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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**

**PAULA LANE**, et al,

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

Plaintiffs,

**STATEMENT OF INTEREST OF THE  
UNITED STATES OF AMERICA IN  
SUPPORT OF PLAINTIFFS REGARDING  
DEFENDANTS' MOTION TO DISMISS**

v.

**JOHN KITZHABER**, in his official  
capacity as the Governor of Oregon, et al.,

Defendants.

**I. INTRODUCTION**

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517<sup>1</sup> regarding Defendants' Motion to Dismiss (ECF Nos. 29-30), in order to clarify to the Court the proper scope and application of the integration regulation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, to Plaintiffs' claims of unnecessary segregation in sheltered workshops by Defendants. The integration regulation provides that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).<sup>2</sup> The "most integrated setting," in turn, means one that "enables individuals with disabilities to interact with

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<sup>1</sup> Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

<sup>2</sup> Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, contains an identical regulation issued by the Attorney General. 28 C.F.R. § 41.51(d). These regulations have been read in tandem to provide similar protections to persons with disabilities. See Olmstead v. L.C., 527 U.S. 581, 591 (1999).

nondisabled persons to the fullest extent possible ...” 28 C.F.R. Pt. 35, App. B at 673. Based on these regulations, the Supreme Court has held that the “unjustified isolation” of persons with disabilities by States constitutes discrimination under Title II. Olmstead v. L.C., 527 U.S. 581, 600 (1999).

As authorized by Congress, see 42 U.S.C. § 12134, the U.S. Department of Justice enacted these regulations to implement the ADA’s broad mandate to end the pervasive segregation of persons with disabilities in all facets of life, including employment, public accommodations, and services, programs and activities of state and local governments. See 42 U.S.C. § 12101(a)(2) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”). Consistent with this mandate, the integration regulation, by its own terms, applies to all “services, programs and activities” of a public entity, including segregated, non-residential employment and vocational programs such as sheltered workshops. See 28 C.F.R. § 35.130(d). Accordingly, the Department has interpreted the integration regulation to prohibit the unnecessary provision of such services to persons with disabilities in segregated sheltered workshops, in which persons with disabilities have little to no opportunity to interact with non-disabled persons. See, e.g., “Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.” at 3 (June 22, 2011), available at: [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm).

As the agency charged by Congress with enforcing and implementing regulations under Title II, the Department’s interpretation of both Title II and the integration regulation has been accorded substantial deference. See Olmstead, 527 U.S. at 597-98; M.R. v. Dreyfus, 663 F.3d

1100, 1117 (9th Cir. 2011). The Department's interpretation of the integration regulation must be upheld "unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997). Accordingly, the United States believes that its views will be of interest to the Court in resolving Defendants' Motion to Dismiss. Furthermore, the United States has an interest in ensuring the appropriate and consistent interpretation of Title II and the integration regulation. See M.R., 663 F.3d at 1117-18 ("DOJ's interpretation is not only reasonable; it also better effectuates the purpose of the ADA 'to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.'") (quoting 42 U.S.C. § 12101(b)(2)). The United States additionally requests that, should the Court hear oral argument on Defendants' Motion, the United States be permitted to participate.<sup>3</sup>

## **II. BACKGROUND AND SUMMARY OF ARGUMENT**

Plaintiffs in the instant suit are alleged to be persons with intellectual or developmental disabilities who receive, or will receive, employment and vocational services from Defendants. (Compl. ¶¶ 1-2, 32, ECF No. 1) Their Complaint asserts that they want to and are capable of working in integrated employment settings with appropriate supports and services, known generally as "supported employment" services, but have instead been placed in sheltered workshops, in which they have little or no opportunity to interact with non-disabled workers or learn valuable skills that would assist them in working in competitive employment. (Id. ¶¶ 1-4) Plaintiffs allege that this segregation is attributable to Defendants' systematic failure to provide, fund or make available sufficient, integrated supported employment services, in violation of Title II of the ADA and Section 504 of the Rehabilitation Act. (Id. ¶¶ 6, 8)

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<sup>3</sup> A hearing on Defendants' Motion is currently scheduled for May 10, 2012. (See ECF No. 28.)

The facts alleged in Plaintiffs' Complaint properly state a claim under Title II of the ADA and the integration regulation.<sup>4</sup> The ADA was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), including, specifically, "segregation" and actions that prevent persons with disabilities from "fully participat[ing] in all aspects of society." *Id.* § 12101(a)(1) & (5). Furthermore, Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." *Id.* § 12101(a)(7). The integration regulation was designed to implement this national mandate against segregation by prohibiting State and local governments from unnecessarily segregating persons with disabilities in all programs and services they provide, including employment and vocational services. The integration regulation is, therefore, not limited to residential services.

In addition, Plaintiffs' Complaint seeks to have Defendants provide or make available those vocational and employment services Defendants already provide in segregated sheltered workshops in integrated community settings. Such services would typically take the form of supported employment services designed to help persons with disabilities find and maintain competitive employment. The Court may properly award such relief if it finds that Defendants violated the integration regulation by unnecessarily segregating Plaintiffs in sheltered workshops. As a modified form of the vocational services already provided in sheltered

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<sup>4</sup> To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

workshops, supported employment services constitute appropriate relief for violations of the integration regulation. See Townsend v. Quasim, 328 F.3d 511, 517 (9th Cir. 2003); Radaszewski v. Maram, 383 F.3d 599, 611 (7th Cir. 2004). Furthermore, Defendants already provide supported employment services to some persons with developmental or intellectual disabilities, though not to the extent necessary to ensure that all persons with disabilities are not unnecessarily segregated in sheltered workshops. (See Compl. ¶ 5)

### **III. ARGUMENT**

#### **A. Title II and the Integration Regulation Apply to All “Services, Programs and Activities” of a Public Entity, and Not Solely to Residential Services**

##### **1. The Broad Remedial Language of Title II**

Title II of the Americans with Disabilities Act states as follows:

[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.

42 U.S.C. § 12132. “Quite simply, the ADA’s broad language brings within its scope ‘anything a public entity does.’” Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001) (quoting Pa. Dep’t of Corr. v. Yeskey, 118 F.3d 168, 171 & n.5 (3d Cir. 1997), aff’d, 524 U.S. 206 (1998)). “Courts must construe the language of the ADA broadly in order to effectively implement the ADA’s fundamental purpose of ‘providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’” Hason v. Med. Bd., 279 F.3d 1167, 1172 (9th Cir. 2002) (quoting Arnold v. United Parcel Serv., 136 F.3d 854, 861 (1st Cir. 1998)). Accordingly, both the Supreme Court and the Ninth Circuit have applied Title II to a wide range of public services, programs and activities, including courthouses, see Tennessee v. Lane, 541 U.S. 509, 527 (2004), prisons, see Yeskey, 524 U.S. at

209, parole hearings, see Thompson v. Davis, 282 F.3d 780, 786-87 (9th Cir. 2002), zoning, see Bay Area Addiction, Research and Treatment v. City of Antioch, 179 F. 3d 725, 731 (9th Cir. 1999), health care, see Rodde v. Bonta, 357 F.3d 988, 995 (9th Cir. 2004), and public sidewalks, see Barden v. City of Sacramento, 292 F.3d 1073, 1074 (9th Cir. 2002). See also McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004) (enforcement of nuisance abatement ordinance); Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996) (“Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.”)

Title II forms part of the ADA’s clear and comprehensive national mandate to end the segregation of persons with disabilities in virtually all aspects of American life, including employment, public accommodations, and transportation. As Congress found, “[i]ntegration is fundamental to the purposes of the ADA. Provision of segregated accommodations and services relegate persons with disabilities to second-class citizen status.” See H.R. Rep. No. 485, at 26 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 449; see also 28 C.F.R. Pt. 35, App. B (same).<sup>5</sup> Accordingly, the ADA prohibits employers from “segregating” job applicants or employees based on their disability, 42 U.S.C. § 12112(b)(1), and similarly prohibits private places of

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<sup>5</sup> Upon signing the ADA in 1990, President George H.W. Bush compared the event to the recent fall of the Berlin Wall and remarked that the ADA “takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp.” He further stated that persons with disabilities “want to work, and they can work, and this is a tremendous pool of people ... who will bring to jobs diversity, loyalty, proven low turnover rate, and only one request: the chance to prove themselves.” He predicted that the ADA would allow persons with disabilities to “move proudly into the economic mainstream of American life, and that's what this legislation is all about.” Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act (Jul. 26, 1990), available at: [http://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html).

public accommodation from providing “separate” benefits, services or facilities, except when doing so is “necessary” to provide equally effective services. *Id.* § 12182(b)(1)(A)(iii).<sup>6</sup>

Additionally, public accommodations must affirmatively “take steps to ensure” that persons with disabilities are not “segregated or otherwise treated differently” from non-disabled individuals due to “the absence of auxiliary aids and services”. *Id.* § 12182(b)(2)(A)(iii).

**2. The U.S. Department of Justice Has Interpreted the Integration Regulation to Apply to All Segregated Services, Programs and Activities, Including Non-Residential Programs**

Congress’ findings in enacting the ADA make clear that the ADA was intended to remedy and reverse all types of segregation facing persons with disabilities, not just in where they lived. For example, Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2). Congress further found that “individuals with disabilities continually encounter various forms of discrimination, including ... segregation[] and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities ...” *Id.* § 12101(a)(5) (emphasis added).

The Department of Justice has long interpreted the integration regulation to apply to all programs, services and activities of public entities. For example, the Department’s 1993 Technical Assistance Manual for Title II states that “[a] primary goal of the ADA is the equal participation of individuals with disabilities in the ‘mainstream’ of American society,” meaning that “[i]ndividuals with disabilities must be integrated to the maximum extent appropriate” and

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<sup>6</sup> Public entities are subject to the same employment discrimination provisions as private employers under these provisions. *See* 28 C.F.R. § 35.140.



“cannot be excluded from the regular program, or required to accept special services or benefits” unless necessary to afford them equal opportunity. ADA Title II Technical Assistance Manual § II-3.4000 (1993), available at: <http://www.ada.gov/taman2.html>. The Technical Assistance Manual further provides numerous examples of public services, programs and activities where the integration regulation applies, including museums, schools, recreational activities, and state motor vehicle departments. Id. §§ II-3.4100 – 3.4400.

In confirming that the integration regulation also applies to residential and health services, the Supreme Court noted that the “unjustified isolation” of persons with disabilities “is properly regarded as discrimination based on disability”. Olmstead, 527 U.S. at 600.<sup>7</sup> This reflects “two evident judgments”: “First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” Id. at 600. “Second, 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 601.

Olmstead was brought by, and thus decided in the context of, two women with developmental disabilities who were challenging their unnecessary segregation in a residential institution owned and operated by the State. Id. at 593. Nevertheless, neither the principles of the decision nor the integration regulation is limited to the decision’s particular facts. Thus,

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<sup>7</sup> As a result, “[t]he Supreme Court has ... foreclosed the ... ‘comparative’ approach to determining whether an individual was discriminated against because of his disability.” McGary, 386 F.3d at 1266 (citing Olmstead, 527 U.S. at 598); see also Henrietta D. v. Bloomberg, 331 F.3d 261, 276 (2d Cir. 2003) (Olmstead “appeared to reject the suggestion that every ADA claim must necessarily include proof of disparate impact”).

courts have applied the Olmstead Court’s analysis to numerous other facts and circumstances involving the unjustified isolation of persons with disabilities, including claims by persons with physical or non-mental disabilities, see, e.g., M.R., 663 F.3d at 1102, claims to prohibit unnecessary segregation in private segregated facilities funded under the state’s disability services system, see, e.g., Voss v. Rolland, 592 F.3d 242, 246-47 (1st Cir. 2010), and claims to prohibit cuts to community services that would place persons at risk of unnecessary institutionalization. See, e.g., M.R., 663 F.3d at 1118; Radaszewski, 383 F.3d at 601; Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1182 (10th Cir. 2003).

Just as the text of Title II and the integration regulation is not restricted to persons with mental disabilities, to state-owned facilities, or to persons already institutionalized, so too is this statutory and regulatory text not limited solely to residential settings. Accordingly, the U.S. Department of Justice has continued to make clear that the integration regulation prohibits the unnecessary segregation of persons with disabilities by public entities in non-residential settings, including segregated sheltered workshops. The Department affirmed this position in an interpretive statement issued on June 22, 2011. Under Question 1, “What is the most integrated setting under the ADA and Olmstead,” the Department wrote:

Integrated services are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual’s choosing; afford individuals choice in their daily life activities; and provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible. ... Segregated settings include, but are not limited to, ... settings that provide for daytime activities primarily with other individuals with disabilities.

“Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.” 3 (June 22, 2011) (emphasis

added), available at: [www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm).<sup>8</sup> The Department further wrote that a “comprehensive, effectively working plan” written pursuant to Olmstead<sup>9</sup> must “include commitments for each group of persons who are unnecessarily segregated,” including “individuals spending their days in sheltered workshops or segregated day programs.” Id. at 7. Finally, the Department wrote that appropriate remedies under the integration mandate include “supported employment.” Id. at 8.<sup>10</sup> The Department has also sought integrated supported employment services as a remedy in cases brought to enforce the integration regulation. See, e.g., United States v. Virginia, No. 3:12-CV-059, ECF No. 2-2 (E.D. Va., settlement agreement filed Jan. 26, 2012); United States v. Delaware, No. 11-CV-591, ECF Nos. 6-7, (D. Del., settlement agreement entered Jul 18, 2011); United States v. Georgia, No. 1:10-CV-249-CAP, ECF Nos. 112, 115 (N.D. Ga., settlement agreement entered as modified Nov. 1, 2010).

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<sup>8</sup> See also Community-Based Alternatives for Individuals with Disabilities, Exec. Order No. 13217, 66 Fed. Reg. 33,155 (Jun. 21, 2001) (“The Federal Government must assist States and localities to implement swiftly the Olmstead decision, so as to help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life.”) (emphasis added).

<sup>9</sup> See 527 U.S. 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 [of the ADA] would be met.”).

<sup>10</sup> The Centers for Medicare and Medicaid Services (CMS), which oversees Medicaid, has also recognized Olmstead’s application to non-residential employment and vocational services provided under Medicaid. CMS has stated that States “have obligations pursuant to ... the Supreme Court’s Olmstead decision” requiring that “an individual’s plan of care regarding employment services should be constructed in a manner that ... ensures provision of services in the most setting appropriate.” CMCS Informational Bulletin 5 (Sept. 16, 2011) (emphasis added), available at: [www.cms.gov/CMCSBulletins/download/CIB-9-16-11.pdf](http://www.cms.gov/CMCSBulletins/download/CIB-9-16-11.pdf).

### 3. **Judicial Deference Afforded to the Department of Justice Regarding the Integration Regulation**

As the agency directed by Congress with issuing regulations under Title II, the Department of Justice's regulations are "entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 646 (1998); see also Olmstead, 527 U.S. at 597-98 ("Because the Department is the agency directed by Congress to issue regulations implementing Title II ... its views warrant respect."). An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997); Barden, 292 F.3d at 1077.

The Ninth Circuit recently affirmed this principle in M.R. v. Dreyfus by strongly deferring to the Department of Justice's interpretation of the integration regulation as stated in a Statement of Interest brief filed with the district court, holding that "[w]e afford DOJ's view considerable respect. ... We also defer to an agency's reasonable interpretation of its own statutorily authorized regulations." 663 F.3d at 1117 (citations omitted).<sup>11</sup>

### 4. **The Department of Justice's Interpretation of the Integration Regulation is Reasonable and Should be Upheld**

The Department's position that the integration regulation includes both residential and non-residential segregated settings is clearly reasonable and not "plainly erroneous or inconsistent with the regulation." See Auer, 519 U.S. at 461. First, the plain language of both the integration regulation and Title II contains nothing that would even suggest, let alone expressly state, that the mandate of public entities to provide services in the "most integrated

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<sup>11</sup> Defendants have cited M.R. as authoritative and controlling. (See Defs.' Mem. of Law in Supp. Mot. to Dismiss ("Defs.' Mem. of Law") at 5-10, ECF No. 30.)

setting” is limited to residential services only. Indeed, the terms “residential” or “institution” appear nowhere in the integration regulation. See 28 C.F.R. § 35.130(d). The Department’s interpretation is also consistent with Congress’ findings in enacting the ADA to address the “isolation” and “segregation” of persons with disabilities without limitation to residential settings or placements. See 42 U.S.C. §§ 12101(a)(2), 12101(a)(5).

Additionally, the same reasoning underlying Olmstead’s analysis of residential settings applies to sheltered workshops. Just as “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,” see 527 U.S. at 600, the unwarranted placement of persons with disabilities in sheltered workshops similarly perpetuates “unwarranted assumptions” that such persons are “incapable or unworthy” of working in competitive employment or interacting with non-disabled co-workers or customers. Likewise, placement in sheltered workshops “severely diminishes everyday life activities” for persons with disabilities, in particular their “social contacts, work options, [and] economic independence ...” See id. at 601. Cf. Halderman v. Pennhurst State Sch. & Hosp., 154 F.R.D. 594, 601 (E.D. Pa. 1994) (finding that class members with developmental disabilities “remain in sheltered workshops where they earn a fraction of what they could earn in the community.”); Homeward Bound, Inc. v. Hissom Mem. Ctr., No. 85-C-437-E, 1987 U.S. Dist. LEXIS 16866, \*43 (N.D. Okla. Jul. 24, 1987) (“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 Department’s interpretation is therefore supported by the Congressional findings, the plain language, and the underlying reasoning of the integration regulation.

**5. Application of the Integration Regulation Does Not Depend Upon the Length of Time in Which Persons with Disabilities Are Unnecessarily Segregated**

Defendants appear to argue that they do not segregate Plaintiffs for long enough periods of time to violate the integration regulation. (See Defs.' Mem. of Law at 11) However, just as the broad language of Title II and the integration regulation covers all services, programs and activities of a public entity, so too does it cover all segregated programs and activities regardless of their duration or the amount of time spent in them by persons with disabilities. The issue, rather, is whether persons with disabilities are interacting with non-disabled persons "to the fullest extent possible." See 28 C.F.R. Pt. 35, App. B at 673. Thus, the placement of persons with disabilities in segregated sheltered workshops on even a part-time basis, when they could be spending these hours working in the community with appropriate supports and services, is sufficient to state a claim under Title II and the integration regulation.

In K.M. v. Hyde, 381 F. Supp. 2d 343 (S.D.N.Y. 2005), the court applied the integration regulation and Olmstead to the segregation of a student with disabilities during his lunch hour, finding as follows:

[U]nnecessary social isolation has been considered a form of actionable discrimination. ... Plaintiff's claims related to the lunchtime isolation appear to be such a claim. Admittedly, eating lunch is not the same thing as institutionalization. However, the comments of the Olmstead Court about the effects of needlessly relinquishing participation in community life apply here. Eating lunch with other students could be considered an integral part of the public school experience, one in which D.G. would be entitled to participate if a reasonable accommodation for his disability would make it possible.

Id. at 360; see also 28 C.F.R. Pt. 35, App. B ("For example, it would be a violation of [the integration regulation] to require persons with disabilities to eat in the back room of a

government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.”).

In this case, the discriminatory impact of this segregation is heightened by the fact that, according to the Complaint, sheltered workshops are the only opportunity Plaintiffs have to access employment of any type.<sup>12</sup> (See Compl. ¶¶ 119, 127, 132, 142, 153, 155, 165, 176) Defendants have likewise not argued that they provide Plaintiffs with some integrated and some segregated programs. Rather, all employment services provided to Plaintiffs are segregated, thus creating a completely segregated program for Plaintiffs.

**B. Supported Employment Services Are Not a “New” Service and Are Already Provided by Defendants**

In their Complaint, Plaintiffs allege that Defendants have “fail[ed] to provide them with supported employment services that would enable them to work in integrated employment settings.” (Compl. ¶ 185) Likewise, under their Prayers for Relief, Plaintiffs request that the Court order Defendants “[t]o provide supported employment programs in integrated community settings for all qualified class members, consistent with their individual needs ...” (Compl. § VII, ¶ 3b) Thus, Plaintiffs have not sought “a job in the community,” as Defendants assert (see Defs.’ Mem. of Law at 12) but, rather, the supports and services necessary to provide them the opportunity to find and keep such a job. This is appropriate relief for a violation of the integration regulation.

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<sup>12</sup> Plaintiffs are therefore not “at risk” of being segregated, but are already receiving employment and vocational services in a segregated setting, namely sheltered workshops. Accordingly, Defendants’ discussion of whether Plaintiffs are “at risk” of residential institutionalization under Dykes v. Dudek, No. 4:11cv116/RS-WCS, 2011 U.S. Dist. LEXIS 119249, \*\*13-15 (N.D. Fla. Oct. 14, 2011) is inapposite. (See Defs.’ Mem. of Law at 10) In addition, Dykes concerned a motion for class certification and not a motion to dismiss.

Defendants already provide employment and vocational services to Plaintiffs in segregated sheltered workshops. Plaintiffs have simply requested that these supports and services be provided instead in integrated community settings, where they would take the modified form of supported employment services. Such modifications do not preclude the availability of these services as a remedy. In Townsend v. Quasim, 328 F.3d 511 (9th Cir. 2003), the Ninth Circuit rejected the contention that the provision of in-home nursing services, as opposed to care in a nursing home, constituted a “new” service that the State need not provide:

Characterizing community-based provision of services as a new program of services not currently provided by the state fails to account for the fact that the state is already providing those very same services. If services were determined to constitute distinct programs based solely on the location in which they were provided, Olmstead and the integration regulation would be effectively gutted. States could avoid compliance with the ADA simply by characterizing services offered in one isolated location as a program distinct from the provision of the same services in an integrated location.

Id. at 517.

Similarly, in Radaszewski v. Maram, 383 F.3d 599 (7th Cir. 2004), the Seventh Circuit refused to find that the provision of a 24-hour private duty nurse in the plaintiff’s home constituted a “new” service based on the State’s contention that it would not provide such a service even in a nursing home:

Nothing in the regulations promulgated under the ADA or the Rehabilitation Act or in the Court’s decision in Olmstead conditions the viability of a Title II or section 504 claim on proof that the services a plaintiff wishes to receive in a community-integrated setting already exist in exactly the same form in the institutional setting. Although a State is not obligated to create entirely new services or otherwise alter the substance of the care that it provides to Medicaid recipients in order to accommodate an individual’s desire to be cared for at home, the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adopt them to community-based settings. ... If variations in the way services are delivered in different settings were enough to defeat a demand for more community-integrated



care, then the integration mandate of the ADA and the Rehabilitation Act would mean very little.

Id. at 611.

The reasoning of the Ninth Circuit in Townsend and the Seventh Circuit in Radaszewski also applies to Plaintiffs' claims here. While supported employment services in the community may take a different form from those provided in sheltered workshops, the services provided in both settings are in essence the same: employment and vocational services designed to assist persons with disabilities in finding employment. For purposes of a claim under the integration regulation, the only material difference is "in what location these services will be provided." Townsend, 328 F.3d at 517. Accordingly, supported employment services are an appropriate remedy to Plaintiffs' claims under the integration regulation.<sup>13</sup>

Finally, it bears noting that Plaintiffs have alleged – and Defendants have not contested – that Defendants already provide supported employment services to some persons with disabilities, albeit in insufficient numbers to serve all who might need them. (See Compl. ¶ 5) Indeed, according to Plaintiffs, Oregon "was once a leader in recommending and promoting

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<sup>13</sup> Defendants' final contention that Plaintiffs' claims should be dismissed because they "are ultimately based upon allegations that the defendants are not meeting their [Plaintiffs'] preferred standard of care with respect to employment services" (see Defs.' Mem. of Law at 13-14) also misunderstands Plaintiffs' claims. The factual allegations Defendants have cited from Plaintiffs' Complaint pertain not to the "standard of care" Defendants have provided, but rather to those methods of administering employment services that operate to deny Plaintiffs supported employment services in the community. These allegations thereby support Plaintiffs' requested relief that Defendants "administer, fund and operate its employment services system in a manner which does not relegate persons with intellectual and developmental disabilities to segregated workshops ..." (Compl. § VII, ¶ 3a) See Conn. Office of Prot. and Advocacy v. Connecticut, 706 F. Supp. 2d 266, 276 (D. Conn. 2010) ("[T]he plaintiffs do not request ... that the individual Plaintiffs receive a certain level of care, but rather that the defendants cease using methods of administration that subject individuals with disabilities to discrimination and, instead, administer their programs and services in a manner that leads to the most integrated setting appropriate for each putative class member's needs.").

integrated employment, such as supported employment services, for individuals with developmental disabilities.” (Id. ¶ 98) Plaintiffs have further alleged that, under three Systems Change grants in the 1980s and 1990s, Oregon developed new supported employment programs and converted some segregated work programs to supported employment programs. (Id. ¶ 96) These allegations are sufficient at this stage to show that Defendants are aware of, and are capable of providing, the modifications to their employment services program to allow persons with disabilities to transition from segregated sheltered workshops to community employment settings.

**IV. CONCLUSION**

For the reasons stated above, the United States respectfully requests that this Court deny Defendants' Motion to Dismiss and find that Plaintiffs have stated a valid cause of action.

Dated: April 20, 2012

RESPECTFULLY SUBMITTED,

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