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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PAULA LANE, et al.,

Plaintiffs,

v.

JOHN KITZHABER, et al.

Defendants.

Case No.: 3:12-cv-00138-ST

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. Introduction

This case challenges the pervasive segregation of persons with developmental disabilities in sheltered workshops, in violation of the integration mandate of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, 12131 *et seq*. and the Rehabilitation Act, 29 U.S.C. § 794a, as well as the implementing regulations of the Department of Justice. 28 C.F.R 35.130(d), 28 C.F.R. Pt. 35, App. A. Doc. 1, Compl., ¶¶ 1-2, 8. As a direct result of the defendants' actions and inactions administering their employment system,[1] which unnecessarily and excessively relies upon segregated employment settings, over 2,500 persons with disabilities remain in sheltered workshops, even though they are qualified and prefer to work in integrated employment settings, with the assistance of supported employment services.[2]

The defendants do not dispute that that they have placed thousands of persons with disabilities in sheltered workshops, and that sheltered workshops are segregated settings. *See Community Leadership for Employment First in Oregon* (2010) at 5, available at http://www.dhs.state.or.us/dd/supp_emp/docs/wise.pdf (hereafter "Call to Action Report"), attached as Exhibit 2 to the Plaintiffs' Motion for Class Certification (Doc. 13-1); *Employment First Strategic Planning: Stakeholder Planning Group Meeting*, Slide 3 (Jan. 27, 2012) (hereafter "PowerPoint Presentation"), attached as Exhibit 6 to the Plaintiffs' Motion for Class Certification (Doc. 13-4). Memorandum in Support of Defendants' Motion to Dismiss at 3 (hereafter "MTD"). Yet the defendants seek to dismiss the Complaint on the theory that Title II of the ADA applies only to residential institutions and has no relevance to segregated

[1] The defendants include the Governor, and the directors of three public entities responsible for funding, administering, coordinating, licensing, monitoring, and overseeing employment services to persons with developmental disabilities: the Department of Human Services (DHS), the Office of Developmental Disability Services (ODDS), and the Office of Vocational Rehabilitation Services (OVRS).

[2] An overview of employment services for persons with developmental disabilities, and specifically the nature, purpose, and consequences of sheltered workshops and supported employment, is set forth in Section III, *infra.*

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employment settings. *Id.* at 6-11. That position is inconsistent with the Department of Justice's Title II regulations, and directly contrary to the 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.*, available at http://www.ada.gov/olmstead/q&a_olmstead.htm ("DOJ Olmstead Guidance"), attached as Exhibit 1. Because Title II clearly applies to *all* services provided by a public entity, including employment services, and because the integration mandate of Title II requires that public entities ensure that *all* of their services are provided in the most integrated setting possible – which sheltered workshops plainly are not – the plaintiffs have stated a legal claim under the ADA and the Rehabilitation Act. *See* Section II, *infra.*

The defendants cannot contest that they fund and provide supported employment services to some persons with developmental disabilities. *See* Powerpoint Presentation, Slide 10. Supported employment services are the program that the plaintiffs seek, that they are qualified for, and that would allow them to participate in an integrated employment setting. The defendants misread the Complaint and mischaracterize the remedy by claiming that the plaintiffs assert a right to competitive employment, which the defendants claim that they do not provide. MTD at 12-13. Rather, because the plaintiffs are seeking a service (supported employment) which the defendants undeniably do provide to some persons with developmental disabilities, and because this service is the vehicle by which the plaintiffs can participate in integrated employment settings, they have stated a claim under Title II of the ADA. *See* Section IV, *infra.*

Finally, the defendants claim that the plaintiffs are merely challenging the quality of the defendants' employment services, and that debates about the "standard of care" do not state a claim under the ADA. MTD at 13-14. Because the plaintiffs challenge the defendants' actions that perpetuate segregation through their maintenance of segregated workshops, not the quality of care of employment services, this argument is misplaced. *See* Section V, *infra.*

Therefore, because the plaintiffs have stated a claim under Title II of the ADA and Section 504 of the Rehabilitation Act, the defendants' Motion should be denied.

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II. The Unnecessary Segregation of Persons With Disabilities in Sheltered Workshops Violates Title II of the ADA.

A. The ADA Prohibits Discrimination in Employment and Employment-Related Services on the Basis of Disability.

In 1990, the United States Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). As the legislative history, express Findings, and specific mandates of Title II of the Act demonstrate, the ADA prohibits discrimination in both employment and employment services.[3]

1. The Legislative Background of the ADA.

The ADA's legislative history evidences Congress's specific intent to ensure that people with disabilities receive equal opportunities to participate in gainful employment, including the right to participate in, and benefit equally from, employment services like job training and supported employment that often are necessary to participate in competitive employment.

> As to employment, Congress found that "[t]wo-thirds of all disabled Americans between the age of 16 and 64 [were] not working at all," even though a large majority wanted to, and were able to, work productively. S.Rep. No. 101–116, at 9. And Congress found that this discrimination flowed in significant part from "stereotypic assumptions" as well as "purposeful unequal treatment." 42 U.S.C. § 12101(a)(7).

Garrett, 531 U.S. at 378 (Breyer, J., dissenting).

In enacting the ADA, both branches of Congress concluded:

> [T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with

[3] The ADA was by no means Congress's first attempt to proscribe discrimination in employment against persons with disabilities. Indeed, in an appendix to his dissenting opinion in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), Justice Breyer catalogued a series of congressional acts intended to serve people with disabilities dating back to 1948. *Id.* at 390 App. B (Breyer, J., dissenting). Despite the existence of these laws, both the Senate and the House of Representatives determined that existing laws did not adequately address "the pervasive problems of discrimination that people with disabilities are facing." S.Rep. No. 116, 101st Cong, 1st Sess. 18 (1989); H.R. Rep No. 485(II), 101st Cong., 2d Sess. 47 (1990).

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> disabilities and for the integration of persons with disabilities into the *economic* and social mainstream of American life.

S.Rep. No. 116, 20; H.R.Rep. No. 485(II), 50 (emphasis added).

2. The ADA's Findings Specifically Address Employment and Recognize the Legacy of Segregation.

In the Findings and Purpose section of the ADA, Congress demonstrated its concern for the employment and economic self-sufficiency that comes with employment of people with disabilities:

> (3) discrimination against individuals with disabilities persists in such critical areas as *employment*, housing, public accommodations, education, transportation, communication . . . and *access to public services*. . . .
>
> (7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and *economic self-sufficiency* for such individuals.

42 U.S.C. § 12101(a) (emphasis added).

Just as the Findings reflected a particular congressional concern about employment and economic independence, they also addressed Congress's special concern that people with disabilities are improperly segregated in our society. Specifically, the Act states:

> (2) 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) individuals with disabilities continually encounter various forms of discrimination, including outright *intentional exclusion*, the discriminatory effects of architectural, transportation, and communication barriers, *overprotective rules and policies*, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, *segregation*, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities

42 U.S.C. § 12101(a) (emphasis added).

3. Courts Have Applied Title II Broadly to Cover All Forms of Services, Programs, and Activities Provided by a Public Entity.

In Title II of the ADA, Congress set forth a straightforward prohibition on discrimination:

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> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, *be excluded from* participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (emphasis added). The plain words of the statute provide that States are prohibited from discriminating or excluding persons with disabilities from *any* of their "services, programs, and activities."

Moreover, as a remedial statute, the ADA must be broadly construed to effectuate its purposes. *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002), *quoting Hanson v. Med. Board*, 279 F. 3d 1167, 1172 (9th Cir. 2002) (*quoting Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 861 (1st Cir. 1998)(alteration in the original) ("Courts must construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of 'provid[ing] a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities'").

The Supreme Court has interpreted Title II to apply to a wide range of public services. *Tennessee v. Lane*, 541 U.S. 509, 524 (2004) (Title II of the ADA was enacted to remediate a wide range of disability discrimination including unjustified civil commitment, abuse and neglect of institutionalized individuals with disabilities, and discriminatory zoning laws.). In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the Supreme Court, after deciding that a prison was a public entity for the purposes of Title II, rejected the defendants' argument that prisons do not provide any service, programs, or activities as defined by Title II, noting, "Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." *Id.* at 210.

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Other courts have applied Title II to all forms of services, programs, and activities of a public entity or an entity related to the public entity by a contract, license, or certification.[4] As the Ninth Circuit has stated:

> Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless hair-splitting arguments. The focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity.

Barden, 292 F.3d at 1076.

Similarly, the Ninth Circuit, has applied Title II to include "*all* operations of a qualifying local government[.]" *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F. 3d 725, 731 (9th Cir. 1999) (emphasis added). In *Bay Area*, the court, in holding that zoning laws were covered by Title II of the ADA, noted that the sweeping language of the ADA "strongly suggests that § 12132 should not be construed to allow the creation of spheres in which public entities may discriminate on the basis of disability…" *Id.* at 731. It concluded that "Congress specifically rejected an approach that could have left room for exceptions to §12132's prohibition on discrimination by public entities." *Id. See also Barden,* 292 F.3d at 1077 (finding that sidewalk accessibility was covered under Title II and the Rehabilitation Act, based upon the legislative history of the statutes); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) ("Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons services disproportionately due to their disability").

The Ninth Circuit, in broadly interpreting Title II, has acknowledged that Congress intended to end the segregation of people with disabilities when it passed the ADA:

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[4] In keeping with this expansive interpretation of the scope of Title II and its integration mandate, courts have recognized a variety of services, programs, and activities as subject to Title II, including, among others, voting in public elections, *Kerrigan v. Philadelphia Bd. of Election*, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008); adult day health care, *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009); in-home supportive service benefits, *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009); a state prison's grievance system and program for tracking the needs of disabled prisoners, *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010); and zoning, *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir. 1997, *rev'd on other grounds by Zervos v. Verizon New York,* 252 F.3d 163, 171 n.7 (2d Cir. 2001).

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> [i]n enacting the RA and ADA, Congress intended to eliminate discrimination against individuals with disabilities, just as it had earlier passed legislation mandating equal treatment of African-Americans. "If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person," the prison may not exclude the blind person from the dining hall unless allowing him access would unduly burden prison administration.

*Armstrong v. Wil*son, 124 F. 3d 1019, 1021-22 (9th Cir. 1997) (holding that California violated Title II by failing to provide accessible safety evacuation plans and an equal range of vocational and educational programs for prisoners with disabilities as compared to those provided to individuals without disabilities). The Ninth Circuit has also applied Title II to a variety of other programs and services. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010) (applying Title II to a state's prison grievance system and program for tracking the needs of prisoners with disabilities); *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (applying Title II to arrests and noting its applicability to prisoners); *Armstrong v. Davis*, 275 F.3d 849, 856 (9th Cir. 2001), *cert den*. 537 U.S. 812 (2002), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-505 (2005) ("*Armstrong II*") (applying Title II to parole hearings and related programs); *Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996) (applying Title II to prison disciplinary proceedings).

Thus, this long line of cases demonstrates that the prohibition of discrimination applies with equal force to all services, programs, and activities of public entities like DHS, ODDS, and OVRS. Under any reasonable construction of Title II, state-operated, state-funded, or state-licensed employment services are plainly covered.

4. Title II of the ADA Prohibits Discrimination in Employment Services.

Although Title II of the ADA does not specifically reference employment or employment-related services,[5] both the legislative history and the regulations implementing

[5] However, as noted at p. 4 above, the Findings and Purpose section of the ADA specifically states that the ADA covers employment.

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Title II reveal that the behavior prohibited of private employers under Title I, which is directed entirely to employment, employment training, and employment services, is similarly prohibited of public entities under Title II. A House of Representatives Report notes:

> Unlike the other titles of this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited. The Committee intends that the regulations under title II incorporate interpretations of the term discrimination set forth in titles I and III of the ADA to the extent that they do not conflict with the Section 504 regulations.

H. REP. NO. 101-485(I) at 52 (1990), reprinted in 1990 U.S.C.C.A.N. at 475.

Accordingly, a Title II regulation, 28 C.F.R. § 35.140, prohibits employment discrimination to the same extent that it is prohibited by the EEOC regulations implementing Title I, and, for those public entities that do not meet the criteria of Title I, prohibits employment discrimination to the same extent that it is prohibited by Section 504 of the Rehabilitation Act. Like the Title I regulations, the Rehabilitation Act regulations prohibit discrimination on the basis of disability in "[s]election and financial support for [employment] training," 28 C.F.R. § 41.52, and mandates that all federally-funded services, including employment services, be provided in the most integrated setting appropriate to the individual. 28 C.F.R. § 41.51(d).

The Title II regulations also make all forms of discrimination that are illegal if conducted by a public entity similarly illegal if they are conducted by a private entity with which the public entity contracts, licenses, or certifies, as do DHS, OHHS, and OVRS with sheltered workshops. 28 C.F.R. § 35.130(b)(6). For instance, if a private entity discriminates against someone in the provision of job training, a public entity that licenses the private entity is liable for a violation of Title II of the ADA. Thus, discrimination and unnecessary segregation in job training programs may violate Title II regardless of whether a public entity provides the program directly or contracts with, funds, licenses, or certifies a private entity, such as a sheltered workshop.

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B. Title II Regulations Require Public Entities to Administer and Fund All of Their Services, Programs, and Activities in the Most Integrated Setting Possible.

As directed by Congress, the Attorney General promulgated regulations necessary to implement Title II, including its integration mandate: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). Courts have interpreted both the integration mandate and the scope of Title II's coverage expansively.

Title II's integration mandate reflects the recognition that "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status." 28 C.F.R. Pt. 35, App. B. The regulations implementing Title II define the "most integrated setting appropriate to the needs of qualified individuals" as "a setting that enables individuals with disabilities to interact with non-disabled persons to fullest extent possible." *Id.*

1. Unjustified Segregation of People with Disabilities Constitutes Discrimination Under the Title II of the ADA.

The integration mandate of Title II is explicitly focused on ending segregation and isolation of individuals with disabilities in all aspects of public services, benefits and programs. *Olmstead, v. L.C.*, 527 U.S. 581 (1999); *Arc of Washington State, Inc. v. Braddock*, 427 F. 3d 615, 618 (9th Cir. 2005) (citations omitted) (describing Title II's integration mandate as "serv[ing] one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons. To comply with the integration mandate, states are required to make "reasonable modifications in policies, practices, or procedures" that are "necessary to avoid discrimination on the basis of disability."); *see also* 28 C.F.R. § 35.130(d).[6]

[6] The Department of Justice's interpretation of the integration mandate and other regulations must be afforded "great weight" and "substantial deference." *Olmstead*, 527 U.S. at 598 ("the well reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for

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Courts regularly rely on the integration mandate and the language of Title II itself in determining whether a public entity's conduct constitutes unlawful discrimination and/or segregation. In *Olmstead,* the Supreme Court, after reciting the integration regulation and the Attorney General's authority to promulgate it, plainly stated, "Unjustified isolation . . . is properly regarded as discrimination based on disability."[7] The Supreme Court reviewed the harm of segregation, declaring that it "perpetuates unwarranted assumptions that persons so isolated are incapable or trustworthy of participating in community life" and that it "severely diminishes the everyday life activities of individuals including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[8] *Id.* at 600–01. The Court held that Title II requires States to provide services in the most integrated setting possible, including shifting programs and services from segregated to integrated settings, unless such a shift would result in a fundamental alteration to their service systems. *Id.* at 607.

Courts have afforded the Department of Justice's integration mandate regulations considerable deference, both because Congress specifically directed the Attorney General to promulgate regulations implementing Title II in the text of the ADA itself and because under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), "Department of Justice regulations interpreting Title II should be given controlling weight unless they are 'arbitrary, capricious, or manifestly contrary to the statute.'" *McGary v. City of Portland,* 386 F.3d 1259, 1269 n. 6 (9th Cir. 2004)(quoting *Chevron,* 467 U.S. at 844). *See also Armstrong v.*

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guidance." (internal quotations omitted); *see also Barden,* 292 F.3d at 1077 (deferring to DOJ's interpretation of sidewalk accessibility regulations promulgated under Title II of the ADA).

[7] Even before *Olmstead*, the Third Circuit Court of Appeals stated, "[T]he ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled. Accordingly, the district court erred in holding that the applicable provisions of the ADA "may not be invoked unless there is first a finding of discrimination." *Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir. 1995) (footnote omitted).

[8] In another pre-*Olmstead* case, a court similarly described a key harm of segregation: "People are harmed educationally if they are kept in an unnecessarily segregated environment. Segregation is harmful to retarded persons; it leads to reduced learning, reduced freedom and reduced growth." *Homeward Bound v. Hissom Memorial Center*, 1987 WL 27104, at *13 (N.D. Okl., July 24, 1987).

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Schwarzenegger, 622 F.3d at 1065 (discussing the deference owed to a regulation implementing a different section of Title II).

More recently, the Department of Justice has issued its *Olmstead* Guidance. *See* Ex. 1. The Guidance is designed to announce the Department's official understanding and regulatory application of the Supreme Court's decision in *Olmstead*. The Guidance is designed "to assist state and local governments in complying with the ADA." Guidance at 1.

The Guidance describes the Supreme Court's *Olmstead* decision as prohibiting "the unjustified segregation of individuals with disabilities." It repeatedly refers to the prohibition on segregation throughout its six pages. Significantly, prohibited segregation is not limited to institutions or residential settings. Rather, the Guidance defines segregated settings as those that have "qualities of an institutional nature." It then identifies segregated settings as including:

> (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for *daytime* activities primarily with other individuals with disabilities.

Id. at 2 (emphasis added). In describing the characteristics of an *Olmstead* plan, the Guidance explicitly states that public entities have an obligation to provide opportunities to *work* in integrated settings, and then specifically mentions that individuals with disabilities can be unnecessarily segregated in *sheltered workshops*. *Id.* at 4.

The Ninth Circuit has afforded the Department's regulations and even its legal position set forth in its *amici* briefs "considerable respect." *See M.R. v. Dreyfus,* 663 F.3d 1100, 1117 (9th Cir. 2011). In *Dreyfus,* the Court acknowledged the unique position of DOJ in interpreting and applying its own regulations, and specifically, the integration mandate regulation. *Id.* The plaintiffs in *Dreyfus,* like those in this case, all live in the community. Although the plaintiffs in *Dreyfus* challenged service reductions that placed them at risk of institutionalization, the Ninth Circuit's decision, which the defendants here repeatedly cite, *see* MTD at 5, 6, 7, 8, 9, 10, applies

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with equal force to all forms of prohibited segregation and reflects similar "respect" to DOJ's Guidance.[9] *See also Day v. District of Columbia,* 2012 WL 456491 **4, 19 (D.D.C. Feb. 14, 2012) (citing with approval the Department's interpretation of the integration mandate set forth in its Guidance).

Other courts have given the integration regulation an expansive interpretation. In *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009) [hereinafter *DAI II*], *rev'd on other grounds sub nom, DAI v. New York Coalition for Quality Assisted Living,* 2012 WL 1143588 (2d Cir. April 6, 2012), the court, referring to its earlier summary judgment decision (*DAI I*), noted:

> In *DAI I,* the court resolved the parties' dispute regarding the meaning of the federal regulations and concluded that the proper inquiry is whether the individuals at issue "are in the *'most* integrated setting appropriate to their needs,' defined as 'enabl[ing] individuals with disabilities to interact with nondisabled persons to the fullest extent possible.' " *See DAI I,* 598 F. Supp. 2d at 321 (*citing* 28 C.F.R. § 35.130(d), App. A and concluding that "the federal regulations mean what they say").

See also, e.g., Frederick L. v. Department of Public Welfare of Pennsylvania, 422 F.3d 151, 157 (3d Cir. 2005); Kerrigan v. Philadelphia Bd. of Election, 2008 WL 3562521 at *18-19 (assessing whether the integration mandate had been met with regard to "the program of voting," which "includes the opportunity to vote in one's local, assigned, polling place, where the voter can take advantage of the opportunities to meet election judges, see their neighbors, and obtain information from candidates' representatives," instead of looking only at the act of casting a ballot).

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[9] The defendants attempt to denigrate the importance of the Guidance, claiming that no court has relied upon it and it "fails in any way to address a key issue here…." In fact, the contrary is true. The Ninth Circuit's lengthy discussion of the deference due to the Department of Justice's interpretation of its own regulations was based upon its *amici* brief as well as the Guidance itself, both of which were filed and considered by the Court in *Dreyfus,* 663 F.3d at 1117 (finding DOJ's interpretation of its integration mandate regulation to be "not only reasonable; its also better effectuates the purpose of the ADA 'to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.' 42 U.S.C. § 12101(b)(2)." *Id.* at 1117-18.

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2. Employment Services are a Form of "Services, Programs, or Activities" Covered Under Title II of the ADA That Must Be Provided in the Most Integrated Setting Possible.

While it is true that most – but not all – cases concerning the integration mandate have typically focused on institutionalized persons who are subjected to residential segregation, the definition of "services, programs, and activities" as used in 42 U.S.C. § 12132 is not so limited and encompasses vastly more settings and contexts in which a person with a disability could be unlawfully segregated under Title II than an institution. As one court has held:

> Under the applicable standard set forth in the regulations for what constitutes the 'most integrated setting,' a plaintiff need not prove that the setting at issue is an 'institution' to establish a violation of the integration mandate. Rather, a plaintiff must show that the *setting* does not 'enable interactions with non-disabled persons to the fullest extent possible.'"

DAI II, 653 F. Supp. 2d at 223.

Given the expansive interpretation of "services, programs, or activities" in judicial opinions and Title II's implementing regulations, the provision, funding, or administration of vocational services by a public entity clearly is covered under Title II and, accordingly, subject to its integration mandate. *See, e.g.*, *Yeskey*, 524 U.S. at 210 (listing vocational services offered by some prisons as among those programs subject to the provisions of Title II). It is irrelevant whether the public entity itself delivers the vocational services and programs, so long as they have contracted with, certified, or licensed the entities that actually provide the services. *See* 28 C.F.R. §§ 35.130(b)(1); 35.130 (b)(3); 35.130 (b)(6).

C. Title II's Integration Mandate Is Not Limited to Residential Services or Institutions.

Contrary to the defendants' assertions, courts in other jurisdictions have also broadly applied Title II, including its integration mandate, beyond residential services. *See Lovely H. v. Eggleston*, 235 F.R.D. 248, 261 (S.D.N.Y. 2006) (applying the integration mandate to welfare benefits). In *Lovely H.*, a sub-class of individuals with psychiatric disabilities sued the City of New York, alleging violation of their rights under Title II of the ADA for forcing them to go to

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one of three "hub" centers in NYC, while individuals without disabilities were permitted to go to numerous centers much more accessible to their homes. The district court granted the plaintiffs preliminary injunctive relief based upon on *Olmstead* and Title II's integration mandate, concluding that the City's policy of relegating them to three hub centers because of their disabilities violated the ADA because it fostered unjustified segregation and, therefore, was discriminatory. *Id*. at 261. Specifically, the court held that:

> The ADA both requires all public entities to refrain from discrimination, see [42 U.S.C.A.] § 12132, and specifically identifies unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination,' see §§ [42 U.S.C.A.] 12101(a)(2), 12101(a)(5)." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 583 (1999). Segregation under the ADA is permitted only in the specific and narrow circumstance where an agency establishes that such segregation is "necessary to provide qualified individuals with disabilities with aids, benefits or services that are as effective as those provided to others." 28 C.F.R. § 35.130(d). Even then, individuals with disabilities must be granted "the opportunity to participate in services, programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2). The current WeCARE program clearly violates the mandate that persons with disabilities be given the opportunity to participate in mainstream service delivery mechanisms….

Id. at 261 (footnotes omitted).

Court have applied Title II's integration mandate to apply to a variety of public services beyond institutions and residential services, including accessible polling places, *Kerrigan,* 2008 WL 3562521 at *18-19; adult day health care, *Brantley v. Maxwell*-Jolly, 656 F. Supp. 2d 1161; and in-home supportive services, *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) and *Oster v. Lightbourne*, 2012 WL 691833 *15-16 (N.D. Cal. Mar. 2, 2012).

Moreover, the Department of Justice has interpreted its own regulations broadly, and never suggested that the integration mandate is limited to residential services. To the contrary, its recent *Olmstead* Guidance shows that the integration regulation applies to a wide range of services and activities, including work, and that segregation settings include those that provide solely for "daytime activities primarily with other individuals with disabilities." Ex. 1 at 2.

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Finally, the Guidance specifically states that a sheltered workshop is a segregated setting for which an *Olmstead* plan is appropriate. *Id.* at 4.

The defendants' reliance on cases applying the integration mandate in the context of institutionalization or risk of institutionalization to support their unjustifiably narrow interpretation of the ADA is contradicted by other cases like *Kerrigan, Lovely H.*, and *DAI.* Because the cases cited in the MTD at 6-11 were brought on behalf of individuals with disabilities who either were confined in large institutions or were at risk of such confinement, it is not surprising that these decisions focused on the segregation inherent in institutionalization. But, as evidenced by the plain words of Title II, the broad reach of the Department of Justice's regulations, and the plain words of the Department's *Olmstead* Guidance, public entities must ensure that all of their services, programs, and activities – not just their residential ones – are provided in the most integrated setting. Conversely, there is nothing in the statute, the regulations, or the Department's interpretation of their regulations which suggests that prohibited segregation *only* applies to institutions and does not extend to all services, programs, and activities provided by the public entity.[10]

Title II and its integration mandate apply well beyond residential services. The defendants' overly narrow interpretation is inconsistent with the well established law of this Circuit and other courts, the DOJ regulations, and basic principles of statutory construction requiring the broad interpretation of the ADA and the Rehabilitation Act. Therefore, to the extent that the Defendants' Motion is based upon this novel and restrictive view of the ADA, it should be denied.

[10] Not surprisingly, the defendants do not point to any authority that limits the application of Title II's integration mandate to such cases.

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D. Oregon's Administration, Funding, and Provision of Segregated Employment Services Through Sheltered Workshops States a Claim Under Title II of the ADA.

DHS, through its ODDS and OVRS, plan, administer, fund, coordinate, and oversee Oregon's employment service system for persons with developmental disabilities. Compl., ¶¶ 80-83. That system places, maintains, and retains over 2,500 persons with developmental disabilities in sheltered workshops which, as explained in more detail in Section III(A), *infra,* undeniably are segregated settings. *Id.,* ¶¶ 84-92. These same state agencies, all of which are public entities within the meaning of Title II of the ADA, have long recognized that sheltered workshops are segregated, facility-based settings, that sheltered workshops offer their clients virtually no contact with their non-disabled peers, that sheltered workshops often pay their workers less than $1.00 per hour, and that persons in sheltered workshops often spend years, if not decades in this setting, with no real hope of obtaining integrated employment. *Id.,* ¶¶ 59-68. Similarly, these same public entities fund and provide supported employment services designed to allow individuals with developmental disabilities to work in integrated settings, have regular contact with non-disabled persons, earn at least the minimum wage, and reap considerable economic and other personal benefits. *Id.,* ¶¶ 69-79. Despite providing supported employment to some persons with developmental disabilities, the defendants have planned, funded, and organized their employment services system in a manner that denies this service to most persons with developmental disabilities who are qualified for, would benefit from, and prefer to participate in supported employment. *Id.,* ¶¶ 108-111. Therefore, the plaintiffs have established a cause of action under Title II to receive employment services in the most integrated setting.[11]

[11] Because the facts in the Complaint are drawn heavily from the defendants' own reports, data, and service descriptions, these allegations include sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

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III. Overview of Employment Services for Persons With Disabilities

In spite of the demonstrated ability and desire of people with disabilities to work, Congress recognized that significant numbers of individuals with disabilities are not able to work at levels commensurate with their capabilities. Congress identified several reasons for this disproportionate unemployment of persons with disabilities including discrimination and a lack of training and supports necessary to secure, retain, regain or advance in employment. *See, e.g.,* 29 U.S.C. § 720(a)(1)(D); 42 U.S.C. § 12101(a)(3), Compl., ¶ 56. Even the defendants have acknowledged that there is "a growing frustration experienced by advocates and individuals with intellectual and developmental disabilities due to continuing unacceptable rates of unemployment among Oregonians with disabilities." *See* Call to Action Report at 5.

Historically, sheltered workshops existed as the primary option for individuals with intellectual and developmental disabilities to pursue employment. A sheltered workshop, as evident by its name, is a service model based upon the stereotype that people with disabilities are not capable of succeeding in competitive employment, must be protected from the outside world, and can only work at menial tasks paying far less than the minimum wage. Compl., ¶ 59.

For many years, however, courts and disability professionals have regarded sheltered workshops as the last resort – a hopeless end point – for people with disabilities. *Halderman v. Pennhurst State School & Hosp.*, 154 F.R.D. 594, 601 (E.D. Pa. 1994); *Homeward Bound, Inc. v. Hissom Memorial Center*, 1987 WL 27104 (N.D. Okla., July 24, 1987); Compl., ¶ 59. As a result, over the last several decades, the professional literature, research and consensus in the provision of publicly-funded employment services for persons with developmental disabilities have been that sheltered workshops are segregated, ineffective, and expensive programs that offer persons with disabilities no realistic opportunity to enter the workplace and to participate in meaningful economic activity with non-disabled peers. Instead, the same research has documented that supported employment is more successful in assisting persons with

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developmental disabilities to work in integrated settings, more preferred by persons with disabilities, and more cost-effective for public entities. Compl., ¶ 77.

A. Sheltered Workshops Are Segregated Employment Programs

1. Sheltered Workshops Are Segregated Settings Where Persons with Disabilities Have No Opportunity to Interact with Non-Disabled Peers.

One of the most salient features of sheltered workshops is the segregation and congregation of persons with disabilities in a setting that is divorced from all contact with real workplaces and persons without disabilities.[12] In a typical sheltered workshop, individuals with disabilities work in congregate settings, often demarcated in practice, if not by official policy, from other program areas or settings.[13] Michelle Morris, Heather Ritchie, & Lisa Clay, SECTION 14C OF THE FAIR LABOR STANDARDS ACT: FRAMING POLICY ISSUES, National Center on Workforce and Disability, Institute for Community Inclusion (2002) at 14, available at http://bbi.syr.edu/publications/morris/Policy_Report_042002.doc.

Most publicly funded sheltered workshops, where workers with developmental disabilities perform their duties in congregate settings alongside other people with disabilities and where their only opportunity for interaction with non-disabled individuals is in their interaction with their fully-compensated managers or supervisors, do not meet the ADA's integration regulation.[14] *See* Albert Migliore, David Mank, Teresa Grossi, & Patricia Rogan,

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[12] The defendants have repeatedly acknowledged that sheltered workshops are segregated settings. Their most comprehensive employment report notes that, as of 2008, "71% of Oregonians with disabilities were in facility-based programs, supporting the claim that a majority of working age adults with significant disabilities are supported today in programs that offer segregation and long-term dependency regardless of cost." Call to Action Report at 6.

[13] Prior to the 1986 amendments to the Fair Labor Standards Act, two different types of certificates were issued: one for work activities centers (WAC) and one for regular work programs (RWP). The regular work program applied to workers with disabilities who could earn at least 50% of the minimum wage, whereas the work activity centers served individuals with the most severe disabilities who could not meet the 50% compensation threshold. Participants in the two programs had to be physically segregated from each other.

[14] These supervisory and program staff regularly receive minimum wage or better, while the disabled workers frequently are "paid" less than one dollar per hour. The contrast in

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Integrated Employment or Sheltered Workshops: Preferences of Adults with Intellectual Disabilities, Their Families, and Staff, 26 J. Vocational Rehabilitation 5, 6 (2007) [hereinafter Migliore, Mank, Grossi, & Rogan]; *see also* Zana Marie Lutfiyya, Pat Rogan, & Bonnie Shoultz, Center on Human Policy, *Supported Employment: A Conceptual Overview* (1988), available at http://thechp.syr.edu/workovw.htm [hereinafter Lutfiyya, Rogan, & Shoultz]. As the defendants recently acknowledged: sheltered employment "typically take place in settings such as sheltered workshops in which there is little or no contact with other workers without disabilities." PowerPoint Presentation, Slide 3.

By separating persons with developmental disabilities from their non-disabled persons, sheltered workshops engage in what Justice Ginsburg explained as one of the most pernicious consequences of segregation:

> Second, [segregation] severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Olmstead, 527 U.S. at 601. When persons with disabilities are denied the opportunity to interact with citizens without disabilities – as they invariably are in most state-funded and licensed sheltered workshops – the very purpose of the ADA is thwarted.

2. Sheltered Workshops Have a Number of Attributes in Common with Segregated Institutions.

While a finding that sheltered workshops do not provide the maximum opportunity possible for interaction with non-disabled peers is sufficient to label it a segregated setting and to demonstrate a violation of Title II of the ADA, it is also significant that sheltered workshops share a number of additional attributes with the residential institutions that have been discredited and emptied in recent decades and the large adult homes that have more recently been criticized,

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compensation, conditions of employment, and regulation is manifestly unequal, yet genuine differences in ability or even productivity may be minimal or non-existent.

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despite their physical location in communities. These attributes are precisely what the DOJ Guidance notes distinguishes segregated settings from integrated ones. Guidance at 2 (Ex. 1).

Many of the indices of institutionalization and segregation found applicable to residential institutions find ready parallels in the sheltered workshop context. In both institutions and sheltered workshops, large numbers of persons are congregated in separate settings where only persons with disabilities live or work. Both settings are usually large, often noisy, and quite unlike ordinary residential or commercial establishments. In both residential institutions and sheltered workshops, activities are highly regimented, with fixed schedules dictated by staff or supervisors, often for the convenience of staff or supervisors. Individualization in routines, activities, preferred patterns, or leisure time is noticeably absent. People spend their entire time living or working in the sheltered setting, with virtually no opportunity for contact with other residential or employment settings or local resources. They do not learn or gain independence, but instead, practice dependency and "learned helplessness." There are few opportunities to engage in other community activities or experiences. The training that is provided is not designed to, and clearly does not have the effect of, allowing persons with disabilities to learn skills that can be used in integrated settings. Not surprisingly, few individuals in residential institutions or sheltered workshops actually transition to more integrated settings.

3. Sheltered Workshops Do Not Lead to Integrated Work Opportunities.

The alleged purpose of this segregation – to train persons with disabilities and prepare them for real jobs in real work settings – is illusory. To the contrary, sheltered workshops are, in almost all States and all programs, a permanent relegation to a separate and unequal job. By any measure, they are dead-end programs which employees rarely, if ever, leave. *See, e.g.*, Jacobus tenBroek, *The Character and Function of Sheltered Workshops*, National Federation for the Blind (1995) (discussing conflicting purposes of sheltered workshops: to provide transitional services on a path toward competitive employment or to offer an indefinite opportunity for paid work to people with disabilities), available at http://www.blind.net/resources/employment/the-

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character-and-function-of-sheltered-workshops.html; Thomas Simmons & Robert Flexer, *Business and Rehabilitation Factors in the Development of Supported Employment Programs for Adults with Disabilities*, J. Rehabilitation (Jan-Mar. 1992), available at 1992 WLNR 4695411 [hereinafter Simmons & Flexer]; Lutfiyya, Rogan, & Shoultz.

Research demonstrates that no more than 5% of individuals in sheltered workshops ever transition into integrated employment. *See* Testimony of Senator Michael Enzi, *Opportunities Too Few? Oversight of Federal Employment Programs for Persons with Disabilities, Hearing Before S. Comm. On Health, Education, Labor, and Pensions*, 109th Cong. 3 (2005), available at http://www.gpo.gov/fdsys/pkg/CHRG-109shrg24480/html/CHRG-109shrg24480.htm (noting that fewer than 5% of participants in the federal Javits-Wagner-O'Day program move into supported or competitive employment in a given year); Michael Gill, *The Myth of Transition, Contractualizing Disability in the Sheltered Workshop*, 20 Disability & Soc'y 613 (2005) (citing a 2003 study which found that only 3.5% of sheltered workshop employees in the United States transitioned into community-based settings per year).

The "work" done under the typical subcontracts fulfilled by sheltered workshops is low-skilled, non-challenging manual labor. *See* Simmons & Flexer. This work does not provide training for integrated employment, largely because technology has made most of the manual labor that individuals in workshops perform obsolete in the "real world" job market. *See* Whittaker, William G., "Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act" (2005), *Federal Publications*, Paper 209, at 18, available at http://digitalcommons.ilr.cornell.edu/key_workplace/209. Indeed, for many employees of sheltered workshops, the endless, daily routine of performing such mundane work causes both their vocational and social skills to atrophy, leading to an even lower likelihood that they will ever find work in the community as well as lowered expectations of themselves. *See* Simmons & Flexer.

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B. Supported Employment Are Integrated Employment Programs

1. Supported Employment Is Provided in Integrated Settings.

There is general agreement that a supported employment program should include four key elements: integration, paid work, individualized services, and ongoing supports, if needed. *See* Lutfiyya, Rogan, & Shoultz. There appears to be universal agreement among disability professionals that supported employment can and must serve individuals with disabilities of all levels of severity. *See, e.g.*, David Mank, *Alderbrook 2007*, 29 J. Vocational Rehabilitation 53 (2008) [hereinafter Mank, *Alderbrook 2007*];[15] Paul Wehman, W. Grant Revell, and Valerie Brooke, *Competitive Employment: Has It Become the "First Choice" Yet?*, 14 J. Disability Pol'y Stud. 163 (2003) [hereinafter Wehman, Revell, & Brooke];[16] Lutfiyya, Rogan, & Shoultz.[17] Similarly, Title I of the Rehabilitation Act reflects Congress's recognition that even individuals with the most significant disabilities have the ability to achieve gainful employment in integrated settings if appropriate services and supports are provided. 29 U.S.C. § 720(a)(3)(A); Compl. ¶ 55.

Because research has demonstrated that people learn best in real world situations, *see* Lutfiyya, Rogan, & Shoultz, many programs use a "place, then train" model of vocational instruction, providing initial training at the actual job site. *See* Simmons & Flexer. However, quality supported employment services rarely begin with immediate job placement or training. Rather, they first engage in person-centered planning with the individual, sometimes enlisting

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[15] As David Mank has noted, there is "well documented research that has emerged across the last forty years establishing that people with nearly any sort of disability label can, in fact, work productively, when provided the environment, training, technology, or other supports tailored to the person." Mank, *Alderbrook* 2007.

[16] According to the authors, "Supported employment was never intended to serve the typical vocational rehabilitation customer: It was created for those people with truly significant disabilities who traditionally were not able to obtain competitive employment through typical VR services."

[17] For a comprehensive review of the literature on supported employment from the perspective of the ADA, *see* Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 Ga. St. U. L. Rev. 875 (2010).

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friends and family along with any legal guardian in a strengths-based assessment that considers the client's personal skills, needs, and preferences. *See generally* Simmons & Flexer; *see also* Aaron Gottlieb, William N. Myhill, Peter Blanck, Employment of People with Disabilities, International Encyclopedia of Rehabilitation, available at http://cirrie.buffalo.edu/encyclopedia/em/article/123 [hereinafter Gottlieb, Myhill, & Blanck] Only after this process is completed does a "job coach" begin identifying potential job placements, using information gathered during the individualized assessment as a guide. *See* Simmons & Flexer; *see also* Section IV(B) *infra* (describing Oregon's supported employment services).

Whereas a sheltered workshop looks for individuals to fill existing job slots based solely on the demands of its contracts, supported employment providers engage in the reverse process: they seek jobs that match the strengths and needs of their individual workers. *Id.* Moreover, they consider how jobs might be tailored to the needs of individuals with disabilities, identifying potential natural supports and negotiating with employers for reasonable accommodations as necessary. Supported employment providers only consider and place workers in integrated, competitive jobs that pay minimum-or-above wages. Once a person has been placed and initial on-the-job training completed, the job coach remains available to provide ongoing supports tailored to the individual's needs, which may well fluctuate over time. *See* Lutfiyya, Rogan, & Shoultz.

2. Supported Employment Has Been Proven to Be Both Clinically-Effective and Cost Effective.

There is a large and ever-increasing body of research which indicates that supported employment provides significant benefits to people with developmental disabilities, particularly as compared to their peers in sheltered workshops.

One obvious benefit is enhanced income. A review of data from seven States on labor force participation and wages among people who had moved from institutional to community

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settings and who initially had worked in sheltered workshops found: "For those relatively few individuals who transitioned to integrated employment settings, employment in integrated settings resulted in substantial gains in earned income." Peter Blanck, Helen A. Schartz, & Kevin M. Schartz, *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Longitudinal Analyses of Seven States During the 1980s and 1990s*, 44 Wm. & Mary L. Rev. 1029, 1088 (2003). Another study concluded that wages and hours worked in integrated employment settings are significantly higher, on average, than for individuals in sheltered workshops, while a survey in Maryland found that individuals in customized or supported employment earn 3.5 times more than those in sheltered employment. Gottlieb, Myhill, & Blanck.

The benefits that flow from integration within the community are another key aspect of supported employment. As one article explains, the gains from supported employment can be more significant than a simple increase in spending money for individuals with developmental disabilities. They may well provide the means to "greater independence and mobility in the community at large," creating opportunities for interaction with non-disabled persons above and beyond the integrated work site itself. *See* Grant Revell, John Kregel, Paul Wehman, and Gary R. Bond, *Cost Effectiveness of Supported Employment Programs: What We Need To Do To Improve Employment Outcomes*, 14 J. Vocational Rehabilitation 173 (2000) [hereinafter Revell et al.] *see also* Aaron Gottlieb, William N. Myhill, Peter Blanck, Employment of People with Disabilities, International Encyclopedia of Rehabilitation, available at http://cirrie.buffalo.edu/encyclopedia/em/article/123 [hereinafter Gottlieb, Myhill, & Blanck].

These benefits, and particularly those of integration, are especially consistent with the goals of the ADA and specifically its Finding on equal opportunity, full participation, and economic sufficiency. 42 U.S.C. § 12101(7). Supported employment has allowed individuals with disabilities "to pursue those opportunities for which our free society is justifiably famous,"

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and reduce the cost to the nation of "unnecessary expenses resulting from dependency and non-productivity." 42 U.S.C. § 12101(8).

The defendants have recognized this key aspect of integration by defining integrated employment as "offering opportunities to interact with non disabled co-workers or the general public." PowerPoint Presentation, Slide 7. Furthermore, ODDS has directed that "employment opportunities in fully integrated work settings shall be the first and priority option explored in the service planning for working age adults with developmental disabilities. Call to Action Report at 32; DHS Employment First Website, *http://www.dhs.state.or.us/dd/supp_emp/initiative.html*, (last visited April 10, 2012).

These benefits also are consistent with the defendants' programmatic goals, which include:

> a fundamental belief that employment is the key to full citizenship. A job can dramatically change the dynamics of an individual's life—providing structure to the day, a paycheck that can be used for purchasing goods and services, an identity as a contributing member of the community, an increase in personal self-esteem, expanded choices, and opportunities to develop friends and relationships. In short, employment is an avenue to a richer, fuller life. Employment is the key to becoming a valued member of society.

Call to Action Report at 9.

Research has demonstrated that the cumulative and per person cost of supported employment to the State is less, over time, than sheltered workshops. *See* Robert Evert Cimera, *Supported Versus Sheltered Employment: Cumulative Costs, Hours Worked, and Wages Earned*, 35 J. Vocational Rehabilitation 85, 90 (2011); Compl., ¶ 79. The defendants have acknowledged this cost differential, noting that "the cumulative costs generated by sheltered employees may be as much as three times higher than the cumulative costs generated by supported employees." Call to Action Report at 10, *citing* Robert Evert Cimera, *The Cost Trends of Supported Employment Versus Sheltered Employment*, 28 J. Vocational Rehabilitation 15 (2008).

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3. Supported Employment Maximizes the Productivity, Independence, and Personal Dignity of Persons with Disabilities.

Individualization is a core tenet of supported employment. Indeed, the defendants acknowledge the widely-accepted premise that "integrated employment is more valued than non-employment, facility-based employment, or day habilitation in terms of employment outcomes." Call to Action Report at 7. For an individual who previously was segregated in a sheltered workshop, working at a job that is matched to her needs and preferences is an opportunity to personally experience the "paradigm shift from fitting people into programs to adapting services to people's needs." Migliore, Mank, Grossi, & Rogan. A job that reflects personal preferences, skills, and strengths, and that includes the individually-tailored supports necessary to perform the job well "may diminish stigma associated with having a disability because [it] emphasize[s] the person's abilities and productivity." Gottlieb, Myhill, & Blanck. Supported employment, like most gainful employment, promotes the individual's self worth and the community's perception of the individual's worth, allowing persons with disabilities to develop relationships, to participate as valued members of the community, and ultimately, to become less dependent on state services and more economically independent.

IV. The Complaint States a Claim for Integrated Supported Employment Services.

A. The Complaint Seeks Supported Employment Services As a Means to Achieve Competitive Employment.

The plaintiffs' Complaint alleges that the defendants have violated the ADA and the Rehabilitation Act by excessively relying on segregated employment settings like sheltered workshops and failing to offer qualified persons with disabilities supported employment services. Compl. ¶¶ 184-186; 192-194. These services are necessary to allow persons with developmental disabilities to participate in integrated employment. *Id.* Since the defendants undeniably provide supported employment services, albeit in such limited supply as to force over 2,500 persons to

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remain in segregated workshops, the Complaint simply seeks to require the defendants to expand a program and services that they already provide.

The defendants mischaracterize the relief that the plaintiffs seek in their Complaint as "community-based jobs," and then attempt to support this mischaracterization with selective citations to the Complaint. Throughout their Complaint, however, the plaintiffs assert that defendants are in violation of Title II of the ADA and its implementing regulations by unnecessarily segregating the named plaintiffs and members of the plaintiff class in sheltered workshops and by failing to provide them *supported employment services that would enable them to work in integrated employment settings*. *See* Compl., ¶¶ 185-187, 192-195 (emphasis added). In their Prayers for Relief, the plaintiffs seek, among other requests, preliminary and permanent injunctions requiring the defendants to "administer, fund and operate its employment services system in a manner which does not relegate persons with intellectual and developmental disabilities to segregated workshops and which includes an adequate array of *integrated employment and supported employment services*, as to avoid segregation." Compl., § VII.3 (emphasis added). In essence, the crux of the relief that the plaintiffs are seeking is an increase in the amount and array of supported employment services that the defendants already provide.

B. Oregon Already Provides Supported Employment Services to Some Persons with Disabilities.

1. ODDS and OVRS Fund and Provide Supported Employment Services.

ODDS and OVRS are familiar with supported employment and currently provide such services to a small percentage of individuals with disabilities. For example, the defendants recently claimed that 423 persons participate in individual supported employment as part of the Comprehensive Waiver that serves a total of over 4,000 individuals with intellectual and developmental disabilities. PowerPoint Presentation, Slide 9. Furthermore, ODDS has indicated

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its hope to increase the number of individuals in "integrated employment." Call to Action Report at 8.

In spite of the meager numbers of individuals currently receiving supported employment services, the defendants have acknowledged that in the early 1990's, approximately 50% of individuals receiving employment services in the Comprehensive Waiver were working in supported employment situations. Call to Action Report at 5. The dramatic decrease in the percentage of waiver recipients participating in supported employment over the past two decades is not related to a decline in interest or qualifications for supported employment services, but instead, to a reduction in provider capacity, system capability, and training opportunities offered by the defendants. Thus, the defendants know how to provide – and do provide a limited amount of – supported employment services. In fact, Oregon was once a national leader in supported employment. Jane Steveley, *Supported Employment for Oregonians with Developmental Disabilities: Recommendations for Action* (2005), available at *http://www.oregon.gov/DHS/vr/eep/se_dd_stevely.doc*, at 17 ("the White Paper"), attached as Ex. 3 to the Plaintiffs' Motion for Class Certification (Doc. 13-2). To suggest now, as they do in their MTD, that "the defendants cannot and do not provide the service plaintiffs seek" is disingenuous.

2. ODDS and OVRS Recognize that Supported Employment Services Are a Necessary and Effective Means to Achieve Their Goals of Competitive Employment.

The defendants allegedly are committed to the principle that "employment opportunities in fully integrated work settings shall be the first and priority option explored in service planning for working age adults with disabilities." Call to Action Report at 32. The defendants have recognized that supported employment services are a necessary component to achieving that goal. As described in the defendants' own report, "[s]upported employment [is] a strategy for

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assisting individuals with disabilities to obtain and maintain employment by providing needed support to ensure success." White Paper at 3.

Because the defendants know how to provide supported employment services and have provided those services, at varying levels, for decades, the plaintiffs have stated a claim under Title II of the ADA for supported employment services necessary to allow them to participate in integrated employment settings.

V. The Complaint Does Not Seek Any Particular Standard of Care.

The defendants incorrectly assert that the plaintiffs' challenge to segregated employment programs constitutes no more than a demand for a certain standard of care. MTD at 13-15. This both mischaracterizes the Complaint and ignores the defendants' own characterization of sheltered workshops as segregated settings and supported employment as an integrated program. To the extent that Oregon plans, administers and delivers employment services to persons with disabilities, those services must comply with the ADA. *Olmstead v. L.C.*, 527 U.S. at 603 n. 14 ("States must adhere to the ADA's non-discrimination requirement with regard to the services they in fact provide."). The Complaint plainly states a claim that Oregon fails to ensure that the entities that it funds, coordinates, and relies upon to provide employment services do so in compliance with Title II of the ADA. Compl., ¶ 184-186.

A. Oregon Uses Various Entities and Processes to Plan, Administer, and Deliver Employment Services to Persons with Disabilities.

As described in greater detail in the plaintiffs' Complaint, DHS plans, funds, and oversees all developmental disability services and vocational rehabilitation services, including the employment service system, for persons with intellectual and developmental disabilities in Oregon. Compl., ¶ 81. DHS determines the amount and allocation of funding for these services and that system, including the range of employment services, the licensing of employment providers, and the level of funding for sheltered workshops versus supported employment programs. Compl., ¶ 81.

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ODDS plans, administers, and directly manages the long-term employment service system for persons with developmental disabilities, including all sheltered workshops and supported employment services. Compl., ¶ 82. Specifically, ODDS has the primary responsibility for developing, implementing, and overseeing all employment programs for persons with developmental disabilities. Compl., ¶ 82. ODDS sets goals, establishes priorities, creates plans, adopts policies and procedures, determines reimbursement rates, collects data, and takes actions with respect to the statewide employment service system. Compl., ¶ 82. On an individual level, ODDS is responsible for overseeing the development and implementation of Individual Service Plans for individuals with developmental disabilities, which are supposed to include professionally-appropriate assessments for employment services. Compl., ¶ 83.

OVRS is responsible for completing a comprehensive vocational assessment and determining the employment needs and potential of individuals with intellectual and developmental disabilities. Compl., ¶ 86. OVRS identifies jobs, contracts with supported employment agencies, and provides job training, job coaching and support. Compl. ¶ 86.

B. Oregon Is Responsible for Ensuring That the Entities Which It Funds, Coordinates, and Relies Upon to Provide Employment Services to Persons with Disabilities Do So in Compliance with Title II of the ADA.

The defendants, relying on *M.K. v. Sergi*, 554 F. Supp. 2d 175 (D. Conn. 2008), argue that the plaintiffs are merely challenging the quality or level of the defendants' employment services.[18] However, a plain reading of the Complaint shows that the plaintiffs are challenging the defendants' actions in perpetuating segregation through their reliance upon sheltered workshops, not the quality of employment services.[19]

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[18] In *Sergi,* the district court held that time limits imposed by Connecticut's Department of Children and Families on the amount of child protective services offered in the community, when no limits existed on the level of institutional services, did not state a claim for discrimination under the ADA because the plaintiffs were effectively challenging the standard of care or level of benefits. *Id.* at 197.

[19] *Sergi* is instructive, however, because the district court in that case emphasized *Olmstead's* holding, which requires that States must adhere to the ADA's non-discrimination

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Moreover, the district court's reasoning in *M.K.* was rejected by the Ninth Circuit in *M.R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011). In that case, the Court held that the plaintiffs were entitled to a preliminary injunction barring the enforcement of a state regulation that reduced the level of in-home personal care services, because the regulation violated the integration mandate of the ADA. Thus, at least in this circuit, a reduction in the level or amount of integrated services, when that reduction results in segregated services, can constitute a valid claim under the ADA. Here, the Complaint challenges the defendants' discriminatory actions which result in the plaintiffs' current segregation in sheltered workshops, and in no way contests the level or quality of care in employment services. Therefore, the failure to provide integrated employment services, through supported employment services, presents a claim under the integration mandate of the ADA.

VI. Conclusion

For the reasons set forth above, the Court should deny the Defendants' Motion to Dismiss.

DATED this 20th day of April, 2012.

Respectfully submitted,

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requirement with regard to the services they do, in fact, provide. *Id*; *citing*, *Olmstead v. L.C.*, 527 U.S. 581, 603, n. 14 (1999).

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