v. Smith*, No. 5:10-cv-01025-OLG, ECF No. 509.

[16] See Fed. R. Civ. P. 26(e)(1)(A) (supplementation required only if "the additional or corrective information has not otherwise been made known to the other parties . . .").

offering community services to all eligible persons would fundamentally alter defendants' service systems if defendants already have policies that these services are, or should be, available.

Simply put, defendants themselves have far better access to clinical, programmatic, utilization, rate, and expenditure data concerning community services necessary to calculate the cost of a proposed remedy than any information available to plaintiffs. And courts recognize this reality in refusing to compel plaintiffs to articulate precise numerical remedies.[17]

IV. The Best Strategy for Plaintiffs in Response to Defendants' Demands

In response to contention interrogatories relating to requested remedies, plaintiffs in *Olmstead* litigation can describe reasonable programmatic modifications of defendants' own services, systems, and capacity without acceding to defendants' demand for precise numerical goals, service models, projected service frequency and intensity, or thresholds that could be then used by defendants to support a fundamental alteration defense.[18] Every effort should be made to avoid providing this information, both because it is often speculative, and, in any event, it is premature. Until the court rules on liability, it is impossible to determine what violations must be remedied, and to precisely identify what elements of those programs are deficient.

In addition, plaintiffs should argue that the fiscal information related to the fundamental alteration defense, such as budgets or other available resources, is within the defendants', not the plaintiffs', control. Moreover, providing answers to these

---

[17] The court in *Lane* did not compel the plaintiffs to specify numeric targets, based in part on this reasoning,

> I understand that the fundamental alteration defense certainly relates to liability. The State can only afford to do so much. However, I suspect [defendants] have the evidence you need to present in that regard, and that you can estimate what the cost would be as far as a range of costs if you had to actually place 100 percent of these 2500 or 3900 people in integrated employment at 20 hours a week. So I don't see really what the problem is here. . . .

Official Court Transcript of Proceedings Filed Telephone Oral Argument held on 4/16/2015 at 21, *Lane v. Brown*, No. 3:12-cv-00138-AC (D. Or. April 22, 2015), ECF No. 315.

[18] For example, in *Lane*, plaintiffs described in detail eighteen areas where relief was sought, providing the defendants' ample understanding of the potential remedy. They also provided defendants with citations to seven peer-reviewed articles documenting the cost-effectiveness of supported employment as compared to workshops. Declaration of Steven J. Schwartz, Ex. 1 (Pls.' Answers to Fifth Interrogs. 5-6), *Lane v. Brown*, No. 3:12-cv-00138-AC (D. Or. April 22, 2015), ECF No. 307, These efforts to outline and describe the requested remedy were enough to defeat the motion to compel a much more detailed articulation of the remedy that defendants had hoped would help them prove fundamental alteration.

information requests requires detailed projections – which are often only best guesses – about how many individuals are qualified for and would not oppose integrated services, or how many or what type of providers need to be added to create sufficient service capacity. Finally, if defendants wish to raise the fundamental alteration defense, the burden is on them to show why providing integrated services for plaintiffs would mean they would be unable to offer essential services to others.[19] It is not plaintiffs' duty to provide defendants with information to support their defense.

To the extent that defendants are entitled to detailed information about the relief sought by plaintiffs in a given case, such as requested modifications of defendants' own programs, systems, and capacity, plaintiffs can describe - in detail – areas and processes where relief is sought. For instance, plaintiffs can describe the elements of effective diversion, informed choice, transition, and community programs, which, if implemented, will allow all individuals who are unnecessarily segregated to access services in integrated settings. However, plaintiffs are not obligated to provide or know the actual fiscal, clinical, service planning, and service capacity data that would be used by defendants to prove a fundamental alteration defense, since information about budgets or other available resources, is within defendants', not plaintiffs', control.[20] Finally, if defendants wish to raise the fundamental alteration defense, the burden is on them to show why providing community services to plaintiffs would mean they would be unable to offer essential services to others. *See Olmstead*, 527 U.S. at 604.

V. Conclusion

Requested relief set forth in pleadings and clarified as needed with a description of remedial measures in response to contention interrogatories together satisfy plaintiffs' obligations under *Olmstead*. When the remedial measures or processes are articulated from within the framework of defendants' own service definitions and system, there is no basis for a court to compel the plaintiffs to identify the precise numerical outcomes for these integration processes.

[19] *See Olmstead*, 527 U.S. at 604.
[20] *See* Fed. R. Civ. P. 26(e)(1)(A).