



## DEPARTMENT OF JUSTICE

### Questions and Answers on the Application of the ADA's Integration Mandate and *Olmstead v. L.C.* to Employment and Day Services for People with Disabilities;

#### Notice of Availability

**AGENCY:** Civil Rights Division, Department of Justice.

**ACTION:** Notice of availability.

**SUMMARY:** The U.S. Department of Justice (Department) is announcing the availability of a guidance entitled “Questions and Answers on the Application of the ADA’s Integration Mandate and *Olmstead v. L.C.* to Employment and Day Services for People with Disabilities.” This guidance describes how the integration mandate applies to the provision of employment and day services in segregated settings.

**FOR FURTHER INFORMATION CONTACT:** Rebecca B. Bond, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY) (not a toll-free number) or [ADA.TADocs@usdoj.gov](mailto:ADA.TADocs@usdoj.gov). Information may also be obtained from the Department’s toll-free ADA Information Line at (800) 514-0301 (voice) or (833) 610-1264 (TTY).

You may obtain copies of this Notice in an alternative format by calling the ADA Information Line at (800) 514-0301 (voice) or (833) 610-1264 (TTY).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Department is announcing the availability of a guidance entitled “Questions and Answers on the Application of the ADA’s Integration Mandate and *Olmstead v. L.C.* to Employment and Day Services for People with Disabilities” (“2023 guidance”). The Department’s regulation implementing title II of the Americans with Disabilities Act (“ADA”) requires public entities to “administer services, programs, and activities in the

most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>1</sup> In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court, interpreting the ADA’s integration mandate, held that title II prohibits the unjustified segregation of individuals with disabilities. The Department’s new 2023 guidance describes how the integration mandate applies to the provision of employment and day services in segregated settings.

The Department issued a similar guidance in 2016, entitled “Statement of the Department of Justice on the Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to State and Local Governments’ Employment Service Systems for Individuals with Disabilities” (“2016 guidance”), which was subsequently withdrawn in 2017.

The Department’s 2023 guidance largely incorporates the underlying substance of the withdrawn 2016 guidance, but includes certain new language as described in more detail below.

#### *E.O. 13777 and the Withdrawal of the Department’s 2016 Guidance*

In February 2017, the President issued Executive Order 13777, which required each agency to create a Regulatory Reform Task Force to identify regulatory actions to repeal, replace, or modify. Pursuant to Executive Order 13777, the Department developed a Regulatory Reform Task Force (“Task Force”), which published a Request for Comment in the *Federal Register* in June 2017 soliciting public input on “the various kinds of actions taken by the Department’s components that the public perceives to be regulatory in nature \* \* \*.”<sup>2</sup> The Department noted that this Request for Comment was issued solely for information and planning purposes and indicated that it would give

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<sup>1</sup> 28 CFR 35.130(d).

<sup>2</sup> 82 FR 29248 (June 28, 2017).

careful consideration to the comments, but did not anticipate providing a point-by-point response to each comment submitted.<sup>3</sup> The comment period closed in August 2017.

The Department's Task Force received 31 total comments, 14 of which related to the Department's 2016 guidance. The majority of those commenters expressed a belief that the Department's 2016 guidance negatively affected individuals with disabilities by limiting their choices to work in a segregated sheltered workshop as opposed to in integrated employment settings. Those commenters emphasized their belief that individuals with disabilities have the right to choose the employment setting that best meets their needs and argued that statements in the 2016 guidance failed to recognize this.

In December 2017, the Department withdrew its 2016 guidance to afford further discussion with relevant stakeholders, including public entities and the disability community, as to how best to provide technical assistance in this area.<sup>4</sup> The Department explained that its withdrawal of the 2016 guidance did not "change the legal responsibilities of State and local governments under title II of the ADA, as reflected in the ADA, its implementing regulations, and other binding legal requirements and judicial precedent, including the U.S. Supreme Court's *Olmstead* decision."<sup>5</sup>

Since then, the Department has heard from numerous stakeholders who have indicated that technical assistance in this area is needed and asked the Department to reissue its withdrawn 2016 guidance.

### *Issuance of the 2023 Guidance*

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<sup>3</sup> *Id.* at 29249.

<sup>4</sup> See Dep't of Just., "Withdrawal of the Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to State and Local Governments' Employment Service Systems for Individuals with Disabilities" (Dec. 21, 2017), [https://www.ada.gov/withdrawn\\_olmstead.html](https://www.ada.gov/withdrawn_olmstead.html).

<sup>5</sup> *Id.*

After consideration of the comments the Task Force received on the 2016 guidance and additional input from stakeholders, the Department is now issuing its 2023 guidance. The bulk of the differences between the 2023 and 2016 documents are intended to (1) address public comments; (2) improve readability and reduce redundancy; and (3) enhance legal precision. While the underlying substance of the 2023 guidance remains consistent with that of the 2016 guidance, the Department has included new language throughout the 2023 guidance to advance these goals.

First, the Department included new language in the 2023 guidance to address public comments that the Department's Task Force received. For example, the Department has added the question "Does the ADA require an individual with a disability to work in an integrated employment setting or participate in integrated day services?" in response to the commenters who understood the 2016 guidance as requiring people to work in integrated settings. The Department's answer to this new question clarifies that individuals may decline to accept a service in the most integrated setting appropriate for them. In addition to including this new question, the Department included clarifying language throughout the 2023 guidance to make that point clear. There were other individual comments to which the Department declined to make changes in response. For example, although one commenter objected to the concept of "informed choice" as it was described in the 2016 guidance, the Department declined to omit from its 2023 guidance the concept of "informed choice." The Department chose not to omit this concept because the law requires that state and local governments provide community-based services to individuals who are appropriate for and do not oppose such services. In general, it would be difficult for a person to meaningfully decide among various options without being aware of all of the options. The Department has consistently taken the position that public entities must take affirmative steps to ensure that people

with disabilities are provided information about their service options before deciding where to receive services.<sup>6</sup>

Second, the Department took numerous steps to ensure the document's readability and reduce redundancy. For example, the Department omitted the question "What is an *Olmstead* Plan in the public employment service system context?" because it repeated content that the Department has already detailed in its guidance document on the integration mandate and *Olmstead* that was issued in 2011.<sup>7</sup> In addition, we have received user feedback from the public asking the Department to use more plain language and to streamline the content of our guidance documents so that they are easier for lay users to read and understand. We made numerous edits throughout the 2023 guidance with that user feedback in mind.

Third, the Department sought to enhance legal precision throughout the document. For example, we included the question, "What is the fundamental alteration defense," to ensure that the 2023 guidance addresses elements of proof as well as limitations on the obligation to comply with the law.

The Department's 2023 guidance is being issued consistent with the Attorney General's July 1, 2021 memorandum entitled "Issuance and Use of Guidance Documents by the Department of Justice."<sup>8</sup> The guidance is available on the Department's website at <https://www.ada.gov/resources/olmstead-employment-qa/> and the Department's guidance portal at <https://www.justice.gov/guidance>.

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<sup>6</sup> See, e.g., Dep't of Just., "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); Post-Trial Conclusions of Law, *United States v. Texas*, No. 10-CV-1025 (W.D. Tex. Jan. 18, 2019) at 37-44; Post-Trial Br. in Supp. of Joint Findings of Fact and Conclusions of Law, *United States v. Texas*, No. 5:10-CV-1025, (W.D. Tex. Jan. 18, 2019) at 21-25; Dep't of Just., Investigation of Glenwood and Woodward Res. Ctrs. (Dec. 8, 2021) at 11-18, 11 n.17; Letter from Kristen Clarke, Assistant Att'y Gen., Civ. Rts. Div., Dep't of Just. to Governor Jared Polis (Mar. 3, 2022).

<sup>7</sup> See Dep't of Just., "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](https://www.ada.gov/olmstead/q&a_olmstead.htm).

<sup>8</sup> See Mem. of the Attorney General, "Issuance and Use of Guidance Documents by the Department of Justice" (July 1, 2021), <https://www.justice.gov/opa/page/file/1408606/download>.

Dated: October 30, 2023.

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