



## Fact Sheet

### **Promoting Integrated Employment: Using the ADA's Integration Mandate to Challenge Sheltered Workshops<sup>1</sup>**

Produced by  
Steven J. Schwartz  
Maissa Boulos  
Center for Public Representation

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#### **I. Introduction.**

This Fact Sheet discusses the general obligation under Title II of the Americans with Disabilities Act (ADA) for States to provide employment services to persons with developmental disabilities in the most integrated setting possible. It concludes that States must modify their employment service system to accommodate the needs and interests of persons with developmental disabilities who currently spend their days in state-sanctioned sheltered workshops by expanding the capacity of its supported employment programs.

#### **II. The ADA Clearly Prohibits Discrimination in Employment and Employment-Related Services on the Basis of Disability.**

In 1990, the United States Congress enacted the Americans with Disabilities Act in order “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). As the legislative history, express findings, and specific mandates of Titles I and II of the Act amply demonstrate, the ADA clearly prohibits discrimination in both employment and employment services.

##### *A. The Legislative Background of the ADA.*

The ADA was by no means Congress’ first attempt to proscribe discrimination in employment against persons with disabilities. Indeed, in an appendix to his

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<sup>1</sup> This special edition Fact Sheet examines the legislative history of the ADA and its mandates, explores the indices of institutionalization and segregation found applicable to sheltered workshops, and offers a framework for P&As to advocate for reform to promote integrated employment using the ADA’s integration mandate.

dissenting opinion in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), Justice Breyer catalogued a series of congressional acts intended to prevent discrimination against persons with disabilities dating back to 1948. *Id.* at 390 App. B (Breyer, J., dissenting). Despite the existence of these laws, as well as any number of similar state and local laws related to employment, both the United States Senate and the House of Representatives determined that existing laws did not adequately address “the pervasive problems of discrimination that people with disabilities are facing.” S.Rep. No. 116, 101<sup>st</sup> Cong, 1<sup>st</sup> Sess. 18 (1989); H.R. Rep No. 485(II), 101<sup>st</sup> Cong., 2d Sess. 47 (1990).

As Attorney General Dick Thornburgh noted:

Over 15 years have gone by since the Rehabilitation Act of 1973 conferred on Federal and federally assisted programs the responsibility to accommodate Americans with disabilities. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life.

*Hearing on H.R. 2273 Before the Sen. Subcommittee on Civil and Constitutional Rights*, 101<sup>st</sup> Cong. 58 (statement of Attorney General Dick Thornburgh). Likewise, both branches of Congress concluded:

[T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

S.Rep. No. 116, 20; H.R.Rep. No. 485(II), 50. “It was against this backdrop that the ADA was enacted.” *Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir. 1995).

The ADA's legislative history evidences Congress's specific intent to ensure that people with disabilities receive equal opportunities to participate in gainful employment, including the right to participate in, and benefit equally from, both employment services like job training and related services such as transportation and education that are often predicates to employment.

The task force hearings, Congress' own hearings, and an analysis of “census data, national polls, and other studies” led Congress to conclude that “people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.” 42 U.S.C. § 12101(a)(6). As to employment, Congress found that “[t]wo-thirds of

all disabled Americans between the age of 16 and 64 [were] not working at all,” even though a large majority wanted to, and were able to, work productively. S.Rep. No. 101–116, at 9. And Congress found that this discrimination flowed in significant part from “stereotypic assumptions” as well as “purposeful unequal treatment.” 42 U.S.C. § 12101(a)(7).

*Garrett*, 531 U.S. at 378 (Breyer, J., dissenting). As Justice Breyer noted, a congressionally appointed task force collected hundreds of specific examples of “adverse treatment at the hand of state officials” that constituted discrimination in employment or services related to employment, including “instances in which a person with a disability found it impossible to obtain a state job, to retain state employment, to use the public transportation that was readily available to others in order to get to work, or to obtain a public education, which is often a prerequisite to obtaining employment.” *Id.* at 379.

*B. The ADA's Findings Specifically Address Employment and Recognize the Legacy of Segregation.*

In the Findings and Purpose section of the ADA, Congress demonstrated its concern for the employment and economic self-sufficiency that comes with employment of people with disabilities:

(3) discrimination against individuals with disabilities persists in such critical areas as *employment*, housing, public accommodations, education, transportation, communication . . . and *access to public services*. . . .

(7) 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

42 U.S.C. § 12101(a) (emphasis added).

Just as the Findings reflected a particular congressional concern about employment and economic independence, they also addressed Congress’s special concern that people with disabilities are improperly segregated in our society. Specifically, the Act states:

(2) 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) individuals with disabilities continually encounter various forms of discrimination, including outright *intentional exclusion*, the

discriminatory effects of architectural, transportation, and communication barriers, *overprotective rules and policies*, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, *segregation*, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101 (a) (emphasis added).

C. *Title II of the ADA Prohibits Discrimination in Public Services.*

In Title II of the ADA, Congress set forth a straightforward prohibition on discrimination:

Subject to the provisions of this subchapter, no 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 (emphasis added). The plain words of the statute make clear that States are prohibited from discriminating or excluding persons with disabilities from *any* of its “services, programs, and activities.” This prohibition of segregation applies with equal force to employment services as it does to residential services such as institutionalization.

Although the statutory language of Title II of the ADA does not specifically reference employment or employment-related services, both the legislative history and the regulations implementing Title II make clear that the behavior prohibited of private employers under Title I is similarly prohibited of public entities under Title II. A House of Representatives Report notes:

Unlike the other titles of this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited. The Committee intends that the regulations under title II incorporate interpretations of the term discrimination set forth in titles I and III of the ADA to the extent that they do not conflict with the Section 504 regulations.

H. Rep. No. 101-485(I) at 52 (1990), reprinted in 1990 U.S.C.C.A.N. at 475.

Accordingly, a Title II regulation, 28 C.F.R. § 35.140, prohibits employment discrimination to the same extent that it is prohibited by the EEOC regulations implementing Title I, and, for those public entities that do not meet the criteria of

Title I, prohibits employment discrimination to the same extent that it is prohibited by Section 504 of the Rehabilitation Act. Like the Title I regulations, the Rehabilitation Act regulations prohibit discrimination on the basis of disability in “[s]election and financial support for training.” 28 C.F.R. § 41.52.

The Title II regulations also make all forms of discrimination that are illegal if conducted by a public entity similarly illegal if they are conducted by a private entity with which the public entity contracts or which the public entity licenses or certifies for any purposes, at least where the public entity effectively controls many of the private entities' activities as do most state agencies that contract with vocational providers serving persons with developmental disabilities. 28 C.F.R. § 35.130 (b)(6). For instance, if a private entity discriminates against someone in the provision of job training, a public entity that licenses the private entity is liable for a violation of Title II of the ADA. Thus, discrimination and unnecessary segregation in job training programs may violate Title II regardless of whether a public entity provides the program directly or contracts with, funds, licenses, or certifies a private entity such as a sheltered workshop.

### **III. Title II of the ADA Requires Public Entities to Administer and Fund Services, Programs, and Activities in the Most Integrated Setting Possible.**

#### *A. Unjustified Segregation of People with Disabilities Constitutes Discrimination Under the ADA.*

Title II's integration mandate reflects the recognition that “[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status.” 28 C.F.R. Pt. 35, App. B. The regulations implementing Title II define the “most integrated setting appropriate to the needs of qualified individuals” as “a setting that enables individuals with disabilities to interact with non-disabled persons to fullest extent possible.” *Id.*

As directed by Congress, the Attorney General promulgated regulations necessary to implement Title II, including its integration mandate: “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). Courts have interpreted both the integration mandate and the scope of Title II's coverage expansively.

Courts have afforded the integration mandate considerable deference, both because Congress specifically directed the Attorney General to promulgate regulations implementing Title II in the text of the ADA itself and because under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), “Department of Justice regulations interpreting Title II should be given controlling

weight unless they are ‘arbitrary, capricious, or manifestly contrary to the statute.’” *McGary v. City of Portland*, 386 F.3d 1259, 1269 n.6 (9th Cir. 2004) (quoting *Chevron*, 467 U.S. at 844). See also, e.g., *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065 (9th Cir. 2010) (discussing the deference owed to a regulation implementing a different section of Title II).

Courts regularly rely on the integration mandate and the language of Title II itself in determining whether a public entity’s conduct constitutes unlawful discrimination. In *Olmstead v. Zimring*, 527 U.S. 581, 597 (1999), the Supreme Court, after reciting the integration regulation and the Attorney General’s authority to promulgate it, plainly stated, “Unjustified isolation . . . is properly regarded as discrimination based on disability.”<sup>2</sup> The Supreme Court reviewed the harm of segregation, declaring that it “perpetuates unwarranted assumptions that persons so isolated are incapable or trustworthy of participating in community life” and that it “severely diminishes the everyday life activities of individuals including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>3</sup> *Id.* at 600–01. The Court held that Title II requires States to provide services in the most integrated setting possible, including shifting programs and services from segregated to integrated settings, unless such a shift would result in a fundamental alteration to their service systems. *Id.* at 607.

Other courts have given the integration regulation an expansive interpretation. In *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009) [hereinafter *DAI II*], the court, referring to its earlier summary judgment decision (*DAI I*), noted:

In *DAI I*, the court resolved the parties’ dispute regarding the meaning of the federal regulations and concluded that the proper inquiry is whether the individuals at issue “are in the ‘most integrated setting appropriate to their needs,’ defined as ‘enabl[ing] individuals with disabilities to interact with nondisabled persons to the fullest extent possible.’” See *DAI I*, 598 F. Supp. 2d at 321 (citing 28 C.F.R. § 35.130(d), App. A and concluding that “the federal regulations mean what they say”).

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<sup>2</sup> Even prior to *Olmstead*, the Third Circuit Court of Appeals stated, “[T]he ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled. Accordingly, the district court erred in holding that the applicable provisions of the ADA “may not be invoked unless there is first a finding of discrimination.” *Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir. 1995) (footnote omitted).

<sup>3</sup> In another pre-*Olmstead* case, a court similarly described a key harm of segregation: “People are harmed educationally if they are kept in an unnecessarily segregated environment. Segregation is harmful to retarded persons; it leads to reduced learning, reduced freedom and reduced growth.” *Homeward Bound v. Hissom Memorial Center*, 1987 WL 27104, at \*13 (N.D. Okl., July 24, 1987).

See also, e.g., *Frederick L. v. Department of Public Welfare of Pennsylvania*, 422 F.3d 151, 157 (noting that under *Olmstead*, the integration mandate “is not boundless,” but finding nevertheless that defendants had not satisfied their obligation to move people from segregated institutions to community placements); *Kerrigan v. Philadelphia Bd. of Election*, 2008 WL 3562521, at \*18-19 (E.D. Pa. Aug. 14, 2008) (assessing whether the integration mandate had been met with regard to “the program of voting,” which “includes the opportunity to vote in one’s local, assigned, polling place, where the voter can take advantage of the opportunities to meet election judges, see their neighbors, and obtain information from candidates’ representatives,” instead of looking only at the act of casting a ballot).

B. “Services, Programs, and Activities”

With few exceptions, litigation concerning the “integration mandate” has typically focused on institutionalized persons who are subjected to residential segregation. However, the definition of “services, programs, and activities” as used in 42 U.S.C. § 12132 is not so limited and encompasses vastly more settings and contexts in which a person with a disability could be unlawfully segregated under Title II than an institution. “Under the applicable standard set forth in the regulations for what constitutes the ‘most integrated setting,’ a plaintiff need not prove that the setting at issue is an ‘institution’ to establish a violation of the integration mandate.” *DAI II*, 653 F. Supp. 2d at 223. “Rather, a plaintiff must show that the *setting* does not ‘enable interactions with nondisabled persons to the fullest extent possible.’” *Id.*

Although the integration regulation has not been extensively applied in cases that do not involve institutionalization or the risk of institutionalization,<sup>4</sup> courts have nonetheless found coverage of Title II to extend to all forms of services, programs, and activities of a public entity or an entity related to the public entity by a contract, license, or certification. For instance, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the Supreme Court, after deciding that a prison was a public entity for the purposes of Title II, rejected the

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<sup>4</sup> In *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003), the court of appeals rejected the argument that plaintiffs needed to be currently institutionalized to raise a claim under the integration mandate, noting:

First, there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized. The integration regulation simply states that public entities are to provide ‘services, programs, and activities in the most integrated setting appropriate’ for a qualified person with disabilities. Second, while it is true that the plaintiffs in *Olmstead* were institutionalized at the time they brought their claim, nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA’s integration requirements.

*Id.* at 1181.

defendants' argument that prisons do not provide any service, programs, or activities as defined by Title II, noting, "Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." *Id.* at 201. As the Ninth Circuit has stated:

Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless hair-splitting arguments. The focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity.

*Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002).

In keeping with this expansive interpretation of the scope of Title II and its integration mandate, courts have recognized a variety of services, programs, and activities as subject to Title II, including, among others, voting in public elections, *Kerrigan v. Philadelphia Bd. of Election*, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008); adult day health care, *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009); in-home supportive service benefits, *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009); a state prison's grievance system and program for tracking the needs of disabled prisoners, *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010); and zoning, *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997), *rev'd on other grounds by Zervos v. Verizon New York*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). Under any reasonable construction of Title II, state-operated, state-funded, or state-licensed employment services are plainly covered.

*C. Employment Services are a Form of "Services, Programs, or Activities" Covered Under Title II of the ADA.*

Given the expansive interpretation of "services, programs, or activities" in judicial opinions and Title II's implementing regulations, the provision, funding, or administration of vocational services by a public entity clearly is covered under Title II and, accordingly, subject to its integration mandate. *See, e.g., Yeskey*, 524 U.S. at 210 (listing vocational services offered by some prisons as among those programs subject to the provisions of Title II). It is irrelevant whether the public entity personally delivers the vocational services and programs, so long as they have contracted with, certified, or licensed the entities that actually provide the services. *See* 28 C.F.R. §§ 35.130(b)(1); 35.130 (b)(3); 35.130 (b)(6).

States generally offer a range of employment services to persons with

disabilities, including job finding,<sup>5</sup> job training,<sup>6</sup> and job support services.<sup>7</sup> For persons with developmental disabilities, state agencies frequently plan, administer, fund, and license employment services and programs that include both segregated and integrated employment. Significantly, some States, like Washington and Vermont, have redesigned their service systems to fully or substantially discontinue all segregated employment programs.

#### **IV. Sheltered Workshops Provide Employment Services in Inappropriately Segregated Settings.**

Sheltered workshops segregate persons with developmental disabilities through two pervasive characteristics, one mandated by law and the other implemented in practice. First, pursuant to section 214(c) of the Fair Labor Standards Act, 29 U.S.C. § 214(c) (2000) (hereafter § 14(c)), employees of sheltered workshops can be paid less – often far less – than the minimum wage. Second, in virtually all States, the public entities that plan, fund, administer, or license services for persons with developmental disabilities routinely relegate individuals with disabilities to segregated programs and settings that are wholly separate from ordinary work opportunities and that offer no contact with individuals without disabilities.<sup>8</sup> Most States include facility-based sheltered workshops as a standard component of their service systems for persons with developmental disabilities, and invest considerable resources in programs that perpetuate the segregation of persons with disabilities.

##### *A. The Legal Basis for Sheltered Workshops*

The legalized aspect of sheltered workshops provides that:

(1) The Secretary [of Labor], to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or

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<sup>5</sup> Job finding services include, among other functions, assisting persons with preparing job applications, identifying potential employment opportunities, understanding job qualifications and conditions of employment, practicing for job interviews, and offering supports, such as transportation, to secure the job.

<sup>6</sup> Job training includes various vocational approaches that are allegedly designed to teach persons job skills and prepare them for gainful employment in the regular workforce. Sheltered workshops allegedly are a form of job training which, as more fully described in Section III, *infra*, rarely prepares recipients for anything.

<sup>7</sup> Job support services generally refer to ongoing assistance at employment settings. Supported employment is a form of job support services which, as more fully described in Section IV, *infra*, allows persons with disabilities to work in regular jobs for regular pay.

<sup>8</sup> In theory at least, States can fund vocational programs that use § 14(c) certificates for individuals who work in crews or enclaves stationed in more traditional employment settings, rather than segregated facilities. Few developmental disability agencies do so. In any event, this memo focuses on the vast majority of sheltered workshops that are site-based and employ persons in segregated facilities.

order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are—

(A) lower than the minimum wage applicable under section 206 of this title,

(B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

(C) related to the individual's productivity.

The regulations that implement the sub-minimum wage provision of the FLSA, despite providing a number of rules that an employer must follow to obtain a “special minimum wage” 14(c) certificate, make clear that the process of obtaining a certificate is in no way onerous. The regulations simply require that an employer submit an initial application that explains the nature of the disabilities of the individuals employed, as it relates to their productivity; that describes the process the employer used to determine the prevailing wage rate with which the earnings of workers with disabilities must be “commensurate;” and that indicates how much the workers with disabilities are to be paid based upon a comparison to workers without disabilities performing the same type of work in the same geographical vicinity. 29 C.F.R. § 525.9.

Certificates are routinely issued as a matter of course by the Department of Labor's Wage and Hour Division. There is no requirement for follow-up or on-site investigation. See Whittaker, William G., “Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act” (2005). *Federal Publications*, Paper 209, at 15, available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/209](http://digitalcommons.ilr.cornell.edu/key_workplace/209) [hereinafter Whittaker, “Treatment of Workers with Disabilities”]. As a result, there is no verification that individuals with disabilities are properly determined to be less than competitively productive, that sub-minimum wages are appropriate, and that the individual is unable to work in a competitive position at minimum wage.

The federal Vocational Rehabilitation Services Program, authorized by 29 U.S.C. § 701 *et seq.*, supports vocational services for persons with disabilities in every State. In 2001, the Program curtailed the circumstances under which the federal government would reimburse States for placing people with disabilities in sheltered workshops as long-term vocational opportunities. The Program now defines “extended employment” (its substitute term for sheltered workshops) as “work in a non-integrated or sheltered setting for a public or private nonprofit agency or organization that provides compensation in accordance with the Fair

Labor Standards Act.” 39 C.F.R. § 361.5(b)(19).

B. *The Practical Reality of Sheltered Workshops for Persons with Developmental Disabilities.*

One of the most salient features of sheltered workshops is the segregation and congregation of persons with disabilities in a setting that is divorced from all contact with real workplaces and persons without disabilities. In a typical sheltered workshop funded, administered, or licensed by a State or local agency for people with developmental disabilities, the public agency’s clients with disabilities work in congregate settings, often demarcated in practice, if not by official policy, from other program areas or settings.<sup>9</sup> Michelle Morris, Heather Ritchie, & Lisa Clay, Section 14c of the Fair Labor Standards Act: Framing Policy Issues, National Center on Workforce and Disability, Institute for Community Inclusion (2002) at 14.

Since sheltered workshops by definition do not include people without disabilities, the only interaction that workers with disabilities have with people without disabilities are with program staff and supervisors. These supervisory and program staff regularly receive minimum wage or better, while workers with disabilities frequently receive subminimum wages. The contrast in compensation, conditions of employment, and regulation exists when differences in ability or even productivity may be minimal or non-existent.

The intent of this segregation – to train persons with disabilities and prepare them for real jobs in real work settings – is illusory. Sheltered workshops are, in almost all states and all programs, a permanent relegation to a separate and unequal job. By any measure, they are dead-end programs which employees rarely, if ever, leave. See, e.g., Jacobus tenBroek, *The Character and Function of Sheltered Workshops*, National Federation for the Blind (1995) (discussing conflicting purposes of sheltered workshops: to provide transitional services on a path toward competitive employment or to offer an indefinite opportunity for paid work to people with disabilities); Thomas Simmons & Robert Flexer, *Business and Rehabilitation Factors in the Development of Supported Employment Programs for Adults with Disabilities*, *Journal of Rehabilitation* (Jan-Mar. 1992) [hereinafter Simmons & Flexer]; Zana Marie Lutfiyya, Pat Rogan, & Bonnie Shoultz, Center on Human Policy, *Supported Employment: A Conceptual Overview* (1988), available at <http://thechp.syr.edu/workovw.htm> [hereinafter Lutfiyya, Rogan, & Shoultz].

C. *Sheltered Workshops Are Segregated Settings.*

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<sup>9</sup> Prior to the 1986 amendments to the Fair Labor Standards Act, two different types of certificates were issued: one for work activities centers (WAC) and one for regular work programs (RWP). The regular work program applied to workers with disabilities who could earn at least 50% of the minimum wage, whereas the work activity centers served individuals with the most severe disabilities who could not meet the 50% compensation threshold. Participants in the two programs had to be physically segregated from each other. While the former § 14(c)(3)(A) has since been repealed, the vestiges of segregation have not.

1. Sheltered workshops are a *de jure* form of discrimination and a *de facto* form of segregation.

Sheltered workshops provide employment services to individuals with disabilities in segregated settings with the full knowledge, active support, and explicit authorization of governmental entities such as federal agencies that fund, and state agencies that serve, people with developmental disabilities. Indeed, very few workshops would have the financial means to continue operating if they were not both (1) permitted to pay their employees less than the minimum or prevailing wage by the federal government, and (2) reimbursed by applicable state or local agencies for their function as state-certified providers of day services for people with developmental disabilities. See Testimony of William E. Kiernan, Institute of Community Inclusion, *Hearing before the S. Comm. of Health, Education, Labor and Pensions* (2011); Whittaker, "Treatment of Workers with Disabilities" at 16. Studies show that nationally, 84% of 14(c) special wage certificate holders operate sheltered workshops, that sheltered workshops employ 95% of all 14(c) workers, and that these workshops receive 46% of their funding from state and local governments. *GAO Report* (2001) at 3, 14. Thus, the segregation which occurs, the exemption from equal pay which is authorized, the isolation and congregation which is endorsed, and the separation from the mainstream of economic activity which results in sheltered workshops are the direct and intentional effect of governmental action.<sup>10</sup>

2. Sheltered workshops recall the legacy of Jim Crow laws as articulated by the Supreme Court in *City of Cleburne v. Cleburne Living Center*.

In *City of Cleburne v. Cleburne Living Center*, 472 U.S. 432 (1985), the Supreme Court struck down a zoning ordinance that prohibited a non-profit corporation that served persons with intellectual disabilities from constructing a group home in a community setting. Justice Marshall, concurring in part and dissenting in part, challenged the majority's analytical distinction between race and disability for equal protection purposes. After noting the importance of community life for all individuals, he recounted a legacy of "segregation and discrimination" toward people with intellectual disabilities "that can only be called grotesque." 473 U.S. at 461. Reviewing the historical treatment of people with intellectual disabilities by the government, he found that with the rise of the eugenics movement, a "regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462. As Justice Marshall more fully elaborated, people with

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<sup>10</sup> For a comprehensive review of the professional literature on sheltered workshops from the perspective of the ADA, see Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U.L. REV. 875 (2010) (hereafter "Beyond Residential Segregation").

intellectual disabilities share with African-Americans a history of categorical exclusion from such fundamental civic institutions as education, marriage, reproduction, and voting. *Id.* at 462–64. The intentional discrimination and paternalistic animus that generated isolated institutions as well as segregated workshops for persons with disabilities are not dissimilar from the Jim Crow laws that shackled African-Americans. This shameful legacy directly informed the enactment of the ADA, its broad Findings, and its basic purpose. See 42 U.S.C. § 12101(a).

Although he acknowledged that some of the gravest injustices toward people with disabilities were now in the past, Justice Marshall took note of the various forms of segregation that still plague individuals with intellectual disabilities: “For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same . . . irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people.” 473 U.S. at 467. People with intellectual disabilities, he determined, constitute “a group [that] may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality. . . .” *Id.* at 472. Because “[p]rejudice, once let loose, is not easily cabined,” *id.* at 464, the combination of federal, state, and local laws that sanction, indeed authorize, a system of employment services that segregates people with disabilities may very well be the product of “prejudiced, thoughtless, or stereotyped action.” As such, sheltered workshops merit particularly exacting inquiry to determine whether there is any reasonable basis, not based in prejudice or stereotype, for the government-sanctioned segregation that they permit.

*D. Sheltered Workshops Do Not Meet the Regulatory Standard for Public “Services Provided in the Most Integrated Setting Possible” Because Workers Do Not Have the Opportunity to Interact with Non-Disabled People to the Maximum Extent Possible on the Job.*

The regulations implementing Title II of the ADA require that services, programs, and activities be provided to people with disabilities in the most integrated setting possible, and define that setting as one “that enables individuals with disabilities to interact with non-disabled persons to fullest extent possible.” 28 C.F.R. Pt. 35, App. B. Most publicly-funded sheltered workshops, where workers with developmental disabilities perform their duties in congregate settings alongside other people with disabilities, and where their only opportunity for interaction with non-disabled individuals, if they have such opportunity at all, is in their interaction with their fully compensated managers or supervisors, clearly do not meet this regulatory test for appropriate integration. See Albert Migliore, David Mank, Teresa Grossi, & Patricia Rogan, *Integrated Employment or Sheltered Workshops: Preferences of Adults with Intellectual Disabilities, Their Families, and Staff*, 26 *Journal of Vocational Rehabilitation* 5–19, 6 (2007) [hereinafter Migliore, Mank, Grossi, & Rogan]; see also Lutfiyya, Rogan, & Shoultz. By

separating persons with developmental disabilities from their non-disabled persons, sheltered workshops engage in what Justice Ginsburg explained as one of the most pernicious consequences of segregation:

Second, [segregation] severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

*Olmstead*, 527 U.S. at 601. When persons with disabilities are denied the opportunity to interact with citizens without disabilities – as they invariably are in most state-funded and licensed sheltered workshops – the very purpose of the ADA is thwarted.

*E. Sheltered Workshops Have a Number of Other Attributes in Common with Segregated Institutions.*

While a finding that sheltered workshops do not provide the maximum opportunity possible for interaction with non-disabled peers is sufficient to label it a segregated setting and to demonstrate a violation of Title II of the ADA, it is also significant that sheltered workshops share a number of additional attributes with the institutions that have been discredited and emptied in recent decades and the large adult homes that have more recently been criticized, despite their physical location in communities. See *DAI II*, 653 F. Supp. 2d at 224 (“The court’s factual finding that the Adult Homes are institutions is compelling evidence supporting the conclusion that such a setting does not enable interactions with nondisabled people to the fullest extent possible.”)

Many of the indices of institutionalization and segregation found applicable to adult homes by the *DAI II* court find ready parallels in the sheltered workshop context. In both adult homes and sheltered workshops, large numbers of persons are congregated in separate settings where only persons with disabilities live or work. Both settings are usually large and institutional like, quite unlike ordinary residential or commercial establishments. In both adult homes and sheltered workshops, activities are highly regimented, with fixed schedules dictated by supervisors, often for the convenience of supervisors. Individualization in routines, activities, preferred patterns, or leisure time is noticeably absent. People spend their entire time living or working in the sheltered setting, with virtually no opportunity for contact with other residential or employment settings or local resources. They do not learn or gain independence, but instead, practice dependency and “learned helplessness.” There are no opportunities to engage in other community activities or experiences. The training that is provided is not designed to, and clearly does not have the effect of, allowing persons with disabilities to learn skills that can be used in integrated settings. Not surprisingly, few individuals in adult homes or sheltered workshops actually transition to more integrated settings.

Moreover, the work that individuals in sheltered workshops perform bears little resemblance to the work performed in most workplaces. See, e.g., Migliore, Mank, Grossi, & Rogan; Simmons & Flexer; Lutfiyya, Rogan, & Shoultz. Indeed, client-employees of sheltered workshops often do manual labor that is typically automated in modern industries. *Id*; See also Whittaker, “Treatment of Workers with Disabilities” at 18. Workshop participants, both by virtue of their schedule and productivity requirements, and because they are often located in remote areas to which participants are transported daily as a group, do not have the opportunity to take advantage of neighborhood amenities and generic resources. Moreover, although many sheltered workshops ostensibly provide the people with disabilities who work for them with vocational and social skills training that should theoretically assist the workers in transitioning to real community jobs, those services, in practice, usually do nothing more than maintain the status quo. See Migliore, Mank, Grossi, & Rogan (noting that “it is not uncommon for workshops to claim to be providing rehabilitation geared toward transition in the general labor market, when instead, what they are actually offering is a long-term placement in the workshop”); see also Katherine Inge, Paul Wehman, Grant Revell, Doug Erickson, John Butterworth, & Dana Gilmore, *Survey Results from a National Survey of Community Rehabilitation Providers Holding Special Wage Certificates*, 30 *Journal of Vocational Rehabilitation* 67–85, 68 (2009) [hereinafter Inge et al.].

F. *Sheltered Workshops Do Not Lead to Integrated Work Opportunities.*

There are two prevailing, and conflicting, views of the function that sheltered workshops serve. The most widely held view considers workshops to be a permanent employment placement for people with disabilities who are deemed incapable of ever working in an integrated setting, although extensive research belies that view even as to the most significantly disabled individuals. See, e.g., Lutfiyya, Rogan, & Shoultz. Another view considers sheltered workshops to be a temporary stop along a continuum that may begin with institutionalization or simply a lack of any work experience, and that will end with a job in the competitive workforce, with or without supports. *Id.*; see, also, David Mank, *The Underachievement of Supported Employment: A Call for Reinvestment*, 5:2 *J. Disability Policy Studies* (1994) at 7. Unfortunately, research demonstrates that no more than 5% of individuals in sheltered workshops ever transition into integrated employment. See Testimony of Senator Michael Enzi, *Opportunities Too Few? Oversight of Federal Employment Programs for Persons with Disabilities, Hearing Before S. Comm. On Health, Education, Labor, and Pensions*, 109<sup>th</sup> Cong. 3 (2005) (noting that fewer than 5% of participants in the federal Javits-Wagner-O’Day program move into supported or competitive employment in a given year); Michael Gill, *The Myth of Transition, Contractualizing Disability in the Sheltered Workshop*, 20:6 *Disability & Society* 613–623 (Oct.2005) (citing a 2003 study which found that only 3.5% of sheltered

workshop employees in the United States transitioned into community-based settings per year).

Workshops generally subsist on reimbursement from the State or local governments as service providers, along with income from subcontracts for the production of goods. See Simmons & Flexer. Individuals spend their days at sheltered workshops performing assigned tasks that bear no relationship to their individual skills, interests, or prior work experience. See, e.g., David Mank, *The Underachievement of Supported Employment: A Call for Reinvestment*, 5:2 J. Disability Policy Studies (1994) at 3 (describing the problems with sheltered workshops that first prompted serious interest in supported employment, and that stubbornly persist despite the early promise that supported employment demonstrated). In fact, the only individualized determination that a sheltered workshop employer needs to make about an employee in order to secure a 14(c) certificate is that the worker is disabled for the specific job being performed in that workshop. It does not matter if, for example, the employee could be successful in the competitive job market in another position, such as a retail worker or customer service representative. See 29 CFR § 525.3(d).

The “work” done under the typical subcontracts fulfilled by sheltered workshops is low-skilled, non-challenging manual labor. See Simmons & Flexer. This work does not provide training for integrated employment, largely because technology has made most of the manual labor that individuals in workshops perform obsolete in the “real world” job market. See Whittaker, “Treatment of Workers with Disabilities” at 18. For many employees of sheltered workshops, the endless daily routine of performing such mundane work causes both their vocational and social skills to atrophy, leading to an even lower likelihood that they will ever find work in the community as well as lowered expectations of themselves, similar to what the district court in *DAI II* termed “learned helplessness.” 653 F. Supp. 2d at 214. See Simmons & Flexer. The lowered expectations that workshops engender are not limited to the workers; they pervade the public consciousness as well. See Aaron Gottlieb, William N. Myhill, Peter Blanck, *Employment of People with Disabilities*, International Encyclopedia of Rehabilitation, available at <http://cirrie.buffalo.edu/encyclopedia/em/article/123/> [hereinafter Gottlieb, Myhill, & Blanck] (“[I]nstead of reducing obstacles to employment, segregation lowers expectations and enhances negative public attitudes, making it more difficult for individuals with disabilities to obtain meaningful employment.”)

Finally, because sheltered workshops must fulfill the terms of their subcontracts in order to stay in business, they have a conflict of interest with promoting integrated work for their employees. The workshops have a financial incentive to retain the most skilled workers—who are quite often the workers who could most easily transition into work in competitive, integrated employment—in the workshops indefinitely. See Lutfiyya, Rogan, & Shoultz.

G. *That Congress Previously Authorized Sheltered Workshops Does*

*Not Insulate Them from Attack Under Title II of the ADA If Their Workers Are Not Provided Employment Services in the Most Integrated Settings.*

Despite the documented failure of sheltered workshops to deliver integrated, individualized, and equitably compensated employment outcomes for their workers, federal laws which support their continued existence remain in effect. The Fair Labor Standards Act permits the payment of subminimum wages to workshop employees, while the Javits-Wagner-O'Day (JWOD) Act (now called AbilityOne), 41 U.S.C. §§ 46-48(c), offers participating non-profit companies exclusive contracts for the sale of goods and services to the federal government, as long as those companies rely on employees with disabilities for at least 75% of the "work hours" (non-supervisory hours) required to meet the contracts' demands. These laws reflect the belief that people with disabilities cannot succeed in the competitive labor market, even with the benefit of proper job matching, reasonable accommodations, and individualized supports.<sup>11</sup> See Stefan, *Beyond Residential Segregation* (reviewing the history of the two statutes in light of the ADA).

Section 14(c) of the FLSA and the JWOD Act seem irreconcilable with the express findings and purpose of the ADA. Nevertheless, there have been virtually no ADA challenges to segregated workshops implemented through FLSA certificates. This is most likely the result of the almost exclusive focus of ADA litigation on residential settings. But it also may reflect some hesitation due to one particular sentence in the legislative history of the Act:

[T]his legislation is in no way intended to diminish the continued viability of sheltered workshops and programs implementing the Javits-Wagner[-]O'Day Act.

S. Rep. No. 101-116, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. (1989). See also H.R. Report 101-485, Part 2, 101<sup>st</sup> Cong., 2d Sess. (1990) (same).

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<sup>11</sup> Testifying at a 2009 Senate hearing, a representative of the independent federal agency that oversees the JWOD program predicted that any restrictions on 14(c) would lead to devastating consequences:

The impact to the thousands of hard working Americans with significant disabilities along with people without disabilities who support them in the AbilityOne Program would be profound and long-lasting. The hardest hit would be employees with developmental disabilities and intellectual disabilities. These are the employees who would have little chance at securing employment in the competitive environment; the employees who would most likely have no job opportunities if not for the AbilityOne Program.

Prepared Statement of National Institute for the Severely Handicapped, *Preventing Worker Exploitation: Protecting Individuals with Disabilities and Other Vulnerable Populations*, Hearing Before S. Comm. on Health, Education, Labor, and Pensions, 11<sup>th</sup> Cong. 49 (2009).

Even if one treats these two lines, buried in over three thousand pages of legislative history, as highly significant, any suggestion that sheltered workshops cannot violate the ADA because another statute authorizes the payment of sub-minimum wages or special preferences for such workshops should be rejected, for at least four reasons. First, it appears that the congressional declaration was intended to protect sheltered workshops in their role as employers from the prohibitions on unequal employment conditions set forth in Title I of the Act. Under Title I, sheltered workshops may qualify as employers (and thus “covered entities”) if they have an employment relationship with the State’s clients, which they customarily do.

Second, the language from the legislative history must be read in the context of the ADA in its entirety and in the context of the two congressional reports in which it appears. As the Senate report notes, “One of the most debilitating forms of discrimination is segregation imposed by others.” The harmfulness of this form of discrimination is the basis of the integration mandate in Title II of the ADA, and a central factor in the holding of *Olmstead*. It also explains the Title II regulations which provide that although the ADA authorizes some segregated programs, if they are designed to benefit people with disabilities, individuals must be allowed to participate in the integrated version of the program if they so choose. Applying this principle to sheltered workshops, the same House Report cited above provided:

The Committee wishes to emphasize that these provisions should not be construed to jeopardize in any way the continued viability of separate private schools . . . , sheltered workshops, special recreational programs, and other similar programs.

At the same time, the Committee wishes to reaffirm that individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and over-arching principle of the Committee’s bill. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used in any way to restrict the participation of disabled persons in general, integrated activities.

H.R. Rep No. 485(II), 101<sup>st</sup> Cong., 2d Sess. (1990). See also S. Rep. No. 116, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. (1989) (same).

Read in its appropriate context, the language in the Senate and House Reports that the ADA “in no way” limits the viability of sheltered workshops is actually quite nuanced. A State may provide funding for individuals to participate in segregated employment services, like sheltered workshops, but only if it also offers all persons with disabilities the very same opportunity to participate in integrated employment services, such as supported employment. Conversely, if a State refuses to provide all persons with disabilities the same opportunity to participate in services in the most integrated settings that it is providing to some

of them, then the provision of sheltered workshop services could be prohibited entirely by the integration mandate and related provisions of Title II. Third, and perhaps most significantly, that segregated settings may be legally permitted by one federal law does not mean that the unnecessary placement of a person with a disability in a segregated setting by a public entity is otherwise immune from attack under Title II of the ADA.<sup>12</sup> For example, no one has ever suggested that because the Medicaid Act authorizes and funds large, state-operated institutions under its ICF/MR provision, 42 U.S.C. § 1396d(a)(15), or private institutions under its nursing facilities provision, 42 U.S.C. § 1396d(f), means that ADA challenges to unnecessary segregation in these facilities is not a violation of the ADA. In fact, numerous courts have upheld ADA claims for the inappropriate placement of persons in these facilities. See *Pennsylvania Protection & Advocacy v. Dep't of Pub. Welfare*, 402 F.3d 374 (3d Cir. 2005); *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003); *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003); *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487 (3rd Cir. 2004); *Rolland v. Cellucci*, 52 F. Supp. 2d 231 (D. Mass. 1999); *Makin v. Hawaii*, 114 F. Supp. 2d 1017 (D. Haw. 1999). Similarly, state or federal statutes creating specific institutions, such as a state psychiatric hospital or mental retardation institutions or authorizing civil commitment to these facilities do not immunize the inappropriate placement in those facilities from ADA attack. See *Ricci v. Patrick*, 544 F.3d (1<sup>st</sup> Cir. 2009), *DAI II*, 635 F. Supp. 2d at 184.

While segregation in publicly-funded programs may be statutorily authorized, Title II nevertheless mandates that States ensure that all persons with disabilities are provided services in the most integrated settings. This mandate is equally applicable to employment. The fact that the legislative history of the ADA suggests that sheltered workshops are not a *per se* violation of the ADA does not mean that the denial of employment services in the most integrated settings to persons in sheltered workshops is not. Also, since sheltered workshops for persons with developmental disabilities constitute a segregated form of employment services that the State has deliberately elected to fund, license, administer, or otherwise rely upon, the integration mandate of Title II requires States to similarly fund and provide access to integrated employment settings like supported employment.

Finally, compliance with one law cannot and should not render a particular program or service automatically compliant with all other laws. In fact, the

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<sup>12</sup> The regulations implementing Title II provide as much:

A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability . . . [p]rovide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others *unless such action is necessary* to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others.

28 U.S.C. § 35.130(b)(1)(4)(emphasis added).

regulations implementing FLSA explicitly disclaim this very implication: “No provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards.” 29 C.F.R. § 525.20. The Department of Labor’s Field Operations Handbook for its Wage and Hour Division specifically notes that “it would be possible for an employer to be in compliance with the provisions of section 14(c) but be in violation of certain provisions of the ADA.” Department of Labor, Wage and Hour Division Field Operations Handbook, Chapter 64a02, available at <http://www.dol.gov/whd/FOH/ch64/64a02.htm>.

## **V. Supported Employment Provides Employment Services in the Most Integrated Setting.**

In *DAI II*, 653 F. Supp. 2d at 227, the court noted that the “existence of supported housing -- a more integrated setting -- further proves” that the adult homes at issue in that case did not enable the plaintiffs “to interact with nondisabled persons to the fullest extent possible.” In a strikingly similar manner, the existence of a far more integrated form of employment services for people with disabilities -- supported employment -- further demonstrates that the public entities who administer and fund sheltered workshops fail to provide their clients with the opportunity to interact with non-disabled individuals to the maximum extent possible, thereby violating the integration mandate of the ADA.

### *A. Definition and Description of Supported Employment*

In 2001, the federal Vocational Rehabilitation Services Program eliminated permanent placement in sheltered workshops (or “extended employment,” in the agency’s parlance) from the list of services that it will fund. The federal agency remained, and continues to remain, committed to supported employment as an effective service for clients of state vocational rehabilitation programs. The agency’s regulations define supported employment for people with intellectual or developmental disabilities to mean:

(i) Competitive employment in an integrated setting, or employment in integrated work settings in which individuals are working toward competitive employment, consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individuals with ongoing support services for individuals with the most significant disabilities—

(A) For whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or intermittent as a result of a significant disability; and

(B) Who, because of the nature and severity of their disabilities, need intensive supported employment services from the designated State unit and extended services after transition as described in [another paragraph of] of this section to perform this work

39 C.F.R. § 361.5(b)(53).

Practitioners and researchers in the field of vocational rehabilitation have elaborated upon this definition, identifying the most significant values and principles that should underlie a system of supported employment services. There is general agreement that a supported employment program must be “grounded in the philosophical concept of self-determination,” see Gottlieb, Myhill, & Blanck, and that any good program or legislation encouraging supported employment should address four key elements: integration, paid work, individualized services, and ongoing supports. See Lutfiyya, Rogan, & Shoultz (summarizing the pioneering work of Marc Gold in defining and implementing supported employment). There appears to be universal agreement that supported employment can and must serve individuals with disabilities of all levels of severity. See, e.g., David Mank, *Alderbrook 2007*, 29 *Journal of Vocational Rehabilitation* 53–62, 53 (2008) [hereinafter Mank, *Alderbrook 2007*];<sup>13</sup> Paul Wehman, W. Grant Revell, and Valerie Brooke, *Competitive Employment: Has It Become the “First Choice” Yet?*, 14:3 *Journal of Disability Policy Studies* 163–173 (2003)[hereinafter Wehman, Revell, & Brooke];<sup>14</sup> Lutfiyya, Rogan, & Shoultz.<sup>15</sup>

Because research has demonstrated that people learn best in an actual community placement, see Lutfiyya, Rogan, & Shoultz, many programs use a “place, then train” model of vocational instruction, providing initial training at the actual job site. See Simmons and Flexer. However, quality supported employment services rarely begin with immediate job placement or training. Rather, they first engage in person-centered planning with the individual, sometimes enlisting friends and family along with any legal guardian in a strengths-based assessment that considers the client’s personal skills, needs,

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<sup>13</sup> In the same article, David Mank paraphrased a colleague as follows: “There are two ways to be wrong about a person. We can meet someone and assume they are too severely disabled and fail to try and be wrong because the person was capable. Or, we can meet someone and believe that in the right way and the right place, the person can learn and be well matched for a job, and wrong because we could not figure it out. If we are going to be wrong about people, we must always be wrong in the second way.”

<sup>14</sup> According to the authors, “Supported employment was never intended to serve the typical vocational rehabilitation customer: It was created for those people with truly significant disabilities who traditionally were not able to obtain competitive employment through typical VR services.”

<sup>15</sup> For a comprehensive review of the literature on supported employment from the perspective of the ADA, see Stefan, *Beyond Residential Segregation*.

and preferences. See *generally* Simmons & Flexer; Gottlieb, Myhill, & Blanck. Only after this process is completed does the job coach begin identifying potential job placements, using information gathered during the individualized assessment as a guide. See Simmons & Flexer.

Whereas a sheltered workshop looks for individuals to fill existing job slots based solely on the demands of its contracts, supported employment providers engage in the reverse process: they seek jobs that match the strengths and needs of their individual clients. *Id.* Moreover, they consider how jobs might be further tailored to the needs of their clients, identifying potential natural supports and negotiating with employers for reasonable accommodations as necessary. Supported employment providers only consider and place clients in integrated, competitive jobs that pay commensurate, minimum-or-above wages to people with and without disabilities alike. Once a client has been placed and initial on-the-job training completed, the job coach remains available to provide ongoing supports tailored to the individual's needs, which may well fluctuate over time, for as long as needed. See Lutfiyya, Rogan, & Shoultz.

*B. A Large and Growing Body of Research Demonstrates the Efficacy of Supported Employment for People with Developmental Disabilities.*

The federal Substance Abuse and Mental Health Services Administration (SAMHSA) has deemed supported employment an evidence-based practice with respect to services for individuals with serious mental illness. There is a large and ever-increasing body of research which indicates that supported employment provides significant benefits to people with developmental disabilities, particularly as compared to their peers in sheltered workshops.

One obvious benefit is enhanced income. A review of data from seven States on labor force participation and wages among people who had moved from institutional to community settings and who initially had worked in sheltered workshops found: "For those relatively few individuals who transitioned to integrated employment settings, employment in integrated settings resulted in substantial gains in earned income." Peter Blanck, Helen A. Scharz, & Kevin M. Scharz, *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Longitudinal Analyses of Seven States During the 1980s and 1990s*, 44 Wm. & Mary L. Rev. 1029, 1088 (2003). Another study concluded that wages and hours worked in integrated employment settings are significantly higher, on average, than for individuals in sheltered workshops, while a survey in Maryland found that individuals in customized or supported employment earn 3.5 times more than those in sheltered employment and work 30% more hours per week. Gottlieb, Myhill, & Blanck. A much smaller-scale study compared the economic effects of supported employment relative to sheltered workshops in the VR program of a single state and concluded that: "Earnings of the supported employment cohort

were 250% greater than the sheltered employment cohort across the seven-year post-program period.” John Kregel & David H. Dean, *Sheltered vs. Supported Employment: A Direct Comparison of Long-Term Earning Outcomes for Individuals with Cognitive Disabilities* in *Achievements and Challenges in Employment Services for People with Disabilities: The Longitudinal Impact of Workplace Supports* (2002).

Another benefit is enhanced productivity and self-worth. As David Mank has noted, there is “well documented research that has emerged across the last forty years establishing that people with nearly any sort of disability label can, in fact, work productively, when provided the environment, training, technology, or other supports tailored to the person.” Mank, *Alderbrook 2007*. As the authors of one article noted, the “work of Marc Gold, Lou Brown and others amply demonstrated the capabilities of people with severe disabilities to perform a variety of complex tasks.” Lutfiyya, Rogan, & Shoultz.

A third and especially important benefit are the consequences of integration. As one article explains, these gains can be more significant than a simple increase in spending money for individuals with developmental disabilities. They may well provide the means to “greater independence and mobility in the community at large,” creating opportunities for interaction with non-disabled persons above and beyond the integrated work site itself. See Grant Revell, John Kregel, Paul Wehman, and Gary R. Bond, *Cost Effectiveness of Supported Employment Programs: What We Need To Do To Improve Employment Outcomes*, 14 *Journal of Vocational Rehabilitation* 173–178, 173 (2000) [hereinafter Revell et al.].

These benefits, and particularly the third, are especially consistent with the goals of the ADA. One of the ADA's Findings states 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.” 42 U.S.C. § 12101(7). The scholarly literature on supported employment services for individuals with disabilities indicates that these services have allowed thousands of persons with disabilities to move toward or attain these goals. Integrated employment services have the potential to help tens of thousands more do the same. Although it remains unfortunately true that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis,” 42 U.S.C. § 12101(8), supported employment services can and have allowed individuals with disabilities “to pursue those opportunities for which our free society is justifiably famous,” and reduce the cost to the nation of “unnecessary expenses resulting from dependency and non-productivity.” *Id.*

1. Supported Employment Provides Employment Training and Services in Integrated Work Settings, Maximizing the Potential for Interaction with Non-Disabled Persons and General Community Inclusion.

The opportunity to interact with non-disabled persons and to form friendships and connections with them both in and out of the workplace is one of the most significant benefits of supported employment for people with developmental disabilities. See, e.g., Revell et al. (“[E]stablishing new friendships and networks of social support in the community is almost always facilitated by having a job within a career path.”); Migliore, Mank, Grossi, & Rogan (noting “greater social integration of people with disabilities” as one major advantage of integrated employment over sheltered employment). When supported employment services are provided appropriately and effectively:

Integration is more than mere physical presence at a work site. It includes individuals with and without disabilities working with and next to each other, sharing work breaks and after hours social activities. The individual placement of people with severe disabilities into the regular work force can best promote the development of relationships and true personal social integration.

Lutfiyya, Rogan, & Shoultz.

2. Supported Employment Provides Services and Supports that are Individually Tailored to the Needs and Strengths of People with Disabilities, Allowing Them to Maximize Their Productivity, Independence, and Personal Dignity.

Individualization is a core tenet of supported employment. “Individuals who choose jobs that match their interests have a better success rate than those who take any job that is available.” Katherine J. Inge, *Choice and Customized Employment: A Critical Component*, 28 *Journal of Vocational Rehabilitation* 67–70, 69 (2008). For an individual who previously was segregated in a sheltered workshop, working at a job that is matched to her needs and preferences is an opportunity to personally experience the “paradigm shift from fitting people into programs to adapting services to people’s needs.” Migliore, Mank, Grossi, & Rogan. Working in a job that reflects personal preferences, skills, and strengths, and that includes the individually-tailored supports necessary to perform the job well “may diminish stigma associated with having a disability because [it] emphasize[s] the person’s abilities and productivity.” Gottlieb, Myhill, & Blanck. As one research team stated, “The gift of supported employment is its focus on valuing the abilities of individuals with disabilities and their productivity in the workplace. Supported employment reduces the impact of disability, even if it is only during the 8 hours that the individual is at work.” Wehman, Revell, & Brooke.

Finally, supported employment, like most gainful employment, promotes the individual's self worth and the community's perception of the individual's worth. It allows persons with disabilities to develop relationships with their co-worker and

become valued members of the community. It ultimately allows persons with disabilities to become less dependent on state services and more economically independent.

## **VI. Conclusion**

This Fact Sheet should provide a framework for P&As to advocate for reforms in their State, by expanding this analysis to include state-specific information on the prevalence of segregation, local efforts to promote integration, and an analysis of whether transitioning persons from sheltered workshops to supported employment would constitute a fundamental alteration of their State service system for persons with developmental disabilities.