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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

PAULA LANE, et al.,

Plaintiffs,

v.

JOHN KITZHABER, et al.,

Defendants.

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I. Introduction

This is a case in which plaintiffs are testing a novel legal theory. Under the Rehabilitation Act ("RA") and the Americans with Disability Act's ("ADA's") "integration mandate," courts have required public entities to provide certain services to disabled persons when to deny the services would likely require the person to reside in an institution. To prove a violation of the integration mandate, courts—including the Ninth Circuit—have required evidence of actual institutionalization or of a risk of institutionalization. Here, plaintiffs do not

allege that they may be institutionalized if they are denied the services they seek. Plaintiffs reportedly reside in the community and do not suggest that they may be forced to do otherwise.

Plaintiffs have sued Governor John Kitzhaber, Erinn Kelley-Siel, who heads Oregon's Department of Human Services ("DHS"), and Mary Lee Fay and Stephanie Parrish Taylor, the chiefs of the DHS divisions that serve the developmentally disabled and that provide vocational rehabilitation services (collectively, "defendants" or "DHS"). Plaintiffs contend that the RA and ADA's integration mandate should be expanded to require defendants to provide a particular type of employment service and to cease providing another type of employment service to intellectually and developmentally disabled people. These people all reside in the community, not institutions. Recognizing this new cause of action would be contrary to Ninth Circuit precedent and to established caselaw around the country. Plaintiffs' Complaint should be dismissed because they have failed to state a recognized cause of action.

Plaintiff's Complaint should be dismissed for several other reasons as well. First, plaintiffs ultimately seek to require the state to provide a service that it does not and cannot provide—integrated employment in a community business. Defendants cannot provide plaintiffs with a community job. Whether or not they achieve that goal depends upon many factors—including the availability of jobs—that are outside the defendants' control. Second, plaintiffs' Complaint alleges that the defendants have failed to properly oversee employment providers, case managers or brokerage agents in assisting the plaintiffs to develop and pursue their employment goals. Plaintiffs essentially claim that DHS is not meeting a certain standard of care in their provision of employment services. Neither the ADA nor the RA imposes a standard of care upon public agencies providing services to disabled persons. For these additional, independent reasons, plaintiffs' Complaint should be dismissed.

II. Facts Alleged in the Complaint

The following allegations are stated in the Complaint. The individual plaintiffs are eight intellectually or developmentally disabled persons who reside in the community. (Complaint, ¶¶

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112, 120, 129, 135, 144, 154, 162, 170 (Lane, apartment; Paniagua, family home; Harrah, adult foster home; Kehler, group home; Cason, family home; Robertson, group home; Green, adult foster home; Kinville, family home)). Seven of the eight plaintiffs work in sheltered workshops. (Complaint ¶¶ 113, 121, 130, 136, 155, 163, 171). The eighth, Ms. Cason, worked at a sheltered workshop in and prior to December 2010. (Complaint, ¶ 146-48). Sheltered workshops, as alleged, are segregated employment settings that employ people with disabilities or where people with disabilities work separately from others. (Complaint, ¶ 3). The individual plaintiffs allege that they would prefer to work in various types of "integrated employment" and receive supported employment services. (Complaint, ¶¶ 119, 124-28, 132-34, 140-43, 151-53, 159-61, 166-68, 174-76). Plaintiffs define integrated employment as "a real job in a community-based business setting, where employees have an opportunity to work alongside non-disabled co-workers and earn at least minimum wage[1]." (Complaint, ¶ 4). Plaintiffs define supported employment services as "vocational training services that prepare and allow people with intellectual and developmental disabilities to participate in integrated employment."

Not stated in the Complaint is any allegation that defendants' alleged actions or failures to act have created a risk that any one of the plaintiffs will be forced to live in an institution.

Plaintiffs have, however, alleged that DHS is actively pursuing goals to expand access to supported employment services for intellectually and developmentally disabled Oregonians. (Complaint, ¶¶ 84, 96, 101-02). In fact, DHS commissioned the preparation of the "Call to Action" report cited in the Complaint in order to help it develop strategies for implementing its "Employment First" policy at the community level. *See Community Leadership for Employment*

[1] Plaintiffs' allegations relating to the minimum wage fail to mention the standards that govern wages here. Under the Fair Labor Standards Act, employers are entitled to request authority from the U.S. Department of Labor to pay disabled workers less than minimum or prevailing wages for their work, whether those employers operate sheltered workshops or employ disabled persons in integrated settings. 29 U.S.C. § 214(c); 29 C.F.R. part 525. The wages that must be paid are those wages comparable to wages paid to nondisabled persons performing the same work, reduced to reflect the disabled workers' relative productivity. *Id.* Plaintiffs fail to allege any violation of these laws.

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First in Oregon (2010) (available at *http://www.dhs.state.or.us/dd/supp_emp/docs/wise.pdf*, at 12). But Oregon's commitment to improving services to the developmentally disabled does not mean that plaintiffs have a right under the RA and ADA to obtain a court order directing such improvements.

III. Argument

A. The Standards Applicable to Rule 12(b)(6) Motions

When considering a motion under Fed. R. Civ. P. 12(b)(6), courts construe the complaint in favor of the plaintiff and take the factual allegations as true. *Garcia v. Fannie Mae*, 794 F.Supp. 2d 1155, 1161 (D. Or. 2011). For a complaint to survive a motion to dismiss, the "non-conclusory factual content and reasonable inferences from that content must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). Although courts are to credit the complaint's factual assertions, they are not required to credit legal conclusions. *Maya v. Centex Corp.,* 658 F.3d 1060, 1067 (9th Cir. 2011) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009)). Further, a complaint must allege facts that plausibly (as opposed to merely conceivably) entitle the plaintiff to relief. *Maya*, 658 F.3d at 1067-68 (*citing Iqbal*, 129 S. Ct. at 1950-51). To state a facially plausible claim, a complaint must provide "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. The complaint must be dismissed if the factual allegations demonstrate only "a sheer possibility that the defendant has acted unlawfully." *Id.*

B. The Standards Applicable to RA and ADA Claims

Title II of the ADA prohibits governmental entities from discriminating against the disabled:

> [N]o qualified individual with a disability shall by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Similarly, § 504 of the Rehabilitation Act provides,

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> 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.

29 U.S.C. § 794. The Ninth Circuit has described these provisions of the ADA and Rehabilitation Act as "coextensive." *M.R. v. Dreyfus*, 663 F.3d 1100, 1115 (9th Cir. 2011) ("Because the applicable provisions of the ADA and the Rehabilitation Act are 'co-extensive', we discuss both claims together, focusing on the ADA"); *Zukle v. Regents of the Univ. of Calif.,* 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999) ("There is no significant difference in the analysis of the rights and obligations created by the ADA and the Rehabilitation Act").

The United States Department of Justice has promulgated implementing regulations under the ADA. One such regulation provides, "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). The "most integrated setting" is defined in an Appendix to the federal regulations as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. A. A regulation implementing § 504 of the RA also requires that recipients of federal funds administer programs "in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d). ADA regulations, however, provide that the obligations of public entities are not unlimited:

> 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.

28 C.F.R. § 35.130(b)(7).

The Supreme Court addressed the scope of the ADA and its implementing regulations in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S. Ct. 2176 (1999). In *Olmstead*, the two plaintiffs were mentally disabled women who were both voluntarily admitted to Georgia

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Regional Hospital's psychiatric unit. Once their conditions stabilized, their treatment providers found that the plaintiffs' needs could be met in one of the state-supported community-based treatment programs. However, both women remained institutionalized and filed suit against Georgia officials; they argued that their continued confinement to an institution violated the ADA. *Id.* at 593. The Supreme Court held that "unjustified institutional isolation of persons with disabilities is a form of discrimination." *Id*. at 600. The Court found that this holding reflects two judgments:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Id. at 600-01 (citations omitted). Accordingly, the Court concluded that states are obligated to provide community-based treatment for mentally disabled individuals when (1) the State's treatment professionals conclude that community placement is appropriate; (2) the individuals do not object to community placement; and (3) placement in the community can be reasonably accommodated, given the resources of the state and needs of other intellectually disabled individuals. *Id.* at 607.

Following *Olmstead*, courts have held that, in order to demonstrate a violation of Title II of the ADA, plaintiffs must prove that the policies, activities, or programs they are challenging have resulted in their institutionalization or create a risk of institutionalization. *See, e.g., M.R.*, 663 F.3d at 1116; *Brantley v. Maxwell-Jolly*, 656 F.Supp. 2d 1161, 1170-71 (N.D. Cal. 2009). Significantly, it is the risk of forced living in an institution that gives rise to liability. The Ninth Circuit has held that "a plaintiff need only show that the challenged state action creates a serious risk of institutionalization." *M.R.*, 663 F.3d at 1116 (reversing the district court's denial of a preliminary injunction and holding that Washington's reduction of personal care services places

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the plaintiffs at a "serious risk of institutionalization"). Ninth Circuit law on this point is consistent with the law of courts outside the Ninth Circuit.[2]

A few examples will illustrate courts' application of the so-called "integration mandate" under Title II of the ADA. In *M.R.*, the plaintiffs were severely mentally and physically disabled people who challenged a regulation that uniformly cut in-home personal care services. 663 F.3d at 1102. The plaintiffs contended that the reduction in services would violate the antidiscrimination provisions of the ADA and RA because "the reduction in hours will substantially increase the risk that they will be institutionalized in order to receive care adequate to maintain their mental and physical health." *Id*. One of the plaintiffs, M.R., suffered from severe mental disabilities, daily seizures, scoliosis, cerebral palsy, hypothyroidism, and mood disorder. She lived with her mother who provided her care. When M.R.'s mother learned that

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[2] *See Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003) (noting that "the only alternative for Plaintiffs presently is institutionalization if they seek treatment under the statute" and holding that the risk of institutionalization is sufficient to prove a violation of the ADA and the integration mandate); *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) (reversing the district court's order granting the defendant's motion for judgment on the pleadings where the plaintiff alleged violation of the ADA by the State's failure to fund at-home full-time nursing and the pleadings provided that the plaintiff "is at risk of placement in an institutional health care facility"); *Helen L, v. DiDario*, 46 F.3d 325 (3rd Cir.), *cert. den* 516 U.S. 813 (1995) (reversing the entry of summary judgment in the defendant's favor, directing the entry of summary judgment in the plaintiff's favor, and holding that the defendant violated the ADA by requiring that she receive necessary services in a nursing home rather than her own home); *Mental Disability Law Clinic v. Hogan*, 2008 WL 4104460 (E.D.N.Y. 2008) (denying a motion to dismiss for failure to state a claim for violation of the ADA's integration mandate on behalf of plaintiffs who were required to submit to hospitalization before being able to access needed outpatient mental health services); *Hiltbran v. Levy*, 793 F.Supp. 2d 1108 (W.D. Mo. 2011) (granting plaintiff's motion for summary judgment for violation of the ADA's integration mandate because the evidence showed that plaintiffs would be forced into institutions in order to obtain Medicaid coverage for medically necessary supplies); *Peter B. v. Sanford*, 2010 WL 5912259 (D.S.C. 2010) (recommending entry of preliminary injunction and holding that the risk of institutionalization is sufficient to establish a violation of the ADA's integration mandate); *Pitts v. Greenstein*, 2011 WL 2193398 (M.D.La. 2011) (noting that integration mandate prohibits a state from increasing an individual's risk of institutionalization); *Cruz v. Dudek*, 2010 WL 4284955 (S.D. Fla. 2010) (recommending that a motion for preliminary injunction be granted where the plaintiffs proved that they are at risk of being forced to enter a nursing home because available in-home services are not being provided).

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M.R.'s paid personal care services were to be reduced to 215 hours per month from 236 hours per month, she testified that she already had insufficient funds to keep her household functioning and that reductions in paid personal care service hours would force her to seek work outside her home. Having to work outside the home would necessitate having to move her daughter into an institutional facility. *Id.* at 1109. The Ninth Circuit reversed the denial of a motion for preliminary injunction, holding that the ADA legal standard requires plaintiff to prove "that the challenged state action creates a serious risk of institutionalization." *Id*. at 1116. The plaintiffs met that standard.

In *Hiltibran v. Levy*, 793 F. Supp. 2d 1108 (W.D. Mo. 2011), the plaintiffs were low-income disabled adults living in the community who were incontinent due to their disabilities. The plaintiffs sought an injunction requiring the defendants to pay for their incontinence supplies, which would have been covered had plaintiffs been living in an institution. *Id*. at 1111. Their physicians determined that incontinence briefs were "medically necessary for Plaintiffs to prevent skin deterioration and infections and to maintain Plaintiffs' ability to live in the community." *Id*. The defendant argued only that its waiver program was sufficient to "prevent forced institutionalization," but the court found that the waiver program was not "a viable alternative to institutionalization" given that three of the four plaintiffs requested but were denied coverage under the waiver. *Id.* at 1116. Accordingly, the court entered an order permanently enjoining defendants from applying their unlawful policies and requiring defendants to establish a process whereby Medicaid recipients could obtain needed incontinence supplies. *Id*. at 1116-17.

In *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009), the plaintiffs were elderly and disabled individuals who resided in the community and participated in an "organized day care" program at one of the many centers located in the state. *Id.* at 1164. The plaintiffs were entitled to and did receive services, including personal care services, social services, physical therapy services, occupational therapy services, and ongoing therapeutic activities, for

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up to four hours per day five days per week in the centers. *Id*. at 1164, 1165, 1166. However, the California legislature enacted a cost-cutting statute that would temporarily reduce plaintiffs' maximum benefit to three days of services per week. *Id.* at 1167. The plaintiffs presented evidence that if their services were reduced from five to three days per week, they would be forced to live in institutions. *Id.* at 1171-73. The court found that the plaintiffs demonstrated a "serious risk of institutionalization" and preliminarily enjoined the state from enforcing the cost-cutting statute. *Id*. at 1171, 1178.

C. The Court Should not Recognize a New Cause of Action under the RA or ADA

This case is nothing like *Olmstead* or the opinions following it, all of which apply the integration mandate. No allegation in the Complaint supports the contention that plaintiffs are threatened with institutionalization. In fact, the allegations suggest just the opposite. The plaintiffs are all apparently living in community settings and doing well in those settings. Ms. Lane, for example, lives in an apartment with staff support, is "very social" and "spends money on pizza parties and goes out for dinner." (Complaint, ¶¶ 112, 118). Ms. Robertson "enjoys many social activities in the community, including bowling, horseback riding, attending movies, and going out for meals. She also likes going on dates with her boyfriend and shopping." (Complaint, ¶ 159). Ms. Kehler likes "going out on dates" and "likes to travel." Complaint, ¶ 143. Ms. Cason "enjoys social interaction in the community." (Complaint, ¶ 153). Ms. Green "enjoys shopping" and "going to movies." (Complaint, ¶ 169).

As explained above, to prevail on a Title II claim, plaintiffs must allege that they are at risk of being forced to live in an institution. *M.R.,* 663 F.2d at 1116; *See also Sanchez v. Johnson*, 416 F.3d 1051, 1063 (9th Cir. 2005) ("In *Olmstead*, the Supreme Court interpreted Title II of the ADA as forbidding the arbitrary segregation of the disabled in large state institutions"). They have not done so. Plaintiffs have failed to allege facts that would plausibly entitle them to relief on their ADA and RA claims. *See Maya*, 658 F.3d at 1067-68 (*citing Iqbal*, 129 S. Ct. at 1950-51). Accordingly, their Complaint should be dismissed.

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In an apparent attempt to meet the Ninth Circuit standard for proving a violation of Title II, plaintiffs attempt to equate sheltered workshops with the sort of residential institutions about which the *Olmstead* Court was concerned. (Complaint, ¶ 60). However, the two settings are not equivalent. In *M.R.*, the Ninth Circuit clearly referred to forced institutional living. 663 F.3d at 1116-17. In fact, nearly every page of the majority opinion by Judges Reinhardt and Fletcher speaks in terms of "institutionalization" in such a setting. *Id.* at 1102, 1104, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121. Here, plaintiffs seek to go well beyond whether plaintiffs face any such risk. This Court would be required to depart from Ninth Circuit precedent and make new law in order to find in favor of plaintiffs in this case.

In fact, we could find no opinion in which any court has addressed whether or not *Olmstead* and the integration mandate should be extended beyond the issue of where an individual resides. One court suggested that a state's denial of community-based services for those living in the community and not at risk of institutionalization may not be able to prove a violation of the ADA's integration mandate. In *Dykes v. Dudek*, 2011 WL 4904407 (N.D. Fla 2011), the plaintiffs sought to certify two subclasses. One subclass consisted of persons who were institutionalized and the other consisted of persons living in the community. Both groups sought services under a Medicaid waiver program. The District Court found that the plaintiffs in the community failed to show that they are at risk of institutionalization. As a result, the Court found that the differences in the established ADA law between the two groups precluded the two subclasses' ability to co-prosecute a class action:

> Most problematic is that the law treats institutional and community plaintiffs differently. That is, undue institutionalization qualifies as discrimination. But, it is unclear whether exclusion from community based programs qualifies as discrimination. Thus, the institutionalized plaintiffs articulate a recognized cause of action. But the community plaintiffs will have more difficulty arguing their case. Answering the uncertainty in the community plaintiffs' ADA claim will be central to their case, but inconsequential to the institutional plaintiffs. This difference in established law is fatal to creating a class which contains both groups.

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Id. at *3 (citation omitted). Like the claim of the proposed subclass in *Dykes*, plaintiffs' cause of action has not been recognized. Plaintiffs' claim should be dismissed.

That the law would draw a legal distinction between the residential *Olmstead* context and the employment context makes sense. In *Olmstead* and the cases following *Olmstead*, the actual or threatened institutionalization was or would have been against the will of the plaintiffs. Here, there is no suggestion in the Complaint that the plaintiffs are working against their will. To work or not work is a choice that each plaintiff may exercise as he or she wishes. The plaintiffs may desire to work in another setting, but that is not equivalent to being forced to live in an institution. That is particularly true where, as here, several of the plaintiffs have identified continuing to work in their sheltered workshops as employment goals. (Complaint, ¶¶ 126 (identifying goal to continue to be employed in workshop setting); 160 (setting workshop production goal); 167 (identifying goal of remaining at sheltered workshop); 175 (identifying goal of attending facility-based employment program)).

Moreover, several of the plaintiffs in this case work as little as a couple of hours per week. (Complaint, ¶ 137 (alleging that Ms. Kehler worked 19.33 hours in September 2011, 8.83 hours in October 2011, and 13.9 hours in November 2011); ¶ 147 (alleging that Ms. Cason worked 1-2 hours per week in a workshop)). The most that plaintiffs allege that any of them worked in one month was 81 hours, and that number was unusually high compared with the other alleged monthly hours worked. (Complaint, ¶ 115; *cf.* Complaint, ¶¶ 123, 131, 137, 157, 164, 172). Working as few as one or two hours per week in a segregated employment situation hardly qualifies as the sort of "institutionalization" with which the courts have been concerned under the integration mandate. Plaintiffs' allegations are insufficient to plausibly state a claim under the ADA or RA. Therefore, plaintiff's claims should be dismissed.

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D. Plaintiffs' Claims Must Fail Because DHS Cannot Provide them with Integrated Employment in the Community

Plaintiffs' claims should also be dismissed because DHS does not provide the "service" of integrated employment in the community. In their complaint, plaintiffs make it clear that they "would prefer to work in an integrated employment setting." (*See, e.g.,* Complaint, ¶ 33). Their claims allege that defendants failed "to provide the named plaintiffs and members of the plaintiff class with integrated employment." (Complaint, ¶ 187; *See also* Complaint, ¶¶ 184, 185, 188, 192, 193, 195). The problem with plaintiffs' claims, however, is that defendants cannot provide plaintiffs with integrated employment. Integrated employment in the community is not a service that defendants provide. Nor is it a service that defendants *can* provide. In other words, DHS cannot assure that anyone will secure a job in the community.

The integration mandate regulation requires that "services" be provided in "the most integrated setting appropriate to the needs" of the disabled. 28 C.F.R. § 35.130(d). But integrated employment in the community is, by plaintiffs' own definition, a job in a "community-based business setting." (Complaint, ¶ 4). Defendants cannot provide plaintiffs with a community job. Whether or not community jobs are available to plaintiffs is a function of the economy, job competition, and other factors. Because defendants cannot and do not provide the service plaintiffs seek, plaintiffs' Complaint should be dismissed. *See Olmstead*, 119 S. Ct. at 2188 n. 14 (noting that States must only "adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide").

As in the recent Rule 16 conference, plaintiffs may argue that a recent statement issued by the U.S. Department of Justice on the application of the integration mandate provides support for the recognition of their claim. Apparently sometime after mid-2011, the U.S. Department of Justice issued a document it calls a "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.*" *See http://www.ada.gov/olmstead /q&a_olmstead.htm* (noting in the preamble that the Statement was issued "as we commemorate the 12th anniversary of the Olmstead decision," which was

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issued in June 1999.) In the Statement, the U.S. Department of Justice makes brief references to working in integrated settings and to sheltered workshops.[3] There are a number of problems with using this Statement to support plaintiffs' legal claim. First and most obviously, as explained above, no court has recognized such a claim. Second, the Statement fails in any way to address a key issue here: that the ultimate goal of integrated employment in community-based businesses is not a service that States can or do provide. Because the State does not and cannot provide the plaintiffs with the relief they ultimately seek—integrated employment—plaintiffs' Complaint should be dismissed.

E. Plaintiffs' Complaint Fails to State a Claim Because Neither the RA nor the ADA Imposes a Standard of Care Requirement

Plaintiffs' claims fail for another reason as well. Plaintiffs' claims are ultimately based upon allegations that the defendants are not meeting their preferred standard of care with respect to the provision of employment services. However, the Court in *Olmstead* made it clear that the ADA and RA do not impose a standard of care for services provided: "We do not in this opinion hold that the ADA imposes on the States a 'standard of care' for whatever medical services they render, or that the ADA requires States to 'provide a certain level of benefits to individuals with disabilities.'" *Olmstead*, 119 S. Ct. at 2188 n. 14. Another District Court faced with such a claim rejected it, recognizing that "the ADA does not impose on the States a standard of care for whatever services they provide to the disabled nor does it require the States to 'provide a certain level of benefits to individuals with disabilities.'" *M.K. v. Sergi*, 554 F. Supp. 2d 175, 197-98 (D. Conn. 2008) (holding that the plaintiffs' Title II ADA and RA claims failed because a claim challenging the level of benefits provided is not cognizable under the ADA or RA).

[3] For example, the Statement states that "[i]ntegrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community." Statement of the Department of Justice, response to question 1.

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Plaintiffs' claims here appear to be based in a challenge to the level of services provided to them. Plaintiffs repeatedly take issue with the quality of the services provided to them, and apparently ask the Court to mandate that the State provide additional services to them.

- As for plaintiff Lane, the Complaint alleges that "there has been only one effort in 2007-08 to identify a community position for Ms. Lane, which was unsuccessful. Ms. Lane's 2009 ISP said that the program would 'explore community-based job opportunities' but this was not mentioned in later ISPs." (Complaint, ¶ 116). Further, the Complaint alleges that "Ms. Lane's 2011 ISP has no goals or action plans related to employment" and that "[n]either Ms. Lane's case manager nor the sheltered workshop provider has taken the actions necessary to assist Ms. Lane in obtaining supported employment." (Complaint, ¶ 117, 119).
- With respect to Ms. Cason, the Complaint alleges that she applied for services with Oregon Vocational Rehabilitation Services ("OVRS") and was determined eligible. She was given an evaluation, which concluded that she "'is a good candidate for supported employment or alternatives to employment program, through her brokerage.'" However, OVRS allegedly closed her file because "'the Community Based Work Assessment showed you need more skills to get competitive work.'" The Complaint alleges, "Neither Ms. Cason's brokerage personal agent nor her previous employment provider provided the services and supports necessary to help Ms. Cason fulfill her desire to work in the community at competitive employment. DHS and OVRS failed to adequately oversee the brokerage personal agent and employment provider in the development and implementation of an appropriate ISP for Ms. Cason." Complaint, ¶¶ 150, 152.
- The allegations with respect to the other individual plaintiffs are similar. (*See* Complaint, ¶¶ 124, 126, 128, 133-34, 140-42, 160-61, 166-68, 175-76).

Plaintiffs' claims are based on an alleged failure to deliver a certain level of services or to meet a certain standard of care for the provision of employment services. Such a claim is not

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cognizable under the ADA or the RA. For this reason as well, plaintiffs' claims should be dismissed.

IV. Conclusion

For the reasons stated above, the defendants respectfully request that their motion to dismiss be granted and that the Complaint be dismissed.

DATED April 3rd, 2012.

Respectfully submitted,

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