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BEYOND RESIDENTIAL SEGREGATION: THE APPLICATION OF *OLMSTEAD* TO SEGREGATED EMPLOYMENT SETTINGS

Susan Stefan*

INTRODUCTION

Several years ago, I was a client of Georgia Vocational Rehabilitation . . . at [Atlanta Rehabilitation Center]. I was put in a sheltered workshop and asked to put a plastic cover on two bottles, eight hours a day, for three weeks to show my readiness to work. I balked and the counselor said, "Oh, so you don't really want to work. I had two other Ph.Ds who didn't want to work."¹

In the decade since the Supreme Court interpreted the scope of the Americans with Disabilities Act's (ADA) integration mandate in *Olmstead v. L.C.*,² litigation about integration has been brought primarily to ensure that institutionalized people with psychiatric and developmental disabilities can live in their own homes in community settings.³ Expansion of *Olmstead* beyond the gates of state institutions has focused for the most part on its application to other congregate settings such as nursing homes⁴ and, most recently, large

* This article would not have been possible without the outstanding work and assistance of Gwen Russell, Boston University Law School Class of 2011. I am grateful for the vision and insights of Robert Pledl, the first attorney to challenge sheltered workshops under *Olmstead*. As usual, the legal analysis and impatient hectoring of Ira Burnim of the Bazelon Center for Mental Health Law improved my thinking, as did more gentle discussions with Jennifer Mathis, also of the Bazelon Center. Debates with Steven Schwartz, Bob Fleischner, Cathy Costanzo, and Pat Rea at the Center for Public Representation helped to sharpen the issues addressed here. None of the work that I do would be possible without the (flexible) support of my husband, Wes Daniels, and my best friend, Jamie Elmer. This article is dedicated to the memory of my mother, Gabrielle Stefan.

1. Interview with Kent Earnhardt, Sheltered Workshop Services Consumer (Oct. 24, 2009).

2. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

3. E.g., *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151 (3d Cir. 2005); *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294 (D. Conn. 2008); *Williams v. Wasserman*, 164 F. Supp. 2d 591 (D. Md. 2001); *Martin v. Taft*, 222 F. Supp. 2d 940 (S.D. Ohio 2002).

4. See generally *Ligas v. Maram*, 478 F.3d 771 (7th Cir. 2007) (denying motion to intervene); *Rolland v. Celluci*, 52 F. Supp. 2d 231 (D. Mass. 1999); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280 (E.D.N.Y. 2008).

congregate settings that purport to be community-based but function as institutions.⁵ In addition, advocates have used *Olmstead* to challenge waiting lists and state Medicaid regulations or policies, including state budget cuts, which effectively force disabled citizens living in the community to move to institutions to get the medical services that they need.⁶

Litigation seeking to apply *Olmstead*'s integration requirement to other contexts has been sparse. A few cases have been brought citing the ADA's integration mandate in areas such as voting,⁷ insurance coverage,⁸ reduction in services,⁹ communication issues, including interpreter services¹⁰ and facilitated communication,¹¹ and even interpretation of a contract.¹²

Only one case has been brought directly challenging sheltered workshops as unnecessary segregation in employment services under the integration mandate,¹³ although *Olmstead* and the integration mandate have been raised in another case challenging sheltered workshops' exemptions from unemployment compensation.¹⁴

5. See generally *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009); *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009); *Disability Advocates Inc. v. Paterson*, No. 03-CV-3209, 2010 U.S. Dist. LEXIS 17949, at *22 (E.D.N.Y. Mar. 1, 2010) (*DAI III*).

6. See generally *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003); *Ball v. Rodgers*, No. CV 00-67-TUC-EHC, 2009 U.S. Dist. LEXIS 45331 (D. Ariz. Apr. 24, 2009); *Brantley v. Maxwell-Jolly*, No. C 09-3798 SBA, 2009 U.S. Dist. LEXIS 91454 (N.D. Cal. Sept. 10, 2009); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017 (D. Haw. 1999); *Masterman v. Goodno*, Civ. No. 03-2939 (JRT/FLN), 2004 U.S. Dist. LEXIS 354 (D. Minn. Jan. 8, 2004); *Crabtree v. Goetz*, No. 3:08-0939, 2008 U.S. Dist. LEXIS 103097, at *64 (M.D. Tenn. Dec. 18, 2008).

7. *Kerrigan v. Phil. Bd. of Elections*, Civ. No. 07-687, 2008 U.S. Dist. LEXIS 62263 (E.D. Pa. Aug. 14, 2008).

8. *Iwata v. Intel Corp.*, 349 F. Supp. 2d 135 (D. Mass. 2004).

9. *Lincoln CERCPAC v. Health & Hosps. Corp.*, 147 F.3d 165 (2d Cir. 1998); *Brantley v. Maxwell-Jolly*, No. C 09-3798 SBA, 2009 U.S. Dist. LEXIS 19154 (N.D. Cal. Sept. 10, 2009); *V.L. v. Wagner*, No. C 09-04668 CW, 2009 U.S. Dist. LEXIS 99107 (N.D. Cal. Oct. 23, 2009); *Crimmins v. Fergus Falls Reg'l Treatment Ctr.*, Civ. File No. 02-3668 (PAM/RLE), 2003 U.S. Dist. LEXIS 1748 (D. Minn. Jan. 17, 2003).

10. *Doe v. Sylvester*, No. CIV. A. 99-891, 2001 WL 1064810 (D. Del. Sept. 11, 2001).

11. *Hahn v. Linn County, Iowa*, 191 F. Supp. 2d 1051 (N.D. Iowa 2002).

12. *Omega Healthcare Investors, Inc. v. Res-Care, Inc.*, 475 F.3d 853 (7th Cir. 2007).

13. See *Schwartz v. Jefferson County*, No. 2004CV000091 (Jefferson County Cir. Ct. Feb. 24, 2004).

14. See *Tyler v. Smith*, 472 F. Supp. 2d 818 (M.D. La. 2006) (upholding exemption of sheltered workshops from unemployment compensation against ADA challenge); see also *Okla. Goodwill Indus.*,

Yet sheltered workshops, also sometimes called “center-based work” or “facility-based work,” are also segregated work environments often operated in conjunction with segregated facilities or day habilitation programs. They often pay sub-minimum wages and have been criticized for more than twenty years by courts, developmental disability professionals, and scholars as isolating and congregate dead-ends which rarely, if ever, result in meaningful transition into actual mainstream employment.¹⁵ Sometimes sheltered workshops give their employees make-work, such as folding and unfolding newspapers. When employees of sheltered workshops attempted to unionize forty years ago, the NLRB found that it did not even have jurisdiction since sheltered workshops’ “essential purpose is to provide therapeutic assistance rather than employment.”¹⁶

Inc. v. State ex rel Okla. Employment Sec. Comm’n, 219 P.3d 540 (Okla. 2009) (upholding exemption from unemployment taxes of sheltered workshop employees, regardless of where they work).

15. See Jacobus tenBroek, *The Character and Function of Sheltered Workshops*, BLIND AMERICAN, May 1962, available at <http://www.blind.net/g3800001.htm>; ZANA MARIE LUTFIYYA, PAT ROGAN & BONNIE SHOULTZ, CTR. ON HUMAN POL’Y, SUPPORTED EMPLOYMENT: A CONCEPTUAL OVERVIEW (1988), <http://thechp.syr.edu/workovw.htm> (citing critiques of sheltered workshops as early as 1976); see also *Opportunities for 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) [hereinafter *HELP Hearing*], NAT’L COUNCIL ON DISABILITY (FORMERLY NAT’L COUNCIL ON THE HANDICAPPED), TOWARDS INDEPENDENCE (1986) (criticizing sheltered workshops as non-competitive and non-integrated work); James H. Omvig, *More Progress in the Javits-Wagner-O’Day Program: Establishing Best Practices for a Quality Work Environment*, BRAILLE MONITOR, June 2009, available at <http://www.nib.org/documents/pressroom/2009/BrailleMonitorArticle.doc> (explaining that the President’s Committee for Purchase from People Who Are Blind or Severely Disabled adopted in 2009 the statement that all AbilityOne [JWOD program] workers should have “opportunities to do the work of their choice with appropriate supports and/or workplace flexibilities, alongside nondisabled employees . . . [and] ongoing training opportunities that make employment with other community based businesses possible . . .”).

16. Sheltered Workshops of San Diego, Inc., 126 N.L.R.B. 961 (1960). Later, the NLRB began taking a more nuanced approach, looking to whether sheltered workshop employees were in fact in a “typically industrial” rather than “primarily rehabilitative” setting. See *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536 (1977). In order to determine whether the setting was typically industrial, the Board looked to four factors: long term employment at the sheltered workshop (since that would detract from its alleged rehabilitative purpose), whether employees were disciplined in the same way as non-disabled employees, whether they had to comply with productivity standards, and whether the counseling they received was “limited.” *Id.* at 536–37. Since 1977, the inquiry has been primarily fact-based, with both the NLRB and appellate courts finding some sheltered workshops to be “primarily rehabilitative” while others are “typical industrial settings.” See, e.g., *Davis Mem’l Goodwill Indus., Inc. v. N.L.R.B.*, 108 F.3d 406 (D.C. Cir. 1997) (reversing NLRB order to bargain with employees); *Ark. Lighthouse for the Blind v. N.L.R.B.*, 851 F.2d 180 (8th Cir. 1988); *N.L.R.B. v. Lighthouse for Blind of Houston*, 696 F.2d 399 (5th Cir. 1983) (enforcing NLRB’s order to recognize and bargain with union); *Brevard*

Unlike clients of therapeutic programs, however, sheltered workshop employees are laid off when there is no work, but cannot collect unemployment benefits because states are permitted by federal law to exempt sheltered workshop employees from unemployment benefits.¹⁷

Professionals in the field of developmental disabilities generally favor the model of supported employment,¹⁸ which provides individualized supports for disabled persons to join the regular workforce working at actual jobs and receiving competitive wages. This model has been shown to successfully integrate persons with disabilities into mainstream employment.¹⁹ Supported employment programs provide coaching or other supports as necessary; these supports are often phased out over time. At least one state, Vermont, has prohibited the use of state funds for sheltered workshops, but they continue to be utilized across the country.²⁰

The Americans with Disabilities Act does not prohibit segregated services that operate to the benefit of people with disabilities and are genuinely chosen and preferred by people with disabilities. The legislative history of the ADA explicitly provides that sheltered workshops are not automatically prohibited or foreclosed by the enactment of the ADA. However, the ADA, its regulations and the Department of Justice's guidance to those regulations make equally clear that all people with disabilities must be given a choice of the

Achievement Ctr., Inc., 342 N.L.R.B. 982 (2004) (finding sheltered workshop "primarily rehabilitative"); *Cincinnati Ass'n for the Blind v. N.L.R.B.*, 672 F.2d 567 (6th Cir. 1982).

17. *Tyler v. Smith*, 472 F. Supp. 2d 818 (M.D. La. 2006).

18. Supported employment began in the late 1970s. See Joe Marrone & Martine Gold, *Supported Employment for People with Mental Illness: Myths and Facts*, J. REHABILITATION, Oct.-Dec. 1994, at 38, available at 1994 WLNR 4950590. The term "supported employment" was coined by Madeleine Will in 1984. Letter from Paul Wehman, Director, Vir. Commonwealth U. Rehabilitation Research & Training Center (Jan. 21, 2010) (on file with author). Supported employment is an evidence-based practice. See Substance Abuse and Mental Health Services Administration, <http://www.mentalhealth.samhsa.gov/cmhs/CommunitySupport/toolkits/employment> (last visited Feb. 19, 2010).

19. William C. Torrey, Robin E. Clark, Deborah R. Becker, Philip F. Wyzik & Robert E. Drake, *Switching from Rehabilitative Day Treatment to Supported Employment*, in 4 CONTINUUM, DEVELOPMENTS IN AMBULATORY HEALTH CARE 27 (L.L. Kennedy ed., 1997).

20. Jennifer Sullivan Sulewski, *Working Together to Convert to the Last Sheltered Workshop in Vermont to Individualized Supports*, INST. FOR COMMUNITY INCLUSION, http://www.communityinclusion.org/article.php?article_id=201 (last visited Feb. 19, 2010).

most integrated service appropriate to their needs and an opportunity to reject segregated services ostensibly provided for their benefit.²¹

This article examines the applicability of Title II of the ADA to public entities that fund segregated employment and vocational services to clients with cognitive and developmental disabilities. Research for several decades amply reflects that supported employment is appropriate for, and desired by, far more clients than actually receive these services. In fact, the continued existence of segregated sheltered workshops results primarily from a federal and state statutory framework that continues to create incentives for segregated day services, the preferences of parents and of some agency staff, and (in some cases) the substantial profits that workshops bring to the agencies that run them rather than the preferences of, or benefits to, clients with disabilities or any evidence that sheltered workshops represent a successful model to transition people with disabilities into employment.²²

The article further argues that the Supreme Court's decision in *Olmstead v. L.C.* and subsequent case law, including the recent case of *Disability Advocates, Inc. v. Paterson*,²³ amply support the proposition that the ADA prohibits unjustified isolation of people with disabilities in segregated sheltered workshops when those people would prefer to work in the community with the aid of supported employment services and the states currently fund programs that would enable them to work in the community.

Sheltered workshops are outmoded vestiges of a historical perspective that people with disabilities could not be employed in the

21. 28 C.F.R. § 35.130(d) (1991).

22. Although most sheltered workshops are run by non-profit agencies, some directors and executive staff of those agencies receive six figure salaries. In addition, research has shown that in order to continue to bring in contracts, sheltered workshops often keep their more skilled labor in order to fulfill contracts, rather than make sustained efforts to find competitive and higher paid employment for those individuals. See *HELP Hearing*, *supra* note 15, at 3, 10; see also Marvin Rosen, Albert Bussone, Peter Dakunchak & John Cramp, Jr., *Sheltered Employment and the Second Generation Workshop*, J. REHABILITATION, Jan.-Mar. 1993, at 30, available at 1993 WLNR 4771987.

23. See *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009); *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009); *Disability Advocates Inc v. Paterson*, No. 03-CV-3209, 2010 U.S. Dist. LEXIS 17949, at *22 (E.D.N.Y. Mar. 1, 2010) (DAI III).

regular workforce and needed to be “sheltered” in segregated settings. In the last few years, federal agencies that allocate the billions of federal dollars that support sheltered workshops have started to transform the system into one that is more integrated and pays closer to the minimum wage. These changes are, however, being achieved slowly and incrementally. They do not undermine the fundamental fact that segregated sheltered work settings are maintained, not for the benefit of people with disabilities, but because they are part of a long-existing and well-funded system of congregating and segregating people with disabilities. As recent investigations have revealed, some sheltered workshops are also cash cows for a number of very large and profitable industries.

Supported employment, which integrates people with disabilities into actual employment in the community, with accompanying wages, self-esteem, and the opportunity to spend time with non-disabled people, has been funded by states for years and has shown itself successful in serving precisely the same kinds of people who are currently stagnating in sheltered workshops. Advocates should apply the prohibitions of Title II of the ADA²⁴ to force states providing vocational assistance to people with disabilities to convert entirely to integrated supported employment.

I. THE INTEGRATION MANDATE AND *OLMSTEAD V. L.C.*

A. *The Integration Mandate*

When Section 504 of the Rehabilitation Act²⁵ was passed in 1973, it contained a single line prohibiting discrimination on the basis of handicap in programs receiving federal funding.²⁶ Because programs receiving federal funds were funded by different agencies across the Executive Branch from the Department of Transportation to the Department of Housing and Urban Development,²⁷ each federal

24. 42 U.S.C. § 12131 (2006).

25. 45 C.F.R. § 84 (2009).

26. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394.

27. See 28 C.F.R. § 35.190 (1991) (describing agencies charged with enforcing the regulations).

agency had to develop its own regulations to implement Section 504 in the particular programs it funded.²⁸

While each agency would have regulations specific to the focus of the agency, it was obvious that many definitions and other aspects of the regulations would be identical across the agencies. Therefore, a “lead agency” was designated to issue so-called “coordination regulations” which applied to all agencies and which had special authority.²⁹ The then Department of Health, Education and Welfare (HEW) was designated the “lead agency” but failed to develop any coordination regulations.³⁰ After significant pressure, including a federal lawsuit³¹ and disability activists taking over the San Francisco office of the HEW and picketing the home of Secretary Califano,³² HEW reluctantly issued regulations implementing Section 504 of the Rehabilitation Act of 1973.³³

One of these “coordination” regulations, which applied across the board to all recipients of federal funds regardless of their program, was the forerunner of the regulation that came to be known as the integration mandate.³⁴ In its definition of “discrimination” in the coordination regulations, the Department of Health and Human Services (HHS) defined discrimination as a failure to provide equally effective aids, benefits and services to handicapped individuals as nonhandicapped person.³⁵ The regulation added:

28. All agencies have to develop their own 504 regulations. See *id.* for a description of agencies charged with enforcing the regulations.

29. *Id.*

30. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). See also *Helen L. v. Didario*, 46 F.3d 325, 330 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995).

31. *Cherry v. Matthews*, 419 F. Supp. 922, 923 (D.C. 1976).

32. For accounts of the history behind the battle to obtain regulations for Section 504, see RICHARD SCOTCH, FROM GOODWILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984) 111–16; JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 65, 66 (1994).

33. These regulations are entitled “Nondiscrimination on Basis of Handicap in Programs or Activities Receiving or Benefiting from Federal Financial Assistance,” and are found at 45 C.F.R. § 84 (2008).

34. *Id.*

35. *Id.*

For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.³⁶

Later, the "lead agency" function for Rehabilitation Act anti-discrimination regulations was shifted to the Department of Justice, which in turn wrote regulations applicable to all agencies.³⁷ It defined discrimination to include the failure to provide services in the most integrated setting appropriate to the individual's needs.³⁸

After the Americans with Disabilities Act was passed, the Department of Justice was charged with writing regulations to elaborate the prohibition on discrimination contained in Title II of the ADA,³⁹ which was almost as spare as the language of Section 504 of the Rehabilitation Act. When the Department of Justice wrote the regulations for Title II, it included a regulation that came to be known as the integration mandate.⁴⁰ In addition, its Interpretive Guidance to the Title II regulations added a definition of an integrated setting for the first time.⁴¹ An integrated setting was defined as "a setting that enables disabled individuals to interact with non-disabled persons to the fullest extent possible."⁴²

Although usually only 28 C.F.R. § 35.130(d) is referenced as the integration mandate, the DOJ Interpretive Guidance underscores that the regulation ensuring that people with disabilities are provided with a choice to refuse any segregated setting offered as an "accommodation" to their disabilities constitutes an integral part of the integration mandate:

36. 45 C.F.R. § 84.4(b)(2) (2005).

37. See SHAPIRO, *supra* note 32, at 129–30.

38. 28 C.F.R. § 41.51(d) (1981).

39. 28 C.F.R. § 35.130 (1991).

40. *Id.* § 35.130(d).

41. *Id.* pt. 35, app. A.

42. *Id.*

Paragraphs (d) and (e), previously referred to in the discussion of Paragraph (b)(1)(iv) [the provision that permits public entities to offer separate services] provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e. in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided with the option of declining to accept a particular accommodation.⁴³

Thus, the right to enjoy services in the most integrated setting appropriate to the individual's disabilities is accompanied by a parallel right to refuse separate or segregated services offered ostensibly to benefit or accommodate the individual's disability.

B. The Homeward Bound Case and Integration in Vocational Services

The first case to recognize that unnecessary discrimination constituted segregation was decided several years before the passage of the Americans with Disabilities Act.⁴⁴ *Homeward Bound v. Hissom Memorial Center* is an unjustly neglected case, years ahead of its time in its understanding of the true components of community integration,⁴⁵ including supported employment in community settings. The court in *Homeward Bound* created principles and remedies that remain as alive and true today as they were over twenty years ago. *Homeward Bound* was brought on behalf of individuals with developmental disabilities institutionalized at the Hissom Memorial Center in Oklahoma, and sought to provide those individuals and their families with the services they needed to live in

43. ADA Title II Interpretive Guidance, *id.* § 35.130(d) and (e).

44. *Homeward Bound v. Hissom Mem'l Ctr.*, No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987).

45. I have discussed elsewhere the understanding of the importance of family integration in the *Homeward Bound* decision. See Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 135 (2008).

the community.⁴⁶ Among those services were employment services. More than twenty years ago, the judge wrote:

The Court is cognizant of the radical change which the perception of employment capabilities of persons with severe disabilities has undergone in the past several years. Whereas sheltered workshops and work activity centers were previously considered the only possible place in which to employ people with disabling conditions, now many professionals consider these places the last resort when every other employment option has failed. The Court is similarly cognizant of the 1986 Amendment to the Rehabilitation Act of 1973 (Public Law 99-506) which creates a new formula grant to assist states in developing supported employment options for persons who are unable to function independently in employment without ongoing support services for the duration of their employment. Such change in the perception of employment possibilities and the corresponding federal legislation afford *Hissom* class members substantial opportunities for meaningful employment in an integrated work setting.

The Court directs that all *Hissom* class members are to receive prevocational and vocational services commensurate with his/her need. This will necessitate that the State accelerate and perhaps redirect its efforts to create employment options for persons with severe disabilities. The State will have to overcome resistance to employment of such persons based on the conventional arguments that limitations in physical and mental fitness lessen their ability to produce on the job and that employers prefer able-bodied workers, even if disadvantaged, to workers with disabilities. The State will have to engage business in a partnership to create a variety of supported and transitional job options for all Oklahoma citizens with severe disabilities who wish to work. In doing so, the Court directs the State to use the Medicaid waiver budget applicable to the *Hissom* class to assure

46. *Homeward Bound*, 1987 WL 27104, at *1-6.

that each member receives the kind and amount of prevocational and vocational services which the IDT assessment deems appropriate.⁴⁷

In addition, as part of the objectives and remedies of the case, the court ordered the development of supported and transitional employment options:

5. Sheltered workshops and work activity centers are to be encouraged and assisted to develop supported and transitional employment options for Hissom class members, with the assistance of the State.

6. The State Vocational Rehabilitation Agency is to be engaged in the development of supported and transitional employment options for Hissom class members in recognition of its responsibilities for doing so pursuant to the 1986 Amendment to the Rehabilitation Act of 1973 (P.L. 99-506).⁴⁸

In 1987, the *Homeward Bound* court recognized the importance of an array of employment options for people with severe cognitive disabilities directing that

Concentration on development of a single kind of employment option for Hissom class members should be avoided in favor of attempts to create the full array of options—job coaches for competitive employment, shared jobs in the transitional employment program (TEP), the specialized training program (STP), mobile work crews, sheltered enclaves in industry, etc.

⁴⁹
....

But supported employment was clearly the wave of the future anticipated by the *Homeward Bound* court:

47. *Id.* at *38.

48. *Id.* at *39.

49. *Id.* at *40.

9. High priority should be directed toward development of a partnership with the business community to educate and obtain the assistance of not only the leadership but also rank and file workers in creating integrated employment options for persons with severe disabilities, including Hissom class members.⁵⁰

The *Homeward Bound* court was correct in forecasting that supported employment would gain a share of state-funded vocational service dollars, as well as increasing support in the professional community. Supported employment would be awarded the status of an evidence-based practice⁵¹ and would be the sole form of vocational service funded by at least one state, Vermont.⁵² But sheltered workshops have stubbornly hung on, largely because they are hugely underwritten by federal dollars and a federal system that structurally subsidizes segregation, even as it rhetorically supports integration and provides limited funding to integrated programs. Essentially, this is similar to the current federal system that supports institutionalization in nursing homes and congregate facilities, even as it rhetorically supports community integration and funds community-based “waivers.”⁵³ The difference is that the structure of residential institutionalization began to be challenged in the courts in 1995,⁵⁴ and those challenges have accelerated to the present, while

50. *Id.*

51. See AGENCY FOR HEALTHCARE QUALITY & RESEARCH, THE SCHIZOPHRENIA PATIENT OUTCOMES RESEARCH TEAM (PORT) TREATMENT RECOMMENDATIONS (1998), <http://www.ahrq.gov/clinic/schzrec.htm> (recommendation 28 providing range of vocational services that should be included).

52. See Sulewski, *supra* note 20.

53. See, e.g., Daniel McCarthy, Daniel Thompson & Susan Olson, *Planning a Statewide Project to Convert Day Treatment to Supported Employment*, 22 PSYCHIATRIC REHABILITATION J. 30, 31 (1998) (“Medicaid reimbursement has perpetuated the use of day program treatment centers, and split financing of vocational rehabilitation and mental health resources has made it difficult to integrate vocational and clinical services.”); David Mank, *The Underachievement of Supported Employment: A Call for Reinvestment*, 5 J. DISABILITY POL’Y STUD. 1, 17 (1994) (stating that if federal and state governments were serious about supported employment, they would “cease to offer segregated options for any person entering the system”); Andrew Batavia, *A Right to Personal Assistance Services: “Most Integrated Setting Appropriate” Requirements and the Independent Living Model of Long Term Care*, 27 AM. J.L. & MED. 23–24 (2001); K.C. Lakin, R. Prouty & K. Coucouvanis, *Twenty Year Retrospective on Proposals to Eliminate ‘Institutional Bias’ in Medicaid for Persons with ID/DD*, 44 MENTAL RETARDATION 450–54 (2006).

54. *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995).

the segregated employment and other day habilitation systems have not been the subject of any systemic court challenge to date.

C. The Olmstead Decision

1. The Facts in Olmstead

Lois Curtis and Elaine Wilson were women with co-occurring mental retardation and psychiatric disabilities who were institutionalized in Georgia Regional Hospital in Atlanta for years after their treatment professionals believed they would benefit from placement in the community.⁵⁵ Georgia officials argued that there were no available community placements for either woman.⁵⁶ Georgia had applied for and received permission to use Medicaid money to pay for up to 2,109 community placements, but had only developed 700 such placements, failing to utilize all the funds available to it.⁵⁷ According to the Georgia state defendants, no appropriate placements existed for either woman in community settings. At one point, the hospital tried to discharge Elaine Wilson to a homeless shelter, but her advocates went immediately to court, and the proposed discharge was rescinded.⁵⁸

2. The Procedural History

In the district court, Judge Shoob initially granted summary judgment for the plaintiffs in this case, finding that unnecessary institutionalization constituted discrimination *per se*, which could not be justified by lack of funding because the cost of providing the two women services in the community was negligible compared to the budget of the state agency.⁵⁹

55. *Olmstead v. L.C.*, 527 U.S. 581, 593 (1999).

56. *Id.* at 598.

57. *Id.* at 601.

58. *Id.* at 593.

59. *L.C. v. Olmstead*, No. 1:95-cv-1210-MHS, 1997 WL 148674, at *3 (N.D. Ga. Mar. 26, 1997) (“[U]nder the ADA, unnecessary institutional segregation of the disabled constitutes discrimination *per se*, which cannot be justified by a lack of funding.”). I entirely agree with Judge Shoob’s holding, since the legislative history makes clear that Congress intended that claims of unnecessary segregation under Title II should not be analyzed as “reasonable accommodation” claims. *See* SUSAN STEFAN, *UNEQUAL*

This decision was appealed to the Eleventh Circuit, which affirmed in part.⁶⁰ However, the Eleventh Circuit held that the judge erred in comparing the cost of serving the two women in the community with the state's entire mental health budget; rather, the appropriate test was whether the State could prove "that requiring it to expend additional funds to provide LC and EW with integrated services would be so unreasonable given the demands of the State mental health budget that it would fundamentally alter the service the State provides."⁶¹ However, the Eleventh Circuit panel warned that such a defense would succeed "only in the most limited of circumstances."⁶² Because the district court had rejected a cost-based defense entirely, the Eleventh Circuit remanded.⁶³

Under ordinary circumstances, the district court would have reconsidered its decision, subject to appeal to the Eleventh Circuit and then to the Supreme Court. However, twenty-two states and the territory of Guam asked the Supreme Court to grant certiorari, and the Court acceded "in view of the importance of the question presented to the states and affected individuals."⁶⁴ The Supreme Court granted certiorari, and on June 22, 1999, it issued its decision. During this time, Judge Shoob reconsidered his decision and found that the State of Georgia had not met the standard laid out by the Eleventh Circuit.⁶⁵

3. *The Olmstead Holdings*

Justice Ginsberg began the majority opinion with the clear statement:

This case concerns the proper construction of the anti-discrimination provision contained in the public services portion

RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 118 (Bruce D. Sales et al. eds., 2001).

60. *L.C. v. Olmstead*, 138 F.3d 893, 895 (11th Cir. 1998).

61. *Id.* at 905.

62. *Id.* at 902.

63. *Id.* at 905.

64. *Olmstead v. L.C.*, 527 U.S. 581, 596 n.8 (1999).

65. *Id.* at 596 n.7.

(Title II) of the Americans with Disabilities Act of 1990 (ADA). Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes.⁶⁶

The majority held that plaintiffs with disabilities were entitled to placement in community settings when 1) the State's treatment professionals determined that such placement was appropriate; 2) the transfer was not opposed by the individual; and 3) the placement could be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.⁶⁷

The majority went into some detail to explain why unnecessary segregation constituted discrimination under the ADA and its regulations.⁶⁸ It explored the damage that unjustified isolation caused both to the people so isolated and to the society that would continue to misunderstand and stigmatize them. Interestingly, Justice Ginsberg began with the greater social harm caused by unnecessary segregation: it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."⁶⁹ Justice Ginsberg followed this observation with citations from prior Supreme Court cases on racial and gender discrimination, underscoring the underlying similarity of race, sex, and disability discrimination.

Second, unjustified isolation harms those subjected to it by depriving them of opportunities for "every day life activities" that the

66. *Id.* at 587 (internal citations omitted).

67. *Id.* at 607.

68. *Id.* at 589–92. Perhaps ominously, the Court noted initially that "[w]e recite these regulations with the caveat that we do not determine their validity We do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization." *Id.* at 592. However, courts from pre-*Olmstead* days to the present have held that the integration regulation has the force of law. *See, e.g.*, *Helen L. v. Didario*, 46 F.3d 325, 332 (3d Cir. 1995); *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289, 313 (E.D.N.Y. 2009); *Brantley v. Maxwell-Jolly*, No: C 09-3798 SBA, 2009 U.S. Dist. LEXIS 91454, at *37 (N.D. Cal. Sept. 10, 2009); *Crabtree v. Goetz*, No. 3:08-0939, 2008 U.S. Dist. LEXIS 103097, at *64 (M.D. Tenn. Dec. 18, 2008).

69. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

rest of us take for granted, including “family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”⁷⁰

Finally, the court noted that people with mental disabilities were forced, as people without disabilities were not, to relinquish participation in community life, which they could have enjoyed with reasonable accommodations, in order to receive the medical services that they needed.⁷¹

The reasoning set out by the Court did not limit the concept of segregation by disability to institutional settings. Rather, “unjustified isolation, we hold, is properly regarded as discrimination based on disability.”⁷² Justice Ginsberg emphasized, over a dissent by Justice Thomas, that no comparison class was needed to make out a claim for discrimination under the ADA⁷³ and that

under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.⁷⁴

4. *The Olmstead Defenses*

The Court did permit states to assert a defense when a claim for community integration would fundamentally alter the state’s services and programs.⁷⁵ As an example of a potentially successful defense, the Court noted that where a state could show that it had “a comprehensive, effectively working plan for placing qualified

70. *Id.*

71. *Id.*

72. *Id.* at 593.

73. *Id.* at 598.

74. *Id.* at 587.

75. *Olmstead*, 527 U.S. at 605. Although only four justices concurred in this portion of the opinion, lower courts have consistently read it as a holding of *Olmstead*. See, e.g., *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 619 n.3 (9th Cir. 2005).

individuals with disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable modifications standard would be met."⁷⁶ For ten years after *Olmstead*, litigation centered on the scope and meaning of the defense to community integration created by the Supreme Court.

D. Court Decisions Regarding the Integration Mandate After Olmstead

1. The First Decade of Court Decisions: The Meaning of "Fundamental Alteration"

As noted in the introductory section to this article, virtually all of the cases after *Olmstead* involved attempts to place people from individual institutions into the community. The major legal controversies raised by these cases involved interpretation of the fundamental alteration defense. Could a claim for integrated services be defeated simply by the assertion that it might involve the expenditure of additional state funds?⁷⁷ Was the existence of a so-called *Olmstead* plan an absolute defense?⁷⁸ What were the components of an *Olmstead* plan?⁷⁹ Did the absence of an *Olmstead* plan defeat a fundamental alteration defense? At what pace, over what period of time, encompassing what populations, did the State have to move in order to fulfill its responsibilities under the ADA to its disabled citizens?⁸⁰ How were the complex financial components involved in a fundamental alteration defense to be analyzed?

76. *Olmstead*, 527 U.S. at 605–06.

77. The answer to that question is no. See *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151 (3d Cir. 2005); *L.C. v. Olmstead*, 138 F.3d 893, 902 (11th Cir. 1998); *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294 (D. Conn. 2008). In fact, Congress itself had anticipated this defense, and noted that "[t]he fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services" H.R. REP. NO. 101-485(III), at 50 (1990), as reprinted in 1990 U.S.C.A.N. 445, 473.

78. See *infra* notes 288, 289.

79. *Id.*

80. *Williams v. Wasserman*, 164 F. Supp. 2d 591 (D. Md. 2001).

In some cases, questions were raised as to whether the absence of a recommendation by state professionals meant that individuals were not “otherwise qualified” to move to the community. What did it mean if the state professionals did not bother to recommend people who were appropriate for community placement because they knew no placements were available or because of pressure from family members?⁸¹

Because these cases were brought on behalf of people who were in institutions, or at risk of being institutionalized, one issue that did not receive much attention was the meaning of “segregation” and the requirement that services be integrated. The general belief shared by advocates was that requiring the State to discharge people from institutions into the community would result in the creation of a more integrated system.⁸² But in the decade following *Olmstead*, it became increasingly clear that many state mental health and developmental disability systems operated within a framework that offered “community” services in a context of control and segregation, even after discharge from formal institutional settings. People who lived in what was euphemistically called “the community” still lived regimented lives with other disabled people, had little control over the most mundane decisions of their lives, and had little or no interaction with non-disabled people.⁸³ Although truly integrated residential and day services such as supported housing and supported employment existed and had been funded by states for years, the demand for these services far outpaced the funding they received.⁸⁴

81. See *Charles Q. v. Houstoun*, No. 1:CV-95-280, 1996 U.S. Dist. LEXIS 21671 and 21681 (M.D. Pa. Apr. 22, 1996); *Messier v. Southbury Training Sch.*, 562 F. Supp.2d 294 (D. Conn. 2008).

82. See, e.g., Samuel R. Bagenstos, *Justice Ginsberg and the Judicial Role in Expanding “We the People,”: The Disability Rights Cases*, 104 COLUM. L. REV. 49, 54–58 (2004); Neil S. Butler, *In the Most Appropriate Setting: The Rights of Mentally Disabled Individuals Under the Americans with Disabilities Act in the Wake of Olmstead v. L.C.*, 49 CATH. U. L. REV. 1021 (2000); Joanne Karger, *Don’t Tread on the ADA: Olmstead v. L.C. ex rel. Zimring and the Future of Community Integration for People with Mental Disabilities*, 40 B.C. L. REV. 1221 (1999); Jennifer Mathis, *Community Integration of Individuals with Disabilities: An Update on Olmstead Implementation*, 35 CLEARINGHOUSE REV. 395 (2001).

83. See, e.g., *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009).

84. Mank, *supra* note 53, at 9.

2. DAI v. Paterson: *The Meaning of Segregation*

Thus in many cases, so-called community services were merely replications of institutional life. In New York, many people who had been discharged from state institutions were funneled into large congregate facilities known as adult homes.⁸⁵ Ironically, these adult homes were sometimes actually larger and more regimented than the institutions from which people had been discharged.⁸⁶ The *New York Times* ran a prize-winning expose of the squalid conditions in which people lived, the profits made by operators of the homes, and the cozy arrangements between the operators of the adult homes and Medicaid providers who billed for services to the residents—services that the residents may not have wanted or needed.⁸⁷ In 2001, a successful lawsuit was brought on behalf of adult home residents who had been subjected to unnecessary prostate cancer surgery in order to enrich adult home operators.⁸⁸

In 2003, a group of advocates challenged adult homes as violating the integration mandate of the Americans with Disabilities Act.⁸⁹ This case, brought by the Bazelon Center for Mental Health Law, Disability Advocates Inc., the private law firm of Paul Weiss Rifkin, the Urban Justice Center, New York Lawyers for the Public Interest, and MFY Legal Services, challenged the largest of the so-called “impacted” adult homes in New York City, for-profit residences with more than 120 residents, of whom at least 25% or 25, whichever was fewer, received mental health services.⁹⁰ Plaintiffs claimed that virtually no one with a psychiatric disability was appropriately housed in the “impacted adult homes” targeted by the litigation,⁹¹ but

85. *DAI I*, 598 F. Supp. 2d 289.

86. *Id.*

87. See the *Broken Homes* series by Clifford J. Levy: Clifford J. Levy, *For Mentally Ill, Death and Misery*, N.Y. TIMES, Apr. 28, 2002, at A1; Clifford J. Levy, *Here, Life Is Squalor and Chaos*, N.Y. TIMES, Apr. 29, 2002, at A1; and Clifford J. Levy, *Voiceless, Defenseless, and a Source of Cash*, N.Y. TIMES, Apr. 30, 2002, at A1.

88. *Bowen v. Rubin*, 01-CV-0070, 2002 U.S. Dist. LEXIS 25283 (E.D.N.Y. May 17, 2002).

89. *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009).

90. *Id.* at 187.

91. *Id.* at 197.

rather that all or virtually all persons currently housed in adult homes could be served in supported housing.⁹²

On Feb. 19, 2009, Judge Garaufis issued a 112 page opinion denying defendant's motion for summary judgment, holding that the integration mandate required providing services that offered not simply an opportunity to interact with people without disabilities, but the maximum opportunity to do so.⁹³ On September 8, 2009, after a five week bench trial, the judge agreed that defendants discriminated against the residents of the largest impacted adult homes in New York City by failing to provide them with services in the most integrated setting appropriate to their needs, and ordered defendants to come up with a remedial plan.⁹⁴ The judge found that these allegedly "community" residences were actually institutions, but also held that plaintiffs did not have to show that their services were provided in institutions to prevail under an integration mandate claim.⁹⁵ Rather, all they had to show was that they were not receiving services in the most integrated setting, that is, the setting that maximized their ability to interact with non-disabled people.⁹⁶

In finding that adult homes were institutions, the judge looked to their large size, the control they exercised over every aspect of residents' lives, their isolation from non-disabled people, and their lack of individualization and individualized services.⁹⁷ These are also all characteristics of sheltered workshops. The judge rejected defendant's arguments that adult homes did not violate the integration mandate and that adult home residents were not "otherwise qualified" to live in supported housing because of the

92. *Id.* at 219.

93. *Id.* at 184.

94. *DAI II*, 653 F. Supp. 2d 184. The judge permitted defendant to offer its own remedial plan initially, but on March 1, 2010, ruled that "instead of making a good faith proposal, defendants offered a plan that scarcely began to address" the violations found by the court, and therefore the court adopted much of the plaintiff's proposed remedial order. *DAI v. Paterson*, No. 03-CV-3209, 2010 U.S. Dist. LEXIS 17949, at *4 (E.D.N.Y. Mar. 1, 2010).

95. *Id.* at 187.

96. *Id.*

97. *Id.* at 290.

severity of their disabilities and their failure to apply to live in supported housing.⁹⁸

On March 1, 2010, the court issued an opinion rejecting the defendants' proposed remedial plan and requiring them "to develop at least 1500 supported housing units per year until there is sufficient capacity for all plaintiff's constituents who desire such housing, and no fewer than 4,500 units in total."⁹⁹ In his accompanying remedial order¹⁰⁰ the judge ordered that all adult home residents who desired housing in supported housing be supplied with such housing within a four year period¹⁰¹ and approved an "in-reach" educational effort to assure that adult home residents were aware of the choices available to them.¹⁰²

II. VOCATIONAL AND EMPLOYMENT SERVICES FOR PEOPLE WITH DEVELOPMENTAL AND COGNITIVE DISABILITIES

A. *Models of Employment Services for People with Disabilities*

1. *The Sheltered Workshop Model*

The sheltered workshop model is characterized by repetitive piecework, which has been subcontracted to the sheltered workshops by companies that never interact with the disabled employees performing the work.¹⁰³ Some sheltered workshops also create "make work" for their clients when contracted work is not available, or have them play games appropriate for children, such as alphabet bingo.¹⁰⁴

98. *Id.* at 257.

99. Disability Advocates Inc. v. Paterson, No. 03-CV-3209, 2010 U.S. Dist. LEXIS 17949, at *22 (E.D.N.Y. Mar. 1, 2010) (DAI III).

100. Order, Disability Advocates Inc. v. Paterson, No. 03-CV-3209, available at www.bazelon.org/incourt/docket/DAI/DAIOrder_on_remedy3-1-10.pdf.

101. The judge approved exceptions for three categories of residents: those with severe dementia, high levels of nursing needs, or those who were likely to cause imminent danger to themselves or others. *Id.* at 7–8.

102. *Id.*

103. LUTFIYYA, ROGAN & SHOULTZ, *supra* note 15.

104. SHAPIRO, *supra* note 32, at 249.

Sheltered workshops are by definition “sheltered,” i.e. segregated from contact with the public.¹⁰⁵ They have generally involved less than minimum wage work, and often lacked any of the legal protections associated with traditional employment in the workforce, such as unemployment compensation,¹⁰⁶ the ability to unionize,¹⁰⁷ or worker’s compensation.¹⁰⁸ Lacking the benefits of traditional employment, they also lack the hallmarks of therapy or treatment: the piecework is not individualized to the abilities, talents or preferences of the consumer but is determined by the subcontracts negotiated by the workshop, and there is little evidence or expectation of progress from the segregated to integrated settings.¹⁰⁹

Almost all of these characteristics are the result of a complex federal, state, and private funding and regulatory structure, including

105. Rosen et al., *supra* note 22 (exploring the meaning of “sheltered”); U.S. GEN. ACCOUNTING OFFICE, SPECIAL MINIMUM WAGE PROGRAM, CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 10 (2001), *available at* <http://www.gao.gov/new.items/d01886.pdf> [hereinafter GAO REPORT (2001)]; LUTFIYYA, ROGAN & SHOULTZ, *supra* note 15.

106. For example, § 3309(b)(4) of the Federal Unemployment Tax Act, 28 U.S.C. § 3309 (2006), permits states to exclude sheltered workshops from coverage under state unemployment compensation programs (service performed in a facility for purpose of carrying out program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired mental or physical capacity cannot readily be absorbed into the competitive labor market). *See* Tyler v. Smith, 472 F. Supp. 2d 818, 825 (M.D. La. 2006) (“Likewise, this Court holds that the ADA and RA are not violated by FUTA’s characterizing, for purposes of section 3309(b)(4), that certain disabled persons are within the category of individuals who receive services from entities which are covered by the exemption.”).

107. Sheltered Workshops of San Diego, Inc., 126 N.L.R.B. 961 (1960). Since 1960, some sheltered workshops have been required to permit unions and others have remained protected, based on an individualized inquiry. *See supra* note 16.

108. Although each state has its own workers’ compensation law, many states exempt employees of sheltered workshops. *See, e.g.,* N.Y. MENTAL HYG. LAW § 33.09(c) (McKinney 1989) (exempting employees of sheltered workshops from workers compensation requirements but permitting an employer to elect to cover them under workers’ compensation); CAL. GOV’T CODE § 12926 (West 2005) (excludes from definition of “employee” for purposes of discrimination law any individual employed in a sheltered workshop). Some states, including those like Missouri that are increasing their support of sheltered workshops, require sheltered workshops to maintain workers compensation insurance. *See* MO. CODE REGS. ANN. tit. 5, § 70-770.010(2)(D) (1999).

109. Thomas Simmons & Robert Flexer, *Business and Rehabilitation Factors in the Development of Supported Employment Programs for Adults with Developmental Disabilities*, J. REHABILITATION, Jan.–Mar. 1992, at 35, *available at* 1992 WLNR 4695411; *see also* HELP Hearing, *supra* note 15; GAO REPORT (2001), *supra* note 105, at 11; Peter Blanck, Helen A. Scharz & Kevin M. Scharz, *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, 1041 (2003).

the federal Departments of Education, Labor, and Health and Human Services; state agencies for individuals with cognitive, developmental and emotional disabilities; and a federal statute known as the Javits-Wagner-O'Day-Act (JWOD).¹¹⁰

The Javits-Wagner-O'Day Act was originally intended to fund segregated work for blind people who could not get work in mainstream employment, and after 1971¹¹¹ funded work for people with any disability sufficiently severe to preclude competitive employment. In order to qualify for the benefits of the Javits-Wagner-O'Day Act,¹¹² an employer must employ primarily (seventy-five percent) workers with disabilities.¹¹³ While technically, this does not require an absolutely segregated environment, as a practical matter, sheltered workshops do not involve interactions with people without disabilities. Historically, segregating persons with disabilities was considered a protective mechanism that allowed them to safely experience the benefits of a work environment.¹¹⁴ Today's sheltered workshops reflect these origins, but have not evolved to fit in a culture that has come to appreciate the ability and the legal right of individuals with disabilities to work successfully in an integrated environment, even if employers must make reasonable accommodations to enable them to do so.¹¹⁵

110. Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46–48c (1993).

111. Only blind people received the benefit of this substantial federal program until 1971, when the Javits-Wagner-O'Day Act was amended to include people with severe disabilities.

112. The Javits-Wagner-O'Day program has been known as "AbilityOne" since 2006. First passed in 1938 as the Wagner-O'Day Act to benefit blind people, the Act requires the federal government to set aside some contracts for non-profits that employ people with disabilities. Those contracts include such things as manufacturing uniforms, canteens, and chemical suits for the U.S. military, and janitorial services at federal buildings. This has become a multi-billion dollar industry.

113. Javits-Wagner-O'Day Act, 41 U.S.C. § 48b(3)(C) (1976).

114. Rosen et al., *supra* note 22.

115. When it passed the Americans with Disabilities Act in 1990, Congress found that isolation and segregation of people with disabilities was a national problem, which persisted in critical areas including employment, and that the "nation's proper goals" for individuals with disabilities were "full participation" "equality of opportunity" and "independent living." 42 U.S.C. § 12101(2), (3), (7) (2006). The Americans with Disabilities Act requires employers to make "reasonable accommodations" in order to integrate employees with disabilities into the workforce. 42 U.S.C. § 12112(b)(5)(A) (2006). *See also* Blanck, Schartz & Schartz, *supra* note 109, at 1033, 1039.

2. *History of Sheltered Workshops*

Although sheltered workshops had existed in Europe for centuries, the first American sheltered workshop was opened in 1838 by the Perkins Institute for the Blind in Massachusetts.¹¹⁶ Other institutes and schools serving people who were blind soon followed the Perkins model and built their own workshops.¹¹⁷ All of these workshops had one goal: to provide occupational skills training that would allow people who were blind to participate in mainstream workforce.¹¹⁸ Nevertheless, despite training in manufacturing brooms, chair bottoms and mattresses, graduates were not able to secure employment.¹¹⁹ The workshop graduates returned to the shops seeking employment to support themselves, and the workshops evolved from training centers to assist people who were blind into the mainstream workforce into long-term segregated employment.¹²⁰ This was a role that the institutes and schools neither desired nor could afford.¹²¹ Workshop doors at schools and institutions were often closed within a few years of opening, although the Perkins workshop lasted until 1954.¹²²

In 1887, California funded a workshop, the Industrial Home of Mechanic Trades for the Blind in California, which duplicated the original goal of sheltered workshops in the East, to train people who were blind for jobs in the mainstream workforce.¹²³ Several years later, the Governor of California announced that this goal also failed.¹²⁴

But the concept of workshops as providing both training and long-term employment centers remained and was perpetuated through

116. NATHAN NELSON, WORKSHOPS FOR THE HANDICAPPED IN THE UNITED STATES: AN HISTORICAL AND DEVELOPMENTAL PERSPECTIVE 7 (1971).

117. *Id.* at 8.

118. *Id.*

119. *Id.* at 26–28.

120. *Id.* at 26.

121. *Id.* at 8.

122. NELSON, *supra* note 116, at 27.

123. *Id.* at 28.

124. *Id.* at 28–29; see also Jonathan C. Drimmer, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1363–66 (1993).

independent, stand-alone workshops such as the Pennsylvania Working Home for Blind Men, which opened in 1874.¹²⁵ Over time, sheltered workshops became indelibly associated with the premise and principle that people who worked in them were so severely handicapped that they were incapable of being trained to work in the competitive workforce.¹²⁶ Later, the idea that the people in these workshops were in need of shelter or protection also developed: in 1915, the first sheltered workshops for people with tuberculosis was opened in New York, to give them work in a more protected and less pressured setting.¹²⁷

Thus, when injured World War I and World War II veterans spurred the development of vocational rehabilitation, the concept of rehabilitating veterans with injuries and amputations to return them to the competitive workforce, developed for many years in a parallel track and without reference to sheltered workshops.¹²⁸ While the first federal vocational rehabilitation act was passed in 1918 to assist injured soldiers returning from World War I, and these services were expanded in 1920 to the civilian population, the services contemplated did not include sheltered workshops, because sheltered workshops were for people without hope of ever competing successfully in mainstream employment.¹²⁹

Although today sheltered workshops primarily serve people with developmental disabilities or mental retardation, this is a relatively recent occurrence in the history of sheltered workshops. For people with developmental disabilities, sheltered workshops were the outgrowth of efforts by parents whose children were excluded from public school settings.¹³⁰ These programs had added workshop services starting in the 1950s,¹³¹ and the workshops quickly came to

125. NELSON, *supra* note 116, at 28.

126. *Id.* at 17.

127. *Id.* at 15.

128. Smith-Sears Vocational Rehabilitation Act of 1918, ch. 107, 40 Stat. 617.

129. The Smith-Sears Vocational Rehabilitation Act, *id.*, did not apply by its terms to civilians; the Smith-Fess Act expanded vocational services to disabled civilians. Ch. 219, 41 Stat. 735 (1920).

130. NELSON, *supra* note 116, at 11.

131. The workshop established by the King's County, Washington branch of United Cerebral Palsy in 1952 was one of the first workshops of its kind for individuals with cerebral palsy, while San Francisco Aid Retarded Children opened its workshop doors in 1951. See NELSON, *supra* note 116, at 21;

dominate these programs.¹³² Just as parent-run workshops proliferated, public schools began to accept disabled students.¹³³ Schools slowly phased in the enrollment of children with mental retardation, however, taking students with the most academic potential first while leaving behind those with the least.¹³⁴ Parent programs responded by shifting their focus to serve individuals with more severe mental retardation.¹³⁵ These students began to reach the limits of their educational abilities and the sheltered workshop programs added paid work and social opportunities.¹³⁶ At many parent-run workshops the educational functions essentially ceased, leaving a workshop for the mentally retarded.¹³⁷ Such workshops received a significant financial boost from grants under the Amendments, and workshops for people with mental retardation became the largest type of sheltered workshop in the U.S.¹³⁸

Although the Javits-Wagner-O'Day Act results in billions of dollars flowing into workshops,¹³⁹ and some workshop workers are receiving minimum wage or better, many workers continue to receive sub-minimum wages.¹⁴⁰ The salaries of workshop CEOs, however, are a different matter. In March 2006, the Oregonian newspaper broke a scandal of executive abuses of JWOD sub-contract funds at

EMPLOYMENT & TRAINING ADMIN., DEP'T OF LABOR, SHELTERED WORKSHOP STUDY: A NATIONWIDE REPORT ON SHELTERED WORKSHOPS AND THEIR EMPLOYMENT OF HANDICAPPED INDIVIDUALS 11 (1977) [hereinafter SHELTERED WORKSHOP STUDY].

132. See NELSON, *supra* note 116, at 11.

133. See *id.*

134. See *id.*

135. See *id.*

136. See SHELTERED WORKSHOP STUDY, *supra* note 131.

137. *Id.*

138. NELSON, *supra* note 116, at 17.

139. See ACQUISITION & TECHNOLOGY, THE ABILITYONE PROGRAM (2009), http://www.abilityone.gov/documents/AT_AbilityOne_Info_Sheet.pdf [hereinafter ABILITYONE INFO SHEET] (explaining that the Department of Defense alone procured more than \$1.5 billion of goods and services in fiscal year 2008).

140. JOHN BUTTERWORTH, FRANK A. SMITH, ALLISON C. HALL, ALBERTO MIGLIORE & JEAN E. WINSOR, INST. FOR COMMUNITY INCLUSION (UCEDD), STATEDATA: THE NATIONAL REPORT ON EMPLOYMENT SERVICES AND OUTCOMES (2008), available at http://www.communityinclusion.org/pdf/statedatabook_F.pdf [hereinafter STATEDATA]; see also David Mank, Andrea Cioffi & Paul Yovanoff, *Supported Employment Outcomes Across a Decade: Is There Evidence of Improvement in Quality of Implementation?*, 41 MENTAL RETARDATION 188 (2003).

nonprofits.¹⁴¹ While most of the 45,000 workers with disabilities working at the time on JWOD contracts earned less than the federal minimum wage, and the national average salary for a nonprofit executive was \$126,000,¹⁴² many sheltered workshop CEOs were earning upwards of \$350,000 a year.¹⁴³ Robert E. Jones, CEO of the Texas workshop the National Center for the Employment of the Disabled (NCED), the largest JWOD contractor, claimed not to receive a salary, but his consulting company was paid \$4.6 million, loaned another \$1.6 million, and pledged assets in exchange for discounted CEO Lear jet travel.¹⁴⁴ Another CEO was paid \$715,000 per year.¹⁴⁵ When the abuses came to light, lawsuits and arrests followed. Jones settled a lawsuit with the NCED in 2007 for allegedly defrauding them of \$13 million, and in 2008 was arrested by the FBI on charges of fraud and embezzlement.¹⁴⁶

The Oregonian investigation followed the October 2005 Senate Health, Education, Labor and Pensions (HELP) Committee hearings on the same issue.¹⁴⁷ According to the Committee's findings, the Javits-Wagner-O'Day Act resulted in undesirable employment outcomes for its workers and enabled excessive compensation, perquisites, and self-dealing for its executives.¹⁴⁸ According to the Committee's report, a desirable employment outcome is competitive placement for workers, but the JWOD program creates jobs for persons with disabilities while increasing incentives to keep productive workers in a workshop.¹⁴⁹ In 2004, the JWOD program

141. Special Coverage, Charity Series, http://blog.oregonlive.com/oregonianspecial/charity_series/index.html (last visited Mar. 13, 2010).

142. Dave Reynolds, *Federal Programs Help Executives, Fail Workers with Disabilities*, RAGGED EDGE ONLINE, Oct. 26, 2005, available at <http://www.raggededgemagazine.com/departments/closerlook/000567.html>.

143. Jeff Kosseff, Bryan Denson & Les Zaitz, *Charity Leaders Prosper as "Disabled" Is Redefined*, OREGONIAN, Mar. 5, 2006, at A01, available at 2006 WLNR 3741352.

144. *HELP Hearing*, *supra* note 15, at 11, 12.

145. *Id.*

146. Bryan Denson, *GAO: Jobs Act Needs Oversight*, OREGONIAN, Jan. 30, 2007, at A01, available at 2007 WL 1838013.

147. *HELP Hearing*, *supra* note 15, at 11, 12.

148. *Id.*

149. *Id.* at 10.

increased jobs for individuals with disabilities by 22% but its placement rate fell to a low of 5.2%.¹⁵⁰

Particularly noteworthy was the Committee's finding that the Javits-Wagner-O'Day program does not fulfill congressional intent as evidenced by the ADA and Rehabilitation Act, which promote integration of individuals with disabilities.¹⁵¹ The Committee found that Javits-Wagner-O'Day should increase competitive employment opportunities and increase oversight on how JWOD funds are used.¹⁵²

Since the Committee's report, there have been some changes. The Javits-Wagner-O'Day oversight committee received additional funds to hire compliance staff.¹⁵³ Without significant reform, however, the JWOD will continue to fail to promote the congressional aim of competitive placement for sheltered workers while keeping the current workshop model entrenched in federal law.

3. *The Supported Employment Model*

First developed in the late 1960s and early 1970s,¹⁵⁴ the key components and values of supported employment are almost precisely the opposite of the assumptions on which sheltered workshops operate. These values, as set out in one state policy, include:

- People with disabilities are capable of being employed.
- People with disabilities who want to work have the same right to work and earn a living wage as people who do not have a disability.
- Facilitating community employment allows people (who have traditionally been excluded from community life) the fullest community participation.

150. *Id.*

151. *Id.* at 12.

152. *Id.* at 13.

153. Bryan Denson, *Congress Aims to Fix Job Program for Disabled*, OREGONIAN, Nov. 17, 2006, at A01, available at 2006 WLNR 20040173.

154. Joe Marrone & Martine Gold, *Supported Employment for People with Mental Illness: Myths & Facts*, J. REHABILITATION, Oct.-Dec. 1994, at 38, available at 1994 WLNR 4950590.

- People learn a job best on the job, not in simulated segregated environments.
- Employment options are based upon preferences, skills and needs of the applicant.
- Jobs may be carved or created to fulfill the specific needs of an employer and the specific skills of an employee.
- Employer/employee consultation and support is provided after a job has been found for as long as the employer and employee feel it is necessary.¹⁵⁵

Supported employment supports workers with disabilities in integrated environments at minimum wages or better.¹⁵⁶ The entire focus of supported employment is to locate competitive employment for their clients and provide them with the support necessary to perform those jobs, rather than jobs reserved for workers with disabilities.¹⁵⁷ Job placements are the results of individualized assessments, rather than sheltered workshop contracts.¹⁵⁸ The support provided is individualized to the client's needs, and, as indicated above, the support lasts for as long as the client needs it.¹⁵⁹

Beginning in 1986 with amendments to the Rehabilitation Act,¹⁶⁰ the federal government has increasingly funded supported employment through the Rehabilitation Act.¹⁶¹ This has continued with parallel funding of segregated employment through Javits-

155. N.D. DEP'T OF HUMAN RES., NORTH DAKOTA VOCATIONAL REHABILITATION SUPPORTED EMPLOYMENT GUIDELINES AND PAYMENT RATES (2007), <http://www.nd.gov/dhs/rcs/docs/guidelines-payment-rates.pdf>.

156. See U.S. Dep't of Labor, Office of Disability Employment Pol'y, What is Supported Employment?, <http://www.dol.gov/odep/archives/fact/supportd.htm> (last visited Feb. 20, 2010) (defining the supported employment model to include work that is "compensated with the same benefits and wages as other workers in similar jobs receive").

157. *Id.* ("Supported employment facilitates competitive work in integrated work settings.").

158. *Id.*

159. *Id.*; see also Pat Rogan and Stephen Murphy, *Supported Employment and Vocational Rehabilitation: Merger or Misadventure?*, J. REHABILITATION, Apr.-June 1991, at 39, available at 1991 WLNR 4401619.

160. Pub. L. No. 99-506, 100 Stat. 1807 (1986).

161. See generally STATEDATA, *supra* note 140.

Wagner-O'Day.¹⁶² Congress has recognized that the employment it funds through JWOD is segregated in various Congressional documents.¹⁶³ The Rehabilitation Act's definition of the recipients of supported employment services has changed over the years from "persons with developmental disabilities for whom competitive employment at or above the minimum wage is unlikely" to "individuals with severe handicaps for whom competitive employment has not traditionally occurred."¹⁶⁴

The Javits-Wagner-O'Day Act ensures that sheltered workshops will remain a multi-billion dollar a year industry, although very recently the federal oversight agency that distributes JWOD dollars has started to evolve, passing an aspirational statement that supported integrated employment and jobs paying the minimum wage or better.

4. Vocational Services for People with Disabilities Today: Perspective from the States

Sheltered workshops are massively funded by federal government requirements of federal contractors through Javits-Wagner-O'Day;¹⁶⁵ they are also heavily subsidized by state agencies serving people with

162. See generally ABILITYONE INFO SHEET, *supra* note 139.

163. See, e.g., H.R. REP. NO. 105-635 (1998); 134 CONG. REC. E1308 (daily ed. Apr. 22, 1988) (statement of Rep. Tony Coelho) ("[W]hen prejudice dictates that the handicapped can be productively employed only in separate sheltered workshops . . .").

164. The definition of "supported employment" in the Rehabilitation Amendments Act of 1984 provides:

Paid employment which (i) is for persons with developmental disabilities for whom competitive employment at or above the minimum wage is unlikely, and who, because of their disabilities, need intensive, ongoing support to perform in a work setting; (ii) is conducted in a variety of settings, particularly work sites in which persons without disabilities are employed; and (iii) is supported by any activity needed to sustain paid work by persons with disabilities, including supervision, training, and transportation.

Developmental Disabilities Act of 1984, Pub. L. No. 98-527, 98 Stat. 2662. Compare that definition with the 1986 reauthorization of the Rehabilitation Act of 1973, which also defined the term "supported employment" but changed the definition to

. . . competitive work in integrated work settings (A) for individuals with severe handicaps for whom competitive employment has not traditionally occurred, or (B) for individuals for whom competitive employment has been interrupted or intermittent as a result of a severe disability, and who, because of their handicap, need ongoing support services to perform such work.

Rehabilitation Amendments Act of 1986, Pub. L. No. 99-506, § 103, 100 Stat. 1807.

165. ABILITYONE INFO SHEET, *supra* note 139.

mental retardation and developmental disabilities using both federal funds under the Rehabilitation Act and state funds for programs for people with developmental disability.¹⁶⁶ Many states have, with greater and lesser degrees of speed and commitment, been evolving from the sheltered workshop model to the supported employment model.¹⁶⁷ Studies have shown that when foundations or pilot programs have been established to assist the transition from sheltered workshops to more innovative and integrated approaches, the sheltered workshop staff have resisted the change in culture.¹⁶⁸

Nevertheless, many states have made substantial progress. Vermont banned the use of state funds to support sheltered workshops in the late 1990s.¹⁶⁹ Some states have cut back on sheltered workshop funding during the fiscal crises of 2008-2009.¹⁷⁰ Almost every state except Vermont continues to fund and subsidize sheltered workshops, especially in conjunction with other segregated habilitation and residential programs.¹⁷¹ For example, in New York,

[t]here are currently 52,229 individuals enrolled in segregated employment programs, including sheltered workshops, through OMRDD [Office of Mental Retardation and Developmental Disability] alone, with a total cost to the state of more than \$1 billion. The cost per person in a segregated program is \$21,309 compared to \$5,291 per person in supported employment.¹⁷²

A number of states, including Washington, Colorado, and New Mexico have embarked on initiatives to broaden supported

166. See generally STATEDATA, *supra* note 140.

167. See Alison Cohen Hall, John Butterworth, Dana Scott Gilmore & Deborah Metzel, *High-Performing States in Integrated Employment*, INST. FOR COMMUNITY INCLUSION, Feb. 2003, http://www.communityinclusion.org/article.php?article_id=121.

168. E.g., Albert Migliore, Teresa Grossi, David Mank & Patricia Rogan, *Why do Adults with Intellectual Disabilities Work in Sheltered Workshops?*, 28 J. VOCATIONAL REHABILITATION 29 (2008).

169. See STATEDATA, *supra* note 140, at 305.

170. See generally *id.*

171. See generally *id.*

172. N.Y. ASS'N ON INDEP. LIVING, 2009 DISABILITY PRIORITY AGENDA, <http://www.docstoc.com/docs/24291920/Disability-Priority-Agenda---New-York-Association-on-Independent> (last visited Feb. 20, 2010).

employment.¹⁷³ Other states, including, Arizona, Colorado, Montana, and Nevada, have mandated that sheltered workshop employees be paid the minimum wage.¹⁷⁴ Although the use of supported employment is increasing, the use of sheltered workshops is not necessarily decreasing to correspond with the increase in use of supported employment.

As part of this article, we surveyed, either through email or telephone interviews with staff, or through email requests which resulted in mailings of relevant material, State staff in Alaska, California, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oregon, Mississippi, Washington, West Virginia and Wyoming.¹⁷⁵ All of these states continue to have at least some sheltered or segregated employment services for people with disabilities.¹⁷⁶ Idaho was most explicit about greater funding for

173. John Butterworth & Alison Cohen Hall, *Innovations in Employment Supports: Washington State's Division of Developmental Disabilities*, INSTITUTE FOR COMMUNITY INCLUSION, (Aug. 2003), www.communityinclusion.org/article.php?article_id=140; Jean E. Winsor, John Butterworth & Alison Cohen Hall, *Innovations in Employment Supports: Colorado's State Division of Developmental Services*, (July 2005), www.communityinclusion.org/article.php?article_id=160&type=topic&id=4.

174. Catherine Komp, *Groups Clash over Ariz. Minimum-Wage Exemption*, NEWSTANDARD, Jan. 4, 2007, available at <http://newstandardnews.net/content/index.cfm/items/4044>. See Ariz. Office of the Attorney General, Ariz. Op. Att'y Gen. 107-002 (R06-039) (Feb. 7, 2007), available at www.azag.gov/opinions/2007/107-002.pdf ("Proposition 202 (Minimum Wage Law) and the Disabled Worker").

175. Telephone and E-mail Interviews with Donna Ashworth, West Virginia (July 24, 2009); Chris Anthony, Louisiana, Rehabilitation Services Bureau Administration (July 22, 2009); Lynn K.K. Fischer, Idaho, Extended Employment Services Specialist (July 21, 2009); Susan Foard, Hawaii, Vocational Rehabilitation Assistant Administrator (July 20, 2009); Frank C. Lloyd, Assistant Commissioner, Vocational Rehabilitation, Nebraska (July 20, 2009); Jim McIntosh, Wyoming (July 20, 2009); Gary Neely, Mississippi Department Rehabilitative Services (July 20, 2009); David A. Rees, Indiana, Social Services Coordinator, JRDS (Jan. 13, 2010); Lynnae M. Rutledge, Director of the Washington Division of Vocational Rehabilitation (July 21, 2009); John Sherman, Minnesota, Rehabilitation Services, Department of Employment and Economic Development (July 21–22, 2009); Jean Updike, Director of Employment (July 21, 2009); and Ronald C. Winter, M. Ed., Director, Office of Field Services, Division of Rehabilitation Services, Maryland (July 21, 2009); Stephanie Parrish Taylor, Administrator, Office of Vocational Rehabilitation Services, Department of Human Services, Oregon (July 21, 2009), and Charles W. Leggate of Montana Vocational Rehabilitation (July 24, 2009). Staff in Alaska, California, New Mexico, Kentucky and North Dakota sent state policy and regulatory materials by email, which are cited herein as a response to questions. Staff in Washington, Minnesota and Indiana sent materials and also gave generously of their time in answering questions. Email responses are on file with the author.

176. Sources *supra* note 175.

sheltered workshops than supported employment,¹⁷⁷ because, staff maintained, the client and family preferred what they called “work services” (sheltered employment).¹⁷⁸ This opinion is in marked contrast to the results of a 2007 survey on the work environment preferences of adults with intellectual disabilities in nineteen different workshops.¹⁷⁹ Seventy-four percent of the 210 people surveyed would prefer or be interested in competitive employment.¹⁸⁰

In Minnesota, a few clients are described as “grandfathered” into sheltered employment because they were working in sheltered employment prior to changes in the statutory mandate of vocational rehabilitation agencies to serve clients primarily through supported employment services.¹⁸¹ In Minnesota, an individual can combine both supported and sheltered employment, e.g. have a ten to twelve hour competitive job and use center-based work for more hours.¹⁸² One of the chief problems that emerged in these interviews was the common assertion that “anyone in supported employment must have long term financial supports from a county service (i.e. Medicaid waiver services) for us to agree to supported employment.”¹⁸³ Because supported employment services funded by vocational rehabilitation funds are limited to eighteen months,¹⁸⁴ if it is obvious that an individual will need supports for longer than eighteen months, many state staff we interviewed stated explicitly¹⁸⁵ or implicitly¹⁸⁶

177. “We rarely authorize more than a maximum of 20 hours *per month* supported employment or 25 hours *per week* for sheltered employment.” E-mail from Lynn K.K. Fischer, Extended Employment Services Specialist (July 22, 2009) (emphasis added).

178. The reason that clients preferred sheltered workshops were “working with friends, people they know through school and residential settings, regular and consistent schedule (Monday to Friday, 9–3 with weekends off), unlike much integrated employment, the sheltered workshop provides transportation and closer supervision, no site development is required so they can start sooner, and the job environment is more stable with less staff turnover. Communication with Lynn K.K. Fisher, *supra* note 177.

179. Alberto Migliore, David Mank, Teresa Grossi & Patricia Rogan, *Integrated Employment or Sheltered Workshops: Preferences of Adults with Intellectual Disabilities, Their Families, and Staff*, 26 J. VOCATIONAL REHABILITATION 5, 12 (2007).

180. *Id.*

181. Communication with John Sherman, *supra* note 175.

182. *Id.*

183. *Id.* This was explicitly supported by almost every other respondent to the survey.

184. 34 C.F.R. § 361.5(b)(54)(i) (2009).

185. In response to the question, “Are there any other criteria for supported employment?” the Mississippi staff person stated, “Well, as long as you meet the requirements under the regulations. One of them is that you must have a third party provider who will continue the supports after the VR case is

that such individuals would not be considered for supported employment unless they were receiving Medicaid-waiver services that could continue to supply needed supports after VR funding terminated. Since the federal-state Vocational Rehabilitation program does not permit states to use federal funds for individuals who will need ongoing support after placement, individuals who are not likely to have those ongoing supports are often turned away from supported employment.¹⁸⁷

Other commonly cited problems by staff were finding supported employment placements (Oregon),¹⁸⁸ the continuing bias of rehabilitation counselors toward sheltered employment (Minnesota) and the fact that even integrated jobs pay so little that they do not enable people to support themselves in independent, integrated residential settings (Minnesota).¹⁸⁹

Problems that emerged strikingly and consistently from the interview process were definitions or examples of integrated employment that sounded quite segregated, for example, in Washington, someone working alone as a janitor after hours in an empty building, or working by himself on a farm is considered to be engaged in integrated employment,¹⁹⁰ whereas in Virginia “supported employment” included “supported employment crews, enclaves, and

closed. Services cannot begin without that up front. Sometimes that provider is not available. Most states are having problems with that issue Keep in mind that funds for supported employment are limited due to the limited funds in the SE grant.” In Washington, criteria for supported employment include “the availability of long-term support to assist the customer in maintaining their employment.” Email from Lynnae M. Rutledge, *supra* note 175; *see also* Email from David A. Rees, *supra* note 175.

186. For example, in Washington, services called “extended services” are defined as “support services provided once the customer is stabilized on the job and DVR services are no longer needed to maintain satisfactory on-the-job performance. Extended services consist of specific services needed to maintain the customer in supported employment.” WASH. DIVISION OF VOCATIONAL REHAB., CLIENT SERVICES MANUAL ON SUPPORTED EMPLOYMENT, SUPPORTED EMPLOYMENT DEFINITIONS [hereinafter CLIENT SERVICES MANUAL].

187. 34 C.F.R. § 361.5(b)(54)(i) (2009); *see* E-mail from Lynnae M. Rutledge, *supra* note 175; E-Mail from David A. Rees, *supra* note 175.

188. Personal Communication from Stephanie Parrish Taylor, Administrator, Office of Vocational Rehabilitation Services, Department of Human Services, Oregon (July 21, 2009).

189. Personal communication from John Sherman, *supra* note 175.

190. CLIENT SERVICES MANUAL, *supra* note 186.

facility-based integrated settings.”¹⁹¹ In Montana “supported employment” includes enclaves.¹⁹²

II. CHALLENGES TO SEGREGATED EMPLOYMENT SERVICES UNDER TITLE II OF THE ADA

Most sheltered workshops are operated by private non-profit agencies.¹⁹³ But all are enabled to operate by the state agencies which contract with them and provide them with funding from a combination of state and federal sources, as well as the contracts mandated by federal law.¹⁹⁴ As in the *DAI v. Paterson* case, the best way to challenge the continued operation of segregated vocational settings is not to challenge any individual sheltered workshop or set of workshops, but to challenge the state policies and practices that fund unnecessarily segregated vocational services when people with disabilities would prefer to be involved in integrated supported employment programs.

As noted in the introduction, only one case has ever challenged a public entity for its funding of sheltered workshops.¹⁹⁵ But a number of older federal cases contemplated that a move from sheltered workshops to supported employment would be required by Section 504 and/or the ADA. In *Homeward Bound v. Hissom*, the judge ordered the State of Oklahoma to develop supported employment options for plaintiffs as part of the remedy.¹⁹⁶ More than fifteen years

191. “Facility-based integrated settings” is, in many, ways an oxymoronic term.

192. See Montana Department of Public Health and Human Services website, Supported Employment Services, <http://www.dphhs.mt.gov/dsd/workandotherdayservices/supportedemploymentservices.shtml> (last visited Jan. 22, 2010).

193. See Fact Sheet for AbilityOne, http://www.abilityone.org/media%20room/fact_sheet.html (last visited Mar. 1, 2010) (“The AbilityOne program uses the purchasing power of the Federal Government to buy products and services from participating community-based non-profit agencies dedicated to training and employing individuals with disabilities.”).

194. STATEDATA, *supra* note 140, at 10 (noting that “[s]tate . . . agencies remain the primary source of long-term funding” for employment services for intellectually and developmentally disabled individuals, and Medicaid is “the largest federal source of funding for day and employment services under the Home and Community Based Services Waiver program”).

195. *Schwartz v. Jefferson County*, No. 2004CV000091 (Jefferson County Cir. Ct. Feb. 24, 2004). Complaint and Motion for Class Certification on file with the author.

196. *Homeward Bound v. Hissom* Mem’l Ctr., No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987).

ago, the court in *ARC v. Schaefer* found that “[i]nstances of segregation do exist in sheltered workshops, whose place in the paradigm is being phased out.”¹⁹⁷

Sheltered workshops are not a unique and necessary component of a state’s vocational service system for people with disabilities. Many states have been trying to phase out segregated work environments, although success has been more limited in some states than others.¹⁹⁸ Both the federal government and the states have articulated for over a decade the principle that people with disabilities will be provided services in the most integrated setting appropriate to their needs, in response to decades of research and recommendations to phase out sheltered workshops by a number of scholars and policymakers in the field, including the National Council on Disability.¹⁹⁹ Research also indicates that most people with disabilities, offered the choice, would prefer to receive supported employment services than work in sheltered workshops.²⁰⁰

A. People Who Work in Sheltered Workshops and Seek Supported Employment Services Are Disabled

The identity, number, and legal status of plaintiffs are key to any litigation challenging sheltered workshops, as well as the definition of the plaintiff class, if any. There are a number of options regarding the identity of plaintiffs: an organizational plaintiff, by itself, as in *DAI v. Paterson*;²⁰¹ an organizational plaintiff plus individual

197. *ARC v. Schaefer*, 872 F. Supp. 689, 706 (D.N.D. 1995).

198. For example, Vermont has phased out state funding of sheltered workshops entirely. See STATEDATA, *supra* note 140 at 18 & tbl.5. Compare to Missouri, which is increasing funding for sheltered workshops to 24.8 million dollars in its 2010 budget. In Missouri, ninety-three sheltered workshops employ 7,500 clients. *First Lady Visits Sheltered Workshops*, Jan. 30, 2009, http://firstlady.mo.gov/newsroom/2009/First_Lady_visits_sheltered_workshops.

States which are making concerted efforts to increase supported employment services and decrease sheltered workshops include Washington and Connecticut. See STATEDATA, *supra* note 140.

199. NAT’L COUNCIL ON DISABILITY, ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE TWENTY-FIRST CENTURY (1996), <http://www.ncd.gov/newsroom/publications/1996/achieving.htm>.

200. Migliore et al., *supra* note 179, at 12.

201. *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289, 307–10 (E.D.N.Y. 2009) (finding that DAI could bring the action without establishing that any of its constituents suffered harm or were qualified for supported housing).

plaintiffs, a plaintiff class,²⁰² or a discrete number of individual plaintiffs.²⁰³

There appears to be little controversy that individuals served by sheltered workshops are “disabled” under the Americans with Disabilities Act. Their very placement in a sheltered workshop setting is the result of an assessment and conclusion by state professionals that they are substantially limited in the major life activity of working.²⁰⁴ Whether this perception is correct or is the product of disability discrimination is at the core of an ADA challenge to public entity funding of sheltered workshops, rather than supported employment for the named plaintiffs or (in the case of an organizational plaintiff) the plaintiff’s constituents.

B. Sheltered Workshop Clients Are Qualified for Supported Employment

Title II claims require that plaintiffs are not only be disabled but also “qualified” for the services they seek.²⁰⁵ This is the same as the integration regulation’s limitation that the disabled person is entitled to receive services in the integrated setting most appropriate to the needs of that individual.²⁰⁶ The Court in *Olmstead* held that states were entitled to rely on the reasonable judgments of state

202. See *Messier v. Southbury Training School*, 562 F. Supp. 2d 294 (D.Conn. 2008), a case which included a challenge to the exclusion of the plaintiff class from integrated employment services; and *Jackson v. Fort Stanton Hosp. and Training Sch.*, 964 F. 2d 980 (10th Cir. 1992) (In *Jackson*, the settlement agreement required measurement of the number of class members receiving integrated vocational services).

203. See *Schwartz v. Jefferson County*, No. 2004CV000091 (Jefferson County Cir. Ct. Feb. 24, 2004). The attorney in the Schwartz case began with four plaintiffs. One was working at a chicken farm sorting eggs, and could have worked more hours if the county had been willing to fund more hours of job support; she and another plaintiff developed medical problems that prevented them from working at all. Another plaintiff moved out of the county, leaving a single remaining plaintiff whose requests were accommodated by the county in a settlement, mooted the case. E-mail from Robert Pledl, Esq., civil rights attorney, Pledl & Cohn, Milwaukee, Wisconsin (Mar. 30, 2010).

204. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a)(2)(A), 122 Stat. 3553, 3555 (amending the ADA to include working as a major life activity). Note that some courts have raised questions about whether “working” should be considered a major life activity in Title I cases but that these courts are in the minority and that this question arises only in Title I cases in any event.

205. 42 U.S.C. § 12131(2) (2006).

206. *DAI I*, 598 F. Supp. 2d at 319 (finding the two elements to be the same).

professionals as to whether a prospective plaintiff was qualified for the integrated services he or she sought.²⁰⁷

But these judgments must actually be reasonable and based on professional assessment rather than simply the exigencies of available services or other pressures. Several courts have held that plaintiffs were entitled to show that a state professional's judgment was not based on clinical factors.²⁰⁸

As noted above, many state vocational rehabilitation agencies automatically *disqualify* individuals from even being considered for supported employment unless they are covered by a government program or have family that will continue to provide the necessary funding or support for supported employment after the eighteen month limitation on vocational rehabilitation funding of supported employment services has expired. Most state vocational rehabilitation employees interviewed for this article clearly believed that an individual was not "qualified" for supported employment unless he or she had extended service support available through Medicaid or other state or natural supports. This has nothing to do with an individual's actual ability to work in mainstream employment with the help of a job coach or other support. Rather, as in the case of *Helen L. v. DiDario*, it is a problem with different silos of state funding, where the funding for integrated services is insufficient compared to the disproportionate funding for segregated services.²⁰⁹

Professionals can and do disagree on assessments of the capabilities and qualifications of individuals with disabilities. If the professionals with whom the state contracted to provide supported employment were asked to assess prospective clients, their responses regarding the appropriateness of those clients for integrated services might be substantially different from the responses of state vocational rehabilitation or state mental retardation professionals.²¹⁰

207. *Olmstead v. L.C.*, 527 U.S. 581, 602 (1999).

208. *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294 (D. Conn. 2008); *Kathleen S. v. Dep't of Pub. Welfare of Pa.*, 10 F. Supp. 2d 460 (E.D. Pa. 1998); *Charles Q. v. Houston*, No. 1:CV-95-280, 1996 U.S. Dist. LEXIS 21671 (M.D. Pa. Apr. 22, 1996).

209. *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995).

210. *Migliore et al.*, *supra* note 179 (professionals tend to discourage integrated employment option and encourage sheltered workshops).

Another issue when considering a case involving a large number of people is whether each and every one of them has to show that he or she is qualified for the services sought. A number of courts have held that plaintiffs in class actions need not make this showing.²¹¹ In the remedial order in *Disability Advocates Inc v. Paterson*, the judge explicitly found that all adult home residents were entitled to be served in supported housing.²¹²

In fact, the very essence of the philosophy of supported employment is that all or virtually all people with disabilities can be served by supported employment programs. From this perspective, the way to show that a group of plaintiffs was “qualified” or that defendants’ judgment that they were not qualified was unreasonable, is to show that no material difference exists between the population of people served by sheltered workshops and those served in supported employment, which can be done by evaluating scientifically valid samples of each group.²¹³ This argument would be not so much about the qualifications of the plaintiffs but the flexibility and scope of supported employment services, which have since the late 1970s served extremely disabled individuals, including people just like those currently marooned in the segregated setting of sheltered workshops.²¹⁴

Defendants in *DAI v. Paterson* also argued that an individual could not be “qualified” to receive supported housing unless he or she had applied for it.²¹⁵ This argument was soundly rejected by the court,

211. *E.g.*, *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280 (E.D.N.Y. 2008).

212. Order, *Disability Advocates Inc. v. Paterson*, No. 03-CV-3209, available at www.bazelon.org/incourt/docket/DAI/DAIOrder_on_remedy3-1-10.pdf. See also, *supra* discussion at notes 100–101.

213. There has been repeated concern in the research literature that groups of individuals in supported employment are different demographically from individuals in sheltered workshops, and there do appear to be some distinctions between the two groups. JOHN KREGEL & DAVID H. DEAN, SHELTERED VS. SUPPORTED EMPLOYMENT: A DIRECT COMPARISON OF LONG-TERM EARNINGS INCOME FOR INDIVIDUALS WITH COGNITIVE DISABILITIES, <http://www.worksupport.com/main/downloads/dean/shelteredchap3.pdf> (last visited Mar. 25, 2010). But a number of researchers have done research with great pains to ensure that the samples were demographically similar.

214. Pat Rogan & Stephen Murphy, *Supported Employment and Vocational Rehabilitation: Merger or Misadventure?*, J. REHABILITATION, Apr.–June 1991, at 39, available at 1991 WLNR 4401619.

215. *DAI I*, 598 F. Supp. 2d 289.

which noted that most residents of adult homes were never informed that they had any choice about where they lived, were never provided with either information about alternatives or the opportunity to apply for any alternatives,²¹⁶ and that most, if not all, adult home residents could be served in supported housing.²¹⁷ In fact, the court found, “[a]pproved HRA [supported housing] applications are an inappropriate measure of how many Adult Home residents are qualified for supported housing because of the inability of many residents to meaningfully utilize the HRA process,”²¹⁸ which is unnecessarily complicated and was designed to be filled out by agencies rather than individuals.²¹⁹ Many individuals with disabilities may not ask for supported employment services because they are not aware of them, or because they are not aware that they have any choices as to the vocational services that they are entitled to receive. The remedial order in *Disability Advocates Inc. v. Paterson* included an order for “in-reach” to educate residents of adult homes about their choices for residential services,²²⁰ similar education would have to accompany any challenge to segregated vocational services.

Finally, the qualification standards themselves may be discriminatory.²²¹ In many cases, people with severe disabilities will *not* have been offered and declined supported employment, but will have been excluded from consideration for reasons unrelated to their ability to benefit from supported employment, e.g. not having Medicaid benefits that would get them beyond the eighteen months that vocational rehabilitation would fund supported employment.²²² The qualification standards may, in fact, constitute “administrative

216. *Id.* at 319–20.

217. *DAI I*, 598 F. Supp. 2d 289.

218. *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184, 255 (E.D.N.Y. 2009).

219. *Id.*

220. See *Disability Advocates Inc. v. Paterson*, No. 03-CV-3209, 2010 U.S. Dist. LEXIS 17949, (E.D.N.Y. Mar. 1, 2010) (*DAI III*); Order, *Disability Advocates Inc. v. Paterson*, No. 03-CV-3209, available at www.bazelon.org/incourt/docket/DAI/DAIOrder_on_remedy3-1-10.pdf.

221. 28 C.F.R. § 35.130(b)(8) (2009) (“A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”)

222. See interviews, *supra* note 175.

methods” which result in disparate exclusion of individuals with disabilities in violation of the ADA, a discrete claim from an *Olmstead* claim.²²³

Other eligibility requirements for supported employment discriminate on the basis of a person’s medical disabilities, or severity of disability, excluding people because of needs for various kinds of medical supports during a work day. These eligibility requirements violate the ADA if a disabled person could in fact perform the employment with reasonable accommodations.²²⁴ These eligibility limitations are similar to eligibility limitations successfully attacked in other cases.²²⁵

C. Individuals in Sheltered Workshops Do Not Oppose Placement in Supported Employment

In analyzing the integration mandate claim in *Olmstead*, the Court repeatedly invoked the phrase that the plaintiffs did not “oppose such treatment [in the community]”:²²⁶ an interesting phrase to use regarding plaintiffs asserting a specific claim for community services. In *DAI v. Paterson*, part of the court’s resolution of defendant’s argument that residents of impacted adult homes did not apply for supported housing²²⁷ was that “as a whole” the majority of impacted adult home residents “were not opposed” to moving to more integrated settings.²²⁸

223. 28 C.F.R. § 35.130(b)(3)(i) (2009) (“A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability . . .”).

224. Discrimination based on severity of disability is prohibited under both section 504 of the Rehabilitation Act and the Americans with Disabilities Act. *Messier v. Southbury Training Sch.*, 916 F. Supp. 133, 140 (D. Conn. 1996).

225. *See Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005) (rejecting claim to expand community service program and distinguishing the case of *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), because it sought only to change the method of eligibility determination rather than increasing the size of the integrated program, and noting this interferes less with the operation of the state).

226. At various points in the decision, Justice Ginsberg referred to the requirement that “the transfer from institutional care to a less restrictive setting is not opposed by the affected individual.” *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999). “[N]either woman opposed such treatment.” *Id.* at 603. “[T]he affected persons do not oppose such treatment.” *Id.* at 607.

227. *DAI II*, 653 F. Supp. 2d at 204–08.

228. *Id.* at 222.

The issue of informing individuals about their available choices prior to asserting that a segregated setting represents the individual's choice has been addressed by more than one court.²²⁹ In practice, individuals do not choose their services and the settings in which those services are received; state professionals make those choices, often based more on the availability of the services than on what would best serve the individual's needs.²³⁰ To interpret the individual's acquiescence to segregated services as choice when he or she has not been informed of more integrated alternatives is legally unacceptable under the integration mandate. A federal district court in Connecticut held that the defendant cannot assert that an individual has chosen a segregated option until and unless it has first offered the individual the integrated option and had that offer rejected; reliance on the individual's acquiescence could not be taken as indicative of preference.²³¹ The court held that any argument that a disabled person preferred a segregated service was an affirmative defense, and the burden was on the defendant to prove it.²³²

As noted above, it is obvious that the preferences of people with disabilities are central to Title II claims regarding integrated services. Depending on whether there is a plaintiff class and how it is defined, plaintiff counsel may not know that each and every individual covered by the complaint wants or prefers supported employment. While research shows that people with disabilities themselves would prefer to work in integrated setting,²³³ attorneys in a case seeking more integrated vocational services should anticipate potential opposition from parents or guardians who wish these entities to remain viable. While at least two courts have held that a guardian's desire that a person remain in an institution was insufficient to keep

229. *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009); *Messier*, 562 F. Supp. 2d 294.

230. *DAI I*, 598 F. Supp. 2d 289.

231. *Messier*, 562 F. Supp. 2d 294, 323 (stating that if plaintiffs are able to satisfy the elements of 42 U.S.C. § 12132 or section 504, the defendants may rebut by producing evidence that they offered appropriate community placements or vocational services to STS residents but those residents exercised their statutory right to decline).

232. *Id.*

233. Mank, *supra* note 53; Migliore et al., *supra* note 179.

that person there when State professionals had decided to discharge the person or close the institution,²³⁴ the thorny question of whose preferences and choices matter for purposes of asserting legal rights is one that has occurred in *Olmstead* litigation involving people with developmental disabilities.²³⁵

The best way to resolve this issue may be the approach taken by the court in its remedial order in *DAI v. Paterson*: assume that all persons in segregated settings are entitled to be served in more integrated settings, order the development of sufficient integrated settings to provide true choice, and provide for “in-reach” to determine the actual preferences of individuals when presented with real choices about the services they are entitled to receive.²³⁶

D. States Discriminate Against Persons with Disabilities by Paying for Services in Sheltered Workshop Settings When Those Persons Want and Can Receive Vocational Services in a More Integrated Setting

1. A Challenge to State Funding of Sheltered Workshops Can Be Brought Under Title II Even if the Workshops Are Operated by Private Entities

Although sheltered workshops are generally run by non-profit rather than public entities, the fact that the public entities²³⁷ are paying to provide vocational services in segregated settings makes them appropriate defendants to claims under both the integration mandate,²³⁸ and the regulation prohibiting the use of administrative

234. See, e.g., *Brown v. Bush*, 194 F. App'x 879 (11th Cir. 2006); *Richard C. v. Houstoun*, No. 89-2038, U.S. Dist. LEXIS 22172 (W.D. Pa. Sept. 29, 1999).

235. See *Brown*, 194 F. App'x 879 (denying motion for intervention of parents who opposed institutional closure); *Alexander v. Rendell*, 246 F.R.D. 220 (W.D. Pa. 2007).

236. See *supra* note 100 and accompanying text.

237. See STATEDATA, *supra* note 140.

238. *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289, 321 n.36 (E.D.N.Y. 2009) (“[L.C.] received a wide variety of community-care services . . . leaving during the day . . . via public transportation for persons with disabilities, to attend a daily community-based program that included social activities, vocational opportunities, and field trips; L.C. returned on the bus each evening to the institution.”).

methods that discriminate on the basis of disability.²³⁹ As in *DAI v. Paterson*, the defendants would not be the sheltered workshops themselves, who are arguably protected under the ADA by language in the legislative history as offering services to disabled individuals who might voluntarily choose and prefer them, but the public entities that, through their financing and budget decisions, constrain or limit the choices of those people with disabilities who would want more integrated settings, but must settle for segregation or no services at all.²⁴⁰

2. Sheltered Workshops Are Not the Most Integrated Setting to Provide Vocational Services for People with Disabilities

Sheltered Workshop services and settings are segregated. The Department of Justice, in its regulatory guidance, has construed an integrated setting as one that “enables individuals with disabilities to interact with non disabled individuals to the fullest extent possible.”²⁴¹ Sheltered workshops are by definition “sheltered”: the work takes place in facility- or program-based venues where the only non-disabled people are those involved in running the workshop. Sheltered workshops operate in an almost completely segregated setting, especially as compared with supported employment, which by definition operates in an integrated work setting.²⁴² Even the so-called enclaves, such as the janitorial units that venture into the community after working hours, are not integrated with non-disabled individuals to the maximum extent possible.²⁴³

The requirement of the integration mandate is whether plaintiffs are in “the ‘most integrated setting appropriate to their needs’ Inquiring simply ‘whether’ individuals with disabilities have *any* opportunities for contact with non-disabled persons ignores the ‘most

239. 28 C.F.R. § 35.130 (b)(3) (2009).

240. See sources cited *infra* notes 273, 274 and accompanying text. See also, e.g., *DAI v. Paterson*, 598 F. Supp. 2d 289, 317–18 (E.D.N.Y.2009); *State of Conn. Office of Protection and Advocacy for Persons with Disabilities v. The State of Conn.*, No. 3:06CV00179(AWT), 2010 U.S. Dist. LEXIS 31601, at *15 (D.Conn. Mar. 31, 2010).

241. See 28 C.F.R. pt. 35, app. A; 28 C.F.R. § 35.130(d); see also *DAI I*, 598 F. Supp. 2d at 292.

242. See sources cited *supra* notes 155, 156.

243. See *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184, 227 (E.D.N.Y. 2009).

integrated setting' and the 'fullest extent possible' language of the regulations."²⁴⁴

Although the vast majority of applications of the integration mandate have involved residential settings, including psychiatric facilities, institutions for people with mental retardation, and nursing homes,²⁴⁵ the integration mandate applies to any services provided by a public entity.²⁴⁶ A number of courts have weighed in on this question, as summarized by the court in *DAI v. Paterson*:

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. See *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (noting that "there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized" and "while it is true that the plaintiffs in *Olmstead* were institutionalized at the time they brought their claim, nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements."). Rather, a plaintiff must show that the setting does not "enable interactions with nondisabled persons to the fullest extent possible." *DAI I*, 598 F. Supp. 2d at 321; see also *Joseph S.*, 561 F. Supp. 2d at 289-290 ("A failure to provide placement in a setting that enables disabled individuals to interact with non-disabled persons to the fullest extent possible violates the ADA's integration mandate.") (internal quotation marks and citation omitted).²⁴⁷

However, the court in *DAI* also concluded that "whether a particular setting is an institution is nonetheless a relevant consideration" and looked more closely at the nature of

244. *Id.* at 321.

245. See *supra* notes 3-6.

246. 28 C.F.R. § 35.130(d) (2009).

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

institutions.²⁴⁸ The court found that adult homes were institutions, defining institutions as “a segregated setting for a large number of people that through its restrictive practices and its controls on individualization and independence limits a person’s abilities to interact with other people who do not have a similar disability.”²⁴⁹ Furthermore, the judge rejected the defendant’s experts’ attempt to distinguish between “setting[s] with institutional characteristics” and “institutional settings per se.”²⁵⁰

In deciding whether a setting was institutional, the judge looked to a number of factors: its regimented nature, its control over individuals’ lives, including when and what and where to eat, the “close quarters entirely with other persons with disabilities,” presence of professional staff who instructed the individuals as to what to do, lack of privacy, and lack of ability to form friendships or personal relationships with nondisabled people.²⁵¹ The judge also looked to the absence of opportunities for employment in the community.²⁵²

All of these factors also describe the realities of sheltered workshops. Sheltered workshops congregate disabled people in close quarters with each other, staff instruct people as to what to do, and generally are unable to take individual preferences, talents, or abilities into consideration in devising the work that people do, because the work is created by the contracts that the sheltered workshop negotiates.²⁵³ Sheltered workshops limit and minimize their abilities to form friendships with non-disabled people, and reinforce dependence, both because the skills for sheltered workshop jobs often do not translate into any training useful for the larger economy, and because they often pay such low wages.²⁵⁴

248. *Id.*

249. *Id.* at 199.

250. *Id.* at 218.

251. *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289, 298–99 (E.D.N.Y. 2009).

252. *Id.*

253. GAO REPORT (2001), *supra* note 105, at 10.

254. Thomas Simmons & Robert Flexer, *Business and Rehabilitation Factors in the Development of Supported Employment Programs for Adults with Developmental Disabilities*, J. REHABILITATION, Jan.–Mar. 1992, at 35, available at http://findarticles.com/p/articles/mi_m0825/is_n1_v58/ai_12382049/?tag=content,coll.. See also GAO REPORT (2001), *supra* note 105, at 11.

DAI v. Paterson was the first case that challenged a specific service setting provided by a Title II entity as segregated and inappropriate for virtually all of the people it served, rather than simply trying to move a group of people from a segregated setting to a community setting. It is true that the challenged service setting was actually a very small subset of the general service—although impacted adult homes in New York City with over 120 beds served about 4300 people, adult homes still serve more than 15,000 mentally ill people in the state of New York.²⁵⁵ It was not only that the clients served by impacted adult homes were inappropriately placed there: adult homes themselves were inappropriately segregated settings.²⁵⁶ Likewise, sheltered workshops are inappropriately segregated settings.

While adult homes had been criticized as inappropriately segregated settings for thirty years,²⁵⁷ the call to end sheltered workshops is much older. Disabled people themselves first started criticizing sheltered workshops during the administration of Franklin Delano Roosevelt.²⁵⁸ Recommendations to abolish sheltered workshops as segregated settings offering no advantage to disabled individuals have been made by federal agencies, courts, and disability professionals for almost forty years.²⁵⁹ The modern critique of the sheltered workshop model began with an essay by Jacobus tenBroek, noted disability scholar, about workshops for people who were blind in 1960.²⁶⁰ He wrote that sheltered workshops

255. Clifford J. Levy, *New York State Fires Operator of 2 Homes for the Mentally Ill*, N.Y. TIMES, Sept. 9, 2004, at B1.

256. *Id.*

257. Disability Advocates, Inc. v. Paterson (*DAI II*), 653 F. Supp. 2d 184, 197 (E.D.N.Y. 2009).

258. See PAUL LONGMORE, WHY I BURNED MY BOOK, AND OTHER ESSAYS ON DISABILITY 73–75, 83 (2003).

259. See generally J. Buckley & G. Thomas Bellamy, *Day and Vocational Programs for Adults with Severe Disabilities: A National Survey*, in ISSUES IN TRANSITION RESEARCH: ECONOMIC AND SOCIAL OUTCOMES (P. Ferguson ed., 1986); C. Whitehead, *Sheltered Workshops in the Decade Ahead: Work, Wages, and Welfare*, in VOCATIONAL REHABILITATION OF SEVERELY HANDICAPPED PERSONS: CONTEMPORARY SERVICE STRATEGIES 66–92 (G. Thomas Bellamy, Gail O'Connor & Orv C. Karan eds., 1979); Blanck, Scharztz & Scharztz, *supra* note 109, at 1033, 1039; Michael Gill, *The Myth of Transition: Contractualizing Disability in the Sheltered Workshop*, 20 DISABILITY & SOC'Y 613 (2005).

260. tenBroek, *supra* note 15.

perpetuate a relic of the past: a vague combination of the workhouse, the almshouse, the factory, and the asylum, carefully segregated from normal competitive society and administered by a custodial staff armed with sweeping discretionary authority. In many cases their responsibility for the client of their services is so broad as to appear to embrace the function of nearly all other community agencies and groups In their traditional, and still perhaps their most characteristic, role as permanent employment outlets for the disabled, the sheltered shops are incompatible with the purposes and goals of modern vocational rehabilitation. . . . Because of their customary role as sheltered (i.e., segregated, covered, and noncompetitive) employment retreats, the social and psychological environment of the workshops is often not conducive to the paramount objective of vocational rehabilitation: that of restoring the disabled person to a vocational status of normality and equality.²⁶¹

tenBroek followed this article with an attack on sheltered workshops for people with physical disabilities in 1967.²⁶² In the 1970s, as the Independent Living movement came into its own, supported employment was developed as an alternative to sheltered workshops.²⁶³ By 1986, the National Council on the Handicapped condemned sheltered workshops as segregation.²⁶⁴ The following year, the court in *Homeward Bound v. Hissom* ordered the state of Oklahoma to develop supported and transitional employment options for plaintiffs in the case.²⁶⁵ In 1995, a court reviewing the process of a defendant mental retardation agency toward integration noted that the agency was in the process of phasing out sheltered workshops.²⁶⁶

261. *Id.*

262. Jacobus tenBroek, *Sheltered Workshops for the Physically Disabled*, 44 J. URB. L. 39 (1967).

263. See SHAPIRO, *supra* note 32, at 53–55 (1993) (emergence of Center for Independent Living); *id.* at 144–45, 147–49, 209 (rejection of sheltered workshops and development of supported employment).

264. NAT'L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES, at iv (1986).

265. *Homeward Bound v. Hissom* Mem'l Ctr., No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987).

266. *Ass'n for Retarded Citizens v. Schafer*, 872 F. Supp. 689, 706 (D.N.D. 1995).

In 2002, the State of Vermont closed its last sheltered workshop for persons with developmental disabilities.²⁶⁷

3. Supported Employment Provides a Far More Integrated Setting for Vocational Services Than Sheltered Workshops

In addition to the integration mandate, another regulation of the DOJ provides that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA.²⁶⁸ The DOJ Guidance explicitly states that this section “was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them.”²⁶⁹ The Guidance quotes the House Committee on the Judiciary Report as to this section as follows:

The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid, or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation²⁷⁰ has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows person to touch

267. Jennifer Sullivan Silewski, *Working Together to Convert the Last Sheltered Workshop in Vermont to Individualized Supports*, INST. FOR COMMUNITY INCLUSION, http://www.communityinclusion.org/article.php?article_id=201 (last visited Mar. 25, 2010).

268. The regulation states that nothing in the ADA shall be construed to “require an individual with a disability to accept an accommodation, aid, service, or benefit . . . which such individual chooses not to accept.” 28 C.F.R. 35.130(e)(1) (2009).

269. 28 C.F.R. pt. 35, app. A.

270. Although the Guidance refers to public accommodations, it is found in the DOJ Guidance pertaining to Title II of the ADA.

sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.²⁷¹

Thus, Title II agencies may offer segregated services, but they cannot structure the offer of services in a way that precludes a person with a disability from refusing those services and requesting more integrated services. Under the integration mandate, the Title II agency must offer services in the most integrated setting appropriate to the needs of the person with the disability and honor the choices of disabled people to accept those services rather than segregated services. The question of the role of choice in vocational rehabilitation has not been given as much attention as it deserves: proponents of sheltered workshops are often not people with disabilities, but their parents or the professionals paying for their care.²⁷²

VI. POTENTIAL DEFENSES TO A TITLE II CLAIM CHALLENGING SHELTERED WORKSHOPS

A. ADA Legislative History Protects Sheltered Workshops

The legislative history of the ADA specifically protects sheltered workshops, providing that "[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."²⁷³ Immediately after this language in the House Report, however, is an all-important caveat:

At the same time, the Committee wishes to reaffirm that individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Committee's bill. *Separate, special or different programs that are designed to*

271. 28 C.F.R. pt. 35, app. A.

272. See generally Migliore et al., *supra* note 168.

273. S. REP. NO. 101-116, at 30, 61 (1989); see also H.R. REP. NO. 101-485 (1990).

*provide a benefit to persons with disabilities cannot be used in any way to restrict the participation of disabled persons in general, integrated activities.*²⁷⁴

The language in the legislative history appears designed to protect sheltered workshops if people with disabilities choose or prefer placement in those venues. However, as the language immediately following the reference to Javits-Wagner-O'Day makes clear, people with disabilities must have the choice to participate in integrated vocational services; their "choice" of sheltered workshops cannot be made on the basis that no other vocational services are available to them. Therefore, the continued existence of sheltered workshops should, theoretically, depend on whether they are considered desirable services by people with disabilities. Research generally shows that people receiving vocational services in a segregated environment would greatly prefer to be employed in a mainstream environment with support.²⁷⁵

B. Failure to Exhaust Administrative Remedies Under Vocational Rehabilitation Programs Renders Applicants for Supported Employment Not Qualified

One of the claims in the case of *Messier v. Southbury Training School* involved a challenge to the failure to provide integrated vocational services—or indeed any vocational services—to residents of Southbury Training School.²⁷⁶ This claim, brought against the Department of Social Services—even though the Bureau of

274. H.R. REP. NO. 101-485, pt. 2 (1990) (emphasis added).

275. Gary R. Bond, *Supported Employment: Evidence for an Evidence-Based Practice*, 27 PSYCHIATRIC REHABILITATION J. 345, 345–46 (Spring 2004). Tellingly, while the Mississippi Department of Rehabilitation Services notes that other options (such as sheltered workshops) will remain available, "However, when given a choice, clients prefer individual placements by an overwhelming majority." www.mdrs.state.ms.us/Documents/411c42010.doc. See also, Torrey et al., *supra* note 19, (finding that "competitive employment is a major goal of people with severe mental disorders"); Migliore et al., *supra* note 168. JR Bedell D. Draving & A. Parrish, et al., *A Description and Comparison of Experiences of People with Mental Disorders in Supported Employment and Paid Prevocational Training*, 21 PSYCHIATRIC REHABILITATION JOURNAL 279, 283 (1998).

276. *Messier v. Southbury Training Sch.*, No. 3:94-CV-1706(EBB), 1999 WL 20910, at *14 (D. Conn. Jan. 5, 1999).

Rehabilitation Services (BRS) was responsible for providing vocational rehabilitation—failed because the court held that plaintiffs could not show that they had applied for vocational services, been turned down, and availed themselves of the appeal process provided by state statute.²⁷⁷

Despite the fact that plaintiffs proffered a BRS deposition stating that “BRS *likely* would not provide vocational services to profoundly retarded residents incapable of communicating above an eighteen-month-old level,”²⁷⁸ and demonstrated that no STS resident currently received any vocational services,²⁷⁹ the court found that individuals had to “request or apply for vocational services in order to trigger BRS’ duty to consider the applicant for those services” and plaintiff had provided no such evidence.²⁸⁰ Therefore, the court held, plaintiffs had no standing to assert a claim when they had no proof that they had suffered an injury in fact.²⁸¹

This argument—that plaintiffs must apply for integrated services in order to have standing to challenge one’s relegation to segregated services—was made by defendants in *Disability Advocates, Inc. v. Paterson* and was soundly rejected by the court.²⁸² Under the court’s analysis, adult home residents need only meet the “essential” eligibility requirements for supported housing: “Not every eligibility requirement is an ‘essential eligibility requirement.’”²⁸³ Whether or not they had applied for supported housing did not matter in terms of whether they were “qualified” to receive it.²⁸⁴ Tactly noting that most residents of adult homes had never been informed that they had any choice about where they lived and were never provided with either information about housing alternatives or the opportunity to apply for supported housing,²⁸⁵ in a subsequent opinion, the court held that

277. *Id.* at *15.

278. *Id.*

279. *Id.*

280. *Id.* at 20.

281. *Id.* at 15, 21–22.

282. *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F.Supp.2d 184, 254–56 (E.D.N.Y. 2009).

283. *Id.* at 333 (quoting *PGA Tour v. Martin*, 532 U.S. 661, 688 (2001)).

284. *Id.* at 333 n.44.

285. *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184, 261 (E.D.N.Y. 2009).

applying for supported housing was not a requirement to show that an individual was qualified to receive supported housing services.²⁸⁶

Nor was the plaintiff required to show that each adult home resident in a large impacted adult home was eligible for supported housing services.²⁸⁷ Rejecting this contention, the court noted:

The court does not read *Olmstead* as creating a requirement that a plaintiff alleging discrimination under the ADA must present evidence that he or she has been assessed by a “treatment provider” and found eligible to be served in a more integrated setting.

In *Joseph S. v. Hogan*, 561 F. Supp. 2d 280 (E.D.N.Y. 2008), the district court found that no eligibility determination from the “state’s mental health professionals” is required, noting that “it is not clear whether *Olmstead* even requires a specific determination by any medical professional that an individual with mental illness may receive services in a less restrictive setting, or whether that just happened to be what occurred in *Olmstead*.” *Id.* at 291. In *Frederick L. v. Department of Public Welfare*, 157 F. Supp. 2d 509 (E.D. Pa. 2001), the district court declined to read *Olmstead* as requiring “a formal ‘recommendation’ for community placement, as that term may be used in the mental health field,” noting that “*Olmstead* does not allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals with mental disabilities.” *Id.* at 540; *see also Long v. Benson*, No. 08-cv-26 (RH/WCS), 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the State “cannot deny the right [to an integrated setting] simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise the right would, or at least could, become wholly illusory.”); *cf. Fisher*, 335 F.3d at 1181 & n.7 (when there was no dispute as to

286. *Id.* at 258.

287. *Id.*

whether community placement was appropriate, citing the standard as “when treatment professionals have determined that community placement is appropriate for disabled individuals”); *but see Martin v. Taft*, 222 F. Supp. 2d 940, 972 & n.25 (S.D. Ohio 2002) (requiring plaintiffs to plead “that the state’s professionals have determined the plaintiffs are qualified for community-based care, or . . . facts from which it may be inferred that the determinations of the state’s professionals are manifestly unreasonable.”).²⁸⁸

In fact, all that was required for a showing of “otherwise qualified” was that integrated programs existed in which adult home residents could be served in a more integrated setting than existed in adult homes.²⁸⁹ The court found that adult home residents did not have more severe disabilities than residents of supported housing,²⁹⁰ and that there were providers who were willing and able to serve them.²⁹¹ Plaintiffs’ experts interviewed hundreds of adult home residents and reviewed the records of hundreds more, and they testified credibly as to the ability of adult home residents to be served in supported housing.²⁹²

In the case of sheltered workshops, every state in the country except Vermont has for at least a decade provided some form of supported employment option for individuals with mental disabilities, while continuing to fund sheltered workshops.²⁹³ It is quite likely that clients of supported employment are no less disabled than sheltered workshops, just luckier or more adept at accessing services. Many people who would be qualified for supported employment services are deemed ineligible because they cannot prove they have long term (past eighteen months) supports required by state vocational rehabilitation agencies; this administrative requirement has nothing to

288. *Id.* at 258–59.

289. *Id.* at 191.

290. *Id.* at 245–47.

291. *DAI II*, 653 F. Supp. 2d at 247–48.

292. *Id.* at 257.

293. See STATEDATA, *supra* note 140. See generally DAVID L. BRADDOCK, THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES (7th ed. 2008).

do with individuals' ability to succeed in supported employment or the obligation of state mental retardation and developmental disability agencies to provide funding for supported employment services.

C. Fundamental Alteration

When the Supreme Court decided *Olmstead*, it created a potential defense for states being asked to serve disabled people in more integrated settings. If the state could show that it could not accommodate the plaintiffs' requests to be served in a more integrated settings without inequities toward the larger population of people with mental disabilities it served, it could prevail even if plaintiffs could show that they were being inappropriately segregated.²⁹⁴

One example the Court in *Olmstead* gave of how a State could meet the reasonable modifications standard was "if, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated."²⁹⁵ The plan referred to by the Court quickly became known as an "*Olmstead* Plan" and a substantial amount of litigation has taken place as courts attempt to determine whether the presence of an *Olmstead* plan is an absolute defense, and if so, what is required in such a plan;²⁹⁶ courts have also sought to determine if the absence of such a plan means that plaintiff prevails.²⁹⁷

294. *Olmstead v. L.C.*, 527 U.S. 581, 603–04 (1999).

295. *Id.* at 605–06.

296. See *Frederick L. v. Dep't of Pub. Welfare (Frederick L. I)*, 364 F.3d 487, 497 (3d Cir. 2004); *Frederick L. v. Dep't of Pub. Welfare (Frederick L. II)*, 422 F.3d 151, 157 (3d Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1064–68 (9th Cir. 2005); *Williams v. Wasserman*, 164 F. Supp. 2d 591, 628 (D. Md. 2001).

297. See *Frederick L. I*, 364 F.3d at 497; *Frederick L. II*, 422 F.3d at 157; *Sanchez*, 416 F.3d at 1064–68; *Williams*, 164 F. Supp. 2d at 628.

1. *What Is the Meaning of an “Olmstead Plan” in the Context of Vocational Services?*

It is not clear how an *Olmstead* plan would look in the case of vocational rehabilitation. Presumably, the State would have to demonstrate that it had created and implemented an efficiently-operating plan to transition disabled individuals served in sheltered workshops who qualified for supported employment and desired supported employment services into such services; in addition, the State would have to show it did not keep people in sheltered workshops merely to keep them full.

While the court in *DAI v. Paterson* held that a State did not have to have a formal *Olmstead* plan as a prerequisite for a fundamental alteration defense, “a state’s efforts to comply with the integration mandate with respect to the population at issue are nonetheless an important consideration in determining the extent to which the request for relief would be a permissible ‘reasonable accommodation’ or an impermissible ‘fundamental alteration.’”²⁹⁸

It is likely that in the case of vocational services, as was the case with adult homes in *DAI v. Paterson*, many states will have not have incorporated vocational services into their *Olmstead* plan because they will not have anticipated the need to do so. In many states, sheltered workshop clients will not have been told that they have any choice at all about where to receive services; rather, either because long-term supports are not in place, or because they have medical problems, personal care issues, or behavioral difficulties, they will have been screened out of eligibility for supported employment services.

Some states—New Mexico,²⁹⁹ Vermont, and Washington,³⁰⁰ for example—have made efforts to expand their supported employment

298. *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289, 339 (E.D.N.Y. 2009); *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184, 268–69 (E.D.N.Y. 2009).

299. New Mexico’s vocational services efforts are part of its compliance with the settlement in *Jackson v. Fort Stanton*. See www.jacksoncommunityreview.org. Unfortunately, participation in supported employment has declined over the last five years. See Metro 1 Report, 38, available at www.jacksoncommunityreview.org/2009_Metro1_CPRReport_DRAFT.pdf, and the Northeast Region Report, 36, available at www.jacksoncommunityreview.org/2009DRAFTNEROCPR11.27.09.pdf.

services. Other states—Idaho, Missouri, and Nevada, for example—continue to rely primarily on sheltered workshops. In the absence of any state efforts to comply with the integration mandate, there can be no fundamental alteration defense. There are sufficient examples of states making considerable efforts to provide integrated supported employment services that if a given state did not have any plan to move people from sheltered workshops to supported employment, it should not be able to assert a fundamental alteration defense.

Other States, however, are making efforts to move clients from sheltered workshops to supported employment: New Mexico, and Colorado have been working to transition people with developmental disabilities to supported employment.

Another potential *Olmstead* plan analysis is the one adopted by some Ninth Circuit cases: if a state has a supported employment program which is open to everyone capable of benefiting from it and which is expanding, both in terms of the number of people served and the money spent on it, and if the state's sheltered workshop population is decreasing, then the State may be able to assert an *Olmstead* Plan-type defense to a claim against funding sheltered workshops.³⁰¹ Simply asserting that the State funds some supported employment programs and believes in the concept of supported employment is insufficient in any circuit.³⁰²

2. *What Is the Cost of Supported Employment Compared to Sheltered Workshops?*

The principal argument available to a state in a case asserting the right of people to receive services in a more integrated setting is that the cost of such services would inequitably deprive the state's other

300. John Butterworth & Alison Cohen Hall, *Innovations in Employment Supports: Washington State's Division of Developmental Disabilities*, INST. FOR COMMUNITY INCLUSION, Aug. 2003, http://www.communityinclusion.org/article.php?article_id=140; Jean E. Winsor, John Butterworth & Alison Cohen Hall, *Innovations in Employment Supports: Colorado's State Division of Developmental Services*, INST. FOR COMMUNITY INCLUSION, July 2005, http://www.communityinclusion.org/article.php?article_id=160&type=topic&id=4.

301. *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 620 (9th Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1067 (9th Cir. 2005).

302. See *Frederick L. v. Dep't of Pub. Welfare (Frederick L. II)*, 422 F.3d 151 (3d Cir. 2005).

service recipients of needed services.³⁰³ In doing so, the State would attempt to “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.”³⁰⁴ Thus, the Supreme Court in *Olmstead* instructed a lower court to “consider . . . the range of services the State provides others with mental disabilities” prior to ordering injunctive relief.³⁰⁵

As the court noted in *DAI v. Patterson*, a state asserting a fundamental alteration defense based on costs must

provide a “specific factual analysis” in order to demonstrate that the requested relief would constitute a “fundamental alteration.” See, e.g., *Fisher*, 335 F.3d at 1183 (refusing to accept fundamental alteration defense absent specific evidence that the costs of providing the requested relief would “in fact, compel cutbacks in services to other Medicaid recipients” or be inequitable to others with disabilities); accord *Townsend [v. Quasim]*, 328 F.3d [511] at 520 [(9th Cir. 2003)].³⁰⁶

The cost defenses have raised a number of questions about how to measure both the costs to the state and the resources available to the state, as well as the relevant period of time for the court to analyze in determining whether any cost constitutes a fundamental alteration. In *DAI II*, the court looked to all the resources the state had at its disposal to serve people with mental illness, across agencies.³⁰⁷

Any case involving a comparison between sheltered workshops and supported employment will raise a number of issues related to cost. First, to what degree does the effectiveness of outcomes matter in measuring cost? There seems to be little doubt from the research

303. See *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994); *Williams v. Wasserman*, 937 F. Supp. 524, 531 (D. Md. 1996); *Dees v. Austin Travis County Mental Health & Mental Retardation*, 860 F. Supp. 1186, 1190 n.7 (W.D. Tex. 1994).

304. *Olmstead v. L.C.*, 527 U.S. 581, 604 (1999).

305. *Id.* at 597.

306. *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009).

307. *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184, 268–69 (E.D.N.Y. 2009).

that supported employment is far more effective at securing gainful competitive employment for its clients,³⁰⁸ even clients with very serious disabilities,³⁰⁹ and the clients themselves may be financially better off with supported employment than sheltered workshops.

Second, the population served matters in assessing cost: people with autism, for example, are costlier to serve in supported employment than people with mental retardation.³¹⁰

Third, definitions matter: are so-called “enclaves” considered sheltered employment or supported employment?³¹¹ There are different models of supported employment.

Fourth, the time period during which the cost-effectiveness is measured is also extremely important. By its nature, supported employment is cost-intensive at the front end: when the client is being interviewed as to his or her desires and preferences, the job is being located, and support is being initially provided. Theoretically, supports are supposed to decline over time as the client becomes familiar with the job. The costs of a sheltered workshop, on the other hand, are generally fixed.³¹² One researcher who reviewed twenty-one cost studies of supported employment concluded that supported employment programs began to provide a net benefit to the taxpayer through the taxes paid by disabled individuals in competitive employment beginning in the fourth year of the supported

308. Justine Schneider, *Is Supported Employment Cost-Effective? A Review*, 7 INT'L J. PSYCHOSOCIAL REHABILITATION 145 (2003); G.R. Bond, R.E. Drake, K.T. Mueser & D.R. Becker, *An Update on Supported Employment for People with Mental Illness*, 48 PSYCHIATRIC SERVICES 335 (1997).

309. R. Crowther, M. Marshall, G.R. Bond & P. Huxley, *Vocational Rehabilitation for People with Severe Mental Illness*, COCHRANE REVIEWS (2002); A.F., Lehman, R. Goldberg, S. McNary, L. Dixon, L. Postrado & F. Osher, *Improving Employment Outcomes for Persons with Schizophrenia and Other Severe and Persistent Mental Illnesses*, 49 SCHIZOPHRENIA RES. 273 (2001) (recounting success of supported employment in population with high level of psychosis (seventy-five percent) and current substance abuse (forty percent)).

310. J. Noble, R. Conley, S. Banerjee & S. Goodman, *Supported Employment in New York State: A Comparison of Benefits and Costs*, 2 J. DISABILITY POL'Y STUD. 39 (1991).

311. “Enclaves” are a group of people with disabilities working under the supervision of a non-disabled individual in a community setting, often providing janitorial services. See LUTFIYYA, ROGAN & SHOULTZ, *supra* note 15.

312. Robert E. Cimera, *The Cost-Efficiency of Supported Employment Programs: A Literature Review*, 14 J. VOCATIONAL REHABILITATION 51 (2000).

employment program.³¹³ This finding replicated those of earlier studies.³¹⁴ In all cases, the benefits of supported employment for people with milder impairments was significant; the earlier studies also found that supported employment was consistently less costly than sheltered work if measured over at least a four-year period.³¹⁵

Fifth, the utilization or non-utilization of available government programs to assist people who are receiving supported employment services is key to measuring costs. Such programs range from obvious ones such as Home and Community Based Service waiver payments to PASS (Plan for Achieving Self Support) and IRWE (Impairment-Related Work Expenses), as well as the Ticket to Work plan, all of which remain largely underutilized and could be used to cut costs.³¹⁶

Finally, to add an even greater degree of complexity, one of the benefits claimed by advocates of supported employment is that the increased community integration decreases other costs, such as hospitalization, by reducing levels of symptoms.³¹⁷ In *DAI v. Paterson*, the court looked at associated costs, finding that the State paid much more in Medicaid medical benefits for residents of adult homes than people who lived in supported housing, in part because the operators of adult homes had financial agreements with health care providers that operated to the benefit of the adult home operators and artificially increased medical costs for the residents.³¹⁸ In some adult homes, in fact, the operators arranged for unnecessary surgeries

313. *Id.*

314. W. McCaughrin, W. Ellis, F. Rusch & L. Heal, *Cost Effectiveness of Supported Employment*, 31 MENTAL RETARDATION 41 (1993); D. Lewis et al., *Accounting for Costs of Habilitation Training, Sheltered Workshops and Supported Employment*, 28 EDUC. & TRAINING MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 75 (1993); F. Rusch, R. Conley, & W. McCaughrin, *Benefit-Cost Analysis of Supported Employment in Illinois*, J. REHABILITATION, Apr.-June, 1993, at 31, available at 1993 WLNR 4771551.

315. Cimeria, *supra* note 312 at 57; McCaughrin et al., *supra* note 314, at n.310.

316. STATEDATA, *supra* note 140.

317. Torrey et al., *supra* note 19; M.D. Bell, R.M. Milstein & P.H. Lysaker, *Pay as an Incentive in Work Participation by Patients with Severe Mental Illness*, 44 HOSPITAL & COMMUNITY PSYCHIATRY 684 (1993); K. Sciarappa, E.S. Rogers, K. MacDonald-Wilson & K. Danley, *A Benefit-Cost Analysis of a Supported Employment Model for Persons with Psychiatric Disabilities*, 18 EVALUATION & PROGRAM PLANNING 105 (1995) (quoted in Schneider, *supra* note 308 (reduced housing costs for people in supported employment program)).

318. Disability Advocates, Inc. v. Paterson (*DAI I*), 598 F. Supp. 2d 289 (E.D.N.Y. 2009).

for their residents and pocketed kickbacks from the providers, a practice that was stopped after DAI brought a lawsuit on behalf of the residents.³¹⁹ Rather than comparing housing costs with housing costs, the court in *DAI* looked at all costs to the State associated with adult home residence and supported housing residence, from all parts of the New York State budget devoted to supporting people with mental illness.³²⁰ In part, it was this broader conceptualization that enabled the court to conclude that supported housing did not cost more than adult homes.³²¹

CONCLUSION

The integration mandate states very clearly its expectation that a public entity will provide services in the most integrated setting appropriate to the needs of people with disabilities. Under the ADA, integrated service is the rule, and segregated service is the exception. But for people with mental disabilities seeking vocational services, the norm in many states remains a sheltered and segregated setting that bears no relationship to how non-disabled people perform actual work in the real world. Just as adult homes resembled institutions more than people's homes, sheltered workshops are a vestige of institutional days. People with disabilities do not need to be sheltered from the world; they need to be welcomed into it.

319. *Id.*

320. *Id.*

321. *Id.*

