Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to State and Local Governments' Employment Service Systems for Individuals with Disabilities

Nationally, millions of individuals with disabilities spend the majority of their daytime hours receiving employment and day services in segregated sheltered workshops and segregated day settings (including day treatment programs or facility-based day habilitation centers) where they are segregated from non-disabled persons. Many of these individuals are capable of working competitively and earning minimum wage or above in integrated employment and are not opposed to doing so, but they have been unable to access the services and supports that would allow them to find, obtain, and succeed in competitive integrated employment. In the approximately seventeen years since the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), regarding the integration mandate of Title II of the Americans with Disabilities Act (ADA), some state and local service systems have begun to provide a greater number of integrated community alternatives to individuals in or at risk of segregation in institutions or other segregated settings; yet, despite these advances, many individuals with disabilities who receive employment and day services that are planned, funded, and administered by state and local governments continue unnecessarily to receive services, and spend the majority of their daytime hours, in segregated settings.

A core purpose of the ADA is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[1] The integration mandate of Title II of the ADA is intended to allow individuals with disabilities to live integrated lives like individuals without disabilities, including by working, earning a living, and paying taxes. The civil rights of persons with disabilities, including individuals with mental illness, intellectual or developmental disabilities, or physical disabilities, are violated by unnecessary segregation in a wide variety of settings, including in segregated employment, vocational, and day programs.

Since the passage of the ADA and the Supreme Court's decision in *Olmstead*, the ADA's Title II integration mandate has been applied in a variety of contexts. The ADA's integration mandate applies to all the services, programs, and activities of state and local governments, including their employment service systems.[2] This guide discusses and explains the requirements of the ADA integration mandate and *Olmstead* as applied to employment service systems for individuals with disabilities. It complements and supplements, but does not supersede, the

[1] 42 U.S.C. § 12101(a)(7) (2009).

[2] *Id.* §§ 12131(1), 12132; 28 C.F.R. § 35.130(d) (2016); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-11 (1998); *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1205-06 (D. Or. 2012) (holding that the ADA's integration mandate extends to employment services and prohibits the unnecessary segregation, and risk of unnecessary segregation, of persons with disabilities in sheltered workshops).

"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.*" (June 22, 2011).[3]

Date: October 31, 2016

The ADA and Its Integration Mandate

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[4] In passing the ADA, Congress recognized 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."[5] Therefore, the ADA and its Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[6] The preamble to the "integration mandate" regulation explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ."[7]

In *Olmstead*, the Supreme Court, interpreting the ADA and its integration mandate, held that Title II prohibits the unjustified segregation of individuals with disabilities. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who receive disability services from the entity.[8]

To comply with the ADA's integration mandate, public entities must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination.[9] The obligation

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[3] A State's obligations under the ADA are independent from the requirements of the Medicaid Act, including the requirements of the Home and Community Based Services regulations, 70 Fed. Reg. 2947, 3039 (Jan. 16, 2014) (codified at 42 C.F.R. §§ 440-47); *see also* "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.*" (June 22, 2011), Question 7 (discussing the interplay between the requirements of Title II of the ADA and the Medicaid Act).

[4] 42 U.S.C. § 12101(b)(1). Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."). Claims under the ADA and the Rehabilitation Act are generally treated identically.

[5] 42 U.S.C. § 12101(a)(2).

[6] 28 C.F.R. § 35.130(d) (the "integration mandate").

[7] 28 C.F.R. pt. 35, app. B (addressing § 35.130(d)).

[8] *Olmstead*, 527 U.S. at 607.

[9] 28 C.F.R. § 35.130(b)(7).

to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would "fundamentally alter" its service system.[10]

State and Local Governments' Employment Service Systems

Employment service systems typically include services and supports that are available through multiple state agencies and funding streams, including vocational rehabilitation, Medicaid, and educational (*e.g.*, youth transition services) service systems. Employment service systems may include a range of service settings, including sheltered workshops; supported employment services provided in competitive, integrated employment; small group or enclave employment; facility-based day programs; and integrated day services provided in typical community settings.[11]

Questions and Answers on the Application of the ADA's Integration Mandate and *Olmstead v. L.C.* to State and Local Governments' Employment Service Systems

1. What is the ADA's Title II integration mandate, and how does it apply to state and local governments' employment service systems?

The ADA's integration mandate requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[12] Accordingly, public entities must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.[13]

The integration mandate is implicated when a state or local government administers the services, programs, and activities of its employment service system in a manner that results in unjustified segregation of persons with disabilities in segregated employment settings.[14] A public entity may

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[10] *Id.*; *see also Olmstead*, 527 U.S. at 603-07.

[11] *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTR. FOR MEDICAID, CHIP AND SURVEY & CERTIFICATION, CMCS INFORMATIONAL BULLETIN 5 (Sept. 16, 2011), *available at* https://www.medicaid.gov/federal-policy-guidance/downloads/CIB-09-16-2011.pdf [https://perma.cc/8B8P-3EH5]; *see also* Settlement Agreement, *United States v. Rhode Island and the City of Providence*, 1:13-cv-00442 (D.R.I. June 13, 2013); Consent Decree, *United States v. Rhode Island*, 1:14-cv-00175 (D.R.I. April 9, 2014); Consent Decree, *Lane v. Brown* (formerly *Lane v. Kitzhaber*), 12-cv-00138 (D. Or. Sept. 8, 2015), *available at* https://www.ada.gov/olmstead/olmstead_enforcement.htm.

[12] 28 C.F.R. § 35.130(d).

[13] *Id.* § 35.130(b)(7)(i) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

[14] This guidance addresses the obligations of state and local governments under Title II of the ADA. Title I of the ADA covers public and private employers' nondiscrimination obligations toward individuals with disabilities. Title

violate the ADA's integration mandate when it plans, administers, operates, funds, or implements its employment service system in a way that unnecessarily relies on segregated employment facilities or programs for individuals with disabilities. This includes the public entity's planning, service system design, funding choices, and service implementation practices that require or promote segregated employment settings for persons with disabilities.[15]

2. What is the most integrated setting under the ADA and *Olmstead* in the context of a state and local government's employment service system?

The "most integrated setting" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[16] In the employment services context, state and local employment service systems provide services and supports that allow people with disabilities to work. Providing those services in an integrated setting enables an individual with a disability to work in a typical job in the community like individuals without disabilities. Such settings are commonly referred to as competitive integrated employment settings.[17] An example of a competitive integrated employment setting is work on a full- or part-time basis, at minimum wage or above, at a location where the employee interacts with individuals without disabilities and has access to the same opportunities for benefits and advancement provided to non-disabled workers.

By contrast, segregated settings include settings that are managed, operated, or licensed by a service provider to serve primarily people with disabilities or whose workers are exclusively or primarily individuals with disabilities who are supervised by paid support staff.[18] Employment

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III of the ADA covers the nondiscrimination obligations of public accommodations, including private providers of goods and services to people with disabilities.

[15] *See* 28 C.F.R. § 35.130(b)(1) (prohibiting a public entity from discriminating "directly or through contractual, licensing or other arrangements, on the basis of disability"); *id.* § 35.130(b)(3)(i) (prohibiting a public entity from "directly or through contractual or other arrangements . . . utiliz[ing] criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability").

[16] 28 C.F.R. pt. 35, app. B.

[17] "Competitive Integrated Employment," consistent with the federal Workforce Innovation and Opportunity Act (WIOA), means work that is performed on a full-time or part-time basis (including self-employment): (a) For which an individual is compensated at a rate that: (1) Meets or exceeds state or local minimum wage requirements, whichever is higher; and (2) Is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; or (3) In the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities, and who are self-employed in similar occupations or on similar tasks and who have similar training experience, and skills; and (b) For which an individual is eligible for the level of benefits provided to other employees; and (c) Which is at a location where the employee interacts with other persons who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that individuals who are not individuals with disabilities and who are in comparable positions interact with other persons; and (d) Which, as appropriate, presents opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions. *See* WIOA, Pub. L. No. 113-128, 128 Stat. 1425, 1633-34 (2014).

[18] *See Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 198-216 (E.D.N.Y. 2009) (describing characteristics of institutions to include, *inter alia*, large numbers of individuals with disabilities congregated

services provided to a person with a disability performing work tasks in a sheltered workshop,[19] or to groups of employees with disabilities who routinely work in isolation from non-disabled peers or coworkers or who do not interact with customers or the general public in a manner similar to workers without disabilities performing similar duties, are examples of services provided in a segregated employment setting.

3. How can state and local governments' employment service systems ensure that people with disabilities have access to competitive integrated employment?

Over the past three decades, integrated supported employment services have emerged as a leading model for enabling persons with disabilities to work in competitive integrated employment settings. Supported employment can include various services based on the individualized needs of workers with disabilities to support their entrance into and ongoing sustainability in competitive integrated employment.[20]

Research on supported employment services has yielded best practices for ensuring that individuals with disabilities are able to engage in employment in the most integrated setting appropriate, including ensuring that employment services are individualized, sufficiently intense and of sufficient duration, provided in integrated settings, and designed to achieve competitive integrated employment.[21]

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together with few opportunities to interact with individuals outside of the institution), *vacated on other grounds sub nom. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012); *see also id.* at 223-24 ("Whether a particular setting is an institution is nonetheless a relevant consideration in determining whether it enables interactions with nondisabled persons to the fullest extent possible. It is clear that, 'where appropriate for the patient, both the ADA and the [Rehabilitation Act] favor integrated, community-based treatment over institutionalization.' This echoes *Olmstead*'s recognition that '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 . . . and institutional confinement severely diminishes individuals' everyday activities.'" (first quoting *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 491-92 (3d Cir. 2004); then quoting *Olmstead*, 527 U.S. at 600)).

[19] "Sheltered workshop" refers to a segregated facility where primarily or exclusively persons with disabilities perform contract work or receive prevocational services. Sheltered workshops are usually center-based facilities that possess institutional qualities in which persons with disabilities have little or no contact with non-disabled persons besides paid staff. People with disabilities in sheltered workshops often earn wages that are well below minimum wage.

[20] "Supported Employment Services" refers to services that allow persons with disabilities to work in competitive integrated employment. Such services may include person-centered employment planning, vocational assessments, job development analysis, job placement, job training, job carving, job coaching, negotiation with prospective employers, training and systematic instruction, benefits support, transportation, asset development, career advancement services, and other workplace support services and ongoing supports.

[21] *See* LEAD CENTER & U.S. DEP'T OF LABOR, OFFICE OF DISABILITY EMP'T POLICY ("ODEP"), EMPLOYMENT FIRST TECHNICAL BRIEF #3: CRITERIA FOR PERFORMANCE EXCELLENCE IN *EMPLOYMENT FIRST* STATE SYSTEMS CHANGE & PROVIDER TRANSFORMATION 8-9 (2016), *available at* http://employmentfirst.leadcenter.org/employment-first-resources/criteria-for-performance-excellence-in-employment-first-state-systems-change-provider-transformation [https://perma.cc/VT6U-Q226] [hereinafter ODEP Technical Brief #3] ("ODEP encourages state governments to prioritize and financially incentivize the following types of employment services and evidence-based effective practices that lead to competitive, integrated

In assessing whether a state or local government's employment services system appropriately supports integration, an important factor to consider is whether the system has sufficient capacity to enable people with disabilities to work in competitive integrated employment instead of in segregated settings.[22]

a. Individualization of Services

The success of a person with a disability in competitive integrated employment often depends on the individual "matching" of the person's skills, abilities, and interests with both a set of services and a job. Individualization of services is achieved through a process by which a person with a disability identifies his or her particular interests, preferences, strengths, skills, and support needs for the purpose of finding, obtaining, and maintaining employment. This process includes: 1) assessments that evaluate the individual's skills, strengths, and support needs in an integrated setting; and 2) person-centered planning.[23] Individualization typically depends upon a career development plan developed by a qualified employment professional who is familiar with how to support people with disabilities in competitive integrated employment and how to connect a person with a disability with employment opportunities identified in the local job market. Employment professionals, like job developers and job coaches, typically match a person's distinct interests and capabilities with an employer's unmet needs to create a strong job match and a potential employment opportunity.

b. Intensity and Duration of Services

In employment, people with disabilities are generally most successful in achieving integration to the fullest extent possible when they receive the amount, intensity, and duration of services and supports that will allow them to work in an integrated employment setting for the maximum number of hours consistent with their preferences and skills. Supported employment services that are provided in a sufficient amount, intensity, and duration are more likely to meet the

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employment for individuals with disabilities: Competitive Placement . . . Customized Employment . . . Supported Employment . . . Self-Employment . . . [and] Entrepreneurship or Small Business.").

[22] *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE II ADA INVESTIGATION OF THE CITY OF PROVIDENCE REGARDING THE HAROLD A. BIRCH VOCATIONAL PROGRAM AT MOUNT PLEASANT HIGH SCHOOL ("*United States v. Rhode Island and City of Providence* Letter of Findings") (June 7, 2013); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., UNITED STATES' TITLE II ADA INVESTIGATION OF EMPLOYMENT, VOCATIONAL, AND DAY SERVICES FOR PERSONS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN RHODE ISLAND ("*United States v. Rhode Island* Letter of Findings") (January 6, 2014), *available at* https://www.ada.gov/olmstead/olmstead_docs_list.htm#Letters of Findings [https://perma.cc/N962-HYLX]; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., UNITED STATES' INVESTIGATION OF EMPLOYMENT AND VOCATIONAL SERVICES FOR PERSONS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN OREGON PURSUANT TO THE AMERICANS WITH DISABILITIES ACT ("*Lane v. Brown* (formerly *Lane v. Kitzhaber*) Letter of Findings") (June 29, 2012), *available at* https://www.ada.gov/olmstead/olmstead_docs_list.htm#Letters of Findings [https://perma.cc/N962-HYLX].

[23] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., SECTION 2402(A) OF THE AFFORDABLE CARE ACT – GUIDANCE FOR IMPLEMENTING STANDARDS FOR PERSON-CENTERED PLANNING AND SELF-DIRECTION IN HOME AND COMMUNITY-BASED SERVICES PROGRAMS 4-8 (June 6, 2014), *available at* http://www.acl.gov/Programs/CIP/OCASD/docs/2402-a-Guidance.pdf [https://perma.cc/4J8S-W3KF].

requirements of the integration mandate and will better prepare people with disabilities for integrated employment in the long run. The type, amount, and intensity of someone's services may change over time, but such services should be provided for a sufficient duration to ensure that the person can continue to succeed after initial job stabilization to avoid placing the person at risk of unnecessary segregation. The need for such services and supports may fade over time as individuals become accustomed to their employment and become connected with natural supports, including supports provided by co-workers and peers. However, particularly at the beginning of a job, it is important that supported employment services be provided in a manner that meets a person's needs.

Understanding the resource limitations inherent to public systems, employment service systems may wish to consider how to design models that invoke promising practices to provide such supports in the most integrated setting while rewarding outcomes and efforts made based on individual need. Additionally, state and local government entities may assess, rebalance, and redistribute their resources to emphasize the provision of employment services in the most integrated setting appropriate.

c. Access to Integration During Non-Work Hours

In addition to integrated supported employment services on the job, integration in non-work services also supports the achievement of competitive integrated employment. Many states administer day service programs in combination with employment services, and sometimes such programs are co-located in facilities with sheltered workshops. The ADA's integration mandate applies to public entities' day service programs. Individuals with disabilities should have access to integrated ways to spend the hours when they are not working, such as chosen activities in the community at times and frequencies and with persons of their choosing, and interacting to the fullest extent possible with non-disabled peers instead of being relegated to services in segregated settings. For instance, integrated day services allow persons with intellectual and developmental disabilities to participate in and gain membership in mainstream community-based recreational, social, educational, cultural, and athletic activities, including community volunteer activities and training activities. Such integrated non-work activities can allow individuals with disabilities to develop autonomy and self-determination, networks of contacts, models, and mentors that assist in improving employment opportunities and outcomes.

4. What evidence may a person with a disability rely on to establish that an integrated setting is appropriate for him or her?

A considerable body of professional research shows that people with significant disabilities can work in integrated employment settings.[24] Moreover, numerous states have adopted Employment First policies that instruct states' disability service systems to prioritize supports in competitive integrated employment for individuals with disabilities.[25] Such policies frequently include the

[24] *See* ODEP, INTEGRATED EMPLOYMENT TOOLKIT, *available at* https://www.dol.gov/odep/ietoolkit/researchers.htm [https://perma.cc/7PCU-NFLM].

[25] *See* ODEP Technical Brief #3, *supra* note 21 at 3.

directive that state systems must be driven by the presumption that individuals with disabilities can work, and that not working should be the exception.[26] A person with a disability may rely upon a variety of evidence to establish that an integrated employment setting is appropriate. As the Department has previously stated, a reasonable, objective assessment by a public entity's treating professional is one, but only one, such avenue.[27] For example, a vocational rehabilitation counselor or a state-funded caseworker may conduct a vocational assessment to identify individuals' needs and the services and supports necessary for them to succeed in an integrated employment setting. A professional involved in the assessment should be knowledgeable about the range of supports and services available in integrated employment settings.[28]

However, the ADA and its regulations do not require a person with a disability to have a medical or vocational rehabilitation professional determine that he or she is capable of competitive integrated employment. A person with a disability can also present his or her own independent evidence of the appropriateness of an integrated employment setting. Evidence of appropriateness of competitive integrated employment may include, but is not limited to: 1) people with similar needs are working in integrated settings with appropriate supports; 2) he or she has formerly worked in an integrated employment setting; or 3) he or she currently performs work in a sheltered workshop that demonstrates his or her capability to perform work in a competitive integrated employment setting with the appropriate services and supports. This evidence may come from a person's employment service provider, from community-based organizations that provide supported employment services, from former employers, from family members and friends, or from any other relevant source. Limiting the evidence on which people with disabilities may rely would enable public entities to circumvent their *Olmstead* obligations

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[26] *Id*.

[27] *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., 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.* (JUNE 22, 2011), *available* at https://www.ada.gov/olmstead/q&a_olmstead.htm [hereinafter Department of Justice Statement], at Question 4; *see also Day v. District of Columbia*, 894 F. Supp. 2d 1, 23 (D.D.C. 2012) ("[A]lthough the Court in *Olmstead* noted that a State 'generally may rely on the reasonable assessments of its own professionals,' . . . it did not hold that such a determination was required to state a claim. Since *Olmstead*, lower courts have universally rejected the absolutist interpretation proposed by defendants" (quoting *Olmstead*, 527 U.S. at 602).) (citing *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 539-40 (E.D. Pa. 2001) (denying defendants' motion to dismiss *Olmstead* claims and rejecting the argument that *Olmstead* "require[s] a formal 'recommendation' for community placement")); *Disability Advocates, Inc.*, 653 F. Supp. 2d at 259 (requiring a determination by treating professionals, who are contracted by the State, "would eviscerate the integration mandate" and "condemn the placements of [individuals with disabilities in adult homes] to the virtually unreviewable discretion" of the State and its contractors); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008) ("I reject defendants' argument that *Olmstead* requires that the State's mental health professionals be the ones to determine that an individual's needs may be met in a more integrated setting."); *Long v. Benson*, No. 08-0026, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (refusing to limit class to individuals whom state professionals deemed could be treated in the community, because a State "cannot deny the [integration] right simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise the right would, or at least could, become wholly illusory")).

[28] Department of Justice Statement, *supra* note 27, at Question 4.

by failing to require professionals to make recommendations regarding the ability of individuals to be served in more integrated settings.[29]

5. What factors are relevant in determining whether an individual does not oppose receiving services in an integrated employment setting?

People with disabilities in or at risk of entering segregated employment settings must have the opportunity to make an informed decision about whether to work in integrated employment settings. Individuals who have been segregated in sheltered workshops have often been told that they cannot work, frequently have been tracked away from competitive integrated employment or steered to sheltered workshops directly from secondary school settings, have been absent from the competitive labor market for long periods of time, or been given scant information about supported employment services, integrated employment settings, or how individuals with disabilities can work in jobs in the community. Consequently, individuals and their families may hesitate to explore work in an integrated setting, or they may not ask for or be aware of supported employment services.[30] Public entities that have traditionally relied on segregated work settings should take affirmative steps to remedy this history and to ensure that individuals have a real opportunity to make an informed choice to work in integrated settings. Affirmative steps may include providing information about the benefits of working in integrated employment settings; providing vocational and situational assessments, career development planning, and discovery in integrated employment settings; arranging peer-to-peer mentoring; facilitating visits, conducting job exploration, interest inventories, and work experiences in integrated job settings; and providing benefits counseling, and access to benefits plans, to explain the impact of competitive work on an individual's public benefits.

6. Do the ADA and *Olmstead* apply to persons at serious risk of segregation in sheltered workshops?

The ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization and segregation and are not limited to individuals currently in segregated settings. In the employment context, this includes individuals at risk of unnecessary segregation in sheltered workshops. Individuals need not wait until the harm of unnecessary segregation in a sheltered workshop occurs to receive the protections of the ADA and *Olmstead*. For example, public entities, including state and local education agencies, may be contributing to a pipeline to segregation if vocational rehabilitation counselors, caseworkers, and other supports are not available to assist youth with disabilities to prepare for and transition to competitive integrated employment. Moreover, such public entities need to ensure that students with disabilities can make informed choices prior to being referred for admission to sheltered workshops by, for example, offering timely and adequate transition services designed to allow students to understand and experience the benefits of work in an integrated setting. For instance, factors relevant to whether students with disabilities are at risk of institutionalization include whether a school, as part of the school

[29] *Id.*

[30] *See Lane v. Kitzhaber*, 283 F.R.D. 587, 600 (D. Or. 2012) ("Due to their disability, many individuals with [intellectual or developmental disabilities] may not ask for supported employment services because they are not aware of them or because they are not aware that they have any choices as to services that they are entitled to receive.").

curriculum, trains students with disabilities in tasks similar to those performed in sheltered workshops; encourages students with disabilities to participate in sheltered workshops; and/or routinely refers students to sheltered workshops as a postsecondary placement without offering such students opportunities to experience integrated employment. In the adult context, people with disabilities could show risk of segregation if a public entity systematically screens out adults with significant disabilities from vocational rehabilitation services, finding such persons "not competitively employable" because of their disability status, increasing the likelihood that such persons would have to receive employment services in a sheltered workshop in order to receive employment services at all.

7. What remedies address violations of the ADA's integration mandate in the context of disability employment systems?

In the employment services context, a wide range of remedies may be appropriate to address violations of the ADA and *Olmstead*. The Department has entered into settlement agreements that require states to expand the services and supports available in integrated employment settings. This typically means expanding the variety, intensity, and duration of supported employment services made available to allow people to work in competitive integrated employment.

Various indicators of integration are relevant to *Olmstead* employment remedies, such as individuals with disabilities' interaction with non-disabled persons to the fullest extent possible, and parity of hours, compensation, and benefits. The use of such criteria has been recognized as an appropriate mechanism "to measure the success of the [remedial] employment services offered" by a public entity, including whether such employment services have allowed individuals to receive services in the most integrated setting appropriate.[31]

For individuals to be integrated in a workplace, they should have an opportunity to interact regularly and consistently with their non-disabled peers to the same extent as their non-disabled coworkers. The amount of time spent working in these settings is an important criterion for measuring the extent to which individuals are integrated in employment. Therefore, individuals should be offered supported employment services to allow them to work in integrated settings for the maximum number of hours consistent with their abilities and preferences.[32]

Another factor considered in assessing whether employment services are effective in allowing individuals with disabilities to be integrated to the fullest extent possible with non-disabled peers is whether they participate equally in the customary benefits of the employment setting. For example, individuals with disabilities in integrated employment settings should be compensated roughly equally to their nondisabled peers performing the same job.[33] They should have the

[31] *Lane v. Kitzhaber*, No. 3:12-cv-00138 –ST, 2013 WL 6798470, at *2 (D. Or. Dec. 19, 2013).

[32] It is important to note that the number of hours a person with a disability works in an integrated setting, not necessarily the number of service hours provided, is most relevant to this inquiry.

[33] Providing compensation and benefits to people with disabilities in an employment setting that are not equal to those offered to peers without disabilities performing the same job may also violate Title I or Title III of the ADA or other federal laws. Individual service provider entities, including sheltered workshops, have obligations not to discriminate against individuals with disabilities. Title I of the ADA covers employers with 15 or more employees.

same opportunities in the employment setting as their non-disabled peers, including: (1) access to the community at lunch, during breaks, or before and after the work day; (2) promotion and/or advancement; (3) privacy, autonomy, and the ability to manage one's schedule, work assignments, or breaks; and (4) other employment benefits. In addition, whether the setting is integrated with other community businesses and employers, and whether the work performed by persons with disabilities is matched to individuals' preferences, strengths, or particular support needs (in contrast to "make-work" or simulated tasks that do not correspond to an authentic business necessity or purpose), are also factors relevant to whether the services are effective in integrating individuals with their non-disabled peers.[34]

Employment service system remedies include system-wide capacity-building, transition, and ongoing support, based on measurable goals, outcomes, and timelines. A public entity may need to expand service providers' capacity to offer supported employment services in integrated employment settings. This may involve, among other things, changes to what services and supports are approved, changes to rates to encourage community-based services, and adjustments to caps or durational limits on services. It may also require assistance to existing segregated employment service providers to help them to transition to community-based models.

In cases involving individuals currently in segregated sheltered workshops, remedies are designed so that individuals can access the services and supports necessary to allow them to find, obtain, retain, and advance in employment in integrated settings. In addition, individuals currently segregated in sheltered workshops often need information about supported employment services in integrated settings and about opportunities that will allow them to make informed decisions about working in integrated employment (including meeting with persons who formerly were in sheltered workshops and now are working in integrated employment; speaking with community service providers; and visiting integrated job sites).

State and local school educational service systems may need to adjust expectations and strengthen transition planning and support for students preparing to exit school and enter employment. Upon deciding to move from a school or a segregated setting to an integrated setting, students may need a variety of supports and services to adjust to the change. Even those

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As such, Title I's coverage can include individual service provider entities or sheltered workshops in their capacity as private employers. Title I prohibits employers from discriminating on the basis of disability in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment and requires reasonable accommodations. 42 U.S.C. § 12112 *et seq*. Also, under Title III of the ADA, individuals with disabilities cannot be discriminated against on the basis of disability in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). A "social service center establishment" is a place of public accommodation, 42 U.S.C. § 12181(7), and can include an individual service provider entity or a sheltered workshop. Accordingly, individual service provider entities may also have obligations not to discriminate against their clients as places of public accommodation under Title III of the ADA.

[34] *See* ODEP Technical Brief #3, *supra* note 21, at 9 (stating that "ODEP encourages states to assure the use of individualized supported employment services (SES) to facilitate competitive, integrated employment outcomes as opposed to focusing on group supported employment options. To be clear, competitive, integrated employment, by definition, does *not* include work crews, enclaves, social enterprise, or other forms of group employment").

who decide to remain in segregated placements require periodic follow-up support and in-reach so that the option for work in competitive, integrated employment remains open to them.

Throughout the decision making and transition processes, individuals may need assurance that services in the integrated setting will be sufficient, flexible, and lasting. To continue to avoid unnecessary segregation for the long term, states addressing a history of segregated employment should engage in affirmative efforts at system transformation.

8. What is an *Olmstead* Plan in the state and local government employment service system context?

An *Olmstead* plan is a public entity's plan for implementing its legal obligation to provide services to individuals with disabilities in the most integrated setting appropriate.[35] To be legally sufficient, a plan must be comprehensive and effectively working.[36] A plan is neither comprehensive nor effectively working if it merely provides vague assurances of future integrated options or describes the public entity's general history of increased funding for community services and decreasing institutional populations.[37] For example, in the employment context, a public entity cannot rely merely on the number or amount of supported employment services that it provides to people with disabilities, if the entity cannot demonstrate in what type of settings those services are provided or the success of those services in moving individuals from sheltered workshops to integrated employment settings.

To be comprehensive and effective, the plan must include concrete, reliable, and specific commitments for, and a demonstrated success of, actually moving individuals from segregated sheltered workshops or other segregated settings to integrated employment settings.[38] In assessing an *Olmstead* plan for a state's employment service system, the Department will consider criteria such as the number of individuals who have transitioned from sheltered workshops to work in competitive, integrated employment[39] with appropriate services and supports, their tenure in integrated jobs, the number of hours that such persons work in competitive integrated employment, and the number of individuals who remain in segregated settings. The Department also considers a public entity's adherence to integration criteria such as interaction with non-disabled persons to the fullest extent possible and individualization of services.

Any *Olmstead* plan should be evaluated in light of the length of time that has passed since the Supreme Court's decision in *Olmstead*, including a fact-specific inquiry into what the public entity could have accomplished in the past, and what it could accomplish in the future to prevent the unnecessary segregation of persons with disabilities. Any plan must address the concrete steps that will be taken in the future and how the entity plans on sustaining those steps beyond the scope of any litigation or legal challenge. Plans should include specific and reasonable

[35] Department of Justice Statement, *supra* note 27, at Question 12.

[36] *Olmstead*, 527 U.S. at 605-06.

[37] *Day*, 894 F. Supp. 2d at 26.

[38] Department of Justice Statement, *supra* note 27, at Question 12.

[39] *See* WIOA Definition of "Competitive Integrated Employment," *supra* note 17.

timeframes for the employment of persons with disabilities in integrated employment settings; measurable goals for which the public entity may be held accountable; and funding to support the plan, which may come from reallocating existing service dollars.

9. Is the ADA limited to segregation in employment settings when the same individuals are also subject to segregation in other settings during the day, like facility-based day programs?

No. The ADA and the integration mandate have a broad reach; Title II of the ADA covers all services, programs, and activities of state and local government entities. For example, the integration mandate covers residential, employment, and day services provided by a state. If individuals with disabilities are unnecessarily segregated in sheltered workshops for part of the day and in segregated facility-based day programs for other parts of the day or week, such persons may be unnecessarily segregated in both sheltered workshops and facility-based day programs in violation of the ADA and *Olmstead*. It also violates the civil rights of individuals with disabilities, under the ADA and *Olmstead*, when such persons are unnecessarily segregated in facility-based day programs for all of their daytime hours.

Moreover, public entities cannot evade their *Olmstead* obligations by limiting access to one segregated setting while moving individuals into a different segregated setting.[40] For example, a state could not cease referrals of individuals with disabilities to sheltered workshops while instead referring those individuals to facility-based day or other segregated day programs, or transferring individuals out of the sheltered workshops and into the facility-based day programs (a process known as trans-institutionalization or re-institutionalization), without providing access to alternative services, programs, and activities in the most integrated setting appropriate.

Additional Resources

For more information about the ADA, you may call the DOJ's toll-free ADA information line at 800-514-0301 or 800-514-0383 (TDD), or access its ADA website at www.ada.gov. For more information about DOJ's enforcement of the integration mandate of Title II of the ADA, please visit www.ada.gov/Olmstead.

Information regarding disability employment-related policies and practices can be found at: www.dol.gov/odep/

Questions regarding the use of Medicaid funding for supported employment and states' obligations under the Medicaid Act should be directed to the Centers for Medicaid and Medicare Services.

[40] *See, e.g.*, *Olmstead*, 527 U.S. at 605 ("Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter . . .").