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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PAULA LANE; ANDRES PANIAGUA; ELIZABETH HARRAH; ANGELA KEHLER; GRETCHEN CASON; LORI ROBERTSON; SPARKLE GREEN; and **ZAVIER KINVILLE,** on behalf of themselves and all others similarly situated, and **UNITED CEREBRAL PALSY ASSOCIATION OF OREGON AND SOUTHWEST WASHINGTON, INC.,**

Plaintiffs,

vs.

KATE BROWN, in her official capacity as the Governor of the State of Oregon; **ERINN KELLEY-SIEL,** Director of the Oregon

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO APPROVE CLASS ACTION SETTLEMENT

Department of Human Services; **MARY LEE FAY,** Administrator of the Office of Developmental Disability Services; **and STEPHAINE PARRISH TAYLOR,** Administrator of the Office of Vocational Rehabilitation Services, all in their official capacities,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

THE STATE OF OREGON,

Defendant.

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I. Introduction

The overall settlement is fair to the class. Both sides made significant compromises to reach a settlement. Even if plaintiffs had been very successful at trial despite the substantial risks they faced, it is doubtful that the Court would have ordered relief beyond what would be ordered under the proposed settlement. The settlement is also fair to those who want to maintain the status quo, because the status quo would not be maintained with or without the settlement.

II. Standards

Federal Rule of Civil Procedure 23(e) provides that "[i]f the proposal would bind class members, the Court may approve it only after a hearing and on finding that it is fair, reasonable and adequate." Fed. R. Civ. P. 23(e). Approval under Rule 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *In re Google Referrer Header Privacy Litigation*, 87 F.3d 1122, 1127 (2015) (citations and quotations omitted). At the final approval stage, the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998). Having already completed a preliminary examination of the agreement, the Court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g., Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir.2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992). Ultimately, "the decision to approve or reject a settlement is committed to the sound

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discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof."

In the Ninth Circuit, the so-called "*Hanlon* factors" guide the district court in making the settlement fairness determination, including the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement, the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.' *See also Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012), cert. denied, 134 S. Ct. 8 (2013) (quotations omitted).

Courts are careful not to substitute their own judgment for that of the settling parties. Newberg on Class Actions, § 13.46 (5th ed. 2015). The "judicial role in reviewing a proposed settlement is … limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement." *Manual for Complex Litigation, Fourth*, § 21.61 (citing *Hanlon*, 150 F.3d at 1026 (9th Cir. 1998)). As the Ninth Circuit has held, a court may not "delete, modify or substitute certain provisions" of the settlement; rather, "[t]he settlement must stand or fall in its entirety." *Hanlon*, 150 F.3d at 1026 (district court approval reflected the "proper deference to the private consensual decision of the parties"). *See also Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) ("[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties.").

III. Background

The settlement occurred after litigation of a number of issues.

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A. Procedural Background

1. Motion to Dismiss Granted in Part, Denied in Part

Plaintiffs filed their complaint in January 2012, pursuant to Title II of the ADA and the Rehabilitation Act. Defendants moved to dismiss the complaint for failure to state a claim. The Court granted the motion in part, with leave to amend, holding that plaintiffs could not "seek the forbidden remedy of requiring defendants to provide an adequate level of services to enable plaintiffs to obtain a competitive job." *Lane v. Kitzhaber*, 841 F.Supp.2d 1199, 1208 (D. Or. 2012).

2. Class Certified

In August 2012, the Court certified a class of "all individuals in Oregon with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops" and "who are qualified for supported employment services." *Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012).

3. USDOJ Intervenes

In May 2013, the United States sought leave to file a Complaint-in-Intervention. The Complaint-in-Intervention supports the class action allegations, and adds a new focus: the allegation that transition-aged youth with I/DD were "at risk" of being "placed in sheltered workshops." (Complaint in Intervention at ¶¶ 44, 77, 79, ECF No. 106). The Court granted intervention, but added that it would "take a very careful look at any expansion of the claims or issues due to the intervention. (5/22/13, Tr. 23-24, ECF No. 113).

4. Class Member Intervention Denied, Class Definition Modified

In April 2014, a group of class members moved to intervene as defendants. The Court denied the motion. *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST, 2014 WL 2807701,

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at *1, 6 (D. Or. 2014). Regarding the class definition, the Court stated that in "certifying the class, this court explicitly incorporated into the class definition the requirement that class members must be qualified for supported employment services, meaning that they must be eligible for and desire those services." (*Id*. at 8).

5. Mediation

In July and August 2015, counsel for the parties attended several lengthy mediation sessions with a settlement judge, Magistrate Judge John Acosta. The settlement agreement resulted.

B. Factual Background

1. Key Players in Oregon

The class plaintiffs brought official capacity claims against the head of the Oregon Department of Human Services (DHS) and the heads of two DHS subagencies, the Office of Vocational Rehabilitation Services ("OVRS") and the Office of Developmental Disability Services (ODDS). OVRS provides employment services for persons with a broad range of disabilities including I/DD. OVRS typically helps people get jobs and hold them. OVRS services are time limited. ODDS provides longer term employment services – and many other services – to persons with I/DD.[1]

The United States' action is against the State of Oregon, and it added education-related issues to the case. The Oregon Department of Education (ODE) provides direction and support to Oregon public schools. The Oregon Department of Education functions under the direction and control of the State Board of Education. O.R.S. §§ 326.111, 326.300, 326.310. The State Board of Education sets policy for the

[1] The actual services purchased by both DHS agencies are typically provided by provider agencies.

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administration and operation of the schools, O.R.S. § 326.011, as well as standards for public elementary and secondary schools, through administrative rules. O.R.S. § 326.051. School districts, however, are responsible for educating children. There are 197 school districts in Oregon, and 19 educational service districts. District boards control the schools in each district and are responsible for educating the children. O.R.S. § 332.072. Education service districts provide regional educational services to component school districts, O.R.S. § 334.005, including certain special education services.

2. Community Services in Oregon

a. National Leadership in Residential Services

This matter also should be viewed in light of Oregon's history of national leadership in providing services to persons with I/DD. Oregon was the first state in the country to empty its residential institutions for those with I/DD. While faulting Oregon's employment services, even USDOJ said that Oregon "is one of a handful of states that no longer has any state-operated institutions for people with intellectual and developmental disabilities, and is one of an even smaller number of states with no state-funded, privately-operated institutions for this population." (June 2015 Findings letter, at 2 (*linked at* http://www.ada.gov/olmstead/olmstead_cases_list2.htm)). Further, "Oregon has set an example for other states by demonstrating its express commitment to the benefits of transitioning individuals with intellectual and developmental disabilities into integrated, community residential settings." *Id.* USDOJ also acknowledged that Oregon is a leader in "in-home" support services like home care worker and personal support

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worker programs, which enable individuals with I/DD to live in their own or their families' homes. *Id.*

b. After Addressing Deinstitutionalization, Oregon Moves to Employment Services

The changes in residential services did not occur overnight. During the 1990s, Oregon intensified its efforts to close residential institutions. The Fairview Training Center facility closed in 2000, and a small facility in Eastern Oregon closed in 2006. Beginning in 2000, Oregon also engaged in a sustained effort to reduce the waiting list for a long list of community services, under a settlement of the *Staley* case.[2] That effort was completed in 2011.

In the years before this case was filed, the focus on employment resumed, but at a difficult time. In 2008, just as the worst recession in decades began, Oregon became one of the first states to adopt an "Employment First" policy. Under the policy, "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." During the recession, of course, it was tough for anyone to find a job, regardless of disability. DHS, ODE, and Oregon public schools were also hit with steep budget cuts. Yet despite those cuts, in 2010, well before suit was filed in 2012, Oregon contracted with a Washington state consulting and advocacy group, the Washington Initiative for Supported Employment ("WiSE"), to analyze Oregon's progress and help Oregon improve its integrated employment efforts. WiSE concluded that "both nationally and at a state level, there has been a huge loss of momentum from previous employment

[2] *Staley v. Kitzhaber*, No. CV00-0078-ST (D. Or.)

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efforts." Oregon made the report public, and has taken many steps since then to remedy the issues noted in the report.

3. Executive Orders

In April 2013, as part of the State's efforts, Governor Kitzhaber issued Executive Order 13-04 ("EO"), directing DHS to reduce funding for sheltered workshops and increase the provision of employment services to achieve integrated employment. In January 2015, Governor Kitzhaber issued Executive Order 15-01, which added several new terms, effectively modifying the original Executive Order. The Executive Orders have required the State to: (1) as of July 1, 2014, cease funding of vocational assessments in sheltered workshop settings; (2) as of July 1, 2015, cease funding of new placements in sheltered workshop settings; (3) on a schedule starting in 2014 and ending in 2022, provide employment services designed to help thousands of persons with I/DD to choose, get, learn, and keep jobs in integrated settings; and (4) make many changes to DHS and ODE policies, practices, and procedures to help decrease the State's reliance on sheltered workshop services and improving the provision of employment services designed to achieve integrated employment. Executive Order 13-04 (April 2013) (http://www.oregon.gov/dhs/employment/employment-first/Documents/Executive-Order-Employment-First.pdf). Executive Order 15-01 (July 2015) (http://www.oregon.gov/dhs/employment/employment-first/Documents/Executive%20Order%2015-01.pdf).

4. Contributions by the Oregon Legislature.

In 2013 and 2015, the Oregon Legislature committed many millions of dollars to carry out the Executive Orders. In 2013, the Legislature took further steps to cement the

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policies in the Executive Orders, requiring DHS to prioritize integrated employment, and codifying the Employment First policy:

> The employment of individuals with developmental disabilities in fully integrated work settings is the highest priority over unemployment, segregated employment, facility-based employment or day habilitation.

O.R.S. § 427.007(b); *see* also O.R.S. § 427.007(a).

5. Implementation of the State Policies

The State has taken numerous steps to implement the Executive Orders and state policy, including:

- Providing several million dollars in transformation grants, as well as technical assistance from consultants, to help sheltered workshop providers transform their business model to supporting integrated employment. Another $750,000 in grants were awarded to providers who already provided supported employment services, to help them to increase capacity;
- Adopting policies and procedures for career development planning for individuals with I/DD;
- Conducting numerous training sessions across the State for educators, VR counselors, providers, and others, designed to further the goal of supported employment;
- Establishing an Employment First unit in the Department of Human Services, in order to better coordinate the activities of three state agencies, OVRS, ODDS, and ODE, and hiring five employees to staff that unit;
- Adding eight VR counselors who specialized in helping persons with I/DD;
- Financing the hiring of an education transition network of eight specialists to help schools to assist supported employment expectations;
- Improving the collection and analysis of data regarding supported employment;
- Establishing numeric targets for the delivery of employment services to 7000 persons with I/DD;

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- Extensive rulemaking by ODDS, OVRS, and ODE and policy revisions to align each agency's policies and practices with the goals of the Executive Order. DHS promulgated new rules and service definitions to the same end. OAR Chapter 407, Division 25. ODE adopted changes to OAR 581-015-2245, and OAR 581-015-2000, and added new OAR 581-015-2930.[3]

These efforts are bearing fruit. The number of individuals with I/DD is declining. In the most recently reported period, the number of persons in sheltered workshops decreased from about 2713 persons in March 2014 to about 2190 or 1925 individuals received employment services in sheltered workshops, depending on the counting methodology used. (July 2015 Employment First Report, at 12, 17). (http://www.oregon.gov/dhs/employment/employment-first/Pages/data-reports.aspx). The number of persons obtaining integrated jobs is going up. In the most recent one-year period, ending July 2015, the Employment First Office reported that more than 400 persons with I/DD had obtained competitive integrated employment through OVRS, an annual increase over the previous of about 40%. (July 2015 Employment First Report, at 2). About 105 persons working in workshops also obtained integrated employment in that time frame. (Integrated Employment Plan (July 2015), at 77 (reporting baseline experience in the previous year of 105 jobs) (http://www.oregon.gov/dhs/employment/employment-first/Documents/7-6-15%20Integrated%20Employment%20Plan.pdf)). There also were significant upticks in the number of persons with I/DD seeking VR employment services.

[3] The State will provide testimony by declaration or at the hearing to support the factual statements in this memorandum.

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6. Waiver amendments Submitted to CMS.

To achieve the EO's fundamental goals, Oregon has also sought and obtained federal approval to change the terms of its waivers from Centers for Medicaid and Medicare Services ("CMS"). Under a Medicaid waiver, the State receives federal funding to provide employment-related services and receives permission to deviate from certain federal requirements. To implement the EO and to satisfy other CMS expectations, DHS received approval from CMS for the necessary waiver changes. Approval occurred on September 8, 2015. (Dunbar Decl., Exs. 2, 3).

C. Settlement.

On August 26, 2015, after a lengthy mediation, the parties finally reached a settlement of plaintiffs' claims. Key terms are:

1. "Substantial Progress:" The Agreement acknowledges that "Oregon has made substantial progress in providing employment services to and improving employment outcomes" for persons with intellectual and developmental disabilities (I/DD). The Agreement is intended to "reflect and take into account this substantial progress." (Agreement, § I.4).

2. Continue Existing State Reforms: The settlement is built largely around what the State already set out to do. The State will continue to carry out a broad range of system reforms instituted under a State Executive Order. These reforms include "closing the front door" – ending new entries to sheltered workshops training, certifying service providers, coordinating more closely with the schools, and increasing services designed to achieve integrated employment. *E.g.*, Executive Order 15-01, at secs. III, IV, VI, X, XI (http://www.oregon.gov/dhs/employment/employment-first/Documents/Executive%20Order%2015-01.pdf).

   Under the Order, the State will provide employment services to 7,000 persons with I/DD, including persons in workshops and transition-aged youth. (*Id.* § IV). Executive Order 15-01 built upon an earlier Executive Order, EO 13-04).

3. Competitive Integrated Employment: The State will help 1,115 persons who have worked in workshops (out of about 4000 persons

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who have worked in workshops since 2012) to obtain community jobs at a competitive wage. (*Id.* § V.3). The 1115 job number was taken directly from a State planning document, the State's Integrated Employment Plan. Integrated Employment Plan, at 77 metric 11 (http://www.oregon.gov/dhs/employment/employment-first/Documents/7-6-15%20Integrated%20Employment%20Plan.pdf). The State is agreeing to carry out the commitment that it made in its own Plan.

4. Guidance regarding 20 hours of work per week: The State will issue "guidance" that the recommended standard for services is the "opportunity" to work at least 20 hours per week, if that is what the individual wants. (Agreement, § VII.1). The State will take other such measures, but the State does not agree with some of the Statements made by plaintiffs about these provisions. [4] The Agreement controls.

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[4] For example, plaintiffs incorrectly state that "all jobs should include the opportunity to work 20 hours per week." The Agreement does not use this language, and plaintiffs' statement is incorrect. Instead, the Agreement requires that the State provide "guidance" to certain persons that the recommended standard for implementing services be "the opportunity to work at least 20 hours per week." Not all jobs will provide this opportunity, and the Agreement does not forbid jobs that do not provide this opportunity. Moreover, the Agreement notes that this guidance will recognize "that based on individual choice, preferences, and circumstances, some people may choose to work at that level while others may not." No persons are guaranteed a job for any specific amount of hours. The Agreement simply requires that "DHS will establish and promote a goal that all persons with I/DD who want to work in the community will be afforded an opportunity to pursue competitive employment that allows them to work the maximum number of hours consistent with their abilities and preferences." (*Id.*; *see also id.* at § VII.3).

Plaintiffs also argue in their memorandum that plaintiffs had previously refused hours commitments in settlement discussions (Pls. Mem. In Support of Joint Motion for Final Approval, at 14). In fact, the State already had adopted regulations on hours. *See* OAR 411-345-0160(4)(e) (career development plans shall "[b]e completed with the goal of maximizing the number of hours spent working consistent with the interests, abilities, and choices of the individual;" see also OAR 407-025-0050(3). The State also had adopted targets in its Integrated Employment Plan on hours. *See* Integrated Employment Plan (2015 version), at 74, 75 (http://www.oregon.gov/dhs/employment/employment-first/Documents/7-6-15%20Integrated%20Employment%20Plan.pdf); Integrated Employment Plan (2013 version), at 59-60 (http://www.oregon.gov/dhs/employment/employment-first/Documents/Integrated%20Employment%20Plan-2013.pdf).

What the State had declined in settlement discussion was the demand by plaintiffs that the State must guarantee that a particular percentage of persons with I/DD must obtain employment averaging at least 20 hours per week. The State reserves the right to correct other issues in the papers filed on this motion.

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5. Reduce Workshop Numbers: In the next two years, the State will carry out its plan to reduce the number of persons with I/DD in sheltered workshops (from 1,926 to 1,530) and reduce the hours they work each month (from 93,530 hours to 66,100 hours). (Agreement, § IV.2). These goals are also generally drawn from the State's Integrated Employment Plan. (Integrated Employment Plan, at 76-77, metrics 9-10 (http://www.oregon.gov/dhs/employment/employment-first/Documents/7-6-15%20Integrated%20Employment%20Plan.pdf)).

6. Close the Front Door. As of July 1, 2015, OVRS and ODDS may not fund new entrants into sheltered workshops. (Agreement, § IV.1).

7. Flexibility. Subject to the terms of the Agreement, the State is given flexibility to revise its Executive Order and can seek relief from the requirements in the Agreement, like the one requiring 1,115 community jobs, in the event of an economic downturn or other events. (*E.g.* Agreement, §§V.A.1, XV.1).

IV. The Settlement Agreement is Fair.

The proposed settlement is fair to the class and should be approved. The settlement occurred after vigorous litigation, extensive discovery, and a lengthy mediation that led to a lengthy, complex settlement that will be carried out over the next several years. The litigation involved substantial risk to both sides, and averted substantial further costs. Several government participants actively participated in the litigation and in the settlement. The objections made are few in number.

In this case, as a result of the intervention of the United States, a second target population has been added to this settlement: persons of transition age who are not working in a sheltered workshop. (Agreement, § III.1.b; *see also* Executive Order 15-01, § II.1.b.). Many of these persons never have worked in a sheltered workshop. Though the settlement is fair to this group, in reviewing the settlement here, the Court should examine the fairness of the settlement to the certified class.

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A. The Risk was substantial to both sides.

Plaintiffs base their case on the ADA and on the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S. Ct. 2176 (1999). Defendants based their defense on *Olmstead*. There was risk to both sides in this first of its kind case.

1. *Olmstead* Issues.

In *Olmstead*, two mentally disabled plaintiffs were patients confined in the psychiatric unit of a Georgia state hospital. Once their conditions stabilized, their treatment providers found that the plaintiffs' needs could be met in a community-based treatment. They sued, arguing that their continued confinement violated the ADA. *Id.* at 593. The Supreme Court held that "unjustified institutional isolation of persons with disabilities is a form of discrimination." *Id*. at 600. The Court concluded that states should release patients to community-based treatment when (1) the State's treatment professionals conclude that community placement is appropriate; (2) the individuals do not object to community placement; and (3) placement in the community can be reasonably accommodated, given the resources of the state and needs of other intellectually disabled individuals. *Id.* at 607.

The Supreme Court limited its holding, in two basic ways. First, the Court ratified the fundamental alteration defense, making clear that a state's responsibility to provide community based treatment "is not boundless." *Id*. at 603. The Court of Appeals in *Olmstead* had incorrectly permitted a cost-based defense "only in the most limited of circumstances. The Supreme Court rejected this individual approach, holding that this construction was "unacceptable for it would leave the State virtually defenseless once it

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is shown that the plaintiff is qualified for the service or program she seeks." *Id.* Instead, more "leeway" was due to state officials. *Id.*

The Court identified two ways for a state to prove a fundamental alteration defense. *Id.* at 605, 605-606. One, a state may show that "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead*, 527 U.S. at 604. Two, a state may also "demonstrate that it ha[s] a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated [ ]." *Id.* at 605-606.

As the Ninth Circuit has confirmed, *Olmstead* instructs courts "to be sympathetic to fundamental alteration defenses, and to give states 'leeway' in administering services for the disabled." *Arc of Washington State v. Braddock*, 427 F.3d 615, 620-22 (9th Cir. 2005) (rejecting challenge to cap limiting the number of persons receiving home and community based services under Medicaid program) (citations omitted). Thus, "despite the integration mandate . . . , we have held that we normally 'will not tinker with' comprehensive, effective state programs for providing care to the disabled." *Id.* This is consistent with principles of federalism. For example, in ruling on the enforceability of consent decrees, the Supreme Court has stated that when a decree "mandates the State, through its named officials, to administer a significant federal program, principles of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion." *Frew v. Hawkins*, 540 U.S.431,

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442 (2003) (Eleventh Amendment did not bar enforcement of decree). Further, "[a]s public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities." (*Id.*).

Second, the Court in *Olmstead* limited its holding in another significant way, explaining that it was not imposing a "standard of care" on states, and that claims challenging "the level of benefits" provided by states are not cognizable under the ADA:

> We do not in this opinion hold that the ADA imposes on the States a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities." We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.

Id. at 603 n.14 (internal citations omitted). As this Court has recognized, "*Olmstead* admonishes that a disability discrimination claim may not be premised upon allegations that defendants failed to meet a particular standard of care with regard to the services provided or upon a request for a particular level of benefits .... Thus, a claim survives only if it truly alleges a 'discriminatory denial of services' and must be dismissed if it instead concerns the 'adequacy' of the services provided." *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1207 (D. Or. 2012). "Accordingly, claims by qualified individuals who both meet the eligibility requirements for a particular program and are willing participants may properly allege a claim for a denial of the services provided by a program, but not a claim for providing inadequate services." *Id.*, *citing Buchanan v. Maine*, 469 F.3d 158, 174-75 (1st Cir. 2006). In determining whether the settlement is sufficient, the Court should consider these limits that the Supreme Court placed on the plaintiffs' case and the deference that should be afforded the State.

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In this case, Oregon's *Olmstead* plan was stated in two executive orders, a State integrated employment plan, and other documents. The State took many actions to carry out its plan and to address plaintiffs' complaints, including the adoption of numerous regulations, hiring more than 15 employees whose jobs were devoted to helping coordinate or provide supported employment services, training, and millions of dollars of additional funding, including state grants to sheltered workshop providers to help them transform their business model to support higher levels of community employment. The commitment was a serious one, adding to the litigation risk faced by plaintiffs.

Though plaintiff and their experts criticized the progress by the State, they frequently ignored the fact that Oregon launched its Employment First policy in 2008, a very bad time to launch a jobs program. Recent employment figures show that Oregon's employment efforts are bearing fruit, posing further risk to plaintiffs.

In considering risk, the Court should also consider the standard for any injunction that would have issued in this case. That standard is heightened because class plaintiffs seek to enjoin state officials. Plaintiffs therefore must "contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 851 (9th Cir. 2001). "This 'well-established rule' bars federal courts from interfering with non-federal government operations in the absence of facts showing an immediate threat of substantial injury." *Id.* "Any injunctive relief awarded must avoid unnecessary disruption to the state agency's 'normal course of proceedings."' *Gomez v. Vernon*, 255 F.3d 1118, 1128 (9th Cir. 2001) (citing *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974)). If an injunction issues against the state, the Court must "heel close to the

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identified violation and respect the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Gilmore v. People of the State of California*, 220 F.3d 987, 1005 (9th Cir. 2000).

2. Federal support for workshops.

The reasonableness of the State's efforts, and the risk to the parties, should also be viewed in light of the fast changing federal policy on workshops. Federal law and policy has long supported workshops. Though federal policy has turned against workshops in the past few years, Oregon has moved quickly to deal with that change.

a. The FLSA.

Sheltered workshops are permitted by a federal law, the Fair Labor Standards Act. Section 14(c) of the FLSA allows exemptions from the federal minimum wage for workers whose productivity is impaired by disability. 29 U.S.C. § 214 (c). Under Section 14(c), "to the extent necessary to prevent curtailment of opportunities for employment," the Secretary of Labor may permit payment of wages lower than the otherwise applicable federal minimum to persons "whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury." *Id.* The Secretary does so by issuing issues certificates to employers – sheltered workshop operators -- under which wages are set at a level commensurate with their productivity and reflective of rates found to *be prevailing* in the locality for essentially "the same type, quality, and quantity of work." 29 U.S.C. § 214 (c)(1)(B); *see* also 29 C.F.R. Part 525. The U.S. Department of Labor reports that its "Solicitor's Office has reviewed the ADA and its legislative history and has concluded that the ADA does not nullify the provisions of section 14(c). The ADA affords protection to individuals who, with or without reasonable

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accommodation, can perform the essential functions of the job. An employer is not required to lower quality or production standards to make an accommodation."[5]

b. JWOD.

A 1971 law, the Javits-Wagner-O'Day Act (JWOD), even provides for federal financial support for sheltered workshops, by encouraging federal agencies to purchase goods and services from them. 41 U.S.C. §§ 8501-8506; 41 C.F.R. Part 51. The JWOD Act provides for the purchase by federal agencies of goods and services from nonprofit agencies that employ persons who have severe disabilities. 41 U.S.C. § 8504. Regulations confirm that it "is the policy of the Government to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from qualified nonprofit agencies employing persons who are blind or have other severe disabilities." 41 C.F.R. **§** 51-1.1. A qualified non-profit agency is one that **"**employs persons with severe disabilities (including the blind) for not less than 75 percent of the work-hours of direct labor required to furnish such commodities or services." 41 C.F.R. § 51.1-3.

A federal agency, known as AbilityOne, carries out the JWOD. In 2014, AbilityOne agreed with a report that said the AbilityOne program is "lagging behind the national policy of full integration and community inclusion." In 2015, several workshops

[5] U.S. Department of Labor Wage and Hour Division Field Operations Handbook, Chapter 64: Employment of Workers with Disabilities at Special Wages under Section 14(c), at Section 64a02: Impact of the Americans with Disabilities Act on Section 14(c), http://www.dol.gov/whd/FOH/ch64/64a02.htm.

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in Oregon are listed on AbilityOne's website as qualified nonprofit agencies that can receive federal support.[6]

c. The ADA.

The passage of the ADA in 1989 was not intended to end sheltered workshops. The legislative history makes this clear. For example, a Senate Report on the ADA states: "[T]his legislation in no way is intended to diminish the continued viability of sheltered workshops and programs implementing the Javits-Wagner[-]O'Day Act." Sen. Rep. No. 101-116, at 30 (1989). The legislative history also notes, however, that if persons wish integrated opportunities, states should provide them.

d. Medicaid.

For decades, another source of federal support of workshops has come in the form of Medicaid payments for services at the workshops. The National Disability Rights Network, a parent association of agencies, including Disability Rights Oregon and similar organizations, complained in 2012 that "states are still able to access money to facilitate the continuation of sheltered settings for individuals with disabilities….".[7] NDRN also complained that the current Social Security law does not promote employment opportunities that are integrated and in community settings:

> The funding for segregated employment options continues partially because § 1915(c)(5)(b) of the Social Security Act provides that states may request funding for prevocational services and supported employment. However, there is absolutely nothing in the federal rules and

[6] AbilityOne Network of Nonprofit Agencies, available at http://www.abilityone.gov/abilityone_network/documents/AbilityOne_nonprofit_agencies_2013.pdf.

[7] Nat'l Disability Rts. Network, Beyond Segregated and Exploited: Update on the Employment of People with Disabilities (2012), at 16, available at http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Beyond_Segregated_and_Exploited.pdf [hereinafter Beyond Segregated and Exploited].

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> regulations that require prevocational services or supported employment be provided in community-based or integrated settings. In fact, the sole limit is that such services cannot otherwise be available to the person seeking services under a different statutory scheme like the Rehabilitation Act of 1973, as amended or the Individuals with Disabilities Education Act (IDEA).[8]

3. The changes in federal policy regarding sheltered workshops.

Though federal policy change was slow to come, it has picked up speed in the past few years, as evidenced by this first of its kind suit.

a. RSA "Counting" Rule

In 2001, the Rehabilitation Services Administration, which supervises state vocational rehabilitation agencies, issued new regulations for measuring whether a placement by a state vocational rehabilitation facility would be counted as a successful placement. Under the new regulations, the placement would need to be in an integrated setting or other approved setting. 34 C.F.R. §§ 361.81, 361.88. These settings did not include sheltered workshops. As a result, state VR agencies could not count such a placement towards their placement quotas. This rule did not, however, prohibit placements in workshops, and it only applied to state VR agencies, not to other state agencies that provided employment services to persons with I/DD. In fact, RSA explained at the time that this change would not close down workshops,[9] and that "[e]mployment in a sheltered setting is a legitimate and valuable employment option for individuals with disabilities."[10] In fact, while RSA regulations do not allow placements

[8] *Id.* at 16-17, *citing* 42 U.S.C. § 1915 (c)(5)(b). The Social Security Act contains the laws regulating Medicaid.

[9] 34 C.F.R., Appendix A to Part 361—Questions and Answers, http://www.ecfr.gov/cgi-bin/text-idx?rgn=div6&node=34:2.1.1.1.7.5

[10] Id.

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in workshops to count towards quotas, the RSA regulations still permit "extended employment," meaning placement in a sheltered workshop. *Id.*

b. USDOJ Statement

The next significant announcement occurred ten years later. In June 2011, USDOJ issued its "Statement on the Enforcement of the Integration Mandate" ("USDOJ Statement"), which took the position that *Olmstead* and the ADA applied to sheltered workshops.[11]

[11] http://www.ada.gov/olmstead/q&a_olmstead.htm. The Statement is far-ranging, and expresses opinions on whether sheltered workshops are integrated, whether States may consider budget problems, and even how the Supreme Court's *Olmstead* decision should be interpreted. To the extent the Court needs to consider the Statement in these proceedings, the Court should give little deference to it. An agency's interpretation of a statute receives varying levels of deference depending, in part, on the form the interpretation takes. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). If the agency's opinion is embodied in a "legislative rule"—that is, a formal rule promulgated after opportunities for notice and comment—it is likely entitled to so-called *Chevron* deference. *Id.*; *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). An agency may also offer its opinion in myriad forms apart from legislative rules, such as "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Such rules do not require any formal comment-and-notice process. *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1200-01 (2014). "But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Id.* The Statement at issue here, an informal "Q&A" type document, is an interpretive rule. As far as defendants are aware, it underwent no formal rule-making procedures and was not the result of a notice-and-comment process. Moreover, there is absolutely no indication that the Statement was intended to have the force of law. The Statement is inconsistent with some aspects of *Olmstead* and Ninth Circuit precedent. *See Buren v. Colvin*, No. 6:12-CV-01502-SI, 2013 WL 4782171, at *5 (D. Or. Sept. 5, 2013) (in another setting, noting that "this court is bound by Ninth Circuit precedent" even where an agency advances a different interpretation). The Statement should also be considered less persuasive because its timing and content suggest that it was issued in anticipation of litigation.

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c. CMS Bulletin

In September 2011, just after plaintiffs' counsel had written their demand letter to Oregon, the Centers for Medicare and Medicaid Services ("CMS") issued a bulletin that addressed sheltered workshops and integrated employment. CMS provides much of the federal support for sheltered workshops through the Medicaid program. The CMS bulletin stated that CMS would not allow Medicaid funds to be used for "vocational services" delivered in sheltered settings. However, CMS continued to permit the use of "pre-vocational" services in sheltered settings "for the purpose of furthering habilitation goals *such as attendance, task completion, problem solving, interpersonal relations and safety."* (*Id.* (emphasis in original).) "Updates to the §1915 (c) Waiver Instructions and Technical Guide regarding employment and employment related services" (September 2011), (https://downloads.cms.gov/cmsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf).

d. CMS "HCBS" rule.

In January 2014, two years after this action was filed, CMS issued a regulation that will directly impact sheltered workshops, the home and community based settings ("HCBS") rule. Proposed versions of the rule had only addressed residential settings. The final rule, issued in January 2014, changed course by also including non-residential settings, including employment. The HCBS rule requires that employment settings must be in an "integrated" setting and requires states to submit transition plans "to achieve compliance with this section." 42 C.F.R. § 441.710 (a)(1)(i), (2), (3).

States were given until 2019 to comply. According to CMS, "[w]hile our expectation is that states would transition to compliance with this final rule in as brief a

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period as possible, we will allow states to propose a transition plan that encompasses a period up to five years after the effective date of the regulation if the state can support the need for such a period of time. States are expected to demonstrate substantial progress toward compliance throughout any transition period." Fed. Reg. Vol. 79, No. 11, at 2948, 2980, available at http://www.gpo.gov/fdsys/pkg/FR-2014-01-16/pdf/2014-00487.pdf.

Services to those with I/DD are costly, and the cost of those services is already growing faster than the overall state budget growth. Oregon has already closed the front door to sheltered workshops as of July 1, 2015, and Oregon expects that the CMS rule will further impact the ability of sheltered workshops to continue to exist unless they choose to transform and provide other, Medicaid-fundable services.

e. WIOA.

Yet another change in federal law occurred in 2014, two and-a-half years after this action was filed. On July 22, 2014, President Obama signed the Workforce Innovation and Opportunity Act, H.R. 803, Pub. L. 113-128 ("WIOA" or the "workforce law"). WIOA includes numerous provisions regarding vocational rehabilitation ("VR") services, sheltered workshops, supported employment, informed choice, youth transition services, integrated employment, and performance metrics.

WIOA permits the payment to youth of subminimum wages, which occurs at many workshops, provided that a long list of informed choice requirements are met. WIOA § 458(a). WIOA also imposes another set of informed choice obligations for any individual paid a subminimum, "regardless of age . . . ." WIOA § 458(a).

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Plaintiffs did not allege any violation of WIOA. The United States also did not allege a WIOA violation. The Settlement Agreement does not give any right to enforce WIOA. (Agreement, § XVII.4). Nevertheless, WIOA is yet another indication of the rapid change in federal policy, which Oregon seeks to follow.

f. Why does the legal history matter?

Federal support and the changes on federal policy makes added risk to this case. Sheltered workshops are a creation of federal law. They were regarded by many as important to the effort to move individuals out of residential institutions. The federal thinking has changed dramatically. Federal law and policy can change quickly, but it is difficult for states to implement those changes right away. The settlement is a reasonable compromise that seeks to accommodate many competing needs, including budget limitations.

B. Expense, complexity, and likely duration of further litigation

These factors also favor settlement approval. Trial was set for a month. Completing trial in a month would have been difficult – plaintiffs had named 20 expert witnesses and defendants had named about half that many, and many state employees were also prepared to provide opinion testimony. The cost to the State was particularly acute given the expansion of the case after intervention by the United States. The class plaintiffs had complained about DHS and had named DHS officials, but the United States added issues involving the Oregon Department of Education. And no matter who won at trial, an appeal was likely, adding further costs.

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C. Experience and views of counsel.

Lead counsel for the parties are experienced lawyers who believe the settlement is a fair and reasonable compromise and is fair to the class.

D. Presence of Governmental Participants.

The presence of a governmental participant favors settlement. In this case, there were several, including the U.S. Department of Justice, the Oregon Department of Justice, and several state agencies, all of who participated in and attended the settlement discussions.

E. Reaction of the class members to the proposed settlement.

Thus far, less than one percent of the class have sent written objections. The class has about 4000 persons in it, and less than 40 persons have sent objections. The objections focus primarily on two areas, which are addressed below.

1. The "Closing the Front Door" Feature is Fair and Reasonable.

Some objections express concern about the requirement in the settlement that, beginning July 1, 2015, bars DHS from paying for services at a sheltered workshop for newcomers. (Agreement, § IV.1). This requirement has been a feature of both Executive Orders and has never been a point of controversy in the parties' discussions. Other states have taken similar steps, including Vermont, Massachusetts, and Washington. CMS recently issued policy guidance that permits states to take this step. CMS states that "using their transition plan, a state may establish that certain settings currently in use in a home and community-based services waiver may continue within the waiver, as long as they will be able to meet the minimum standard set in the rule on or before the end of the transition period, *but the state may suspend admission to the setting or suspend new provider approval or authorizations for those settings*." (Dunbar Decl., Ex. 4 at 11

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(emphasis added).). This term is a fair one, particularly given the changes in federal policy discussed above.

2. The Reductions in Workshop Numbers are Fair.

Some objections also express concern about metrics in the agreement that require that the total number of hours worked and persons with I/DD working in sheltered workshops be reduced. These terms also help accommodate the conflicting demands placed on the state by changing federal laws and policies.

3. The jobs guarantee is fair to plaintiffs.

Though the Court need not reach the issue, by requiring 1,115 job placements, the settlement goes beyond what the law requires. This further supports settlement.

In the Court's May 2012 opinion on defendants' motion to dismiss, the Court denied the motion to dismiss the ADA claims in this case, but did dismiss claims that the State was required to provide jobs. The Court noted that "some of the allegations in the Complaint go beyond the clarification offered by plaintiffs at the hearing, that they were not seeking a guarantee of jobs." As the Court pointed out, those further allegations:

> "seek the forbidden remedy of requiring defendants to provide an adequate level of employment services to enable plaintiffs to obtain a competitive job. In particular, plaintiffs allege that defendants are violating Title II of the ADA and the Rehabilitation Act by failing "to offer an *adequate array* of integrated employment and supported employment services" *** and "to provide them with supporting employment services that *would enable them to work in integrated employment settings*" ***. These allegations are subject to dismissal because they demand that defendants provide a competitive job in the community and a certain standard of care or level of benefits. Instead, to comply with the scope of plaintiffs' claims as described at the hearing, these allegations (and other related allegations) must be amended to clarify that defendants are violating Title II of the ADA and the Rehabilitation Act by denying employment services to plaintiffs for which they are eligible with the result of unnecessarily segregating them in sheltered workshops."

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Lane v. Kitzhaber, 841 F.Supp.2d 1199, 1208 (emphasis added).

In a later ruling, the Court noted that that plaintiffs had not said they were seeking percentage outcomes, and that if defendants lost at trial, any issue over job outcomes might arise if there was a dispute over defendants' compliance with any injunction. *Lane v. Kitzhaber*, No. 3:12–cv–00138–ST, 2013 WL 6798470 at *2 (D. Or. 2013) (denying motion for leave to file amended answer). The Court said that outcomes might be used to measure the success of the services offered, noting that the Executive Order requires DHS to "collect and report data" similar to the criteria proposed by plaintiffs. The Court added that if it found a violation and if there was a dispute over compliance with the injunction, there could be a dispute over whether services are consistent with "integration criteria," such as job placement outcomes.

> "The specific parameters of any injunctive relief ordered by the court will be determined by the scope of violations established at trial. Accordingly, whether the appropriate form of relief ever becomes an issue will depend upon the evidence admitted at trial, the Court's findings of fact, and whether there is a dispute over defendants' compliance with the injunction. If plaintiffs and the United States prevail, a dispute could conceivably arise over whether the supported employment services being provided are, in fact, allowing individuals to receive services in the most integrated setting appropriate to their needs. Then — and only then — would the court need to consider whether, and to what extent, supported employment services provided under the injunction are consistent with certain integration criteria. Those integration criteria may or may not include job placement outcomes. At this juncture, however, there is no immediate, concrete dispute over this issue." *Id*.

By providing 1,115 jobs, the settlement is fair to the class.

V. Conclusion

The proposed settlement is fair to the class and should be approved. Plaintiffs made significant compromises in the settlement of the case, but the settlement as a whole remains fair to the class. Even if the case went to a full trial, it is unlikely that plaintiffs

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would achieve a result that mandated the placement of 1,115 class members into integrated jobs. The settlement is also fair to those who want to maintain the status quo because, as a result of federal regulations, the status quo would not be maintained with or without the settlement.

Dated this 16th day of November, 2015.

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