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## THE WAR ON SHELTERED WORKSHOPS: WILL ADA TITLE II DISCRIMINATION LAWSUITS TERMINATE AN EMPLOYMENT OPTION FOR ADULTS WITH DISABILITIES?

J. Gardner Armsby\*

### INTRODUCTION

V.J. Trombley is an adult woman with a developmental disability who lives in the North Country of New York, a region where employment can be scarce.<sup>1</sup> But work has not been a problem for V.J., who has worked a job that she loves for the last twenty years.<sup>2</sup> V.J. works at Essex Industries alongside others with disabilities, building seats and other parts for canoes sold by retailers such as L.L. Bean.<sup>3</sup> In 2011, there were 52,759<sup>4</sup> adults with disabilities employed in sheltered workshops, defined as “facility-based day programs attended by adults with disabilities as an alternative to working in the open labor market.”<sup>5</sup> However, the jobs that have provided gainful employment for V.J. and her coworkers for so many years may soon disappear entirely.<sup>6</sup> Though this sounds like the usual story of outsourcing, these jobs are actually under attack by a campaign to eliminate sheltered workshops led by disability rights advocates and the federal government.<sup>7</sup>

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\* J.D. Candidate 2015, Georgia State University College of Law. I would like to thank the members of the *Georgia State University Law Review* and the College of Law faculty for all of their guidance in this endeavor.

1. Rick Karlin, *Sheltered Workshops Are in Midst of a Storm: Advocates for People with Disabilities Fear Closures*, TIMES UNION (Jul. 20, 2013), <http://www.timesunion.com/local/article/Sheltered-workshops-are-in-midst-of-a-storm-4677272.php>.

2. *Id.*

3. *Id.*

4. JOHN BUTTERWORTH ET AL., INST. FOR CMTY. INCLUSION, UNIV. OF MASS. BOSTON, STATE DATA: THE NATIONAL REPORT ON EMPLOYMENT SERVICES AND OUTCOMES 25 (2012), available at [http://communityinclusion.github.io/book12/pdf/bluebook2012\\_final.pdf](http://communityinclusion.github.io/book12/pdf/bluebook2012_final.pdf).

5. Alberto Migliore, *Sheltered Workshops*, INT'L. ENCYCLOPEDIA OF REHABILITATION, <http://cirrie.buffalo.edu/encyclopedia/en/article/136/> (last visited Aug. 22, 2014).

6. See Karlin, *supra* note 1.

7. *Id.*

The National Disability Rights Network (NDRN) issued reports in 2011 and 2012 calling for an end to sheltered workshops under the premise that adults with disabilities are “segregated and exploited.”<sup>8</sup> NDRN and other opponents call for replacing sheltered workshops with integrated employment options such as supported employment.<sup>9</sup> The Civil Rights Division of the United States Department of Justice (DOJ) also favors moving toward supported employment.<sup>10</sup> However, supported employment is not a panacea because a substantial percentage of adults with disabilities are not able to maintain competitive employment through supported employment programs.<sup>11</sup> A complete elimination of sheltered workshops could have the unintended consequence of leaving many of the 52,759<sup>12</sup> adults in sheltered workshops with no work options.

The attack on sheltered workshops has already resulted in some states eliminating or beginning to phase out funding.<sup>13</sup> In two

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8. NAT’L DISABILITY RIGHTS NETWORK, *Beyond Segregated and Exploited: Update on the Employment of People with Disabilities* 3 (last updated July 2013), [http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Beyond\\_Segregated\\_and\\_Exploited.pdf](http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Beyond_Segregated_and_Exploited.pdf) [hereinafter NAT’L DISABILITY RIGHTS NETWORK, *Beyond Segregated and Exploited*]; NAT’L DISABILITY RIGHTS NETWORK, *Segregated & Exploited: The Failure of the Disability Service System to Provide Quality Work* 3 (Jan. 2011), <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf> [hereinafter NAT’L DISABILITY RIGHTS NETWORK, *Segregated and Exploited*].

9. See, e.g., Laura C. Hoffman, *An Employment Opportunity or a Discrimination Dilemma?: Sheltered Workshops and the Employment of the Disabled*, 16 U. PA. J.L. & SOC. CHANGE 151, 157, 175, 179 (2013); Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U. L. REV. 875, 879–80 (2010); NAT’L DISABILITY RIGHTS NETWORK, *Segregated & Exploited*, *supra* note 8, at 46–47. In supported employment services, the individual works in an integrated community setting alongside nondisabled coworkers, earns a competitive wage, and receives ongoing services from trained professionals needed to support and maintain employment. 34 C.F.R. § 361.5(b)(53)–(54) (2014).

10. See, e.g., Samuel R. Bagenstos, Principal Deputy Assistant Attorney General, Civil Rights Div., United States Dep’t of Justice, Remarks as Prepared for Delivery at Case Western Reserve Univ. School of Law: *Olmstead Goes to Work* 12–15 (Mar. 15, 2011), available at [http://www.ada.gov/olmstead/documents/bagenstos\\_speech\\_cwru.pdf](http://www.ada.gov/olmstead/documents/bagenstos_speech_cwru.pdf).

11. See Gary R. Bond et al., *Generalizability of the Individual Placement and Support (IPS) Model of Supported Employment Outside the US*, 11 WORLD PSYCHIATRY 32, 34 (2012) (averaging the results of fifteen supported employment programs, the competitive employment rate was 58.9%); Deborah Becker et al., *Long-Term Employment Trajectories Among Participants With Severe Mental Illness in Supported Employment*, 58 NO. 7 PSYCHIATRIC SERVICES 922, 925 (2007), available at <http://ps.psychiatryonline.org/data/Journals/PSS/3809/07ps922.pdf> (publishing a study of thirty-eight adults with disabilities receiving supported employment services, where follow-up indicated that only 67% held a competitive job eight to twelve years after enrollment).

12. BUTTERWORTH ET AL., *supra* note 4, at 25.

13. Stefan, *supra* note 9, at 922–23; Karlin, *supra* note 1.

separate cases, plaintiffs are challenging sheltered workshop placements, alleging discrimination under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act).<sup>14</sup> The DOJ Civil Rights Division is involved in both cases.<sup>15</sup>

In light of the above mentioned difficulties, this article analyzes the legal challenges against sheltered workshops under Title II of ADA and the Rehabilitation Act, particularly *Lane v. Kitzhaber*, to determine whether placement in sheltered workshops constitutes discrimination in violation of these statutes. A key consideration is the application of the Supreme Court's interpretation of ADA Title II in *Olmstead v. L.C. ex rel. Zimring*.<sup>16</sup> This article also evaluates whether states' decisions to eliminate funding for sheltered workshops could result in Title II discrimination against individuals not suited for supported employment.

## I. BACKGROUND

### A. Overview of Sheltered Workshops

Sheltered workshops rose to prominence in the United States in the decades following World War II.<sup>17</sup> As of 2011 the number of adults in sheltered workshops was an estimated 52,759.<sup>18</sup> Individuals may be "patients" under long-term arrangements or they may be short-

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14. See generally Complaint for Declaratory and Injunctive Relief, *United States v. Rhode Island*, 1:13-cv-00442-L-PAS, at 1, 8 (D.R.I. filed June 13, 2013); *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1199–1200 (D. Or. 2012); UNITED STATES DEP'T OF JUSTICE CIVIL RIGHTS DIV., *Olmstead Enforcement by Case or Matter*, ADA.gov, [http://www.ada.gov/olmstead/olmstead\\_cases\\_list2.htm#ri](http://www.ada.gov/olmstead/olmstead_cases_list2.htm#ri) (last visited Aug. 22, 2014).

15. Complaint for Declaratory and Injunctive Relief, *United States v. Rhode Island*, 1:13-cv-00442-L-PAS at 1, 8 (D.R.I. filed June 13, 2013); United States of America's Motion to Intervene, *Lane v. Kitzhaber*, at 17 No. 3:12-cv-00138-ST (D. Or. Apr. 21, 2014), available at [http://www.ada.gov/olmstead/documents/lane\\_olmstead\\_mti.pdf](http://www.ada.gov/olmstead/documents/lane_olmstead_mti.pdf).

16. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999) (holding that providing only institutional residential services is discriminatory under ADA where community-based services are determined appropriate for an individual and can be reasonably accommodated, taking into account the resources of the state and the needs of others with disabilities).

17. Migliore, *supra* note 5, at 1–2.

18. BUTTERWORTH ET AL., *supra* note 4, at 25.

term trainees transitioning into community employment.<sup>19</sup> Those employed in sheltered workshops perform relatively simple tasks such as assembling and packaging<sup>20</sup> and may receive compensation at rates below minimum wage.<sup>21</sup>

Proponents offer several arguments in favor of sheltered workshops.<sup>22</sup> First, sheltered workshops are safer than outside employment, protecting adults with disabilities against crime and harassment.<sup>23</sup> Second, they are also less demanding because they are able “to provide work commensurate with [disabled individuals’] capabilities.”<sup>24</sup> Proponents cite sheltered workshops’ social environment and opportunities for fostering friendships as some of sheltered workshops’ most important benefits.<sup>25</sup> Other advantages include the sense of structure and routine provided as well as the consistency of providing assistance throughout the week and the individual’s life span.<sup>26</sup>

19. Migliore, *supra* note 5, at 1.

20. *Id.*

21. 29 U.S.C. § 214(c) (2012). Congress created the subminimum wage under § 14(c) of the Fair Labor Standards Act of 1938 (FLSA). Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (1938) (codified as 29 U.S.C. § 214(c) (2012)). FLSA requires employers paying subminimum wage rates to obtain a certificate from the United States Department of Labor (USDOL). 29 U.S.C. § 214(c)(1) (2012). The subminimum wage must be “commensurate with those paid to nonhandicapped workers . . . for essentially the same type, quality, and quantity of work.” *Id.* § 214(c)(1)(B). Commensurate wages must be adjusted at least annually “to reflect changes in the prevailing wage paid to experienced nonhandicapped individuals in the locality for essentially the same type of work.” *Id.* § 214(c)(2)(B). In 2008, sheltered workshop employees earned an average \$101 per month, based on an average seventy-four hours of work per month. Migliore, *supra* note 5, at 3.

22. See Hoffman, *supra* note 9, at 164–65; Migliore, *supra* note 5, at 2 (summarizing studies finding that perceived risks in the outside world include crime and harassment, and seventy percent of parents and caregivers reported “safety [is] a major concern,” and that one-fourth reported further that it “was the most important concern influencing the[ir] choice of attending a sheltered workshop”).

23. See Hoffman, *supra* note 9, at 164; Migliore, *supra* note 5, at 2.

24. See Hoffman, *supra* note 9, at 164 (describing the ability of sheltered workshops to make allowances for issues such as impaired concentration, lack of verbal and nonverbal communication skills, low motivation, and problems understanding instructions); Migliore, *supra* note 5, at 2.

25. Hoffman, *supra* note 9, at 164; Migliore, *supra* note 5, at 2 (citing study finding that “of the over 90% [of] adults who expressed satisfaction with . . . sheltered workshops, 30% singled out friendships as being the rationale for enjoying work.”).

26. Hoffman, *supra* note 9, at 164–65; Migliore, *supra* note 5, at 2–3 (citations omitted) (“Sheltered workshops typically are open five days a week throughout the year, even in . . . recession[s]. When there is no work, consumers engage in non-paid activities, take classes, or participate in leisure activities. In addition, . . . once consumers are accepted in sheltered workshops they are unlikely to ever lose their positions. Also, placing individuals in sheltered workshops is much easier than finding them jobs in the open labor market because placement is more predictable.”).

Opponents have advanced several arguments against sheltered workshops.<sup>27</sup> First, they argue that “[s]egregated work facilitates feelings of isolation.”<sup>28</sup> Second, opponents argue that sheltered workshops reinforce a life of poverty and reliance on public assistance.<sup>29</sup> Third, that sheltered workshops are a “dead end” and fail to lead to successful outcomes.<sup>30</sup>

## B. *Applicable Statutes and Case Law*

### 1. *Federal Statutes and Regulations Prohibiting Discrimination*

ADA’s Title II broadly requires that no qualified individual with a disability shall “by reason of such disability” be excluded from the services of a public entity.<sup>31</sup> Section 504 of the Rehabilitation Act of 1973 has a provision, nearly identical to the ADA’s, prohibiting discrimination on basis of disability with regard to “any program . . . receiving federal financial assistance.”<sup>32</sup> Although most sheltered workshops are private entities,<sup>33</sup> ostensibly exempt from challenge under the ADA, most sheltered workshops are heavily reliant on government funding.<sup>34</sup> Thus, the state agencies that administer employment services are susceptible to discrimination

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27. See Hoffman, *supra* note 9, at 165–69; Migliore, *supra* note 5, at 3–4; NAT’L DISABILITY RTS. NETWORK, *Segregated and Exploited*, *supra* note 8, at 11–34.

28. NAT’L DISABILITY RTS. NETWORK, *Segregated and Exploited*, *supra* note 8, at 8.

29. *Id.* at 8, 28 (noting that most workers with disabilities are “earning only 50% [of minimum wage]” and “[t]his forces them to continue to rely on federal benefits such as SSI and Medicaid which . . . require recipients to be poor.”).

30. *Id.* at 32–34. See also Migliore, *supra* note 5, at 3 (citations omitted) (“Several authors agree that the transition rate from sheltered workshops to open labor market is very low and may range from under one percent to about five percent.”).

31. 42 U.S.C. § 12132 (2012) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). The definition of “public entity” includes state and local governments as well as “any department, agency . . . or other instrumentality of a State . . . or local government . . . .” *Id.* § 12131(1)(A)–(B).

32. 29 U.S.C. § 794(a) (2012).

33. See NAT’L DISABILITY RTS. NETWORK, *Segregated & Exploited*, *supra* note 8, at 55.

34. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-886, SPECIAL MINIMUM WAGE PROGRAMS: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 14–15 (2001), available at <http://www.gao.gov/new.items/d01886.pdf>.

challenges under ADA Title II as well as Section 504 of the Rehabilitation Act.<sup>35</sup>

One funding source is Vocational Rehabilitation, a program created by the Rehabilitation Act of 1973.<sup>36</sup> Medicaid also provides funding through the Home & Community Based Services (HCBS) waiver for “prevocational . . . and supported employment services” that are not available to an individual through vocational rehabilitation.<sup>37</sup>

The provisions in ADA Title II and the Rehabilitation Act each have a corresponding regulation requiring the provision of services “in the most integrated setting appropriate.”<sup>38</sup> The appendix to the ADA’s regulations defines this as “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible” and further requires “persons with disabilities [to] be provided the option of declining to accept a particular accommodation.”<sup>39</sup>

Another ADA regulation requires a public entity to make “reasonable modifications . . . necessary to avoid discrimination on the basis of disability” unless it can demonstrate that “making the modifications would fundamentally alter the nature of the service . . . .”<sup>40</sup> The Rehabilitation Act has similar regulations requiring recipients to make “reasonable accommodation,” unless the accommodation would impose an “undue hardship” on the program or activity.<sup>41</sup>

35. See *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1200 (D. Or. 2012).

36. 29 U.S.C. § 701 (2012). See also Alberto Migliore, *Vocational Rehabilitation*, INT’L. ENCYCLOPEDIA OF REHABILITATION, <http://cirrie.buffalo.edu/encyclopedia/en/article/128/> (last visited Aug. 22, 2014) (“Typical services include, but are not limited to, vocational assessment and evaluation, vocational training, general skills upgrading, refresher courses, career counseling, on-the-job training program, job search, and consultation with employers for job accommodation and modification.”).

37. 42 U.S.C. § 1396n (2012).

38. 28 C.F.R. § 35.130(d) (2012) (providing that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities”); *Id.* § 41.51(d) (regulation enacted pursuant to the Rehabilitation Act of 1973, likewise providing that “[r]ecipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons”).

39. 28 C.F.R. pt. 35, App. B (2011).

40. 28 C.F.R. § 35.130(b)(7) (2012).

41. *Id.* §§ 41.53, 42.511; 45 C.F.R. § 84.12 (2012).

### B. *Olmstead And Other Applicable Case Law*

In 1999, the Supreme Court addressed Title II of ADA in *Olmstead v. L.C. ex rel. Zimring* in the context of a state's provision of residential services.<sup>42</sup> The plaintiffs in *Olmstead* were adults with disabilities challenging their confinement in mental hospitals.<sup>43</sup> In an opinion by Justice Ginsberg, the Court recognized that such "unjustified institutional isolation" qualifies as discrimination under ADA,<sup>44</sup> and states are thus required to provide community-based treatment where: (1) such placement is appropriate for the individual,<sup>45</sup> (2) the individual does not oppose such treatment,<sup>46</sup> and (3) placement can reasonably be accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.<sup>47</sup> A caveat in Justice Ginsberg's opinion emphasized that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."<sup>48</sup>

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42. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999) ("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.").

43. *Id.* at 593–94.

44. *Id.* at 600. Justice Ginsberg's opinion outlined two bases for this judgment: (1) that "institutional placement . . . perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and (2) that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 600–01.

45. *Id.* at 587. Justice Ginsberg explained Title II of ADA only prohibits discrimination against "qualified individual[s]," defined by ADA as those persons with disabilities who "with or without reasonable modifications . . . meet the essential eligibility requirements . . ." *Id.* at 602 (citing 42 U.S.C. §§ 12131(2), 12132). The court held that "[c]onsistent with these provisions, [states] generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting." *Id.* (citing 28 C.F.R. § 35.130(d) (1998)) (regulation enacted pursuant to ADA requiring public entities to administer services in "the most integrated setting appropriate").

46. *Id.* at 587. "Nothing in this part shall be construed to require an individual . . . to accept an accommodation . . . which such individual chooses not to accept." *Id.* at 602. (citing 28 C.F.R. § 35.130(e)(1) (1998)).

47. *Id.* at 587. This determination applies to the analysis of a state raising a defense pursuant to 28 C.F.R. § 35.130(b)(7) that a modification "would fundamentally alter the nature of the service." *See Id.* at 597.

48. *Olmstead*, 527 U.S. at 601–02. Justice Ginsberg recognized "[s]tates' need to maintain a range of facilities for . . . persons with diverse mental disabilities." *Id.* at 597. Justice Ginsberg noted that for some individuals, "no placement outside the institution may ever be appropriate" and that others may



Courts have applied *Olmstead* to Title II discrimination challenges beyond mental institutions, expanding the scope to include intermediate care facilities and other residential settings.<sup>49</sup> In the *Olmstead* cases, the fundamental inquiry is whether the services are provided in the *most* integrated setting appropriate.<sup>50</sup> A relevant consideration in this determination is “[w]hether [the] particular setting is an institution.”<sup>51</sup>

### C. *Lane v. Kitzhaber*

In *Lane v. Kitzhaber*, eight individuals with disabilities filed a class action suit against Oregon, alleging they and thousands of others are “unnecessarily segregated in sheltered workshops.”<sup>52</sup> Plaintiffs’ original complaint argued that Oregon violates ADA’s Title II and Section 504 of the Rehabilitation Act through its unnecessary segregation of persons in sheltered workshops and failure to provide “an adequate array of integrated . . . and supported employment services.”<sup>53</sup>

In May 2012, the district court in *Lane v. Kitzhaber* ruled that the ADA and Rehabilitation Act mandates applied to these services and that the risk of institutionalization addressed in *Olmstead* applies to

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occasionally require institutionalized care “to stabilize acute psychiatric symptoms.” *Id.* at 605.

49. *Benjamin v. Dept. of Pub. Welfare of Pa.*, 768 F. Supp. 2d 747, 752 (M.D. Pa. 2011) (challenge to intermediate care facilities); Kevin M. Cremin, *Challenges to Institutionalization: The Definition of “Institution” and the Future of Olmstead Litigation*, 17 TEX. J. C.L. & C.R. 143, 148–50 (2012).

50. Cremin, *supra* note 49, at 145. Guiding this analysis is the appendix to 28 C.F.R. § 35.130(d) which defines a “most integrated setting” as one that “enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 C.F.R. Pt. 35, App. B (2013) (effective March 15, 2011). *See also* Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 320 (E.D.N.Y. 2009), *vacated*, 675 F.3d 149 (rejecting plaintiff’s contention that “the key is *whether persons . . . have opportunities for contact with nondisabled persons*, rather than the number of actual contacts”). This inquiry is “fact-specific and subject to the ‘fundamental alteration’ defense.” *Id.* at 321.

51. Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 223–24 (E.D.N.Y. 2009). The court adopted the definition of “institution” 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 ability to interact with other people who do not have a similar disability.” *Id.* at 199. The court explained that “a plaintiff need not prove that the setting . . . is an ‘institution’ to establish a violation of the integration mandate.” *Id.* at 223.

52. Class Action Allegation Complaint at 2, *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012) (No. 3:12-cv-00138-ST), 2012 WL 246537.

53. *Id.* at 47–48.

segregation in an employment setting.<sup>54</sup> The court, however, granted a motion to dismiss with leave to amend because of a defect in plaintiffs' demand for relief.<sup>55</sup> Plaintiffs subsequently filed an amended complaint<sup>56</sup> and in August 2012 the judge certified as a class “all individuals in Oregon with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops’ and ‘who are qualified for supported employment.’”<sup>57</sup>

Several important developments followed. In March 2013, the DOJ Civil Rights Division filed a motion to intervene on plaintiffs' behalf.<sup>58</sup> In April 2013, Oregon Governor John Kitzhaber responded with an executive order that eliminated funding for any new placements in sheltered workshops and committed to increased funding for supported employment services.<sup>59</sup> The district court allowed the DOJ to intervene in May 2013.<sup>60</sup>

In April 2014, another group of individuals with disabilities entered the fray with their own motion to intervene.<sup>61</sup> These individuals—each a member of the certified plaintiff class—moved to decertify the class, arguing that the plaintiffs' claims could impair their ability to choose sheltered workshops over community-based employment.<sup>62</sup> The district court denied intervention and issued an opinion that highlights the main issues.<sup>63</sup> The opinion explains that plaintiffs' demand is not to close sheltered workshops, but rather to

54. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1205–06 (D. Or. 2012).

55. *Id.* at 1208. Plaintiffs' allegation that defendants failed to offer “an adequate array of . . . services” was subject to dismissal because it demanded a certain level of benefits. *Id.* (emphasis omitted). The opinion provided that “these allegations . . . must be amended to clarify that defendants are violating ADA Title II and the Rehabilitation Act by *denying employment services to plaintiffs for which they are eligible with the result of unnecessarily segregating them in sheltered workshops.*” *Id.* (emphasis added).

56. First Amended Complaint at 48–50, *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012) (No. 3:12-cv-00138-ST), 2012 WL 2282365.

57. *Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012).

58. United States of America's Motion to Intervene, *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST (D. Or. Mar. 27, 2013), available at [http://www.ada.gov/olmstead/documents/lane\\_olmstead\\_mti.pdf](http://www.ada.gov/olmstead/documents/lane_olmstead_mti.pdf).

59. Or. Exec. Order No. 13-04 (Apr. 10, 2013), available at [http://www.oregon.gov/gov/docs/executive\\_orders/eo\\_13-04.pdf](http://www.oregon.gov/gov/docs/executive_orders/eo_13-04.pdf).

60. *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST, 2014 WL 2807701, at \*1 (D. Or. June 20, 2014).

61. Motion to Intervene and Supporting Memorandum, *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST (D. Or. Apr. 21, 2014), ECF No. 200.

62. *Id.* at 2–4.

63. *Lane*, 2014 WL 2807701, at \*1.

increase access to supported employment.<sup>64</sup> On its face, this appears to assuage concerns that the ability to choose placement in sheltered workshops is at risk. But the opinion makes it clear that Governor Kitzhaber's executive order poses a very real threat to the ability to choose placement in sheltered workshops, and proponents can do little to prevent the state from eliminating this choice.<sup>65</sup>

## II. ANALYSIS: ARE SHELTERED WORKSHOPS DISCRIMINATORY UNDER FEDERAL LAW?

Although ADA Title II Section 504 of the Rehabilitation Act both provide avenues for a discrimination challenge against sheltered workshops,<sup>66</sup> analysis under ADA Title II alone is sufficient because the acts are similar in substance.<sup>67</sup> In applying Title II, courts have recognized a prima facie case for discrimination.<sup>68</sup> First, a plaintiff must be a qualified individual with a disability.<sup>69</sup> Second, a plaintiff must be excluded from participation in or denied the benefit from a public entity's services, programs, or activities, or otherwise discriminated against by a public entity.<sup>70</sup>

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64. *Id.* at \*5 (“[B]ased upon the express representations of plaintiffs’ counsel, this court found that ‘plaintiffs do not seek to close all sheltered workshops or force people to leave the workshop if that is not their preference.’”). The district court also added that the proposed intervenors “may be able to intervene in the remedial phase.” *Id.* at \*6.

65. *Id.* at \*3 (“The Executive Order may well limit access to sheltered workshops. However, neither the ADA nor the Rehabilitation Act creates a right to remain in the program or facility of one’s choosing.”).

66. *See* 29 U.S.C. § 794(d) (2012); 42 U.S.C. § 12132 (2012).

67. *See* *Folkerts v. City of Waverly*, 707 F.3d 975, 983 (8th Cir. 2013) (citations omitted) (“The ADA and § 504 of the Rehabilitation Act are ‘similar in substance’ and, with the exception of the Rehabilitation Act’s federal funding requirement, ‘cases interpreting either are applicable and interchangeable’ for analytical purposes.”). Because most sheltered workshops are at least partially funded by federal dollars, the Rehabilitation Act’s federal funding requirement is satisfied. *See* 29 U.S.C. § 794(a) (2012).

68. *See, e.g., E.R.K. ex rel. R.K. v. Haw. Dep’t of Educ.*, 728 F.3d 982, 992 (9th Cir. 2013); *Folkerts*, 707 F.3d at 983; *Harris v. Mills*, 572 F.3d 66, 73–74 (2nd Cir. 2009); *Tucker v. Tennessee*, 539 F.3d 526, 532 (6th Cir. 2008).

69. *See* 42 U.S.C. § 12132 (2012); *see also, e.g., E.R.K. ex rel. R.K.*, 728 F.3d at 992; *Folkerts*, 707 F.3d at 983; *Harris*, 572 F.3d at 73–74; *Tucker*, 539 F.3d at 532.

70. *See* 42 U.S.C. § 12132 (2012); *E.R.K. ex rel. R.K.*, 728 F.3d at 992; *Folkerts*, 707 F.3d at 983; *Harris*, 572 F.3d at 73–74; *Tucker*, 539 F.3d at 532.

If the prima facie case is made, there is an important qualification which the state can raise as a defense: pursuant to the “fundamental-alteration” provisions, participation or placement must be something that can be reasonably accommodated by the state’s taking into account the resources available to the state and the needs of others with disabilities.<sup>71</sup>

*A. The First Element: Analysis at the Individual Level*

The text of ADA Title II describes discrimination as it relates to the individual.<sup>72</sup> It appears from the outset that a wholesale challenge to all sheltered workshops is quite difficult because, under Title II, an institution is not analyzed in the abstract without consideration of the attributes of those served.<sup>73</sup> The very first element of the prima facie case requires a “qualified individual.”<sup>74</sup>

A “qualified individual” is one who “with or without reasonable modifications . . . meets the essential eligibility requirements” for the program or service in question.<sup>75</sup> In light of this element, it follows that an individual in a sheltered workshop can be a victim of discrimination *only* if he is qualified for a more integrated option.<sup>76</sup> Professionals in the disability field use a broad range of factors to evaluate an individual’s eligibility for employment services.<sup>77</sup> The

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71. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (“In evaluating [the] fundamental-alteration defense, [a] District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care . . . but also the range of services the State provides others with mental disabilities, and the State’s obligation to mete out those services equitably.”).

72. See 42 U.S.C. § 12132 (2012) (proscribing discrimination against a “qualified individual” (emphasis added)).

73. See *id.*

74. See *id.*; see also *E.R.K. ex rel. R.K.*, 728 F.3d at 992; *Folkerts*, 707 F.3d at 983; *Harris*, 572 F.3d at 73–74; *Tucker*, 539 F.3d at 532. Considerable authority supports the proposition that a “[s]tate generally may rely on the reasonable assessments of its own professionals” to determine whether an individual is qualified. *Olmstead*, 527 U.S. at 602; see also *Lane v. Kitzhaber*, 841 F. Supp. 2d, 1199, 1203 (D. Or. 2012).

75. 42 U.S.C. § 12131(2) (2012).

76. See *Olmstead*, 527 U.S. at 596–97.

77. See, e.g., *Client Services Policy Manual*, GA. VOCATIONAL REHABILITATION AGENCY 1, 100-31–100-32 (May 1, 2013), [http://gvra.georgia.gov/sites/gvra.georgia.gov/files/related\\_files/site\\_page/2013%20Client%20Services%20Policy%20Manual.pdf](http://gvra.georgia.gov/sites/gvra.georgia.gov/files/related_files/site_page/2013%20Client%20Services%20Policy%20Manual.pdf) (listing modes of assessment for Vocational Rehabilitation service plan); *Part II: Policies and Procedures for Comprehensive Supports Waiver Program*, GA. DEPT. OF CMTY. HEALTH DIV. OF MEDICAID 1, VII-3 (July 1, 2014),

factors considered may include specific medical diagnoses, behavioral history, physical health examinations, and a variety of skills and abilities relevant to the individual's success in the workplace.<sup>78</sup>

Because analysis of discrimination occurs on an individual basis, it is also necessary to consider the individual's own preferences regarding services.<sup>79</sup> Preference for an alternative service or accommodation is an implicit requirement for the prima facie case.<sup>80</sup> The ADA's regulations clearly provide that an individual may decline a particular accommodation.<sup>81</sup> The Supreme Court's decision in *Olmstead* similarly held that there is no federal requirement to impose community-based treatment on those who do not desire it.<sup>82</sup> Consequently, individuals who prefer sheltered workshop employment are outside the scope of a Title II discrimination claim—an important distinction recognized by both the plaintiffs and the court in *Lane v. Kitzhaber*.<sup>83</sup>

The individualized nature of Title II poses serious limitations on the extent to which a discrimination claim can challenge sheltered workshops. By combining the qualification element with the preference factor, one can classify sheltered workshop employees

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[http://asiworks.com/sdp/docsPDFsGeorgia/Policies/COMP\\_Part\\_II.pdf](http://asiworks.com/sdp/docsPDFsGeorgia/Policies/COMP_Part_II.pdf) (requiring use of various screening tools in formulation of Medicaid recipients' individual service plans).

78. See, e.g., *Client Services Policy Manual*, *supra* note 77 (listing criteria for evaluation, including stamina, ability to remain on task, interpersonal skills, ability to follow directions, functional skills, and ability to perform specific tasks).

79. See *Olmstead*, 527 U.S. at 602 (noting that there is no “federal requirement that community-based treatment be imposed on patients who do not desire it.”); 28 C.F.R. § 35.130(e)(1) (2011) (specifying that “[n]othing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept.”).

80. 28 C.F.R. § 35.130(e)(1) (2011). Beyond the requirements' inclusion in ADA's regulations, it does not require any great feat of logic to assume that an individual who resorts to filing a lawsuit in federal court seeking the remedy of an alternative service obviously prefers to receive that service. *Id.*

81. 28 C.F.R. pt. 35, app. B (2011) (“[28 C.F.R. § 35.130(e)] provide[s] that . . . persons with disabilities must be provided the option of declining to accept a particular accommodation.”).

82. *Olmstead*, 527 U.S. at 602 (“Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it.” (citing 28 C.F.R. § 35.130(d) (1998))).

83. See *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1204 (D. Or. 2012) (“Plaintiffs do not argue that sheltered workshops must be eliminated because they are *per se* illegal, but instead argue that, in most instances, a more integrated setting is appropriate . . . . Accordingly, participation for persons with disabilities in sheltered workshops ‘must be a choice, not a requirement.’”).

into four categories.<sup>84</sup> The first category encompasses those who both qualify for and desire to receive a more integrated option like supported employment.<sup>85</sup> These individuals may have a discrimination claim if they can satisfy the remaining Title II elements.<sup>86</sup> In the second category are those who are qualified but do not desire to receive supported employment.<sup>87</sup> The third category includes those who are not qualified but nonetheless desire to receive supported employment.<sup>88</sup> The fourth category includes those who are not qualified for supported employment and do not desire to receive those services.<sup>89</sup> Because they fail to satisfy one or both of the qualification and preference requirements, individuals in the second, third, and fourth categories are beyond the scope of a discrimination claim.

It is apparent that a challenge to sheltered workshops is necessarily narrow in scope because potential victims of discrimination lie in only one of the four categories outlined. An action challenging *all* sheltered workshop placements as discrimination under ADA Title II must necessarily fail because those individuals in the second, third, and fourth categories are beyond the scope of such a claim. This conclusion follows directly from *Olmstead*, where the Court illustrated that institutionalization is not necessarily discrimination: “[w]e emphasize that nothing in the ADA or its implementing

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84. It is important to note that quantifying the relative sizes of these categories is beyond the scope of this article. It is possible that a majority of individuals with disabilities fall into the first group.

85. See, e.g., First Amended Complaint at 33, *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012) (No. 3:12-cv-00138-ST), 2012 WL 2282365 at \*33 (“The class consists of several thousand individuals with intellectual and developmental disabilities who are qualified for supported employment services. Over 2,300 individuals are segregated in sheltered workshops in Oregon at any given time, most of whom *could and would prefer* to work in an integrated employment setting.” (emphasis added)). This group includes the individuals who attempted to intervene in *Lane*. *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST, 2014 WL 2807701, at \*1 (D. Or. June 20, 2014).

86. See *Lane*, 841 F. Supp. 2d at 1204–06 (finding no statutory or regulatory basis to conclude that ADA’s integration mandate cannot apply to the risk of institutionalization in a non-residential setting like a sheltered workshop).

87. See, e.g., *Olmstead*, 527 U.S. at 602 (“Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it.” (citing 28 C.F.R. § 35.130(d) (1998))).

88. See *Olmstead*, 527 U.S. at 602 (“Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual ‘meets the essential eligibility requirements’ . . . . Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting.” (citing 28 C.F.R. § 35.130(d) (1998))).

89. See *supra* notes 87–88.

regulations condones termination of institutional settings for persons unable to handle or benefit from community settings.”<sup>90</sup>

### *B. Establishing Discrimination in The Context Of A Sheltered Workshop*

The second element of the prima facie case is the actual discrimination itself.<sup>91</sup> It requires that a plaintiff be “excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>92</sup> To find the actual discrimination required by this element, a plaintiff must establish: (1) that there was an exclusion or denial of participation or benefit from a public entity’s services, and (2) that this denial was discriminatory in effect.<sup>93</sup>

#### *1. Exclusion or Denial of Services*

The ADA does not impose any naked obligation on a state to provide specific services or benefits.<sup>94</sup> In *Lane v. Kitzhaber*, the plaintiffs’ original complaint was dismissed for crossing the line into demanding a certain level of benefits.<sup>95</sup> A Title II challenge against a sheltered workshop “survives only if it truly alleges a ‘discriminatory denial of services’ and must be dismissed if it instead concerns the ‘adequacy’ of services provided.”<sup>96</sup> This necessarily implies that a state must provide some alternative to sheltered workshops before it

90. *Olmstead*, 527 U.S. at 601–02. The majority opinion further explained that ADA’s mission is not “to drive States to move institutionalized patients into an inappropriate setting.” *Id.* at 605.

91. *See supra* Part II.

92. 42 U.S.C. § 12132 (2012). *See also* R.K. *ex rel.* R.K. v. Haw. Dep’t of Educ., 728 F.3d 982, 992 (9th Cir. 2013); Folkerts v. City of Waverly, 707 F.3d 975, 983 (8th Cir. 2013); Harris v. Mills, 572 F.3d 66, 73–74 (2d Cir. 2009); Tucker v. Tennessee, 539 F.3d 526, 532 (6th Cir. 2008).

93. *Harris*, 572 F.3d at 603 n. 14.

94. *See Olmstead*, 527 U.S. at 603 n.14 (“We do not . . . hold that the ADA imposes on the States a ‘standard of care’ . . . or . . . requires States to ‘provide a certain level of benefits to individuals with disabilities.’” (quoting *Olmstead*, 527 U.S. at 623–2 (Thomas, J. dissenting))).

95. *Lane*, 841 F. Supp. 2d at 1208 (“[S]ome of [sic] allegations . . . seek the forbidden remedy of requiring defendants to provide an adequate level of employment services to enable plaintiffs to obtain a competitive job. In particular, plaintiffs allege that defendants are violating Title II of the ADA and the Rehabilitation Act by failing ‘to offer an adequate array of . . . services’ and ‘to provide . . . supporting employment services that would enable them to work in integrated employment settings.’” original).

96. *Id.* at 1207.

can be subject to a discrimination claim, and a state that provides no alternative is apparently immune from challenge because there is no denial of service.<sup>97</sup>

The alternative, proposed by the plaintiffs in *Lane v. Kitzhaber* and various sheltered workshop opponents, is supported employment.<sup>98</sup> Once a state offers supported employment, it may open itself to claims from individuals denied access.<sup>99</sup> However, a denial of available benefits or services is not by itself sufficient to create a Title II claim.<sup>100</sup> The denial must have a discriminatory effect.<sup>101</sup>

## 2. *Discriminatory Effect: Application of the Integration Mandate*

Discrimination in a sheltered workshop may be established through a violation of ADA's integration mandate.<sup>102</sup> Plaintiffs' claims in *Lane v. Kitzhaber* rely on the holding in *Olmstead* that discrimination includes "unjustified institutional isolation."<sup>103</sup> The district court agreed that "the risk of institutionalization addressed in both *Olmstead* and *Dreyfus* includes segregation in the employment setting," but did not address whether Oregon's sheltered workshop program violates the integration mandate.<sup>104</sup>

*Olmstead* and *Disability Advocates, Inc. v. Patterson* discuss the abstract perils of institutionalization at length, but give very little guidance.<sup>105</sup> The definition of "institution" adopted in *Disability*

97. *But see* BUTTERWORTH ET. AL., *supra* note 4, at 25.

98. *Lane*, 841 F. Supp. 2d at 1201. *See also, e.g.*, Hoffman, *supra* note 9, at 179; Stefan, *supra* note 9, at 880; NAT'L DISABILITY RTS. NETWORK, *Segregated & Exploited*, *supra* note 8, at 46, 48.

99. *See, e.g.*, *Olmstead*, 527 U.S. at 603.

100. 42 U.S.C. § 12132 (2012). A person must be a "qualified individual" to be denied the services of a public entity under Title II. *Id.*

101. *Lane*, 841 F. Supp. 2d at 1207 (requiring Title II complaint to allege a "discriminatory denial of services" (emphasis added) (citing *Buchanan v. Maine*, 469 F.3d 158, 174–75 (1st Cir. 2006))).

102. 28 C.F.R. § 35.130(d) (2011). *See also* Cremin, *supra* note 49, at 145 ("[T]he fundamental question in these so-called *Olmstead* cases is not whether the person is receiving services in an institution, but whether the person with a disability is receiving services in the most integrated setting that is appropriate to his or her needs.").

103. *Olmstead*, 527 U.S. at 600; *Lane*, 841 F. Supp. 2d at 1207.

104. *Lane*, 841 F. Supp. 2d at 1205. The court did not touch on the merits of the discrimination claim because the case was dismissed with leave to amend due to defects in plaintiffs' demand for relief. *See id.* at 1208.

105. *See Olmstead*, 527 U.S. at 600; *Disability Advocates, Inc. v. Patterson*, 598 F. Supp. 2d 289, 321 (E.D.N.Y. 2009); *Disability Advocates, Inc. v. Patterson*, 653 F. Supp. 2d 184, 223–24 (E.D.N.Y.



*Advocates, Inc.* is little more than a restatement of ADA's integration mandate.<sup>106</sup> The issue of "institutionalization" proves more or less irrelevant in *Disability Advocates, Inc.* because the district court holds that "the federal regulations mean what they say" and used a straight textual application of the integration mandate.<sup>107</sup> The lack of guidance for analyzing "institutions" suggests that whether a sheltered workshop is "institutional" is likely irrelevant.<sup>108</sup>

In practice, analysis of the integration mandate in *Olmstead* and its progeny is a simple test: if there is some alternative that provides a *more* integrated setting than the original service then the original service's setting cannot logically be the *most* integrated.<sup>109</sup> Following this reasoning, sheltered workshops cannot be the most integrated setting because supported employment provided in the community is more integrated than sheltered work in a facility. Of course, this does not mean that all sheltered workshop placements are discriminatory because of the need for a *qualified* individual. In effect, a denial of services is discriminatory so long as the individual is qualified for the service and the service is more integrated.

### C. Reasonable Modifications vs. Fundamental Alterations: The State's Defense

If a plaintiff can establish that his placement in a sheltered workshop is discriminatory, the claim must still clear the state's fundamental alteration defense.<sup>110</sup> A plaintiff cannot simply argue

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2009).

106. *Disability Advocates, Inc.*, 653 F. Supp. 2d at 199 (adopting definition of "institution" 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 ability to interact with other people who do not have a similar disability." (emphasis added)).

107. *Disability Advocates, Inc.*, 598 F. Supp. 2d at 321.

108. *Disability Advocates, Inc.*, 653 F. Supp. 2d at 223 ("Under the [integration mandate], a plaintiff need not prove that the setting at issue is an 'institution' to establish a violation of the integration mandate."); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (noting that "nothing in the plain language of [ADA] regulations . . . limits protection to [institutionalized persons]" and "while it is true that the plaintiffs in *Olmstead* were institutionalized . . . , nothing in . . . *Olmstead* . . . supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements.").

109. See, e.g., *Olmstead*, 527 U.S. at 602; *Disability Advocates, Inc.*, 598 F. Supp. 2d at 320–21.

110. See *Olmstead*, 527 U.S. at 597 ("In evaluating [the] fundamental-alteration defense, [a court]

that supported employment is not a fundamental alteration if the state already provides that service.<sup>111</sup> Under this defense, a state may argue that immediate relief is inequitable because the state has limited resources with which to care and treat for a large and diverse population of people with disabilities.<sup>112</sup>

A state's motive to resist a demand for supported employment is likely budgetary in nature, and is not based on some animus towards adults with disabilities.<sup>113</sup> A state may not want to avoid supported employment entirely; it might just need time to develop those services and allocate necessary funding. In this case, a state's fundamental alteration defense is not an outright defense, and may be more accurately described as the state positing its own reasonable modifications.<sup>114</sup>

Because evaluating the fundamental alteration defense is a "complex, fact intensive inquiry,"<sup>115</sup> it is difficult to project the success of such a defense in a sheltered workshop case. The court in *Lane v. Kitzhaber* has not yet addressed whether Oregon has a valid fundamental alteration defense.<sup>116</sup> The only conclusion that can be drawn at this point is that such a defense will not be taken lightly

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must consider, in view of the resources available to the State, not only the cost of providing community-based care . . . , but also the range of services the State provides others . . . and [its] obligation to mete out those services equitably.”)

111. *Id.* at 603 (noting “[t]he State’s responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless,” and rejecting that construction because it “would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks.”).

112. *See id.* at 604.

113. *Id.* at 611 (“At the outset it should be noted there is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled. Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa. Of course, the line between animus and stereotype is often indistinct, and it is not always necessary to distinguish between them.”).

114. *See id.* at 605–06 (“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, the reasonable-modifications standard would be met.”).

115. *Disability Advocates, Inc. v. Patterson*, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009) (quoting *Martin v. Taft*, 222 F. Supp. 2d 940, 986 (S.D. Ohio 2002)).

116. *See generally* *Lane v. Kitzhaber*, No. 3:12-cv-00138, 2014 WL 2807701 (D. Or. June 20, 2014); *Lane v. Kitzhaber*, No. 3:12-cv-00138, 2013 WL 6798470 (D. Or. Dec. 19, 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012); *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012).

because *Olmstead* suggests that considerable deference is due to state policymakers<sup>117</sup> and the characteristics of services of the state.<sup>118</sup>

#### D. How Far Can a Sheltered Workshop Challenge Go?

It appears that, because a Title II discrimination claim necessarily depends on whether the individual is qualified for a more integrated service, such a claim cannot legally compel an outright end to sheltered workshops. Discrimination can only occur where an individual is qualified for some alternative, such as supported employment, and prefers to receive that service.<sup>119</sup> In *Olmstead*, the Supreme Court unequivocally stated that some individuals may not be qualified for more integrated settings and the ADA does not condone termination of more restricted settings for those individuals.<sup>120</sup> Title II challenges such as *Lane v. Kitzhaber* are limited to improving access to integrated options like supported employment without the overreaching effect of eliminating sheltered workshops.<sup>121</sup>

#### E. Eliminating Sheltered Workshops: Discrimination?

Despite the limits on Title II claims, sheltered workshops are not entirely safe. The greatest threat to sheltered workshops is political. Vermont has completely eliminated sheltered workshops.<sup>122</sup> Oregon

117. See *Olmstead*, 527 U.S. at 605 (holding that it is necessary that the state have some leeway in order to “maintain a range of facilities and to administer services with an even hand.”); *id.* at 610 (1999) (Kennedy, J., concurring) (“It is of central importance . . . that courts apply today’s decision . . . with appropriate deference to the program funding decisions of state policymakers.”).

118. See *id.* at 597, 607 (holding that, in evaluating a fundamental alteration defense, a court must consider the resources available to the state, cost of providing supported employment, the state’s range of services provided to others with disabilities, and the obligation to “mete out those services equitably”).

119. See *supra* Part II.A.

120. *Olmstead*, 527 U.S. at 597.

121. See generally *Lane*, 283 F.R.D. at 602 (finding plaintiffs’ demand for injunctive relief “is aimed at providing classwide alternatives to segregated employment.”); *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST, 2014 WL 2807701, at \*6 (D. Or. June 20, 2014) (discussing Governor Kitzhaber’s executive order eliminating funding for new sheltered workshop placements, noting that the order “does not reflect the relief requested . . . and does not and cannot constitute enforceable relief requested of, or eventually ordered by, this court.”)

122. See NAT’L DISABILITY RTS. NETWORK, *Beyond Segregated and Exploited*, *supra* note 8, at 34.

Governor John Kitzhaber's executive order eliminates funding for new sheltered workshop placements.<sup>123</sup> New York has also implemented its own measures to phase out sheltered workshops.<sup>124</sup>

Individuals who cannot benefit from supported employment may have no recourse under ADA Title II. Those individuals in states like Vermont cannot use a Title II discrimination suit to challenge the state's refusal to provide sheltered workshops because of the restrictions on demanding a level of benefits.<sup>125</sup> Because some individuals in New York and Oregon are still receiving sheltered workshop services, citizens denied by those states could conceivably make a prima facie case for Title II discrimination: (1) they are qualified and desire to receive sheltered workshop services, and (2) they are excluded from services for which they are eligible.<sup>126</sup>

Such a claim is unlikely to succeed. The court in *Lane v. Kitzhaber* stated that the individuals who attempted to intervene in the case "lack a significant legally protectable interest under the ADA or other federal law in continuing to receive sheltered workshop services," and pointed out that "numerous federal courts have rejected the 'obverse *Olmstead*' argument that a premature discharge into the community violates the ADA or Rehabilitation Act."<sup>127</sup> Even if a court allowed such a claim to proceed, a state could offer a fundamental alteration defense: allowing new admissions would fundamentally alter the state's plan to transition its employment services to community-based settings. It seems unlikely that a court

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123. See Or. Exec. Order No. 13-04 (Apr. 10, 2013), available at [http://www.oregon.gov/gov/docs/executive\\_orders/eo\\_13-04.pdf](http://www.oregon.gov/gov/docs/executive_orders/eo_13-04.pdf).

124. See Karlin, *supra* note 1.

125. See *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1207 (D. Or. 2012) ("Olmstead admonishes that a disability discrimination claim may not be premised upon allegations that defendants failed to meet a particular standard of care with regard to the services provided or upon a request for a particular level of benefits . . . . Thus, a claim survives only if it truly alleges a 'discriminatory denial of services' and must be dismissed if it instead concerns the 'adequacy' of the services provided."); Migliore, *supra* note 5, at 2.

126. See *supra* Part II.

127. *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST, 2014 WL 2807701, at \*3 (D. Or. June 20, 2014). The court reasoned that "[t]here is no ADA provision that *providing* community placement is a discrimination. It may be a bad medical decision, or poor policy, but it is not discrimination based on disability." *Id.* (citing *Richard S. v. Dep't of Developmental Servs. of Cal.*, No. SA CV 97-219-GLT(ANx), 2000 WL 35944246, at \*3 (CD Cal Mar. 27, 2000)) (emphasis in original).

would grant plaintiffs relief if sheltered workshop services will soon be eliminated.

### III. PROPOSAL

To provide the best possible employment services for each and every individual with a disability, states should accommodate access to community-based services like supported employment while maintaining sheltered workshops for those individuals who prefer that option.<sup>128</sup> States should be able to reach this outcome through their own administration of services, obviating the need for judicial intervention.<sup>129</sup> Where states fail to provide sufficient access to employment services, courts should carefully apply *Olmstead* to Title II claims and fashion a remedy focused on providing access to the denied services.<sup>130</sup> State governments should try to avoid litigation on this issue by creating *Olmstead* transition plans for employment services.<sup>131</sup> Both state governments and courts should be mindful that eliminating sheltered workshops is neither necessary nor desirable.<sup>132</sup>

#### A. Courts Should Apply *Olmstead* to Title II Claims Challenging State-Funded Employment Services

Courts should follow the lead of *Lane v. Kitzhaber* and apply *Olmstead* to Title II claims against sheltered workshop placements.<sup>133</sup> More specifically, courts should assess the individual's qualifications and preferences to determine whether placement in community-based services is appropriate.<sup>134</sup> Questions of sheltered workshops' purported institutional nature are irrelevant to this analysis.<sup>135</sup>

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128. See *infra* Part III.C.

129. See *infra* Part III.B.

130. *Olmstead v. L.C ex rel. Zimring*, 527 U.S. 581 (1999).

131. See *generally id.*

132. See *supra* Part I.A and notes 22–26. See also *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1204 (D. Or. 2012).

133. *Lane*, 841 F. Supp. 2d at 1206 (“In sum, this court discerns no statutory or regulatory basis for concluding that the integration mandate to provide services in the most integrated setting appropriate applies only where the plaintiff faces a risk of institutionalization in a residential setting.”).

134. See *supra* Part II.A–B.

135. See *supra* Part II.B.2.

By the same token, the remedy for discrimination must focus on accommodating access to community-based employment services for qualified individuals.<sup>136</sup> Again, the remedy should not affect sheltered workshops because Title II's goal is to eliminate discrimination.<sup>137</sup> Because the form of discrimination is a denial of services, the solution is to eliminate the denial of services by accommodating access to the state's community-based services like supported employment.<sup>138</sup> This result follows directly from *Olmstead*, where the remedy was not a forced closure of mental institutions, but rather increased access to community-based living arrangements.<sup>139</sup>

Courts should also heed *Olmstead*'s guidelines for analyzing a state's fundamental alteration defense.<sup>140</sup> Changes to a state's services cannot happen overnight because a state may need several years to plan and allocate resources to building its capacity to provide community-based services.<sup>141</sup> *Olmstead* provides for states to have a

136. See, e.g., *Olmstead*, 527 U.S. at 601–02 (“We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings.”).

137. See *id.* at 602; *Lane*, 841 F. Supp. 2d at 1200. See also *supra* Part II.D.

138. See, e.g., *Lane*, 841 F. Supp. 2d at 1207–08 (“[Plaintiffs] seek a court order mandating: (1) a treatment planning process that properly and fairly assesses the individuals’ ability and interest in supported employment; (2) provision of supported employment services to those individuals who qualify for and are interested in them; and (3) a supported employment program that complies with CMS and other national accrediting standards.” (footnote omitted)).

139. See *Olmstead*, 527 U.S. at 604 (“ADA is not reasonably read to impel States to phase out institutions”). The court went so far as to hold that it would be inappropriate to remove an individual from a more restrictive setting unless the state’s professionals determine that the individual meets the essential eligibility requirements for a community-based program. *Id.* at 602.

140. *Id.* at 603. See also *Disability Advocates, Inc. v. Patterson*, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009) (“Relying on *Olmstead*’s language . . . lower courts evaluating the fundamental alteration defense have focused on the costs of the requested relief in light of a state’s obligations to other individuals with mental disabilities.”).

141. See generally *Olmstead*, 527 U.S. at 603 (“The State’s responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless.”). Justice Ginsberg further explains in the majority opinion:

Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State 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.

*Id.* at 604.

working plan and waiting lists that move at a reasonable pace.<sup>142</sup> Individuals should not be able to use a Title II claim to jump ahead of others on the waiting list.<sup>143</sup>

### B. States Should Create *Olmstead* Plans for Employment Services

The most important action that states should take is to implement a transition plan—also referred to as an “*Olmstead* plan”—to offer qualified individuals an opportunity to go from sheltered workshops to community-based services like supported employment.<sup>144</sup> *Olmstead* provides that states can fulfill their obligations by demonstrating a comprehensive working plan and a waiting list that moves at a reasonable pace.<sup>145</sup> An *Olmstead* plan helps prevent future litigation because adults with disabilities have no reason to sue if they have access to the services they need. If a Title II claim is filed, perhaps by someone who feels the waiting list is not moving fast enough, the *Olmstead* plan helps establish the fundamental alteration defense by showing that the state is already making reasonable accommodations as required under ADA regulations.<sup>146</sup>

142. *Id.* at 605–06.

143. *See id.* at 606 (“[A] court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.”).

144. *See id.* at 605–06. *See also Disability Advocates, Inc.*, 598 F. Supp. 2d at 339. The plan does not necessarily need to be evidenced in a single document. *See id.*

145. *Olmstead*, 527 U.S. at 605–06. There is a circuit split as to whether an *Olmstead* plan is a necessary component of a fundamental alteration defense. *Disability Advocates, Inc.*, 598 F. Supp. 2d at 336–37 (comparing cases evaluation the necessity of an *Olmstead* plan). *Compare* Pa. Prot. and Advocacy, Inc. v. Pa. Dept. of Pub. Welfare, 402 F.3d 374, 381 (3rd Cir. 2005) (“[T]he only sensible reading of the integration mandate consistent with the Court’s *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA and RA.”), *with* *Martin v. Taft*, 222 F. Supp. 2d 940, 985–86 (S.D. Ohio 2002) (“[D]efendants appear to concede that the State has no plan or waiting lists that move at a reasonable pace. Although this is not a good thing for defendants, it does not necessarily mean [they] cannot prevail.” (footnote omitted)). The court in *Disability Advocates Inc.* ultimately held that a plan is not necessary but that “a state must make efforts to comply with the integration mandate in order to show that specific relief requested would be too costly.” *Disability Advocates, Inc.*, 598 F. Supp. 2d at 339.

146. *See Olmstead*, 527 U.S. at 607; *Disability Advocates, Inc.*, 598 F. Supp. 2d at 337. *But see Martin*, 222 F. Supp. 2d at 985 (“[T]he fundamental alteration analysis entails far more than the comprehensive plan and reasonably paced waiting list example . . . . [T]he example is not actually an illustration of fundamental alteration at all. Rather, it is a way the State may show that it has *already* provided a reasonable accommodation.”).

*C. States Should Preserve the Sheltered Workshop Option*

Elimination of sheltered workshops should play no part in a Title II remedy. Eliminating sheltered workshops does not equate to eliminating discrimination because discrimination lies in the denial of access to community-based services, not in the resulting sheltered workshop placement.<sup>147</sup> Community-based services are not a one-size-fits-all solution, and states recognize this by offering both options.<sup>148</sup> There will always be individuals who are not qualified for community-based services and others who may qualify but prefer sheltered workshop placement.<sup>149</sup> *Olmstead* recognizes states' need to maintain a range of services—some necessarily more restrictive than others—to care for a diverse population of individuals with disabilities.<sup>150</sup> Some states may be concerned about the expense of providing both services. Funding for employment services is, however, typically attached to the individual and moves with the individual.<sup>151</sup> Thus, providing both services does not change the aggregate amount spent on employment services.

Ultimately, sheltered workshops help to accomplish the aims of the ADA, which defines “disability” as an impairment that substantially limits a major life activity.<sup>152</sup> Employment is one of the major life activities recognized under the ADA.<sup>153</sup> If sheltered workshops are eliminated, those individuals who are not qualified for community-based services will be left with no options for employment.<sup>154</sup> Even individuals who are qualified for community-based services may have difficulty securing employment during

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147. *See supra* Part II.B.1–2.

148. *See supra* note 11 and accompanying text.

149. *See supra* Part II.A. *See, e.g., Olmstead*, 527 U.S. at 604–05 (“Some individuals . . . may need institutional care from time to time . . . . For other individuals, no placement outside the institution may ever be appropriate.”).

150. *Olmstead*, 527 U.S. at 605.

151. *See, e.g., Lane v. Kitzhaber*, No. 3:12-cv-00138-ST, 2014 WL 2807701, at \*5 (D. Or. June 20, 2014) (discussing the structure of waiver funding: “[F]unding for employment services is attached to the individual and moves with the individual. Thus, each individual in a sheltered workshop who chooses to remain will continue to have his or her waiver funding allocated . . . even if other individuals elect to allocate their funding for integrated employment services.”).

152. 42 U.S.C. § 12102(1)(A) (2012).

153. *Id.* § 12102(2)(A).

154. *See supra* note 11.



economic downturns and without sheltered workshops they will have no fallback option.<sup>155</sup> Eliminating sheltered workshops will undoubtedly impair the employment options for many adults with disabilities.

#### CONCLUSION

The jobs of V.J. Trombley and more than 50,000 other adults with disabilities are at stake in the sheltered workshop debate.<sup>156</sup> Various disability advocacy groups oppose sheltered workshops, arguing that they segregate and exploit adults with disabilities.<sup>157</sup> On the other side of the debate, supporters contend that sheltered workshops are safer and can offer work commensurate with individuals' capabilities as well as various social benefits.<sup>158</sup> Some individuals with disabilities would prefer to receive community-based services like supported employment instead of facility-based sheltered work.<sup>159</sup> One such group of individuals filed a class-action lawsuit, *Lane v. Kitzhaber*, challenging their placement in sheltered workshops as discrimination under ADA Title II.<sup>160</sup>

The Supreme Court's holding in *Olmstead* is critical to analyzing a Title II claim against sheltered workshops.<sup>161</sup> Pursuant to *Olmstead*, a Title II discrimination claim requires: (1) an individual with a disability who is qualified for community based-services; (2) the individual prefers community-based services; (3) the state offers community-based services; (4) the individual is excluded from these services.<sup>162</sup> As this article shows, these elements pose certain limitations on the scope of Title II claims against sheltered workshops.<sup>163</sup> Because the analysis centers on the qualifications and

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155. *See supra* note 26.

156. BUTTERWORTH ET. AL., *supra* note 4, at 25.

157. *See supra* note 8.

158. *See supra* notes 22–26 and accompanying text.

159. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1200 (D. Or. 2012).

160. *Id.*

161. *See generally* *Olmstead v. L.C ex rel. Zimring*, 527 U.S. 581 (1999).

162. *See supra* Part II.A–B.

163. *See supra* Part II.D.

desires of the individual, there is no discrimination where an individual is not qualified for community-based services or where an individual prefers sheltered workshop placement.<sup>164</sup> This means that a Title II claim cannot go so far as to declare all sheltered workshop placements discriminatory.<sup>165</sup> Furthermore, the fundamental challenge of a Title II claim must be against the denial of an alternative service; the individual's placement in a sheltered workshop is merely a consequence of that denial.<sup>166</sup>

Although a discrimination claim cannot encompass all individuals in sheltered workshops, Title II still enables qualified individuals who are denied access to community-based services to challenge their own placements.<sup>167</sup> With careful application of *Olmstead*, courts can fashion remedies under Title II that will accommodate individuals qualified for community-based employment options without endangering sheltered workshops.<sup>168</sup> The integration mandate enacted pursuant to the ADA compels a finding of discrimination where the individual is denied access to a more integrated option like supported employment.<sup>169</sup> A straightforward application of *Olmstead* suggests that a state must provide community-based services for the individuals who prefer these services, subject to the resources available to the state and the needs of others with disabilities.<sup>170</sup> A court's consideration of a state's resources and the needs of others with disabilities is an evaluation of the state's fundamental alteration defense, which is provided by the regulations enacted pursuant to Title II.<sup>171</sup> Because changes to state services can take years to implement, *Olmstead* encourages deference to transition plans and waiting lists developed by states.<sup>172</sup>

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164. *See supra* Part II.A.

165. *See supra* Part II.A.

166. *See supra* Part II.B.1–2.

167. *See supra* Part II.D.

168. *See supra* Part III.A.

169. *See discussion supra* Part II.B.2.

170. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999).

171. 28 C.F.R. § 35.130(b)(7) (2012); *see also Olmstead*, 527 U.S. at 605–07.

172. *Olmstead*, 527 U.S. at 605–07.

To avoid Title II claims, the most important action that states can take is to design and implement an *Olmstead* plan to offer community-based services to qualified individuals.<sup>173</sup> If properly implemented, an *Olmstead* plan can prevent future litigation. Should litigation arise, courts owe a great deal of deference to the state's *Olmstead* plan as an aspect of the fundamental alteration defense.<sup>174</sup> Courts must also take heed of *Olmstead*'s recognition of the state's need to maintain a range of services for adults with disabilities.<sup>175</sup>

The elimination of sheltered workshops is contrary to the aims of *Olmstead* and is wholly unnecessary to avoiding discrimination in employment services.<sup>176</sup> *Olmstead* recognizes that states must maintain a range of services—some necessarily more restrictive than others—to care for a diverse population of individuals with disabilities.<sup>177</sup> Community-based services like supported employment are not appropriate for all individuals with disabilities.<sup>178</sup> A state can help more of its citizens with disabilities reach their potential by offering a choice between supported employment and sheltered workshop placement.<sup>179</sup>

Proper application of *Olmstead* should leave sheltered workshops undisturbed. However, protection from a Title II claim does not guarantee their continued existence.<sup>180</sup> Although early rulings in *Lane v. Kitzhaber* respect the existence of sheltered workshops for certain individuals,<sup>181</sup> Oregon is poised to go beyond the potential bounds of a Title II claim and eliminate sheltered workshops on its own prerogative.<sup>182</sup> Pressure from advocacy groups and the DOJ has pushed other states toward eliminating sheltered workshops.<sup>183</sup> Those

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173. See *supra* Part III.B.

174. See *Olmstead*, 527 U.S. at 605–07.

175. See *id.*

176. See discussion *supra* Part III.C.

177. *Olmstead*, 527 U.S. at 604–07.

178. See discussion *supra* Part III.C.

179. See discussion *supra* Part III.C.

180. See discussion *supra* Part II.E.

181. See *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1204 (D. Or. 2012).

182. Or. Exec. Order No. 13-04 (Apr. 16, 2013), available at [http://www.oregon.gov/gov/docs/executive\\_orders/eo\\_13-04.pdf](http://www.oregon.gov/gov/docs/executive_orders/eo_13-04.pdf). Governor Kitzhaber's order requires that, by July 1, 2015, the state will no longer purchase or fund any new sheltered workshop placements. *Id.*

183. See *supra* note 15.

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individuals who prefer sheltered workshops will be deprived of their right to choose, and those who are not qualified for community-based services will be deprived of employment services altogether. These individuals will have no recourse under Title II due to the restrictions against demanding a level of benefits.<sup>184</sup>

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184. *See supra* Part II.E.

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