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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, vs. JEFFERSON B. SESSIONS III, Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE, DOES 1-100, Defendants.	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This lawsuit challenges Defendants' bulk rescission of a wide swath of Department of Justice ("DOJ" or "Department") guidance documents setting forth DOJ's interpretation of laws that protect immigrants, the poor, people of color, and people with disabilities. The documents—which provided guidance to regulated entities and helped to protect the civil rights of marginalized individuals across the country—were withdrawn without any meaningful explanation, as required by the Administrative Procedure Act ("APA"). Such an unexplained bulk repeal was unprecedented prior to this administration. The rescission was arbitrary and capricious, and should be vacated.

2. The stated mission of DOJ is "to ensure fair and impartial administration of justice for all Americans." Yet, over the past year and a half, the Department—under the leadership of Attorney General Jefferson B. Sessions—has shown a shocking disregard for protecting the rights of vulnerable communities, rolling back civil rights initiatives in a wide variety of areas. Barely a month into the Trump administration, for example, the Department dropped the federal government's longstanding position that a Texas voter ID law under legal challenge was intentionally racially discriminatory. Shortly thereafter, DOJ attempted—unsuccessfully—to block a court from approving a consent decree negotiated by the Department following an extensive multi-year investigation that aimed to reform discriminatory police practices in the Baltimore Police Department. The DOJ also effectively shut down the Office for Access to Justice ("ATJ"), which was dedicated to improving legal resources for indigent litigants in civil, criminal, and tribal courts. ATJ's offices now sit dark in the Justice Department building.

3. And, in December 2017, Attorney General Sessions rescinded twenty-five DOJ guidance documents—most of which were aimed at protecting marginalized communities.

4. In a press release announcing the repeal, Attorney General Sessions declared—in broad conclusory terms—that the documents were being withdrawn because they were "unnecessary, inconsistent with existing law, or otherwise improper." *See* Press Release No. 17-1469, DOJ Office of Public Affairs, *Attorney General Jeff Sessions Rescinds 25 Guidance Documents* (Dec. 21, 2017) (attached hereto as Exhibit A). He also stated generally that "any guidance that is outdated, used to circumvent the regulatory process, or that improperly goes beyond what is provided for in statutes or

regulation should not be given effect." *Id.* He did not explain which rationale allegedly applied to which document or offer any other particularized justification.

5. Elsewhere, components of DOJ have offered additional explanation for the repeal of some of the guidance documents. For example, the Civil Rights Division explains on its website that the guidance on bailing-out procedures under Section 4(b) and Section 5 of the Voting Rights Act was withdrawn because the "Supreme Court's decision in Shelby County v. Holder, 570 U.S. ___ (2013) held that the coverage formula set forth in Section 4(b) of the Act was unconstitutional, and as a consequence, no jurisdictions are now subject to the coverage formula in Section 4(b) or to Sections 4(f)(4) and 5 of Act. Accordingly, guidance regarding bailout under Section 4(a) is no longer necessary." *See Section 4 of the Voting Rights Act*, DOJ Civil Rights Division, https://www.justice.gov/crt/section-4-voting-rights-act (last updated Dec. 21, 2017).

6. But slipped into the mix of the twenty-five repealed documents were six significant civil rights documents that Defendants provided no meaningful explanation for withdrawing. All six provided critical guidance to state and local governments about compliance with federal laws. Among them were procedures to help state and local governments eliminate unlawful fees against juvenile offenders, standards outlining discrimination protections for disabled individuals in government employment service systems, and guidance for employers about compliance with the anti-discrimination provisions of the Immigration and Nationality Act.

7. The rescission of these documents has been decried by disability rights groups and civil rights activists.[1] Indeed, the United States Commission on Civil Rights—an independent, bipartisan federal agency charged with advising the President and Congress on civil rights matters—issued a statement "strongly criticiz[ing]" the withdrawal of the "recent, narrowly crafted, urgently applicable

[1] *See, e.g., Lawyers' Committee for Civil Rights Under Law Condemns DOJ's Decision to Revoke Critical Legal Guidance Documents*, Lawyers' Committee for Civil Rights (Dec. 22, 2017), https://www.commondreams.org/newswire/2017/12/22/lawyers-committee-civil-rights-under-law-condemns-dojs-decision-revoke-critical ("We condemn Attorney General Sessions's latest attempt to turn back the clock on civil rights progress . . . ."); *DOJ Withdraws Olmstead Employment Guidance*, Letter to DOJ in Response to Olmstead Guidance Withdrawal from Over 200 Disability Organizations, Center for Public Representation (Jan. 5, 2018), https://centerforpublicrep.org/initiative/doj-withdraws-olmstead-employment-guidance/.

guidance documents." *U.S. Commission on Civil Rights Strongly Criticizes Attorney General Jeff Sessions' Withdrawal of Critical Civil Rights Guidance*, U.S. Commission on Civil Rights (Jan. 19, 2018), http://usccr.gov/press/2018/01-19-PR-Sessions.pdf. The Commission "call[ed] for Attorney General Sessions immediately to correct the civil rights harm his guidance withdrawal works on our nation's social fabric by reinstating the guidance, signaling the necessary ongoing leadership of the nation's Department of Justice in actually securing justice for the people." *Id.*

8. Defendants' failure to provide any meaningful explanation for the repeal of these documents is galling—and unlawful. The APA requires agencies to disclose the basis of their decisions, including policy changes made through repeals. They must demonstrate that they engaged in reasoned decision-making. And the explanation for their decision cannot be conclusory; it must be clear enough that the agency's "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

9. The APA imposes these requirements for an important reason. A fundamental tenet of our administrative system is that agency decision-making should not happen in the shadows. The APA's procedural requirements exist to allow members of the public—and the courts—to understand and evaluate the legitimacy and consequences of the agency's action. In the absence of such an explanation, the public is left to guess whether Defendants believe the repealed documents are outdated—and, if so, whether a different document controls—or improperly imposed binding obligations that should have been issued through notice-and-comment rulemaking. Regulated entities like San Francisco and the individuals impacted by the rescission of the documents cannot evaluate the validity of the repeal, challenge it if necessary, or tailor their conduct appropriately when agency action is opaque.

10. The public is entitled to—and the APA demands—more from our federal government.

JURISDICTION AND VENUE

11. The Court has jurisdiction under 28 U.S.C. Sections 1331 and 1346. This Court has further remedial authority under the Declaratory Judgment Act, 28 U.S.C. Sections 2201 and 2202 *et seq*. There exists an actual and justiciable controversy between Plaintiff and Defendants requiring resolution by this Court. Plaintiff has no adequate remedy at law.

12. Venue properly lies within the Northern District of California because this is a civil action in which Defendants are an agency, or officers of an agency, of the United States, because a substantial part of the events or omissions giving rise to this action occurred in the District, and, further, because Plaintiff resides in this District and no real property is involved in the action. 28 U.S.C. § 1391(e).

INTRADISTRICT ASSIGNMENT

13. Pursuant to Civil Local Rule 3-2(c), this case should be assigned to the San Francisco Division or the Oakland Division of this Court because the action arises in San Francisco County.

PARTIES

14. Plaintiff City and County of San Francisco is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county.

15. Defendant Jefferson B. Sessions is the Attorney General of the United States. He is sued in his official capacity. The Attorney General is the federal official leading the DOJ, which is responsible for the governmental actions at issue in this lawsuit.

16. Defendant DOJ is an executive department of the United States of America and an agency within the meaning of 5 U.S.C. § 551(1). DOJ has responsibility for, among other things, administering and enforcing the Civil Rights Acts of 1957, 1960, 1964, and 1968, as amended; the Voting Rights Act of 1965, as amended; the Fair Housing Act of 1968; and the Fair Housing Amendments Act of 1988. In addition, DOJ is charged with all departmental responsibilities under the Americans with Disabilities Act of 1990.

17. Doe 1 through Doe 100 are sued under fictitious names. Plaintiff San Francisco does not now know the true names or capacities of said Defendants, who were responsible for the alleged violations, but pray that the same may be alleged in this complaint when ascertained.

FACTUAL ALLEGATIONS

18. In February 2017, President Trump issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda," in which he ordered each executive agency to create a "Regulatory Reform Task Force" to identify regulatory actions for elimination. Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

19. DOJ established the required task force and installed former Associate Attorney General Rachel Brand as the chair[2]—but has refused to provide information to the public about other task force members.[3]

20. On June 28, 2017, the DOJ Task Force published a Request for Public Comment in the Federal Register seeking input on regulatory actions that should be considered for repeal, replacement, or modification. Enforcing the Regulatory Reform Agenda; Department of Justice Task Force on Regulatory Reform Under E.O. 13777, 82 Fed. Reg. 29,248 (proposed June 28, 2017). This cursory notice requested public comment in broad terms without reference to any specific regulation or document.

21. Among the comments submitted was a request by the Leadership Conference on Civil and Human Rights for DOJ to identify individual regulations and policies it was considering for repeal. Letter from Kristine Lucius, Executive Vice President, the Leadership Conference on Civil and Human Rights, to Robert Hinchman, Senior Counsel of the Office of Legal Policy, DOJ (Aug. 14, 2017), https://www.regulations.gov/document?D=DOJ-OLP-2017-0007-0013. The Leadership Conference explained that in order to provide meaningful comments, it "would need the Department to give proper notice of which specific regulations or policies it is considering repealing, replacing, or modifying." *Id.*

22. Other agencies did this—publishing notice in the Federal Register of the specific rules and regulations considered for repeal or modification. For example, the U.S. Patent and Trademark

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[2] Rachel Brand left DOJ in February 2018. DOJ has not disclosed who—if anyone—replaced her as chair of the task force.

[3] *See* Robert Faturechi, *Secrecy and Suspicion Surround Trump's Deregulation Teams*, ProPublica (Aug. 7, 2017), https://www.propublica.org/article/secrecy-and-suspicion-surround-trumps-deregulation-teams ("In an email exchange, a spokesman, Ian Prior, said he could not provide additional names because 'the Task Force is made up of components, not particular employees.' 'A component may have multiple employees assisting with the work,' he added. Asked if he could name any of those employees, he responded, 'Decline.'").

Indeed, ignoring multiple requests by members of Congress to disclose Regulatory Reform Task Force members leading regulatory rollback efforts, DOJ and other agencies "are actively hiding their members and their meetings from public view." Letter from Rep. Elijah Cummings et al. to Mick Mulvaney & Neomi Rao (Aug. 7, 2017). As a result, senior members of the House of Representatives Committee of Oversight and Government Reform have requested subpoenas to compel DOJ to provide the names of their task force members. *See* Letter from Rep. Elijah E. Cummings to Rep. Trey Gowdy (Mar. 13, 2018).

Office published a proposal to remove regulations governing reservation clauses, petitions from a primary examiner's refusal to admit an amendment, and other specific rules pursuant to Executive Order 13777. *See* Changes To Eliminate Unnecessary Regulations, 83 Fed. Reg. 2759-60 (proposed Jan. 19, 2018).[4] DOJ, however, provided no further information on the specific documents being considered for repeal.

23. Instead, on November 17, 2017, Attorney General Sessions stated at the Federalist Society 2017 National Lawyers Convention that "[w]e have prohibited all Department of Justice components from issuing any guidance that purports to impose new obligations on any party outside the Executive Branch. We will review and repeal existing guidance documents that violate this common sense principle." *See Attorney General Sessions Delivers Remarks at the Federalist Society 2017 National Lawyers Convention*, DOJ Office of Public Affairs (Nov. 17, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federalist-society-2017-national-lawyers.

24. He also issued a memorandum prohibiting all divisions of the Department of Justice from issuing guidance documents that have the effect of adopting new regulatory requirements or amending the law. *See* Memorandum from the Attorney General to "All Components" Regarding Prohibition on Improper Guidance Documents (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download ("November Memorandum").

25. Specifically, in the November Memorandum, Attorney General Sessions declared:

> [G]uidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor

[4] *See also, e.g.*, Eliminating Unnecessary Tax Regulations, 83 Fed. Reg. 6806 (proposed Feb. 15, 2018) (IRS proposing to remove 298 tax regulations); Pesticides; Agricultural Worker Protection Standard; Reconsideration of Several Requirements and Notice About Compliance Dates, 82 Fed. Reg. 60,576 (proposed Dec. 21, 2017) (EPA notifying public it seeks to revise certain Agricultural Worker Protection Standard requirements); Claims Procedure for Plans Providing Disability Benefits; Extension of Applicability Date, 82 Fed. Reg. 47,409 (proposed Oct. 12, 2017) (Department of Labor proposing to delay applicability of the Final Rule amending claims procedure requirements for ERISA-covered employee benefit plans providing disability benefits); National Performance Management Measures, 82 Fed. Reg. 46,427 (proposed Oct. 5, 2017) (Federal Highway Administration notice of proposed rulemaking seeking to repeal the 2017 Greenhouse Gas performance measures for state departments of transportation and metropolitan planning organizations).

> should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.
>
> It has come to my attention that the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process.

Id. at 1.

26. The press release announcing the issuance of the November Memorandum further elaborated that the "Attorney General's Regulatory Reform Task Force . . . will conduct a review of existing Department documents and will recommend candidates for repeal or modification in the light of this memo's principles." Press Release No. 17-1309, DOJ Office of Public Affairs, *Attorney General Jeff Sessions Ends the Departments Practice of Regulation by Guidance* (Nov. 17, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-department-s-practice-regulation-guidance.

27. And then-chair of the task force, Rachel Brand, stated: "Guidance documents . . . should not be used to change the law or to impose new standards to determine compliance with the law. The notice-and-comment process that is ordinarily required for rulemaking can be cumbersome and slow, but it has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own. This Department of Justice will not use guidance documents to circumvent the rulemaking process, and *we will proactively work to rescind existing guidance documents that go too far*." *Id.* (emphasis added).

28. The following month, on December 21, 2017, Attorney General Sessions announced that, pursuant to Executive Order 13777 and his November Memorandum, he was rescinding twenty-five DOJ guidance documents that were "unnecessary, inconsistent with existing law, or otherwise improper." *See* Ex. A.

29. The vast majority of the documents—which dated back decades and covered topics as diverse as Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") procedures and the Americans with Disabilities Act—were aimed at protecting marginalized communities, including immigrants, people of color, the poor, and individuals with disabilities.

30. At the time he announced the repeal, Attorney General Sessions offered six short sentences in explanation:

> Last month, I ended the longstanding abuse of issuing rules by simply publishing a letter or posting a web page. Congress has provided for a regulatory process in statute, and we are going to follow it. This is good government and prevents confusing the public with improper and wrong advice.
>
> Therefore, any guidance that is outdated, used to circumvent the regulatory process, or that improperly goes beyond what is provided for in statutes or regulation should not be given effect. That is why today, we are ending 25 examples of improper or unnecessary guidance documents identified by our Regulatory Reform Task Force led by our Associate Attorney General Rachel Brand. We will continue to look for other examples to rescind, and we will uphold the rule of law.

Id.

31. Attorney General Sessions did not state why any of the twenty-five was specifically selected to be withdrawn. He provided no details on which documents had been deemed outdated, which were "unnecessary," or which were in some way improper because they imposed new binding rights or obligations on persons or entities outside the executive branch.

32. Components of DOJ provided additional explanation with respect to the rescission of certain documents in other places, noting that specific documents were outdated and explaining why. The ATF, for example, issued a ruling explaining that the ATF documents being withdrawn were "unnecessary . . . to the appropriate application of current law and regulation." ATF Ruling 2017-1, *Revoking Certain Guidance Documents*, DOJ Bureau of Alcohol, Tobacco, Firearms and Explosives, (Dec. 20, 2017), https://www.atf.gov/resource-center/docs/ruling/2017-1-revoking-certain-guidance-documents/download. It then listed the documents and explained exactly why each one had been deemed unnecessary—for example, ATF Procedure 75-4 was no longer necessary because the procedure it described had been "incorporated into the Application for Explosives License or Permit, ATF Form 5400," and ATF Ruling 85-3 was "made obsolete by amendments to 18 U.S.C. 922(b)(3)." *Id.*[5]

[5] *See also, e.g.*, *Section 4 of the Voting Rights Act*, DOJ Civil Rights Division, https://www.justice.gov/crt/section-4-voting-rights-act (last updated Dec. 21, 2017) (Civil Rights Division website explaining that guidance on bailing-out procedures under Section 4(b) and Section 5 of the Voting Rights Act was withdrawn because the Supreme Court's holding in *Shelby County v. Holder*, 570 U.S. __ (2013), that the coverage formula set forth in Section 4(b) of the Act was unconstitutional rendered guidance regarding bailout under Section 4(a) unnecessary); *Commonly*

33. But among the large swath of rescinded documents were six significant ones about which Defendants have provided no meaningful explanation.

A. Statement Concerning Application Of The ADA's Integration Mandate To State And Local Governments.

34. One of the documents rescinded without adequate explanation was a "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." *See* Ex. B (the "Statement").

35. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court ruled that pursuant to the integration mandate in Title II of the ADA, state and local governments must create pathways for people with disabilities to live in their own homes or group homes located within their communities, rather than isolating them in segregated institutions.

36. The repealed Statement, which was issued in 2016, explained to state and local governments how this ruling applied to their employment service systems.

37. Specifically, it provided answers to questions such as:

- "What is the ADA's Title II integration mandate, and how does it apply to state and local governments' employment service systems?" Ex. B at 3.
- "What is the most integrated setting under the ADA and *Olmstead* in the context of a state and local government's employment service system?" *Id.* at 4.
- "How can state and local governments' employment service systems ensure that people with disabilities have access to competitive integrated employment?" *Id.* at 5.

38. In answering these questions, DOJ affirmed that the integration mandate applied not only to where individuals with disabilities live, but also to where they spend their days—including at

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Asked Questions About Service Animals in Places of Business, DOJ Civil Rights Division Disability Rights Section (July 1996), https://www.ada.gov/archive/qasrvc.htm ("[Commonly Asked Questions About Service Animals in Places of Business (July 1996)] has been withdrawn because it is outdated and was superseded by the current ADA title II and title III regulations . . . . For more information about the Department's withdrawn technical assistance and guidance documents, please go to: www.ada.gov/ta_withdrawn. html. For the current version of this document, please go to Frequently Asked Questions about Service Animals and the ADA.").

work. It explained that government work programs for people with disabilities were required to integrate employees with disabilities with their non-disabled peers. And it provided criteria to determine "the most integrated setting" for employment services for an individual with a disability, and a process to ensure that individuals with disabilities have access to competitive, integrated employment. *See generally* Ex. B.

39. According to disability advocates, the Statement was integral to helping people with disabilities across the country move away from isolated "sheltered workshops," where they are often paid much less than minimum wage and are vulnerable to exploitation and abuse.[6]

40. Attorney General Sessions withdrew the Statement without any meaningful explanation.

41. On ADA.gov, DOJ provided the following explanation for the withdrawal of this critical document: "This action was taken 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." *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*, DOJ Civil Rights Division (Dec. 21, 2017), https://www.ada.gov/withdrawn_olmstead.html. This explanation, however, is entirely different from those given by Attorney General Sessions. It does not indicate that DOJ determined the Statement was outdated, or unnecessary, or improper. Rather, it introduces an entirely new rationale—that it was withdrawn to allow for further discussion and consideration of the principles addressed in the guidance.

[6] For this reason, its repeal has been met with widespread outrage from disability rights organizations. Indeed, over 200 disability organizations sent a letter to the Acting Assistant Attorney General for Civil Rights expressing concern over the effect the withdrawal will have on people with disabilities across the country. *See* Letter from Consortium for Citizens with Disabilities to AAG John Gore (Jan. 8, 2018), https://centerforpublicrep.org/wp-content/uploads/2017/12/letter-to-DOJ-re-withdrawal-of-guidance-1-5-18.pdf. The U.S. Commission on Civil Rights has also urged Attorney General Sessions to reconsider the withdrawal. *U.S. Commission on Civil Rights Strongly Criticizes Attorney General Jeff Sessions' Withdrawal of Critical Civil Rights Guidance*, U.S. Commission on Civil Rights (Jan. 19, 2018), http://usccr.gov/press/2018/01-19-PR-Sessions.pdf.

42. And elsewhere on ADA.gov, DOJ indicates that it withdrew the Statement because it was "*out-of-date, duplicative, or otherwise ineffective*" and its withdrawal would "make it easier for individuals with disabilities, covered entities, and the public to understand their rights and responsibilities under the ADA." ADA.gov website, DOJ Civil Rights Division, https://www.ada.gov/ta_withdrawn.html (emphasis added).

43. In fact, there is reason to believe that the withdrawal of this guidance reflects a *sub rosa* substantive shift in federal interpretation and enforcement of Title II's integration mandate. Sheltered workshops are profitable enterprises, and a national trade association for sheltered workshops began lobbying DOJ's new political leadership to repeal the *Olmstead* Statement in August 2017. *See* David M. Perry, *Companies That Exploit Disabled People Have a Friend in Jeff Sessions*, Pacific Standard (Jan. 3, 2018), https://psmag.com/economics/jeff-sessions-roll-back-disability-rights. In light of this background as well as the fact that eighteen of the comments submitted in response to the request for input on the Department's regulatory reform agenda urged a withdrawal of the *Olmstead* guidance and/or a change in the underlying substance, the repeal appears to indicate a meaningful shift in policy.

44. Given the vague and contradictory explanations proffered by Defendants, state and local governments, as well as the public, are left without any clear indication of why Defendants actually decided to withdraw this document.

B. Statement On Ability Of Local Government To Exercise Control Over Group Living Arrangements For People With Disabilities.

45. Another one of the repealed documents was a joint statement by DOJ and the Department of Housing and Urban Development concerning the Fair Housing Act's effect on the ability of local governments to exercise control over group living arrangements, particularly for persons with disabilities ("Joint Statement"). *See* Ex. C.

46. This Joint Statement provided critical directions to local governments about what they may and may not do in compliance with federal law. For instance, it explained that local governments may generally restrict the ability of unrelated groups of people to live together (subject

to reasonable accommodations), but cannot treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities.

47. Defendants did not provide any particularized explanation for withdrawing this document.

48. Through its own search, San Francisco was able to locate a later 2016 document that "updates and expands" upon the Joint Statement. *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice: *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* (Nov. 10, 2016), https://www.justice.gov/opa/file/912366/download. But there is material covered in the Joint Statement that does not appear to be included in the 2016 document, such as a discussion of the applicability of the anti-discrimination provisions of the Fair Housing Act to those claiming disability on the basis of having been adjudicated as a juvenile delinquent or for having a criminal record, or those who suffer from an addiction to illegal drugs. *See* Ex. C at 1.

49. In the absence of an explanation from Defendants for their decision to withdraw this document—*e.g.*, that they believe it has been completely supplanted by the 2016 document or that the Joint Statement was somehow incorrect or improper—there is no way for local governments to evaluate the validity of the justification or tailor their conduct accordingly.

C. Letters Concerning Standards For Assessing Citizenship Status Discrimination.

50. The Immigration and Nationality Act ("INA") generally prohibits employers—including local governments—from discriminating against individuals on the basis of national origin or, in the case of "protected individual[s]," on the basis of citizenship status. 8 U.S.C. § 1324b(1).

51. Two of the documents Defendants repealed without any explanation were letters from the DOJ Civil Rights Division providing guidance about compliance with these anti-discrimination provisions of the INA.

52. In one letter, DOJ explained that individuals who fail to apply for naturalization within six months of becoming eligible to do so were not "protected individuals" within the meaning of Section 1324b, but were nonetheless protected against other forms of discrimination, including document abuse (which it defined as "the request for more or different documents, or the rejection of

reasonably genuine looking documents in the employment eligibility verification process based on national original or citizenship status"). *See* Ex. D.

53. In the other letter, the Department provided its view on what employers were required to do to conduct citizenship documentation audits in compliance with the law. For example, DOJ explained that employers must complete internal audits of I-9 forms in the same manner for every employee and "may not scrutinize more closely the I-9 forms and documentation of select employees on the basis of national origin or citizenship status." Ex. E at 2. The letter also stated that employers cannot accept documentation that does not reasonably appear to be genuine or relate to that employee. *Id.*

54. Defendants have not provided any explanation as to why these two letters in particular were selected for rescission.

55. Particularly given the recent increase in Immigration and Customs Enforcement ("ICE") I-9 audits,[7] and acting ICE Director Thomas Homan's recent directive to ICE agents to increase such worksite investigations by "four to five times,"[8] it is critically important for employers—including government employers like San Francisco—to know how to conduct internal audits legally and to understand DOJ's position on what is required of them. Without knowing why Defendants rescinded these letters, employers are left to guess where DOJ stands on these timely and sensitive issues.

D. Guidance Regarding Lawful And Equitable Imposition Of Fines and Fees.

56. When people are convicted of a crime, they are often charged thousands of dollars in fines, fees, or financial penalties related to their conviction, sentence, or incarceration. But an unintended consequence of this practice is that it can push people into (or deeper into) poverty. These fines, fees, and penalties can trap people in a cycle of debt, and low-income individuals and

[7] *See, e.g.*, Andrew Khouri, *Visits by federal immigration authorities are spooking California businesses and workers*, L.A. Times (Feb. 26, 2018), http://www.latimes.com/business/la-fi-immigration-workplace-20180226-story.html.

[8] *See* Tal Kopan, *ICE chief pledges quadrupling or more of workplace crackdowns*, CNN.com (Oct. 17, 2017), https://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html.

people of color are often hit the hardest. Government thus becomes a driver of inequality, creating additional layers of punishment for those moving through the criminal justice system.

57. Two of the documents Defendants withdrew without any explanation were resources to help state and local governments address this problem by reforming their fines and fees practices to comply with the Constitution and federal law, to avoid perpetuating poverty, and to avert unnecessary deprivations of liberty and equal protection.

58. One was a "Dear Colleague" letter issued as part of a package "meant to support the ongoing work of state judges, court administrators, policymakers and advocates in ensuring equal justice for all people, regardless of financial circumstance." Press Release No. 16-285, DOJ Office of Public Affairs, *Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices* (March 14, 2016). The letter provided guidance to state and local courts regarding their legal obligations with respect to the enforcement of court fines and fees. Specifically, it set forth seven requirements that had to be followed to be considered in compliance with the United States Constitution and/or other federal laws. *See* Ex. F.

59. The other was an advisory for recipients of financial assistance from DOJ on levying fines and fees on juveniles ("Juvenile Fines and Fees Advisory"). The stated intent of the advisory was to assist state and local juvenile probation departments, juvenile courts, and other juvenile justice agencies in ensuring that their imposition and enforcement of fines and fees did not violate the Constitution or the nondiscrimination provisions associated with the acceptance of federal financial assistance. To that end, it set forth DOJ's understanding of the constitutional and statutory obligations related to collecting fines and fees from juveniles, summarized the enforcement actions available to DOJ in the event it discovered evidence of a violation, and offered recommendations to improve the administration of juvenile fines and fees. *See* Ex. G.

60. These guidance documents have formed the basis for widespread reform to stem unconstitutional practices. They prompted numerous states to review their policies on fines and fees. The chair of Arkansas's Joint Committee, which was tasked with this review, noted, "The DOJ letter had a profound impact on every judge that read it. For those judges that perceived these issues prior to the letter but were unable to generate enthusiasm for change, the letter provided a perfect platform

for review and modification of policies and procedures." U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights and Constitutional Implications* 51-52 (Sept. 2017). In Texas, the court system's administrative director remarked that the Dear Colleague Letter "was very helpful and very well received by the judges across the state." Chiraag Bains, *Sessions Says to Courts: Go Ahead, Jail People Because They're Poor*, N.Y. Times (Dec. 28, 2017), https://www.nytimes.com/2017/12/28/opinion/sessions-says-to-courts-go-ahead-jail-people-because-theyre-poor.html. In addition, the American Bar Association has explicitly endorsed the seven principles emphasized in these documents, while the Conference on State Court Administrators refers to the Dear Colleague Letter in its policy paper on ending debtors' prisons.

61. More specifically, the "Dear Colleague" letter and the Juvenile Fines and Fees Advisory provided important guidance to San Francisco—and other local and state governments—about criminal justice fines and fees.

62. San Francisco's Adult Probation Department and Juvenile Probation Department are authorized to impose and collect fees governed by these guidance documents:

- San Francisco's Adult Probation Department is led by a Chief Probation Officer who is appointed by and acts as an arm of the San Francisco Superior Court. Pursuant to state law, the Adult Probation Department collects $50 a month from adult probationers. These individuals are typically charged $1,800 upfront when they start their probation, as probation typically lasts for three years.
- State and local laws also authorize the Adult Probation Department to collect fees from clients for a variety of other services, including a booking fee, a criminal justice administration fee, a home detention fee, and an electronic monitoring fee.
- San Francisco's Juvenile Probation Department receives federal funding, including, in recent years, funding from the United States Department of Justice Office of Justice Programs.
- State and local laws authorize the Juvenile Probation Department to collect various fees.

63. The DOJ and private plaintiffs have relied on these documents in evaluating the conduct of local governments. For example, the Department of Justice used this guidance in reviewing whether Sacramento County's collection of juvenile justice fines and fees complied with applicable federal civil rights laws. In another example, in a legal challenge to automatic license suspensions for failures to pay traffic fines and fees in Solano County, California, plaintiffs cited the letter's discussion of the unnecessary harms resulting from unfair fines and fees. *See* Complaint at 8, *Rubicon Programs v. Superior Court of Cal. Cty. of Solano*, No. FCS047212 (Solano Super. Ct. June 15, 2016).

64. Defendants have offered no particularized explanation for the withdrawal of these documents. Were they withdrawn because DOJ believed they improperly imposed new binding obligations on entities outside the executive branch? Or because DOJ concluded they were outdated? We do not know, but the difference is important, as each possible rationale for the repeal represents a different potential policy shift that is relevant for the activities of both the regulated community and for DOJ employees reviewing state and local governments' compliance with the law.

* * *

65. All of these Documents were practically and legally significant.

66. Practically, they helped to protect the civil rights of marginalized individuals across the country. They reduced financial burdens on the poor and helped ensure equal access to justice. They protected immigrants from discriminatory employment practices. And they advanced the rights of disabled people to live and work in the most appropriate settings.

67. Legally, they provided guidance to regulated entities. Guidance letters describing the Department's interpretation of the Constitution and/or federal laws carry an implicit threat that parties that do not follow their recommendations might face federal lawsuits or a loss of federal aid—and an implicit assurance that parties who *do* follow them will be safe from prosecution or administrative action. The withdrawal of these documents eliminated those safe harbors.

68. Moreover, based on Attorney General Sessions' statements (*see* ¶¶ 23–30, *supra*), it is apparent that at least some of the Documents were rescinded because Defendants believed they improperly imposed binding obligations on individuals and/or entities outside the executive branch.

In other words, according to DOJ, some of the Documents contained obligations that have now been removed. Accordingly, legal consequences flow from this rescission.

69. Without an explanation from Defendants about the rationale for the repeal of each of these documents, however, we are left to "guess at what theory underl[ies] the agency's action." *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.").

70. When the court "is left to guess as to the agency's findings or reasons," the agency's action "simply cannot be upheld." *Time, Inc. v. U.S. Postal Serv.*, 685 F.2d 760, 773 (2d Cir. 1982) (quoting *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970)).

COUNT ONE:
AGENCY ACTION THAT IS ARBITRARY AND CAPRICIOUS
IN VIOLATION OF 5 U.S.C. § 706(2)(A)

71. The above paragraphs are incorporated herein by reference.

72. DOJ is an agency subject to the requirements of the APA. 5 U.S.C. § 701(b)(1).

73. Under 5 U.S.C. § 706(2)(A), courts shall hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

74. The rescission of the Documents constitutes final agency action that is reviewable by this Court.

75. The rescission of the Documents and actions taken by Defendants to rescind the six guidance documents are arbitrary and capricious, an abuse of discretion, and not in accordance with law because, among other things, Defendants failed to articulate a meaningful explanation for their actions.

76. Under the APA, agencies must demonstrate that they engaged in reasoned decision-making when reaching a determination, and this includes policy changes made through repeals. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016). The agency's explanation for its decision must be clear enough that the agency's "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). In the absence of any specific reasoning, "[i]t is not the role of the courts to speculate on reasons that might have supported

an agency's decision," and the action must be deemed arbitrary and capricious. *Encino Motorcars*, 136 S. Ct. at 2127.

77. This is particularly true where, as here, the rescinded policies engendered reliance interests. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) ("[T]he APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'" *Id*. (quoting *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009)).

78. San Francisco and its residents were harmed and continue to be harmed by these unlawful acts.

PRAYER FOR RELIEF

Wherefore, San Francisco prays that the Court grant the following relief:

1. Vacate and set aside the rescission of the Documents and any action taken by Defendants to implement rescission of the Documents;

2. Declare that the rescission of the Documents and actions taken by Defendants to rescind the Documents are void and without legal force or effect;

3. Declare that the rescission of the Documents and actions taken by Defendants to rescind the Documents are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of 5 U.S.C. § 706;

4. Enjoin and restrain Defendants, their agents, servants, employees, attorneys, and all persons in active concert or participation with any of them, from implementing or enforcing the rescission of the Documents and from taking any other action to rescind the Documents that is not in compliance with applicable law;

5. Award San Francisco reasonable costs and attorneys' fees; and

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6. Grant any other further relief that the Court deems fit and proper.

Dated: April 5, 2018

DENNIS J. HERRERA
City Attorney
JESSE C. SMITH
RONALD P. FLYNN
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CITY AND COUNTY OF SAN FRANCISCO

EXHIBIT A

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, December 21, 2017

Attorney General Jeff Sessions Rescinds 25 Guidance Documents

Today, Attorney General Jeff Sessions announced that, pursuant to Executive Order 13777 and his November memorandum prohibiting certain guidance documents, he is rescinding 25 such documents that were unnecessary, inconsistent with existing law, or otherwise improper.

In making the announcement, the Attorney General said:

"Last month, I ended the longstanding abuse of issuing rules by simply publishing a letter or posting a web page. Congress has provided for a regulatory process in statute, and we are going to follow it. This is good government and prevents confusing the public with improper and wrong advice."

"Therefore, any guidance that is outdated, used to circumvent the regulatory process, or that improperly goes beyond what is provided for in statutes or regulation should not be given effect. That is why today, we are ending 25 examples of improper or unnecessary guidance documents identified by our Regulatory Reform Task Force led by our Associate Attorney General Rachel Brand. We will continue to look for other examples to rescind, and we will uphold the rule of law."

In March, President Donald Trump issued Executive Order 13777, which calls for agencies to establish Regulatory Reform Task Forces, chaired by a Regulatory Reform Officer, to identify existing regulations for potential repeal, replacement, or modification. The Department of Justice Task Force, chaired by Associate Attorney General Rachel Brand, began its work in May.

On November 17, the Attorney General issued a memorandum prohibiting DOJ components from using guidance documents to circumvent the rulemaking process and directed Associate Attorney General Brand to work with components to identify guidance documents that should be repealed, replaced, or modified.

The Task Force has already identified 25 guidance documents for repeal and is continuing its review of existing guidance documents to repeal, replace, or modify.

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OFFICES of THE UNITED STATES ATTORNEYS

The list of 25 guidance documents that DOJ has withdrawn in 2017 is as follows:

1. ATF Procedure 75-4.
2. Industry Circular 75-10.
3. ATF Ruling 85-3.
4. Industry Circular 85-3.
5. ATF Ruling 2001-1.
6. ATF Ruling 2004-1.
7. Southwest Border Prosecution Initiative Guidelines (2013).
8. Northern Border Prosecution Initiative Guidelines (2013).
9. Juvenile Accountability Incentive Block Grants Program Guidance Manual (2007).
10. Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles (January 2017).
11. Dear Colleague Letter on Enforcement of Fines and Fees (March 2016).
12. ADA Myths and Facts (1995).
13. Common ADA Problems at Newly Constructed Lodging Facilities (November 1999).
14. Title II Highlights (last updated 2008).
15. Title III Highlights (last updated 2008).
16. Commonly Asked Questions About Service Animals in Places of Business (July 1996).
17. ADA Business Brief: Service Animals (April 2002).
18. Prior Joint Statement of the Department of Justice and the Department of Housing and Urban Development Group Homes, Local Land Use, and the Fair Housing Act (August 18, 1999).
19. Letter to Alain Baudry, Esq., with standards for conducting internal audit in a non-discriminatory fashion (December 4, 2009).
20. Letter to Esmeralda Zendejas on how to determine whether lawful permanent residents are protected against citizenship status discrimination (May 30, 2012).
21. Common ADA Errors and Omissions in New Construction and Alterations (June 1997).
22. Common Questions: Readily Achievable Barrier Removal and Design Details: Van Accessible Parking Spaces (August 1996).
23. Website guidance on bailing-out procedures under section 4(b) and section 5 of the Voting Rights Act (2004).
24. Americans with Disabilities Act Questions and Answers (May 2002).
25. 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 (October 31, 2016).

Component(s):
Office of the Attorney General

Press Release Number:
17-1469

Updated December 22, 2017

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EXHIBIT B

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

Nationally, millions of individuals with disabilities spend the majority of their daytime hours receiving employment and day services in segregated sheltered workshops and segregated day settings (including day treatment programs or facility-based day habilitation centers) where they are segregated from non-disabled persons. Many of these individuals are capable of working competitively and earning minimum wage or above in integrated employment and are not opposed to doing so, but they have been unable to access the services and supports that would allow them to find, obtain, and succeed in competitive integrated employment. In the approximately seventeen years since the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), regarding the integration mandate of Title II of the Americans with Disabilities Act (ADA), some state and local service systems have begun to provide a greater number of integrated community alternatives to individuals in or at risk of segregation in institutions or other segregated settings; yet, despite these advances, many individuals with disabilities who receive employment and day services that are planned, funded, and administered by state and local governments continue unnecessarily to receive services, and spend the majority of their daytime hours, in segregated settings.

A core purpose of the ADA is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[1] The integration mandate of Title II of the ADA is intended to allow individuals with disabilities to live integrated lives like individuals without disabilities, including by working, earning a living, and paying taxes. The civil rights of persons with disabilities, including individuals with mental illness, intellectual or developmental disabilities, or physical disabilities, are violated by unnecessary segregation in a wide variety of settings, including in segregated employment, vocational, and day programs.

Since the passage of the ADA and the Supreme Court's decision in *Olmstead*, the ADA's Title II integration mandate has been applied in a variety of contexts. The ADA's integration mandate applies to all the services, programs, and activities of state and local governments, including their employment service systems.[2] This guide discusses and explains the requirements of the ADA integration mandate and *Olmstead* as applied to employment service systems for individuals with disabilities. It complements and supplements, but does not supersede, the

[1] 42 U.S.C. § 12101(a)(7) (2009).

[2] *Id.* §§ 12131(1), 12132; 28 C.F.R. § 35.130(d) (2016); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-11 (1998); *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1205-06 (D. Or. 2012) (holding that the ADA's integration mandate extends to employment services and prohibits the unnecessary segregation, and risk of unnecessary segregation, of persons with disabilities in sheltered workshops).

"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.*" (June 22, 2011).[3]

Date: October 31, 2016

The ADA and Its Integration Mandate

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[4] In passing the ADA, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[5] Therefore, the ADA and its Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[6] The preamble to the "integration mandate" regulation explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ."[7]

In *Olmstead*, the Supreme Court, interpreting the ADA and its integration mandate, held that Title II prohibits the unjustified segregation of individuals with disabilities. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who receive disability services from the entity.[8]

To comply with the ADA's integration mandate, public entities must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination.[9] The obligation

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[3] A State's obligations under the ADA are independent from the requirements of the Medicaid Act, including the requirements of the Home and Community Based Services regulations, 70 Fed. Reg. 2947, 3039 (Jan. 16, 2014) (codified at 42 C.F.R. §§ 440-47); *see also* "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.*" (June 22, 2011), Question 7 (discussing the interplay between the requirements of Title II of the ADA and the Medicaid Act).

[4] 42 U.S.C. § 12101(b)(1). Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."). Claims under the ADA and the Rehabilitation Act are generally treated identically.

[5] 42 U.S.C. § 12101(a)(2).

[6] 28 C.F.R. § 35.130(d) (the "integration mandate").

[7] 28 C.F.R. pt. 35, app. B (addressing § 35.130(d)).

[8] *Olmstead*, 527 U.S. at 607.

[9] 28 C.F.R. § 35.130(b)(7).

to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would "fundamentally alter" its service system.[10]

State and Local Governments' Employment Service Systems

Employment service systems typically include services and supports that are available through multiple state agencies and funding streams, including vocational rehabilitation, Medicaid, and educational (*e.g.*, youth transition services) service systems. Employment service systems may include a range of service settings, including sheltered workshops; supported employment services provided in competitive, integrated employment; small group or enclave employment; facility-based day programs; and integrated day services provided in typical community settings.[11]

Questions and Answers on the Application of the ADA's Integration Mandate and *Olmstead v. L.C.* to State and Local Governments' Employment Service Systems

1. What is the ADA's Title II integration mandate, and how does it apply to state and local governments' employment service systems?

The ADA's integration mandate requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[12] Accordingly, public entities must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.[13]

The integration mandate is implicated when a state or local government administers the services, programs, and activities of its employment service system in a manner that results in unjustified segregation of persons with disabilities in segregated employment settings.[14] A public entity may

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[10] *Id.*; *see also Olmstead*, 527 U.S. at 603-07.

[11] *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTR. FOR MEDICAID, CHIP AND SURVEY & CERTIFICATION, CMCS INFORMATIONAL BULLETIN 5 (Sept. 16, 2011), *available at* https://www.medicaid.gov/federal-policy-guidance/downloads/CIB-09-16-2011.pdf [https://perma.cc/8B8P-3EH5]; *see also* Settlement Agreement, *United States v. Rhode Island and the City of Providence*, 1:13-cv-00442 (D.R.I. June 13, 2013); Consent Decree, *United States v. Rhode Island*, 1:14-cv-00175 (D.R.I. April 9, 2014); Consent Decree, *Lane v. Brown* (formerly *Lane v. Kitzhaber*), 12-cv-00138 (D. Or. Sept. 8, 2015), *available at* https://www.ada.gov/olmstead/olmstead_enforcement.htm.

[12] 28 C.F.R. § 35.130(d).

[13] *Id.* § 35.130(b)(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.").

[14] This guidance addresses the obligations of state and local governments under Title II of the ADA. Title I of the ADA covers public and private employers' nondiscrimination obligations toward individuals with disabilities. Title

violate the ADA's integration mandate when it plans, administers, operates, funds, or implements its employment service system in a way that unnecessarily relies on segregated employment facilities or programs for individuals with disabilities. This includes the public entity's planning, service system design, funding choices, and service implementation practices that require or promote segregated employment settings for persons with disabilities.[15]

2. What is the most integrated setting under the ADA and *Olmstead* in the context of a state and local government's employment service system?

The "most integrated setting" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[16] In the employment services context, state and local employment service systems provide services and supports that allow people with disabilities to work. Providing those services in an integrated setting enables an individual with a disability to work in a typical job in the community like individuals without disabilities. Such settings are commonly referred to as competitive integrated employment settings.[17] An example of a competitive integrated employment setting is work on a full- or part-time basis, at minimum wage or above, at a location where the employee interacts with individuals without disabilities and has access to the same opportunities for benefits and advancement provided to non-disabled workers.

By contrast, segregated settings include settings that are managed, operated, or licensed by a service provider to serve primarily people with disabilities or whose workers are exclusively or primarily individuals with disabilities who are supervised by paid support staff.[18] Employment

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III of the ADA covers the nondiscrimination obligations of public accommodations, including private providers of goods and services to people with disabilities.

[15] *See* 28 C.F.R. § 35.130(b)(1) (prohibiting a public entity from discriminating "directly or through contractual, licensing or other arrangements, on the basis of disability"); *id.* § 35.130(b)(3)(i) (prohibiting a public entity from "directly or through contractual or other arrangements . . . utiliz[ing] criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability").

[16] 28 C.F.R. pt. 35, app. B.

[17] "Competitive Integrated Employment," consistent with the federal Workforce Innovation and Opportunity Act (WIOA), means work that is performed on a full-time or part-time basis (including self-employment): (a) For which an individual is compensated at a rate that: (1) Meets or exceeds state or local minimum wage requirements, whichever is higher; and (2) Is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; or (3) In the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities, and who are self-employed in similar occupations or on similar tasks and who have similar training experience, and skills; and (b) For which an individual is eligible for the level of benefits provided to other employees; and (c) Which is at a location where the employee interacts with other persons who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that individuals who are not individuals with disabilities and who are in comparable positions interact with other persons; and (d) Which, as appropriate, presents opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions. *See* WIOA, Pub. L. No. 113-128, 128 Stat. 1425, 1633-34 (2014).

[18] *See Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 198-216 (E.D.N.Y. 2009) (describing characteristics of institutions to include, *inter alia*, large numbers of individuals with disabilities congregated

services provided to a person with a disability performing work tasks in a sheltered workshop,[19] or to groups of employees with disabilities who routinely work in isolation from non-disabled peers or coworkers or who do not interact with customers or the general public in a manner similar to workers without disabilities performing similar duties, are examples of services provided in a segregated employment setting.

3. How can state and local governments' employment service systems ensure that people with disabilities have access to competitive integrated employment?

Over the past three decades, integrated supported employment services have emerged as a leading model for enabling persons with disabilities to work in competitive integrated employment settings. Supported employment can include various services based on the individualized needs of workers with disabilities to support their entrance into and ongoing sustainability in competitive integrated employment.[20]

Research on supported employment services has yielded best practices for ensuring that individuals with disabilities are able to engage in employment in the most integrated setting appropriate, including ensuring that employment services are individualized, sufficiently intense and of sufficient duration, provided in integrated settings, and designed to achieve competitive integrated employment.[21]

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together with few opportunities to interact with individuals outside of the institution), *vacated on other grounds sub nom. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012); *see also id.* at 223-24 ("Whether a particular setting is an institution is nonetheless a relevant consideration in determining whether it enables interactions with nondisabled persons to the fullest extent possible. It is clear that, 'where appropriate for the patient, both the ADA and the [Rehabilitation Act] favor integrated, community-based treatment over institutionalization.' This echoes *Olmstead*'s recognition that 'institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life . . . and institutional confinement severely diminishes individuals' everyday activities.'" (first quoting *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 491-92 (3d Cir. 2004); then quoting *Olmstead*, 527 U.S. at 600)).

[19] "Sheltered workshop" refers to a segregated facility where primarily or exclusively persons with disabilities perform contract work or receive prevocational services. Sheltered workshops are usually center-based facilities that possess institutional qualities in which persons with disabilities have little or no contact with non-disabled persons besides paid staff. People with disabilities in sheltered workshops often earn wages that are well below minimum wage.

[20] "Supported Employment Services" refers to services that allow persons with disabilities to work in competitive integrated employment. Such services may include person-centered employment planning, vocational assessments, job development analysis, job placement, job training, job carving, job coaching, negotiation with prospective employers, training and systematic instruction, benefits support, transportation, asset development, career advancement services, and other workplace support services and ongoing supports.

[21] *See* LEAD CENTER & U.S. DEP'T OF LABOR, OFFICE OF DISABILITY EMP'T POLICY ("ODEP"), EMPLOYMENT FIRST TECHNICAL BRIEF #3: CRITERIA FOR PERFORMANCE EXCELLENCE IN *EMPLOYMENT FIRST* STATE SYSTEMS CHANGE & PROVIDER TRANSFORMATION 8-9 (2016), *available at* http://employmentfirst.leadcenter.org/employment-first-resources/criteria-for-performance-excellence-in-employment-first-state-systems-change-provider-transformation [https://perma.cc/VT6U-Q226] [hereinafter ODEP Technical Brief #3] ("ODEP encourages state governments to prioritize and financially incentivize the following types of employment services and evidence-based effective practices that lead to competitive, integrated

In assessing whether a state or local government's employment services system appropriately supports integration, an important factor to consider is whether the system has sufficient capacity to enable people with disabilities to work in competitive integrated employment instead of in segregated settings.[22]

a. Individualization of Services

The success of a person with a disability in competitive integrated employment often depends on the individual "matching" of the person's skills, abilities, and interests with both a set of services and a job. Individualization of services is achieved through a process by which a person with a disability identifies his or her particular interests, preferences, strengths, skills, and support needs for the purpose of finding, obtaining, and maintaining employment. This process includes: 1) assessments that evaluate the individual's skills, strengths, and support needs in an integrated setting; and 2) person-centered planning.[23] Individualization typically depends upon a career development plan developed by a qualified employment professional who is familiar with how to support people with disabilities in competitive integrated employment and how to connect a person with a disability with employment opportunities identified in the local job market. Employment professionals, like job developers and job coaches, typically match a person's distinct interests and capabilities with an employer's unmet needs to create a strong job match and a potential employment opportunity.

b. Intensity and Duration of Services

In employment, people with disabilities are generally most successful in achieving integration to the fullest extent possible when they receive the amount, intensity, and duration of services and supports that will allow them to work in an integrated employment setting for the maximum number of hours consistent with their preferences and skills. Supported employment services that are provided in a sufficient amount, intensity, and duration are more likely to meet the

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employment for individuals with disabilities: Competitive Placement . . . Customized Employment . . . Supported Employment . . . Self-Employment . . . [and] Entrepreneurship or Small Business.").

[22] *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE II ADA INVESTIGATION OF THE CITY OF PROVIDENCE REGARDING THE HAROLD A. BIRCH VOCATIONAL PROGRAM AT MOUNT PLEASANT HIGH SCHOOL ("*United States v. Rhode Island and City of Providence* Letter of Findings") (June 7, 2013); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., UNITED STATES' TITLE II ADA INVESTIGATION OF EMPLOYMENT, VOCATIONAL, AND DAY SERVICES FOR PERSONS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN RHODE ISLAND ("*United States v. Rhode Island* Letter of Findings") (January 6, 2014), *available at* https://www.ada.gov/olmstead/olmstead_docs_list.htm#Letters of Findings [https://perma.cc/N962-HYLX]; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., UNITED STATES' INVESTIGATION OF EMPLOYMENT AND VOCATIONAL SERVICES FOR PERSONS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN OREGON PURSUANT TO THE AMERICANS WITH DISABILITIES ACT ("*Lane v. Brown* (formerly *Lane v. Kitzhaber*) Letter of Findings") (June 29, 2012), *available at* https://www.ada.gov/olmstead/olmstead_docs_list.htm#Letters of Findings [https://perma.cc/N962-HYLX].

[23] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., SECTION 2402(A) OF THE AFFORDABLE CARE ACT – GUIDANCE FOR IMPLEMENTING STANDARDS FOR PERSON-CENTERED PLANNING AND SELF-DIRECTION IN HOME AND COMMUNITY-BASED SERVICES PROGRAMS 4-8 (June 6, 2014), *available at* http://www.acl.gov/Programs/CIP/OCASD/docs/2402-a-Guidance.pdf [https://perma.cc/4J8S-W3KF].

requirements of the integration mandate and will better prepare people with disabilities for integrated employment in the long run. The type, amount, and intensity of someone's services may change over time, but such services should be provided for a sufficient duration to ensure that the person can continue to succeed after initial job stabilization to avoid placing the person at risk of unnecessary segregation. The need for such services and supports may fade over time as individuals become accustomed to their employment and become connected with natural supports, including supports provided by co-workers and peers. However, particularly at the beginning of a job, it is important that supported employment services be provided in a manner that meets a person's needs.

Understanding the resource limitations inherent to public systems, employment service systems may wish to consider how to design models that invoke promising practices to provide such supports in the most integrated setting while rewarding outcomes and efforts made based on individual need. Additionally, state and local government entities may assess, rebalance, and redistribute their resources to emphasize the provision of employment services in the most integrated setting appropriate.

c. Access to Integration During Non-Work Hours

In addition to integrated supported employment services on the job, integration in non-work services also supports the achievement of competitive integrated employment. Many states administer day service programs in combination with employment services, and sometimes such programs are co-located in facilities with sheltered workshops. The ADA's integration mandate applies to public entities' day service programs. Individuals with disabilities should have access to integrated ways to spend the hours when they are not working, such as chosen activities in the community at times and frequencies and with persons of their choosing, and interacting to the fullest extent possible with non-disabled peers instead of being relegated to services in segregated settings. For instance, integrated day services allow persons with intellectual and developmental disabilities to participate in and gain membership in mainstream community-based recreational, social, educational, cultural, and athletic activities, including community volunteer activities and training activities. Such integrated non-work activities can allow individuals with disabilities to develop autonomy and self-determination, networks of contacts, models, and mentors that assist in improving employment opportunities and outcomes.

4. What evidence may a person with a disability rely on to establish that an integrated setting is appropriate for him or her?

A considerable body of professional research shows that people with significant disabilities can work in integrated employment settings.[24] Moreover, numerous states have adopted Employment First policies that instruct states' disability service systems to prioritize supports in competitive integrated employment for individuals with disabilities.[25] Such policies frequently include the

[24] *See* ODEP, INTEGRATED EMPLOYMENT TOOLKIT, *available at* https://www.dol.gov/odep/ietoolkit/researchers.htm [https://perma.cc/7PCU-NFLM].

[25] *See* ODEP Technical Brief #3, *supra* note 21 at 3.

directive that state systems must be driven by the presumption that individuals with disabilities can work, and that not working should be the exception.[26] A person with a disability may rely upon a variety of evidence to establish that an integrated employment setting is appropriate. As the Department has previously stated, a reasonable, objective assessment by a public entity's treating professional is one, but only one, such avenue.[27] For example, a vocational rehabilitation counselor or a state-funded caseworker may conduct a vocational assessment to identify individuals' needs and the services and supports necessary for them to succeed in an integrated employment setting. A professional involved in the assessment should be knowledgeable about the range of supports and services available in integrated employment settings.[28]

However, the ADA and its regulations do not require a person with a disability to have a medical or vocational rehabilitation professional determine that he or she is capable of competitive integrated employment. A person with a disability can also present his or her own independent evidence of the appropriateness of an integrated employment setting. Evidence of appropriateness of competitive integrated employment may include, but is not limited to: 1) people with similar needs are working in integrated settings with appropriate supports; 2) he or she has formerly worked in an integrated employment setting; or 3) he or she currently performs work in a sheltered workshop that demonstrates his or her capability to perform work in a competitive integrated employment setting with the appropriate services and supports. This evidence may come from a person's employment service provider, from community-based organizations that provide supported employment services, from former employers, from family members and friends, or from any other relevant source. Limiting the evidence on which people with disabilities may rely would enable public entities to circumvent their *Olmstead* obligations

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[26] *Id.*

[27] *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., 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.* (JUNE 22, 2011), *available* at https://www.ada.gov/olmstead/q&a_olmstead.htm [hereinafter Department of Justice Statement], at Question 4; *see also Day v. District of Columbia*, 894 F. Supp. 2d 1, 23 (D.D.C. 2012) ("[A]lthough the Court in *Olmstead* noted that a State 'generally may rely on the reasonable assessments of its own professionals,' . . . it did not hold that such a determination was required to state a claim. Since *Olmstead*, lower courts have universally rejected the absolutist interpretation proposed by defendants" (quoting *Olmstead*, 527 U.S. at 602).) (citing *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 539-40 (E.D. Pa. 2001) (denying defendants' motion to dismiss *Olmstead* claims and rejecting the argument that *Olmstead* "require[s] a formal 'recommendation' for community placement")); *Disability Advocates, Inc.*, 653 F. Supp. 2d at 259 (requiring a determination by treating professionals, who are contracted by the State, "would eviscerate the integration mandate" and "condemn the placements of [individuals with disabilities in adult homes] to the virtually unreviewable discretion" of the State and its contractors); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008) ("I reject defendants' argument that *Olmstead* requires that the State's mental health professionals be the ones to determine that an individual's needs may be met in a more integrated setting."); *Long v. Benson*, No. 08-0026, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (refusing to limit class to individuals whom state professionals deemed could be treated in the community, because a State "cannot deny the [integration] right simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise the right would, or at least could, become wholly illusory")).

[28] Department of Justice Statement, *supra* note 27, at Question 4.

by failing to require professionals to make recommendations regarding the ability of individuals to be served in more integrated settings.[29]

5. What factors are relevant in determining whether an individual does not oppose receiving services in an integrated employment setting?

People with disabilities in or at risk of entering segregated employment settings must have the opportunity to make an informed decision about whether to work in integrated employment settings. Individuals who have been segregated in sheltered workshops have often been told that they cannot work, frequently have been tracked away from competitive integrated employment or steered to sheltered workshops directly from secondary school settings, have been absent from the competitive labor market for long periods of time, or been given scant information about supported employment services, integrated employment settings, or how individuals with disabilities can work in jobs in the community. Consequently, individuals and their families may hesitate to explore work in an integrated setting, or they may not ask for or be aware of supported employment services.[30] Public entities that have traditionally relied on segregated work settings should take affirmative steps to remedy this history and to ensure that individuals have a real opportunity to make an informed choice to work in integrated settings. Affirmative steps may include providing information about the benefits of working in integrated employment settings; providing vocational and situational assessments, career development planning, and discovery in integrated employment settings; arranging peer-to-peer mentoring; facilitating visits, conducting job exploration, interest inventories, and work experiences in integrated job settings; and providing benefits counseling, and access to benefits plans, to explain the impact of competitive work on an individual's public benefits.

6. Do the ADA and *Olmstead* apply to persons at serious risk of segregation in sheltered workshops?

The ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization and segregation and are not limited to individuals currently in segregated settings. In the employment context, this includes individuals at risk of unnecessary segregation in sheltered workshops. Individuals need not wait until the harm of unnecessary segregation in a sheltered workshop occurs to receive the protections of the ADA and *Olmstead*. For example, public entities, including state and local education agencies, may be contributing to a pipeline to segregation if vocational rehabilitation counselors, caseworkers, and other supports are not available to assist youth with disabilities to prepare for and transition to competitive integrated employment. Moreover, such public entities need to ensure that students with disabilities can make informed choices prior to being referred for admission to sheltered workshops by, for example, offering timely and adequate transition services designed to allow students to understand and experience the benefits of work in an integrated setting. For instance, factors relevant to whether students with disabilities are at risk of institutionalization include whether a school, as part of the school

[29] *Id.*

[30] *See Lane v. Kitzhaber*, 283 F.R.D. 587, 600 (D. Or. 2012) ("Due to their disability, many individuals with [intellectual or developmental disabilities] may not ask for supported employment services because they are not aware of them or because they are not aware that they have any choices as to services that they are entitled to receive.").

curriculum, trains students with disabilities in tasks similar to those performed in sheltered workshops; encourages students with disabilities to participate in sheltered workshops; and/or routinely refers students to sheltered workshops as a postsecondary placement without offering such students opportunities to experience integrated employment. In the adult context, people with disabilities could show risk of segregation if a public entity systematically screens out adults with significant disabilities from vocational rehabilitation services, finding such persons "not competitively employable" because of their disability status, increasing the likelihood that such persons would have to receive employment services in a sheltered workshop in order to receive employment services at all.

7. What remedies address violations of the ADA's integration mandate in the context of disability employment systems?

In the employment services context, a wide range of remedies may be appropriate to address violations of the ADA and *Olmstead*. The Department has entered into settlement agreements that require states to expand the services and supports available in integrated employment settings. This typically means expanding the variety, intensity, and duration of supported employment services made available to allow people to work in competitive integrated employment.

Various indicators of integration are relevant to *Olmstead* employment remedies, such as individuals with disabilities' interaction with non-disabled persons to the fullest extent possible, and parity of hours, compensation, and benefits. The use of such criteria has been recognized as an appropriate mechanism "to measure the success of the [remedial] employment services offered" by a public entity, including whether such employment services have allowed individuals to receive services in the most integrated setting appropriate.[31]

For individuals to be integrated in a workplace, they should have an opportunity to interact regularly and consistently with their non-disabled peers to the same extent as their non-disabled coworkers. The amount of time spent working in these settings is an important criterion for measuring the extent to which individuals are integrated in employment. Therefore, individuals should be offered supported employment services to allow them to work in integrated settings for the maximum number of hours consistent with their abilities and preferences.[32]

Another factor considered in assessing whether employment services are effective in allowing individuals with disabilities to be integrated to the fullest extent possible with non-disabled peers is whether they participate equally in the customary benefits of the employment setting. For example, individuals with disabilities in integrated employment settings should be compensated roughly equally to their nondisabled peers performing the same job.[33] They should have the

[31] *Lane v. Kitzhaber*, No. 3:12-cv-00138 –ST, 2013 WL 6798470, at *2 (D. Or. Dec. 19, 2013).

[32] It is important to note that the number of hours a person with a disability works in an integrated setting, not necessarily the number of service hours provided, is most relevant to this inquiry.

[33] Providing compensation and benefits to people with disabilities in an employment setting that are not equal to those offered to peers without disabilities performing the same job may also violate Title I or Title III of the ADA or other federal laws. Individual service provider entities, including sheltered workshops, have obligations not to discriminate against individuals with disabilities. Title I of the ADA covers employers with 15 or more employees.

same opportunities in the employment setting as their non-disabled peers, including: (1) access to the community at lunch, during breaks, or before and after the work day; (2) promotion and/or advancement; (3) privacy, autonomy, and the ability to manage one's schedule, work assignments, or breaks; and (4) other employment benefits. In addition, whether the setting is integrated with other community businesses and employers, and whether the work performed by persons with disabilities is matched to individuals' preferences, strengths, or particular support needs (in contrast to "make-work" or simulated tasks that do not correspond to an authentic business necessity or purpose), are also factors relevant to whether the services are effective in integrating individuals with their non-disabled peers.[34]

Employment service system remedies include system-wide capacity-building, transition, and ongoing support, based on measurable goals, outcomes, and timelines. A public entity may need to expand service providers' capacity to offer supported employment services in integrated employment settings. This may involve, among other things, changes to what services and supports are approved, changes to rates to encourage community-based services, and adjustments to caps or durational limits on services. It may also require assistance to existing segregated employment service providers to help them to transition to community-based models.

In cases involving individuals currently in segregated sheltered workshops, remedies are designed so that individuals can access the services and supports necessary to allow them to find, obtain, retain, and advance in employment in integrated settings. In addition, individuals currently segregated in sheltered workshops often need information about supported employment services in integrated settings and about opportunities that will allow them to make informed decisions about working in integrated employment (including meeting with persons who formerly were in sheltered workshops and now are working in integrated employment; speaking with community service providers; and visiting integrated job sites).

State and local school educational service systems may need to adjust expectations and strengthen transition planning and support for students preparing to exit school and enter employment. Upon deciding to move from a school or a segregated setting to an integrated setting, students may need a variety of supports and services to adjust to the change. Even those

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As such, Title I's coverage can include individual service provider entities or sheltered workshops in their capacity as private employers. Title I prohibits employers from discriminating on the basis of disability in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment and requires reasonable accommodations. 42 U.S.C. § 12112 *et seq*. Also, under Title III of the ADA, individuals with disabilities cannot be discriminated against on the basis of disability in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). A "social service center establishment" is a place of public accommodation, 42 U.S.C. § 12181(7), and can include an individual service provider entity or a sheltered workshop. Accordingly, individual service provider entities may also have obligations not to discriminate against their clients as places of public accommodation under Title III of the ADA.

[34] *See* ODEP Technical Brief #3, *supra* note 21, at 9 (stating that "ODEP encourages states to assure the use of individualized supported employment services (SES) to facilitate competitive, integrated employment outcomes as opposed to focusing on group supported employment options. To be clear, competitive, integrated employment, by definition, does *not* include work crews, enclaves, social enterprise, or other forms of group employment").

who decide to remain in segregated placements require periodic follow-up support and in-reach so that the option for work in competitive, integrated employment remains open to them.

Throughout the decision making and transition processes, individuals may need assurance that services in the integrated setting will be sufficient, flexible, and lasting. To continue to avoid unnecessary segregation for the long term, states addressing a history of segregated employment should engage in affirmative efforts at system transformation.

8. What is an *Olmstead* Plan in the state and local government employment service system context?

An *Olmstead* plan is a public entity's plan for implementing its legal obligation to provide services to individuals with disabilities in the most integrated setting appropriate.[35] To be legally sufficient, a plan must be comprehensive and effectively working.[36] A plan is neither comprehensive nor effectively working if it merely provides vague assurances of future integrated options or describes the public entity's general history of increased funding for community services and decreasing institutional populations.[37] For example, in the employment context, a public entity cannot rely merely on the number or amount of supported employment services that it provides to people with disabilities, if the entity cannot demonstrate in what type of settings those services are provided or the success of those services in moving individuals from sheltered workshops to integrated employment settings.

To be comprehensive and effective, the plan must include concrete, reliable, and specific commitments for, and a demonstrated success of, actually moving individuals from segregated sheltered workshops or other segregated settings to integrated employment settings.[38] In assessing an *Olmstead* plan for a state's employment service system, the Department will consider criteria such as the number of individuals who have transitioned from sheltered workshops to work in competitive, integrated employment[39] with appropriate services and supports, their tenure in integrated jobs, the number of hours that such persons work in competitive integrated employment, and the number of individuals who remain in segregated settings. The Department also considers a public entity's adherence to integration criteria such as interaction with non-disabled persons to the fullest extent possible and individualization of services.

Any *Olmstead* 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 to prevent the unnecessary segregation of persons with disabilities. Any plan must address the concrete steps that will be taken in the future and how the entity plans on sustaining those steps beyond the scope of any litigation or legal challenge. Plans should include specific and reasonable

[35] Department of Justice Statement, *supra* note 27, at Question 12.

[36] *Olmstead*, 527 U.S. at 605-06.

[37] *Day*, 894 F. Supp. 2d at 26.

[38] Department of Justice Statement, *supra* note 27, at Question 12.

[39] *See* WIOA Definition of "Competitive Integrated Employment," *supra* note 17.

timeframes for the employment of persons with disabilities in integrated employment settings; measurable goals for which the public entity may be held accountable; and funding to support the plan, which may come from reallocating existing service dollars.

9. Is the ADA limited to segregation in employment settings when the same individuals are also subject to segregation in other settings during the day, like facility-based day programs?

No. The ADA and the integration mandate have a broad reach; Title II of the ADA covers all services, programs, and activities of state and local government entities. For example, the integration mandate covers residential, employment, and day services provided by a state. If individuals with disabilities are unnecessarily segregated in sheltered workshops for part of the day and in segregated facility-based day programs for other parts of the day or week, such persons may be unnecessarily segregated in both sheltered workshops and facility-based day programs in violation of the ADA and *Olmstead*. It also violates the civil rights of individuals with disabilities, under the ADA and *Olmstead*, when such persons are unnecessarily segregated in facility-based day programs for all of their daytime hours.

Moreover, public entities cannot evade their *Olmstead* obligations by limiting access to one segregated setting while moving individuals into a different segregated setting.[40] For example, a state could not cease referrals of individuals with disabilities to sheltered workshops while instead referring those individuals to facility-based day or other segregated day programs, or transferring individuals out of the sheltered workshops and into the facility-based day programs (a process known as trans-institutionalization or re-institutionalization), without providing access to alternative services, programs, and activities in the most integrated setting appropriate.

Additional Resources

For more information about the ADA, you may call the DOJ's toll-free ADA information line at 800-514-0301 or 800-514-0383 (TDD), or access its ADA website at www.ada.gov. For more information about DOJ's enforcement of the integration mandate of Title II of the ADA, please visit www.ada.gov/Olmstead.

Information regarding disability employment-related policies and practices can be found at: www.dol.gov/odep/

Questions regarding the use of Medicaid funding for supported employment and states' obligations under the Medicaid Act should be directed to the Centers for Medicaid and Medicare Services.

[40] *See, e.g.*, *Olmstead*, 527 U.S. at 605 ("Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter . . .").

EXHIBIT C

JOINT STATEMENT OF THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

GROUP HOMES, LOCAL LAND USE, AND THE FAIR HOUSING ACT

Since the federal Fair Housing Act ("the Act") was amended by Congress in 1988 to add protections for persons with disabilities and families with children, there has been a great deal of litigation concerning the Act's effect on the ability of local governments to exercise control over group living arrangements, particularly for persons with disabilities. The Department of Justice has taken an active part in much of this litigation, often following referral of a matter by the Department of Housing and Urban Development ("HUD"). This joint statement provides an overview of the Fair Housing Act's requirements in this area. Specific topics are addressed in more depth in the attached Questions and Answers.

The Fair Housing Act prohibits a broad range of practices that discriminate against individuals on the basis of race, color, religion, sex, national origin, familial status, and disability.[1] The Act does not pre-empt local zoning laws. However, the Act applies to municipalities and other local government entities and prohibits them from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities.

The Fair Housing Act makes it unlawful --

- To utilize land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example would be an ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area.

- To take action against, or deny a permit, for a home because of the disability of individuals who live or would live there. An example would be denying a building permit for a home because it was intended to provide housing for persons with mental retardation.
- To refuse to make reasonable accommodations in land use and zoning policies and procedures where such accommodations may be necessary to afford persons or groups of persons with disabilities an equal opportunity to use and enjoy housing.

- What constitutes a reasonable accommodation is a case-by-case determination.
- Not all requested modifications of rules or policies are reasonable. If a requested modification imposes an undue financial or administrative burden on a local government, or if a modification creates a fundamental alteration in a local government's land use and zoning scheme, it is not a "reasonable" accommodation.

The disability discrimination provisions of the Fair Housing Act do not extend to persons who claim to be disabled solely on the basis of having been adjudicated a juvenile delinquent, having a criminal record, or being a sex offender. Furthermore, the Fair Housing Act does not protect persons who currently use illegal drugs, persons who have been convicted of the manufacture or

sale of illegal drugs, or persons with or without disabilities who present a direct threat to the persons or property of others.

HUD and the Department of Justice encourage parties to group home disputes to explore all reasonable dispute resolution procedures, like mediation, as alternatives to litigation.

DATE: AUGUST 18, 1999

Questions and Answers

on the Fair Housing Act and Zoning

Q. Does the Fair Housing Act pre-empt local zoning laws?

No. "Pre-emption" is a legal term meaning that one level of government has taken over a field and left no room for government at any other level to pass laws or exercise authorityin that area. The Fair Housing Act is not a land use or zoning statute; it does not pre-empt local land use and zoning laws. This is an area where state law typically gives local governments primary power. However, if that power is exercised in a specific instance in a way that is inconsistent with a federal law such as the Fair Housing Act, the federal law will control. Long before the 1988 amendments, the courts had held that the Fair Housing Act prohibited local governments from exercising their land use and zoning powers in a discriminatory way.

Q. What is a group home within the meaning of the Fair Housing Act?

The term "group home" does not have a specific legal meaning. In this statement, the term "group home" refers to housing occupied by groups of unrelated individuals with disabilities.[2]Sometimes, but not always, housing is provided by organizations that also offer various services for individuals with disabilities living in the group homes. Sometimes it is this group home operator, rather than the individuals who live in the home, that interacts with local government in seeking permits and making requests for reasonable accommodations on behalf of those individuals.

The term "group home" is also sometimes applied to any group of unrelated persons who live together in a dwelling -- such as a group of students who voluntarily agree to share the rent on a house. The Act does not generally affect the ability of local governments to regulate housing of this kind, as long as they do not discriminate against the residents on the basis of race, color, national origin, religion, sex, handicap (disability) or familial status (families with minor children).

Q. Who are persons with disabilities within the meaning of the Fair Housing Act?

The Fair Housing Act prohibits discrimination on the basis of handicap. "Handicap" has the same legal meaning as the term "disability" which is used in other federal civil rights laws. Persons with disabilities (handicaps) are individuals with mental or physical impairments which substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury,

and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working. The Fair Housing Act also protects persons who have a record of such an impairment, or are regarded as having such an impairment.

Current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders, are not considered disabled under the Fair Housing Act, by virtue of that status.

The Fair Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the persons or property of others. Determining whether someone poses such a direct threat must be made on an individualized basis, however, and cannot be based on general assumptions or speculation about the nature of a disability.

Q. What kinds of local zoning and land use laws relating to group homes violate the Fair Housing Act?

Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city's zoning ordinance defines a "family" to include up to six unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission. If that ordinance also disallows a group home for six or fewer people with disabilities in a certain district or requires this home to seek a use permit, such requirements would conflict with the Fair Housing Act. The ordinance treats persons with disabilities worse than persons without disabilities.

A local government may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups. Thus, in the case where a family is defined to include up to six unrelated people, an ordinance would not, on its face, violate the Act if a group home for seven people with disabilities was not allowed to locate in a single family zoned neighborhood, because a group of seven unrelated people without disabilities would also be disallowed. However, as discussed below, because persons with disabilities are also entitled to request reasonable accommodations in rules and policies, the group home for seven persons with disabilities would have to be given the opportunity to seek an exception or waiver. If the criteria for reasonable accommodation are met, the permit would have to be given in that instance, but the ordinance would not be invalid in all circumstances.

Q. What is a reasonable accommodation under the Fair Housing Act?

As a general rule, the Fair Housing Act makes it unlawful to refuse to make "reasonable accommodations" (modifications or exceptions) to rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use or enjoy a dwelling.

Even though a zoning ordinance imposes on group homes the same restrictions it imposes on other groups of unrelated people, a local government may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. For example, it may be a reasonable accommodation to waive a setback requirement

so that a paved path of travel can be provided to residents who have mobility impairments. A similar waiver might not be required for a different type of group home where residents do not have difficulty negotiating steps and do not need a setback in order to have an equal opportunity to use and enjoy a dwelling.

Not all requested modifications of rules or policies are reasonable. Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. The determination of what is reasonable depends on the answers to two questions: First, does the request impose an undue burden or expense on the local government? Second, does the proposed use create a fundamental alteration in the zoning scheme? If the answer to either question is "yes," the requested accommodation is unreasonable.

What is "reasonable" in one circumstance may not be "reasonable" in another. For example, suppose a local government does not allow groups of four or more unrelated people to live together in a single-family neighborhood. A group home for four adults with mental retardation would very likely be able to show that it will have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an "ordinary family." In this circumstance, there would be no undue burden or expense for the local government nor would the single-family character of the neighborhood be fundamentally altered. Granting an exception or waiver to the group home in this circumstance does not invalidate the ordinance. The local government would still be able to keep groups of unrelated persons without disabilities from living in single-family neighborhoods.

By contrast, a fifty-bed nursing home would not ordinarily be considered an appropriate use in a single-family neighborhood, for obvious reasons having nothing to do with the disabilities of its residents. Such a facility might or might not impose significant burdens and expense on the community, but it would likely create a fundamental change in the single-family character of the neighborhood. On the other hand, a nursing home might not create a "fundamental change" in a neighborhood zoned for multi-family housing. The scope and magnitude of the modification requested, and the features of the surrounding neighborhood are among the factors that will be taken into account in determining whether a requested accommodation is reasonable.

Q. What is the procedure for requesting a reasonable accommodation?

Where a local zoning scheme specifies procedures for seeking a departure from the general rule, courts have decided, and the Department of Justice and HUD agree, that these procedures must ordinarily be followed. If no procedure is specified, persons with disabilities may, nevertheless, request a reasonable accommodation in some other way, and a local government is obligated to grant it if it meets the criteria discussed above. A local government's failure to respond to a request for reasonable accommodation or an inordinate delay in responding could also violate the Act.

Whether a procedure for requesting accommodations is provided or not, if local government officials have previously made statements or otherwise indicated that an application would not receive fair consideration, or if the procedure itself is discriminatory, then individuals with disabilities living in a group home (and/or its operator) might be able to go directly into court to request an order for an accommodation.

Local governments are encouraged to provide mechanisms for requesting reasonable accommodations that operate promptly and efficiently, without imposing significant costs or delays. The local government should also make efforts to insure that the availability of such mechanisms is well known within the community.

Q. When, if ever, can a local government limit the number of group homes that can locate in a certain area?

A concern expressed by some local government officials and neighborhood residents is that certain jurisdictions, governments, or particular neighborhoods within a jurisdiction, may come to have more than their "fair share" of group homes. There are legal ways to address this concern. The Fair Housing Act does not prohibit most governmental programs designed to encourage people of a particular race to move to neighborhoods occupied predominantly by people of another race. A local government that believes a particular area within its boundaries has its "fair share" of group homes, could offer incentives to providers to locate future homes in other neighborhoods.

However, some state and local governments have tried to address this concern by enacting laws requiring that group homes be at a certain minimum distance from one another. The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act. We also believe, however, that if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.

Q. What kinds of health and safety regulations can be imposed upon group homes?

The great majority of group homes for persons with disabilities are subject to state regulations intended to protect the health and safety of their residents. The Department of Justice and HUD believe, as do responsible group home operators, that such licensing schemes are necessary and legitimate. Neighbors who have concerns that a particular group home is being operated inappropriately should be able to bring their concerns to the attention of the responsible licensing agency. We encourage the states

to commit the resources needed to make these systems responsive to resident and community needs and concerns.

Regulation and licensing requirements for group homes are themselves subject to scrutiny under the Fair Housing Act. Such requirements based on health and safety concerns can be discriminatory themselves or may be cited sometimes to disguise discriminatory motives behind attempts to exclude group homes from a community. Regulators must also recognize that not all individuals with disabilities living in group home settings desire or need the same level of services or protection. For example, it may be appropriate to require heightened fire safety

measures in a group home for people who are unable to move about without assistance. But for another group of persons with disabilities who do not desire or need such assistance, it would not be appropriate to require fire safety measures beyond those normally imposed on the size and type of residential building involved.

Q. Can a local government consider the feelings of neighbors in making a decision about granting a permit to a group home to locate in a residential neighborhood?

In the same way a local government would break the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities, a local government can violate the Fair Housing Act if it blocks a group home or denies a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers are not themselves personally prejudiced against persons with disabilities. If the evidence shows that the decision-makers were responding to the wishes of their constituents,and that the constituents were motivated in substantial part by discriminatory concerns, that could be enough to prove a violation.

Of course, a city council or zoning board is not bound by everything that is said by every person who speaks out at a public hearing. It is the record as a whole that will be determinative. If the record shows that there were valid reasons for denying an application that were not related to the disability of the prospective residents, the courts will give little weight to isolated discriminatory statements. If, however, the purportedly legitimate reasons advanced to support the action are not objectively valid, the courts are likely to treat them as pretextual, and to find that there has been discrimination.

For example, neighbors and local government officials may be legitimately concerned that a group home for adults in certain circumstances may create more demand for on-street parking than would a typical family. It is not a violation of the Fair Housing Act for neighbors or officials to raise this concern and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the application, if another type of facility would ordinarily be denied a permit for such parking problems. However, if a group of individuals with disabilities or a group home operator shows by credible and unrebutted evidence that the home will not create a need for more parking spaces, or submits a plan to provide whatever off-street parking may be needed, then parking concerns would not support a decision to deny the home a permit.

Q. What is the status of group living arrangements for children under the Fair Housing Act?

In the course of litigation addressing group homes for persons with disabilities, the issue has arisen whether the Fair Housing Act also provides protections for group living arrangements for children. Such living arrangements are covered by the Fair Housing Act's provisions prohibiting discrimination against families with children. For example, a local government may not enforce a zoning ordinance which treats group living arrangements for children less favorably than it treats a similar group living arrangement for unrelated adults. Thus, an ordinance that defined a group of up to six unrelated adult persons as a family, but specifically disallowed a group living

arrangement for six or fewer children, would, on its face, discriminate on the basis of familial status. Likewise, a local government might violate the Act if it denied a permit to such a home because neighbors did not want to have a group facility for children next to them.

The law generally recognizes that children require adult supervision. Imposing a reasonable requirement for adequate supervision in group living facilities for children would not violate the familial status provisions of the Fair Housing Act.

Q. How are zoning and land use matters handled by HUD and the Department of Justice?

The Fair Housing Act gives the Department of Housing and Urban Development the power to receive and investigate complaints of discrimination, including complaints that a local government has discriminated in exercising its land use and zoning powers. HUD is also obligated by statute to attempt to conciliate the complaints that it receives, even before it completes an investigation.

In matters involving zoning and land use, HUD does not issue a charge of discrimination. Instead, HUD refers matters it believes may be meritorious to the Department of Justice which, in its discretion, may decide to bring suit against the respondent in such a case. The Department of Justice may also bring suit in a case that has not been the subject of a HUD complaint by exercising its power to initiate litigation alleging a "pattern or practice" of discrimination or a denial of rights to a group of persons which raises an issue of general public importance.

The Department of Justice's principal objective in a suit of this kind is to remove significant barriers to the housing opportunities available for persons with disabilities. The Department ordinarily will not participate in litigation to challenge discriminatory ordinances which are not being enforced, unless there is evidence that the mere existence of the provisions are preventing or discouraging the development of needed housing.

If HUD determines that there is no reasonable basis to believe that there may be a violation, it will close an investigation without referring the matter to the Department of Justice. Although the Department of Justice would still have independent "pattern or practice" authority to take enforcement action in the matter that was the subject of the closed HUD investigation, that would be an unlikely event. A HUD or Department of Justice decision not to proceed with a zoning or land use matter does not foreclose private plaintiffs from pursuing a claim.

Litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to group home disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, like mediation. HUD attempts to conciliate all Fair Housing Act complaints that it receives. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.

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1. The Fair Housing Act uses the term "handicap." This document uses the term "disability" which has exactly the same legal meaning.

2. There are groups of unrelated persons with disabilities who choose to live together who do not consider their living arrangements "group homes," and it is inappropriate to consider them "group homes" as that concept is discussed in this statement.

>

Updated August 6, 2015

EXHIBIT D

U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related Unfair Employment Practices - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530
Main (202) 616-5594
Fax (202) 616-5509

MAY 30 2012

Via First Class Mail and E-Mail (ezendejas@crla.org)

Esmeralda Zendejas
Migrant Attorney
California Rural Legal Assistance, Inc.
145 E. Weber Avenue
Stockton, CA 95202

Dear Ms. Zendejas:

This is in response to your February 1, 2012, email seeking clarity as to when eligibility for naturalization begins for a lawful permanent resident as applied under the anti-discrimination provision. Specifically, you write in your email: "Your website identifies the exception to protection to legal permanent residents is that citizenship status discrimination does not apply to permanent residents who do not apply for naturalization within six months of eligibility. I was wondering if you could clarify when eligibility would kick in for an LPR." You further ask whether the eligibility timeframe is typically within three to five years of obtaining LPR status or whether that timeframe can vary.

As you know, the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") investigates and resolves charges of national origin and citizenship status discrimination, as well as over-documentation in the employment eligibility verification process ("document abuse") and retaliation under the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1324b. Please note that OSC cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity; however, we can provide some general guidelines regarding compliance with the anti-discrimination provision of the Immigration and Nationality Act (INA).

As you correctly note, "an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible" is not a "protected individual" under 8 U.S.C. § 1324b(3)(B) and is thus not protected from citizenship status discrimination. However, all work-authorized individuals are protected against other forms of discrimination under the anti-discrimination provision, including document abuse – the request for more or different documents, or the rejection of reasonably genuine looking documents in the employment eligibility verification process based on national origin or citizenship status. United States v. Townsend Culinary, Inc., 8 OCAHO no. 1032 (1999) (relief ordered for all victims of document abuse without distinction as to status as a "protected individual"); United States v. Guardsmark,

United States v. Guardsmark, Inc., 3 OCAHO no. 572 (1993) (all work authorized individuals are protected from document abuse).

The eligibility requirements for naturalization are discussed at length in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1421-59 and most specifically, at 8 U.S.C. § 1427. The six-month period under § 1324b(3)(B) begins tolling as soon as the alien meets all of the requirements under the INA and is eligible to naturalize. Most often, a lawful permanent resident becomes eligible after five years of lawful permanent resident status, but still must meet a number of additional criteria. Because the requirements differ according to those criteria, there is no set length of time that every lawful permanent resident must hold permanent resident status prior to becoming eligible. For instance, a permanent resident who has been married for three years to the same U.S. citizen would become eligible after continuous residency for three years. However, additional factors may influence the timeframe, such as periods of residence outside of the United States. For more information about naturalization eligibility criteria you may visit the USCIS website naturalization subpage, available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=598da2f39b1ab210VgnVCM100000082ca60aRCRD&vgnextchannel=598da2f39b1ab210VgnVCM100000082ca60aRCRD. You may also contact USCIS by telephone at1-800-375-5283.

We hope this information is of assistance to you.

Sincerely,

Seema Nanda
Acting Deputy Special Counsel

EXHIBIT E

U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

DEC - 4 2009

VIA First Class Mail and E-Mail (Alain.Baudry@maslon.com)

Alain Baudry, Esq.
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140

Dear Mr. Baudry:

Thank you for your e-mail inquiry of September 16, 2009. In your e-mail you state that the human resources manager of a client employer, upon learning from the police department that one of its employees is not authorized to work in the United States, reviewed the file of another individual hired around the same time. In reviewing the photocopies of the documents presented by this other employee for employment eligibility verification (I-9) purposes, the human resources manager identified notable spelling errors on the photocopy of the Social Security card. You then pose the following questions:

> "First, is the client able to question the employee regarding this card, and request/require that another form of employment verification be submitted, as the document upon this review does not appear to be facially valid? If not, what, if any, other steps should be taken here?
>
> "Second, can the client conduct a further review/audit of other files and take similar steps assuming, upon inspection, there are such obvious errors?"

Please note that the Office of Special Counsel (OSC) cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, which OSC enforces.

The anti-discrimination provision prohibits hiring, firing, recruitment or referral for a fee, and unfair documentary practices during the employment eligibility verification (Form I-9) process (document abuse) on the basis of citizenship or immigration status or national origin. It

also prohibits retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

An employer may choose to conduct an internal audit of its I-9 forms as long as it is conducted for every employee in the same manner. Consistent with the anti-discrimination provision of the INA, the employer may not treat employees differently because they look or sound foreign or possess a certain citizenship status during an audit. 8 U.S.C. § 1324b(a)(1) and (6). Selective audits, wherein an employer reviews only certain employees' previously completed I-9 forms and accompanying photocopies,[1] are therefore suspect. Further, during audits employers may not scrutinize more closely the I-9 forms and documentation of select employees on the basis of national origin or citizenship status; employers are required to treat all employees in the same manner. *Id.*

If, during the course of conducting an audit in a non-discriminatory manner, an employer discovers that its I-9 forms or accompanying documents for some employees are missing or incomplete, the employer may re-verify those employees. *United States v. Ojiel*, 7 OCAHO 984, *4 (1998) (finding that the government has a considerable interest in encouraging employers to correct mistakes on the I-9 form, and that employers may correct paperwork mistakes at or before government inspection).

Further, if the employee presented documentation that does not reasonably appear to be genuine or to relate to the employee, an employer cannot accept that documentation. *See* Handbook for Employers, at 39.

I hope this information is of assistance to you. Should you have any further questions, please contact OSC's employer hotline at (800) 255-7688.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel

[1] At the time of verification, employers are required to "examine the original document or documents that the employee presents to the employer" and may not rely upon photocopies. Handbook, at 6, 32; 8 C.F.R. 274a.2(b)(1)(v) (requiring that individuals present only original and unexpired documents).

EXHIBIT F

U.S. Department of Justice

Civil Rights Division

Office for Access to Justice

Washington, D.C. 20530

March 14, 2016

Dear Colleague:

The Department of Justice ("the Department") is committed to assisting state and local courts in their efforts to ensure equal justice and due process for all those who come before them. In December 2015, the Department convened a diverse group of stakeholders—judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals—to discuss the assessment and enforcement of fines and fees in state and local courts. While the convening made plain that unlawful and harmful practices exist in certain jurisdictions throughout the country, it also highlighted a number of reform efforts underway by state leaders, judicial officers, and advocates, and underscored the commitment of all the participants to continue addressing these critical issues. At the meeting, participants and Department officials also discussed ways in which the Department could assist courts in their efforts to make needed changes. Among other recommendations, participants called on the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices. Accordingly, this letter is intended to address some of the most common practices that run afoul of the United States Constitution and/or other federal laws and to assist court leadership in ensuring that courts at every level of the justice system operate fairly and lawfully, as well as to suggest alternative practices that can address legitimate public safety needs while also protecting the rights of participants in the justice system.

Recent years have seen increased attention on the illegal enforcement of fines and fees in certain jurisdictions around the country—often with respect to individuals accused of misdemeanors, quasi-criminal ordinance violations, or civil infractions.[1] Typically, courts do not sentence defendants to incarceration in these cases; monetary fines are the norm. Yet the harm

[1] *See, e.g.*, Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf (finding that the Ferguson, Missouri, municipal court routinely deprived people of their constitutional rights to due process and equal protection and other federal protections); Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (reporting on fine and fee practices in fifteen states); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf (discussing practices in Louisiana, Michigan, Ohio, Georgia, and Washington state).

caused by unlawful practices in these jurisdictions can be profound. Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community[2]; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape.[3] Furthermore, in addition to being unlawful, to the extent that these practices are geared not toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.[4]

To help judicial actors protect individuals' rights and avoid unnecessary harm, we discuss below a set of basic constitutional principles relevant to the enforcement of fines and fees. These principles, grounded in the rights to due process and equal protection, require the following:

(1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;

(2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;

(3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;

(4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;

(5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;

(6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

(7) Courts must safeguard against unconstitutional practices by court staff and private contractors.

In court systems receiving federal funds, these practices may also violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin.

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[2] Nothing in this letter is intended to suggest that courts may not preventively detain a defendant pretrial in order to secure the safety of the public or appearance of the defendant.

[3] *See* Council of Economic Advisers, Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor*, at 1 (Dec. 2015), *available at* https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf (describing the disproportionate impact on the poor of fixed monetary penalties, which "can lead to high levels of debt and even incarceration for failure to fulfil a payment" and create "barriers to successful re-entry after an offense").

[4] *See* Conference of State Court Administrators, 2011-2012 Policy Paper, *Courts Are Not Revenue Centers* (2012), *available at* https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf.

As court leaders, your guidance on these issues is critical. We urge you to review court rules and procedures within your jurisdiction to ensure that they comply with due process, equal protection, and sound public policy. We also encourage you to forward a copy of this letter to every judge in your jurisdiction; to provide appropriate training for judges in the areas discussed below; and to develop resources, such as bench books, to assist judges in performing their duties lawfully and effectively. We also hope that you will work with the Justice Department, going forward, to continue to develop and share solutions for implementing and adhering to these principles.

1. Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful.

The due process and equal protection principles of the Fourteenth Amendment prohibit "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). Accordingly, the Supreme Court has repeatedly held that the government may not incarcerate an individual solely because of inability to pay a fine or fee. In *Bearden*, the Court prohibited the incarceration of indigent probationers for failing to pay a fine because "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73; *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that state could not convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (holding that an indigent defendant could not be imprisoned longer than the statutory maximum for failing to pay his fine). The Supreme Court recently reaffirmed this principle in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), holding that a court violates due process when it finds a parent in civil contempt and jails the parent for failure to pay child support, without first inquiring into the parent's ability to pay. *Id.* at 2518-19.

To comply with this constitutional guarantee, state and local courts must inquire as to a person's ability to pay prior to imposing incarceration for nonpayment. Courts have an affirmative duty to conduct these inquiries and should do so sua sponte. *Bearden*, 461 U.S. at 671. Further, a court's obligation to conduct indigency inquiries endures throughout the life of a case. *See id.* at 662-63. A probationer may lose her job or suddenly require expensive medical care, leaving her in precarious financial circumstances. For that reason, a missed payment cannot itself be sufficient to trigger a person's arrest or detention unless the court first inquires anew into the reasons for the person's non-payment and determines that it was willful. In addition, to minimize these problems, courts should inquire into ability to pay at sentencing, when contemplating the assessment of fines and fees, rather than waiting until a person fails to pay.

Under *Bearden*, standards for indigency inquiries must ensure fair and accurate assessments of defendants' ability to pay. Due process requires that such standards include both notice to the defendant that ability to pay is a critical issue, and a meaningful opportunity for the defendant to be heard on the question of his or her financial circumstances. *See Turner*, 131 S. Ct. at 2519-20 (requiring courts to follow these specific procedures, and others, to prevent unrepresented parties from being jailed because of financial incapacity). Jurisdictions may benefit from creating statutory presumptions of indigency for certain classes of defendants—for example, those eligible for public benefits, living below a certain income level, or serving a term of confinement. *See, e.g.*, R.I. Gen. Laws § 12-20-10 (listing conditions considered "prima facie evidence of the defendant's indigency and limited ability to pay," including but not limited to "[q]ualification for and/or receipt of" public assistance, disability insurance, and food stamps).

2. Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.

When individuals of limited means cannot satisfy their financial obligations, *Bearden* requires consideration of "alternatives to imprisonment." 461 U.S. at 672. These alternatives may include extending the time for payment, reducing the debt, requiring the defendant to attend traffic or public safety classes, or imposing community service. *See id.* Recognizing this constitutional imperative, some jurisdictions have codified alternatives to incarceration in state law. *See, e.g.*, Ga. Code Ann. § 42-8-102(f)(4)(A) (2015) (providing that for "failure to report to probation or failure to pay fines, statutory surcharges, or probation supervision fees, the court shall consider the use of alternatives to confinement, including community service"); *see also Tate*, 401 U.S. at 400 n.5 (discussing effectiveness of fine payment plans and citing examples from several states). In some cases, it will be immediately apparent that a person is not and will not likely become able to pay a monetary fine. Therefore, courts should consider providing alternatives to indigent defendants not only after a failure to pay, but also in lieu of imposing financial obligations in the first place.

Neither community service programs nor payment plans, however, should become a means to impose greater penalties on the poor by, for example, imposing onerous user fees or interest. With respect to community service programs, court officials should consider delineating clear and consistent standards that allow individuals adequate time to complete the service and avoid creating unreasonable conflicts with individuals' work and family obligations. In imposing payment plans, courts should consider assessing the defendant's financial resources to determine a reasonable periodic payment, and should consider including a mechanism for defendants to seek a reduction in their monthly obligation if their financial circumstances change.

3. Courts must not condition access to a judicial hearing on prepayment of fines or fees.

State and local courts deprive indigent defendants of due process and equal protection if they condition access to the courts on payment of fines or fees. *See Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that due process bars states from conditioning access to

compulsory judicial process on the payment of court fees by those unable to pay); *see also Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 502 (M.D. Ala. 1976) (holding that the conditioning of an appeal on payment of a bond violates indigent prisoners' equal protection rights and "'has no place in our heritage of Equal Justice Under Law'" (citing *Burns v. Ohio*, 360 U.S. 252, 258 (1959)).[5]

This unconstitutional practice is often framed as a routine administrative matter. For example, a motorist who is arrested for driving with a suspended license may be told that the penalty for the citation is $300 and that a court date will be scheduled only upon the completion of a $300 payment (sometimes referred to as a prehearing "bond" or "bail" payment). Courts most commonly impose these prepayment requirements on defendants who have failed to appear, depriving those defendants of the opportunity to establish good cause for missing court. Regardless of the charge, these requirements can have the effect of denying access to justice to the poor.

4. Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *see also Turner*, 131 S. Ct. at 2519 (discussing the importance of notice in proceedings to enforce a child support order). Thus, constitutionally adequate notice must be provided for even the most minor cases. Courts should ensure that citations and summonses adequately inform individuals of the precise charges against them, the amount owed or other possible penalties, the date of their court hearing, the availability of alternate means of payment, the rules and procedures of court, their rights as a litigant, or whether in-person appearance is required at all. Gaps in this vital information can make it difficult, if not impossible, for defendants to fairly and expeditiously resolve their cases. And inadequate notice can have a cascading effect, resulting in the defendant's failure to appear and leading to the imposition of significant penalties in violation of the defendant's due process rights.

Further, courts must ensure defendants' right to counsel in appropriate cases when enforcing fines and fees. Failing to appear or to pay outstanding fines or fees can result in incarceration, whether through the pursuit of criminal charges or criminal contempt, the imposition of a sentence that had been suspended, or the pursuit of civil contempt proceedings. The Sixth Amendment requires that a defendant be provided the right to counsel in any criminal proceeding resulting in incarceration, *see Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), and indeed forbids imposition of a suspended jail sentence on a probationer who was not afforded a right to counsel when originally convicted and sentenced,

[5] The Supreme Court reaffirmed this principle in *Little v. Streater*, 452 U.S. 1, 16-17 (1981), when it prohibited conditioning indigent persons' access to blood tests in adversarial paternity actions on payment of a fee, and in *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996), when it prohibited charging filing fees to indigent persons seeking to appeal from proceedings terminating their parental rights.

see Alabama v. Shelton, 535 U.S. 654, 662 (2002). Under the Fourteenth Amendment, defendants likewise may be entitled to counsel in civil contempt proceedings for failure to pay fines or fees. *See Turner*, 131 S. Ct. at 2518-19 (holding that, although there is no automatic right to counsel in civil contempt proceedings for nonpayment of child support, due process is violated when neither counsel nor adequate alternative procedural safeguards are provided to prevent incarceration for inability to pay).[6]

5. Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections.

The use of arrest warrants as a means of debt collection, rather than in response to public safety needs, creates unnecessary risk that individuals' constitutional rights will be violated. Warrants must not be issued for failure to pay without providing adequate notice to a defendant, a hearing where the defendant's ability to pay is assessed, and other basic procedural protections. *See Turner*, 131 S. Ct. at 2519; *Bearden*, 461 U.S. at 671-72; *Mullane*, 339 U.S. at 314-15. When people are arrested and detained on these warrants, the result is an unconstitutional deprivation of liberty. Rather than arrest and incarceration, courts should consider less harmful and less costly means of collecting justifiable debts, including civil debt collection.[7]

In many jurisdictions, courts are also authorized—and in some cases required—to initiate the suspension of a defendant's driver's license to compel the payment of outstanding court debts. If a defendant's driver's license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "may become essential in the pursuit of a livelihood" and thus "are not to be taken away without that procedural due process required by the Fourteenth Amendment"); *cf. Dixon v. Love*, 431 U.S. 105, 113-14 (1977) (upholding revocation of driver's license after conviction based in part on the due process provided in the underlying criminal proceedings); *Mackey v. Montrym*, 443 U.S. 1, 13-17 (1979) (upholding suspension of driver's license after arrest for driving under the influence and refusal to take a breath-analysis test, because suspension "substantially served" the government's interest in public safety and was based on "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him," making the risk of erroneous deprivation low). Accordingly, automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.

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[6] *Turner*'s ruling that the right to counsel is not automatic was limited to contempt proceedings arising from failure to pay child support to a custodial parent who is unrepresented by counsel. *See* 131 S. Ct. at 2512, 2519. The Court explained that recognizing such an automatic right in that context "could create an asymmetry of representation." *Id.* at 2519. The Court distinguished those circumstances from civil contempt proceedings to recover funds due to the government, which "more closely resemble debt-collection proceedings" in which "[t]he government is likely to have counsel or some other competent representative." *Id.* at 2520.

[7] Researchers have questioned whether the use of police and jail resources to coerce the payment of court debts is cost-effective. *See, e.g.*, Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505, 527-28 (2011). This strategy may also undermine public safety by diverting police resources and stimulating public distrust of law enforcement.

Even where such suspensions are lawful, they nonetheless raise significant public policy concerns. Research has consistently found that having a valid driver's license can be crucial to individuals' ability to maintain a job, pursue educational opportunities, and care for families.[8] At the same time, suspending defendants' licenses decreases the likelihood that defendants will resolve pending cases and outstanding court debts, both by jeopardizing their employment and by making it more difficult to travel to court, and results in more unlicensed driving. For these reasons, where they have discretion to do so, state and local courts are encouraged to avoid suspending driver's licenses as a debt collection tool, reserving suspension for cases in which it would increase public safety.[9]

6. Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.

When indigent defendants are arrested for failure to make payments they cannot afford, they can be subjected to another independent violation of their rights: prolonged detention due to unlawful bail or bond practices. Bail that is set without regard to defendants' financial capacity can result in the incarceration of individuals not because they pose a threat to public safety or a flight risk, but rather because they cannot afford the assigned bail amount.

As the Department of Justice set forth in detail in a federal court brief last year, and as courts have long recognized, any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment. *See* Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, at 8 (M.D. Ala., Feb. 13, 2015) (citing *Bearden*, 461 U.S. at 671; *Tate*, 401 U.S. at 398; *Williams*, 399 U.S. at 240-41).[10] Systems that rely primarily on secured monetary bonds without adequate consideration of defendants' financial means tend to result in the incarceration of poor defendants who pose no threat to public safety solely because they cannot afford to pay.[11] To better protect constitutional rights while ensuring defendants' appearance in court and the safety of the community, courts should consider transitioning from a system based on secured monetary bail alone to one grounded in objective risk assessments by pretrial experts. *See*, *e.g.*, D.C. Code § 23-1321 (2014); Colo. Rev. Stat. 16-

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[8] *See, e.g.*, Robert Cervero, et al., *Transportation as a Stimulus of Welfare-to-Work: Private versus Public Mobility*, 22 J. PLAN. EDUC. & RES. 50 (2002); Alan M. Voorhees, et al., *Motor Vehicles Affordability and Fairness Task Force: Final Report*, at xii (2006), *available at* http://www.state.nj.us/mvc/pdf/About/AFTF_final_02.pdf (a study of suspended drivers in New Jersey, which found that 42% of people lost their jobs as a result of the driver's license suspension, that 45% of those could not find another job, and that this had the greatest impact on seniors and low-income individuals).

[9] *See* Am. Ass'n of Motor Veh. Adm'rs, *Best Practices Guide to Reducing Suspended Drivers*, at 3 (2013), *available at* http://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3723&libID=3709 (recommending that "legislatures repeal state laws requiring the suspension of driving privileges for non-highway safety related violations" and citing research supporting view that fewer driver suspensions for non-compliance with court requirements would increase public safety).

[10] The United States' Statement of Interest in *Varden* is available at http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/02/13/varden statement_ of_interest.pdf.

[11] *See supra* Statement of the United States, *Varden*, at 11 (citing Timothy R. Schnacke, U.S. Department of Justice, National Institute of Corrections, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM, at 2 (2014), *available at* http://nicic.gov/library/028360).

4-104 (2014); Ky. Rev. Stat. Ann. § 431.066 (2015); N.J. S. 946/A1910 (enacted 2015); *see also* 18 U.S.C. § 3142 (permitting pretrial detention in the federal system when no conditions will reasonably assure the appearance of the defendant and safety of the community, but cautioning that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person").

7. Courts must safeguard against unconstitutional practices by court staff and private contractors.

In many courts, especially those adjudicating strictly minor or local offenses, the judge or magistrate may preside for only a few hours or days per week, while most of the business of the court is conducted by clerks or probation officers outside of court sessions. As a result, clerks and other court staff are sometimes tasked with conducting indigency inquiries, determining bond amounts, issuing arrest warrants, and other critical functions—often with only perfunctory review by a judicial officer, or no review at all. Without adequate judicial oversight, there is no reliable means of ensuring that these tasks are performed consistent with due process and equal protection. Regardless of the size of the docket or the limited hours of the court, judges must ensure that the law is followed and preserve "both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal quotation marks omitted); *see also* American Bar Association, MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Rules 2.2, 2.5, 2.12.

Additional due process concerns arise when these designees have a direct pecuniary interest in the management or outcome of a case—for example, when a jurisdiction employs private, for-profit companies to supervise probationers. In many such jurisdictions, probation companies are authorized not only to collect court fines, but also to impose an array of discretionary surcharges (such as supervision fees, late fees, drug testing fees, etc.) to be paid to the company itself rather than to the court. Thus, the probation company that decides what services or sanctions to impose stands to profit from those very decisions. The Supreme Court has "always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987). It has expressly prohibited arrangements in which the judge might have a pecuniary interest, direct or indirect, in the outcome of a case. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (invalidating conviction on the basis of $12 fee paid to the mayor only upon conviction in mayor's court); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972) (extending reasoning of *Tumey* to cases in which the judge has a clear but not direct interest). It has applied the same reasoning to prosecutors, holding that the appointment of a private prosecutor with a pecuniary interest in the outcome of a case constitutes fundamental error because it "undermines confidence in the integrity of the criminal proceeding." *Young*, 481 U.S. at 811-14. The appointment of a private probation company with a pecuniary interest in the outcome of its cases raises similarly fundamental concerns about fairness and due process.

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The Department of Justice has a strong interest in ensuring that state and local courts provide every individual with the basic protections guaranteed by the Constitution and other federal laws, regardless of his or her financial means. We are eager to build on the December 2015 convening about these issues by supporting your efforts at the state and local levels, and we look forward to working collaboratively with all stakeholders to ensure that every part of our justice system provides equal justice and due process.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General
Civil Rights Division

Lisa Foster
Director
Office for Access to Justice

EXHIBIT G

U.S. DEPARTMENT OF JUSTICE

OFFICE FOR CIVIL RIGHTS
OFFICE OF JUSTICE PROGRAMS

OFFICE FOR ACCESS TO JUSTICE

Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles

Considerations for Compliance with Title VI of the Civil Rights Act of 1964, the Omnibus Crime Control and Safe Streets Act of 1968, and Related Statutes

January 2017

The Office for Access to Justice (ATJ), U.S. Department of Justice (Department or DOJ) and the Office for Civil Rights (OCR) at the Office of Justice Programs (OJP), DOJ jointly issue this Advisory to recipients of financial assistance from the OJP, the Office of Community Oriented Policing Services (COPS Office), and the Office on Violence Against Women (OVW) to remind them of their constitutional and statutory responsibilities related to collecting fines and fees from youth involved with the juvenile justice system. The Advisory also summarizes the enforcement actions available to the Department and offers recommendations to improve the administration of juvenile fines and fees.

On March 14, 2016, the DOJ distributed a letter to state and local courts on the enforcement of fines and fees in criminal justice proceedings.[1] Many of the practices addressed in the March 14, 2016, letter also occur in juvenile courts where, in addition to fines, courts often impose fees on children for diversion programs, counseling, drug testing and rehabilitation programs, mental health evaluations and treatment programs, public defenders, probation, custody, and court costs. These fines and fees can be economically debilitating to children and their families and can have an enduring impact on a child's prospects.

Young people will ordinarily be unable to pay fines and fees themselves. Families burdened by these obligations may face a difficult choice, either paying juvenile justice debts or paying for food, clothing, shelter, or other necessities. The cost of fines and fees may foreclose educational opportunities for system-involved youth or other family members. When children and their families are unable to pay fines and fees, the children often suffer escalating negative consequences from the justice system that may follow them well into adulthood. Perhaps not

[1] U.S. Dep't of Justice, *Dear Colleague Letter: Law Enforcement Fines and Fees* (Mar. 14, 2016), http://go.usa.gov/x9nd7.

surprisingly, given the collateral negative consequences, there is evidence that fines and fees increase the risk of recidivism.[2]

The intent of this Advisory is to assist recipients of financial assistance from the Department—especially the leadership of juvenile courts, juvenile probation departments, and other juvenile justice agencies—in ensuring that the imposition and enforcement of fines and fees on juveniles does not violate their constitutional rights, violate the nondiscrimination provisions associated with the acceptance of federal financial assistance, or impose undue hardships on the development and rehabilitation of system-involved youth.

Constitutional Obligations

Youth in the justice system are entitled to all of the constitutional protections that adults receive when it comes to fines and fees. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[3] The Department's March 14, 2016, letter identified seven constitutional principles relevant to the enforcement of fines and fees. All seven principles apply to juveniles.[4]

When it comes to youth, however, courts cannot stop at the protections afforded to adults. Indeed, the Constitution demands unique protections for juveniles in the justice system due to "children's 'diminished culpability and greater prospects for reform.'"[5] "The law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[6] Our legal system is "replete with laws and judicial recognition that children cannot be viewed simply as miniature adults."[7] As society's understanding of children's unique needs and vulnerabilities has grown over time, the Supreme Court has expanded protections for children.

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[2] *See* Jessica Feierman, Juvenile Law Center, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* 7-8 (2016), http://debtorsprison.jlc.org (discussing results of a criminology study "showing that youth of color in Allegheny County, Pennsylvania, were more likely to have costs or fees owed after case closing, which, in turn, was related to higher recidivism rates, even after controlling for a host of other demographics and case characteristics" (citing Alex R. Piquero & Wesley G. Jennings, *Justice System Imposed Financial Penalties Increase Likelihood of Recidivism in a Sample of Adolescent Offenders* (2016)).

[3] In re Gault, 387 U.S. 1, 13 (1967).

[4] The seven principles are as follows:

1. Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful.
2. Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.
3. Courts must not condition access to a judicial hearing on the prepayment of fines or fees.
4. Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees.
5. Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections.
6. Court must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.
7. Courts must safeguard against unconstitutional practices by court staff and private contractors.

The Department's March 14, 2016, letter discusses these principles and their legal basis in greater detail. Recipients should familiarize themselves with these legal requirements.

[5] Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012)).

[6] J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011) (citation omitted).

[7] *Id.* at 274 (citation and internal quotation marks omitted).

In *Roper v. Simmons*, the Court deemed children ineligible for the death penalty because of their "lack of maturity and an underdeveloped sense of responsibility," their vulnerability "to negative influences and outside pressures," and their "more transitory, less fixed" personalities.[8] Five years later when the Court struck down life-without-parole sentences for juveniles who committed non-homicide offenses in *Graham v. Florida*, the Court noted that scientific research "continue[s] to show fundamental differences between juvenile and adult minds."[9] Accordingly, as in virtually every other context, the justice system, with respect to fines and fees, must recognize and protect the special vulnerabilities of children.

Statutory Civil Rights Obligations for Recipients of Department Financial Assistance

Federal statutes protect the rights of beneficiaries in federally assisted programs, including young people who receive services from Department-funded juvenile courts and other agencies in the juvenile justice system. Recipients of financial assistance from the OJP, the COPS Office, and the OVW must comply with the following federal cross-cutting statutes that apply to all recipients of federal financial assistance:

- Title VI of the Civil Rights Act of 1964 (Title VI), as amended, and its implementing regulations;[10]
- Title IX of the Education Amendments of 1972 (Title IX), as amended, and its implementing regulations;[11]
- Section 504 of the Rehabilitation Act of 1973, as amended, and its implementing regulations;[12] and
- The Age Discrimination Act of 1975, as amended, and its implementing regulations). [13]

Depending on the legislative source of authorized funding from the Department, recipients of financial assistance from the OJP, the COPS Office, and the OVW may also need to comply with the nondiscrimination provisions in the following DOJ program statutes:

- The Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), as amended, and its implementing regulations; [14]
- The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), as amended, and its implementing regulations;[15]

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[8] 543 U.S. 551, 569–70 (2005) (citations omitted).
[9] 560 U.S. 48, 68 (2010); *see also Montgomery*, 136 S. Ct. at 734 (noting that "the distinctive attributes of youth" should have some bearing on the punishment that children receive); *J.D.B.*, 564 U.S. at 277 (holding that children must be given special consideration in the context of *Miranda* waivers because "[a] child's age is far more than a chronological fact").
[10] 42 U.S.C. § 2000d (2012); 28 C.F.R. pt. 42, subpts. C & D (2016).
[11] 20 U.S.C. § 1681; 28 C.F.R. pt. 42, subpt. D & §§ 54.105, .125(a), .605.
[12] 42 U.S.C. § 793; 28 C.F.R. pt. 42, subpt. G.
[13] 42 U.S.C. § 6102; 28 C.F.R. pt. 42, subpt. I.
[14] 42 U.S.C. § 3789d; 28 C.F.R. pt. 42, subpt. D.
[15] 42 U.S.C. § 5672(b); 28 C.F.R. § 31.202(b)(3), (4) & pt. 42, subpt. D.

- The Victims of Crime Act of 1984 (VOCA), as amended, and its implementing regulations;[16] and
- The Violence Against Women Act of 1994 (VAWA), as amended.[17]

Collectively, in addition to other protections, the federal cross-cutting statutes and the Department's program statutes prohibit discrimination in the delivery of services or benefits based on race, color, national origin, sex, religion, disability, sexual orientation, or gender identity. Title VI and the other federal civil rights statutes applicable to Department recipients prohibit not only intentional discrimination but also discrimination resulting from a neutral policy that adversely impacts a protected class, such as people of a particular race or national origin.[18]

The analysis of disparate-impact discrimination claims under Title VI follows the same burden-shifting scheme for employment discrimination claims under Title VII of the Civil Rights Act of 1964.[19] A discrimination claim based on adverse impact ordinarily relies on statistical data showing that the neutral policy of a federally funded service provider has a significantly negative effect on a protected class in comparison to another similarly situated group.[20] Despite the disparate impact on the protected class, the funded service provider may nonetheless legally retain the challenged policy if it can present a substantial legitimate justification for the policy.[21] Even if the recipient can meet this requirement, it may still run afoul of Title VI and other related federal statutes, if "there exists a comparably effective alternative practice which would result in less disproportionality, or . . . the [recipient's] proffered justification is a pretext for discrimination."[22]

Recent investigative findings by the Department, as well as a number of comprehensive surveys, underscore state and local courts' and juvenile justice systems' responsibility to review data related to the assessment of fines and fees to ensure that they are providing nondiscriminatory services to juveniles and their families. The Department's investigation of the Ferguson Police Department in St. Louis County, Missouri, concluded that the local practices of levying fines and fees on adults had an unlawful discriminatory impact on African Americans.[23] Following a lengthy investigation, the Department similarly found in its review of the St. Louis County Family Court that, "compared to national data, Black children in St. Louis County have a higher

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[16] 42 U.S.C. § 10604(e); Victims of Crime Act Victim Assistance Program, 81 Fed. Reg. 44,515, 44,532 (July 8, 2016) (to be codified at 28 C.F.R. § 94.114).
[17] 42 U.S.C. § 13925(b)(13).
[18] *See* 28 C.F.R. §§ 42.104(b)(2), .203(e), .710(a); *see also* Alexander v. Sandoval, 532 U.S. 275, 281–82 (2001); *see generally* U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL (Jan. 11, 2011), http://go.usa.gov/x9QPC (updated sections available at http://go.usa.gov/x9QQf).
[19] *See, e.g.*, N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995).
[20] Ga. State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).
[21] *Id.*
[22] Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993).
[23] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF FERGUSON POLICE DEP'T (Mar. 4, 2015), http://go.usa.gov/x9CJF.

rate of disparity in every decision point in the juvenile justice system."[24] The Policy Advocacy Clinic associated with the School of Law at the University of California at Berkeley analyzed data on the allocation of fines and fees on juveniles in Alameda County, California, and found that African American youth were overrepresented at each step in the juvenile justice system, exposing them to significantly higher fees.[25] These findings suggest that courts and other entities receiving financial assistance from the Department should carefully consider whether their collection of fines and fees from juveniles may have an unlawful discriminatory effect based on race or another protected class.

Enforcement and Technical Assistance

The Department is committed to protecting the rights of youth in the juvenile justice system, and it has a range of options at its disposal to do so, including the administrative process, litigation, and technical assistance.

Through the regulatory administrative process, the OCR has principal responsibility within the Department for enforcing Title VI and related federal civil rights statutes that apply to recipients of financial assistance from the OJP, the COPS Office, and the OVW. The OCR has the authority to investigate administrative complaints alleging that Department-funded courts and other agencies in the juvenile justice system are unlawfully discriminating against youth of a protected class who have been adversely affected by the assessment of fines or fees.[26] The OCR may also independently initiate compliance reviews (i.e., investigative audits) of Department-funded agencies to determine whether their administration of juvenile fines or fees may violate applicable federal civil rights laws.[27] Significantly, the implementing regulations for the Safe Streets Act, which the OCR follows in enforcing not only the Safe Streets Act but also Title VI, Title IX, the JJDPA, VOCA, and VAWA,[28] also contain a provision that defines prohibited discrimination in reference to constitutional standards: a recipient of financial assistance from the Department may not "deny any individual the rights guaranteed by the Constitution to all persons."[29] If the OCR finds evidence of a violation, it works with the funded agency to achieve

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[24] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE ST. LOUIS CTY. FAMILY CTS., ST. LOUIS, MO. 39 (July 31, 2015), http://go.usa.gov/x9CJe; *see also* Katherine Beckett, Alexes Harris & Heather Evans, Washington State Minority & Justice Coalition, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008), *available at* http://faculty.washington.edu/kbeckett/Legal%20Financial%20Obligations.pdf (concluding that "convictions involving Hispanic defendants are associated with significantly higher fees and fines than those involving white defendants, even after controlling for relevant legal factors").

[25] Jeffrey Selbin & Stephanie Campos, *High Pain, No Gain: How Juvenile Administrative Fees Harm Low-Income Families in Alameda County, California* (Mar. 2016), http://ssrn.com/abstract=2738710; *see also* note 2, *supra.*

[26] *See, e.g.*, 28 C.F.R. § 42.205.

[27] *Id.* § 42.206.

[28] 42 U.S.C. § 13925(b)(13)(C) (implementing enforcement of VAWA's nondiscrimination provisions in accordance with the Safe Streets Act); 28 C.F.R. § 42.201(a) (implementing the Safe Streets Act, Title VI, Title IX, and the JJDPA); Victims of Crime Act Victim Assistance Program, 81 Fed. Reg. 44,515, 44,532 (July 8, 2016) (to be codified at 28 C.F.R. § 94.114) (implementing VOCA's nondiscrimination provisions in accordance with 28 C.F.R. pt. 42 and OCR guidance).

[29] 28 C.F.R. § 42.203(b)(8).

voluntary compliance.[30] If negotiations for voluntary compliance fail, however, the OCR may seek the suspension or termination of the Department's financial assistance.[31]

The Department also has litigation authority to enforce the rights of juveniles in the justice system pursuant to the Violent Crime Control and Law Enforcement Act of 1994.[32] Through this statute, the Department is currently enforcing the rights of juveniles through a comprehensive settlement[33] with Shelby County, Tennessee, following findings of serious and systemic failures in the juvenile court that violated the due process and equal protection rights of juvenile respondents.[34] Similarly, the Department is enforcing the rights of juveniles in St. Louis County Family Court[35] after finding systemic violations of children's rights under the Due Process and Equal Protection Clauses.[36] In 2015, the Department's Civil Rights Division, the ATJ, and the U.S. Attorney for the Middle District of Georgia filed a Statement of Interest in the case *N.P. v. State of Georgia*, a class action seeking to vindicate juveniles' constitutional right to counsel in delinquency proceedings.[37] The OJP and the other DOJ grantmaking components also have discretion to refer administrative investigations, which might include matters alleging disparate impact discrimination resulting from the imposition of fines and fees, to the Civil Rights Division for litigation.[38]

The Department also has resources that are available to juvenile courts and juvenile justice agencies to help them comply with their constitutional and statutory civil rights obligations. In addition to the technical assistance that the OCR routinely provides to DOJ recipients, the OJP's Office of Juvenile Justice and Delinquency Prevention works "to develop and implement effective and coordinated prevention and intervention programs and to improve the juvenile justice system so that it protects public safety, holds justice-involved youth appropriately accountable, and provides treatment and rehabilitative services tailored to the needs of juveniles

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[30] *Id.* §§ 42.205(c)(3)(iii), .206(e)(3).
[31] *Id.* §§ 42.210, .212(b)(1)(ii).
[32] The statute provides, *inter alia,* as follows:

> It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by . . . employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

42 U.S.C. § 14141(a). If the Department finds a "pattern or practice" of constitutional violations in a juvenile justice system, the attorney general can file a lawsuit seeking "appropriate equitable and declaratory relief to eliminate the pattern or practice." *Id.* § 14141(b).
[33] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, MEM. OF AGREEMENT REGARDING THE JUV. CTS. OF MEMPHIS & SHELBY CTYS. (Dec. 17, 2012), http://go.usa.gov/x9nfa.
[34] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE SHELBY CTY. JUVENILE CT. 1 (Apr. 26, 2012), http://go.usa.gov/x9nfT.
[35] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, MEM. OF AGREEMENT BETWEEN THE UNITED STATES DEP'T OF JUSTICE AND THE ST. LOUIS FAMILY CT. (Dec. 14, 2016), http://go.usa.gov/x9nfb.
[36] INVESTIGATION OF THE ST. LOUIS CTY. FAMILY CT., note 24, *supra.*
[37] No. 2014-CV-241025 (Fulton Cty. Super. Ct., filed Jan. 7, 2014), *available at* http://go.usa.gov/x9CJv.
[38] 28 C.F.R. §§ 42.108(d)(1), .215(a).

and their families."[39] OJP's Diagnostic Center also provides customized technical assistance resources to local community leaders, providing access to relevant data and experienced subject-matter experts to help communities develop the capacity to address emerging public safety and criminal justice issues, including matters related to juvenile justice.[40]

Recommendations to Recipients on Assessing Fines and Fees Involving Juveniles

Because children in the juvenile justice system are particularly vulnerable, they warrant special protections in regard to the imposition of fines and fees. Mindful of the needs of young people, the ATJ and the OCR offer five recommendations to Department-funded juvenile courts and juvenile justice agencies based on the principles articulated in the Department's March 14, 2016, letter.

1. Juvenile justice agencies should presume that young people are unable to pay fines and fees and only impose them after an affirmative showing of ability to pay.

Young people typically have no meaningful resources of their own. For this reason, the Department's comprehensive settlement with Shelby County, Tennessee, involving its juvenile court includes the acknowledged presumption that children are indigent for the purposes of appointing counsel and setting bond.[41] Pennsylvania, Louisiana, and North Carolina likewise presume that all children are eligible for the appointment of counsel.[42]

The juvenile justice system should also presume that children are unable to pay fines and fees. Absent an affirmative showing of the ability to pay, imposing fines and fees will serve no useful purpose. Instead, assessing these costs may force juveniles into a cycle of further involvement with the justice system and have collateral consequences that inhibit rather than advance rehabilitation.

Presuming that children are unable to afford fines and fees will also help juvenile courts and other juvenile justice agencies comply with their legal obligations. If fines and fees are only imposed on those rare children who are able to afford them, courts and other agencies are far less likely to enforce fines and fees in a way that punishes children for their poverty in violation of the Fourteenth Amendment. In addition, because of the well-documented correlations between poverty and race in the juvenile justice system,[43] conditioning the imposition of fines and fees on a demonstrated ability to afford them may also reduce the chances that the imposition or

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[39] Vision & Mission, OJJDP, http://go.usa.gov/x9nfW (last visited Jan. 9, 2017).
[40] About Us, OJP Diagnostic Ctr., https://www.ojpdiagnosticcenter.org/about (last visited Jan. 9, 2017); *see generally* OJP Diagnostic Ctr, Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees, http:://go.usa.gov/x9QQR (last visited Jan. 10, 2017).
[41] MEM. OF AGREEMENT BETWEEN THE UNITED STATES DEP'T OF JUSTICE AND THE ST. LOUIS FAMILY CT. note 35, *supra*.
[42] *See* 42 PA. CONS. STAT. ANN. § 6337.1; LA. CHILD. CODE ANN. art. 320(A), 848; N.C. GEN. STAT. ANN. §§ 7B-2000(b), 7A-450.1, 7A.450.3.
[43] Annie E. Casey Foundation, *Race Matters: Unequal Opportunities for Juvenile Justice* (2006), http://www.aecf.org/m/resourcedoc/aecf-RACEMATTERSjuvenilejustice-2006.pdf (noting correlations between race and poverty in juvenile and adult justice systems).

enforcement of fines and fees will have a disparate racial impact on beneficiaries of federally assisted programs in violation of Title VI, the Safe Streets Act, and other related statutes.

2. Before juvenile justice agencies punish youth for failing to pay fines and fees, they must first determine ability to pay, considering factors particularly applicable to youth.

As emphasized repeatedly in the Department's March 14, 2016, letter, courts must not incarcerate people solely because they are unable to pay fines or fees, because doing so violates their rights to equal protection and due process.[44] The Constitution requires that before punishing someone for failing to pay a fine or fee, a court must inquire into the individual's ability to pay.[45]

When the person who has failed to pay a fine or fee is a child, courts should consider the unique circumstances that inhibit the child's ability to pay. As noted above, children are presumptively unable to pay fines and fees, and, of course, young children cannot legally work. Requiring a teenager to work to pay fines and fees is often counterproductive: there are often negative consequences resulting from missing school to work, and there are also negative consequences resulting from missing work to attend school. Juveniles often lack their own means of transportation, which can make getting and keeping a job difficult. Many states restrict work for those under eighteen and limit their ability to enter into contracts. Finally, and most importantly, juveniles under probation or in a diversion or other program will likely find it extremely difficult to fulfill simultaneously the obligations related to their probation or program, school, and a job.

An ability-to-pay inquiry that recognizes the unique characteristics of children will help to ensure that juvenile courts and other juvenile justice agencies do not punish children for their poverty in violation of the Constitution and may also prevent the kind of disparate racial impact that may violate Title VI, the Safe Streets Act, and other related statutes.

3. Juvenile justice agencies should not condition entry into a diversion program or another alternative to adjudication on the payment of a fee if the youth or the youth's family is unable to pay the fee.

Due process and equal protection plainly prohibit juvenile courts and other juvenile justice agencies from treating two similarly situated children differently based solely on their economic status or the economic status of their parents.[46] Yet across the country, diversion programs or other alternatives to adjudication or detention for youth are accessible only to those who can afford the required fees. Such practices result in what the Constitution forbids: the incarceration

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[44] Bearden v. Georgia, 461 U.S. 660, 671 (1983).
[45] *E.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2518–19 (2011) (court violates due process when it finds a parent in civil contempt and jails the parent for failure to pay child support, without first inquiring into the parent's ability to pay).
[46] Bearden, 461 U.S. at 671; Griffin v. Illinois, 351 U.S. 12, 24 (1956) (holding that the Fourteenth Amendment prohibits denial of right to appeal based on inability to pay fee); M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) (holding that indigent person could not be denied appeal of decision terminating parental rights based on inability to pay court costs); Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971) (holding that married couple's divorce could not be denied based on inability to pay court costs).

or punishment of children based solely on poverty.[47] Conditioning diversion and other alternatives to formal adjudication or detention on ability to pay also means that the negative consequences of adjudication and detention fall more heavily on children living in poverty. Formal adjudication and a juvenile record can prevent youth from pursuing educational opportunities, participating in school-related activities, living in subsidized housing, obtaining employment, and even obtaining a driver's license,[48] while detention separates youth from positive influences like family and school and increases the risk of recidivism.[49] In addition, if a disproportionate number of children who are unable to pay for diversion are also minorities,[50] making diversion programs available to all regardless of financial resources may help to prevent disparate racial impacts that could violate Title VI, the Safe Streets Act, and other related statutes. For these reasons, juvenile courts and juvenile justice agencies should not deny access to diversion programs and other alternatives to adjudication solely based on inability to pay the fees associated with the programs.[51]

4. Juvenile justice agencies should collect data on race, national origin, sex, and disability to determine whether the imposition of fines and fees has an unlawful disparate impact on juveniles or their families.

Juvenile justice agencies should collect and analyze demographic data related to the imposition of fines and fees on juveniles to assess compliance with the nondiscrimination requirements that accompany acceptance of Department financial assistance. Establishing data-collection and maintenance procedures are critical mechanisms for evaluating the impact that fines and fees may have on a protected class over a period of time. Regular analysis of the relevant data would allow recipients to take affirmative measures to identify and eliminate discrimination.

In tandem with gathering information on the national origin of beneficiaries, Department-funded juvenile justice agencies should also collect data on the primary languages spoken by the children and their families involved with the juvenile justice system. The data will allow funded entities to determine, consistent with the Department's language-access guidance for recipients on complying with Title VI, whether they are taking reasonable steps to provide limited English proficient (LEP) youth and LEP families meaningful access to the services that the recipient offers.[52] If a funded entity decides to translate vital documents into the commonly encountered

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[47] Bearden, 461 U.S. at 671; Tate v. Short, 401 U.S. 395, 398 (1971); Williams v. Illinois, 399 U.S. 235, 241–42 (1970).

[48] Collateral consequences of adjudications of delinquency vary based on state laws. For some examples, see the resources collected on the National Juvenile Defender Center (NJDC) website. Collateral Consequences, NJDC, http://njdc.info/collateral-consequences/ (last visited Dec. 23, 2016).

[49] *See* JAMES AUSTIN *ET AL.*, OJJDP, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS 2–3 (Sept. 2005), *available at* http://go.usa.gov/x9n7E.

[50] *See, e.g.*, Alex R. Piquero & Wesley G. Jennings, *Justice System Imposed Financial Penalties Increase Likelihood of Recidivism in a Sample of Adolescent Offenders* 29 (2016) (noting, in study of Allegheny County, Pennsylvania, "that Non-Whites were more likely to still owe costs and restitution upon case closing").

[51] Aside from barring access to diversion programs and other alternatives to adjudication, the inability to pay should also not result in harsher consequences at any stage of a young person's interaction with the juvenile justice system, including access to rehabilitative services or the length of probation.

[52] Dep't of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

languages in its service population, it should translate into the appropriate languages notices related to the assessment of fines and fees, including information on ability to pay, economic assessment procedures, and appeal rights.[53]

5. Juvenile justice agencies should consider whether the imposition or enforcement of fines and fees in any particular case comports with the rehabilitative goals of the juvenile justice system.

One overriding difference between the juvenile justice system and the criminal justice system is the former's primary focus on rehabilitation. Before courts impose fines and fees on juveniles—even on those rare juveniles who might be able to pay—they should consider whether such financial burdens serve rehabilitation. In many cases, fines and fees will be more punitive than rehabilitative, and they may in fact present an impediment to other rehabilitative steps, such as employment and education.

Conclusion

The ATJ and the OCR find encouraging the innovative efforts that juvenile courts and other juvenile justice agencies around the country have taken to address the legal and practical harms that can result from the imposition of fines and fees. This Advisory supports the effort to ensure that the assessment of fines and fees on juveniles comports with federal law and the juvenile justice system's rehabilitative goals.

Recipients of financial assistance from the Department seeking additional information, resources, or referrals related to the administration of fines and fees in the juvenile justice system may contact the OCR.[54]

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[53] *See id.* at 41,463–64.
[54] Civil Rights (Oficina de Derechos Civiles), OFFICE OF JUSTICE PROGRAMS, http://go.usa.gov/x9nGD (last visited Jan. 8, 2017).