Note

The Most Integrated Setting: *Olmstead*, *Fry*, and Segregated Public Schools for Students with Disabilities

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The State of Georgia operates a network of schools for students with disabilities called the Georgia Network for Educational and Therapeutic Support (GNETS).[1] GNETS purports to "provide comprehensive educational and therapeutic support services to students who might otherwise require residential or other more restrictive placements."[2] However, the GNETS program also segregates students with disabilities from their peers without disabilities in inferior school buildings with inferior educational services.[3] In fact, some GNETS school buildings were originally used as schools for African American students during

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1. *See Georgia Network for Educational and Therapeutic Support,* GA. DEP'T EDUC., http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Georgia-Network-for-Special-Education-and-Supports.aspx (last visited Jan. 30, 2018). As of November 30, 2017, the program is still in operation. *Id.*

2. *Id.*

3. Alan Judd, *Georgia "Psychoeducational" Students Segregated by Disability, Race*, ATLANTA J.-CONST. (Apr. 28, 2016), https://specials.myajc.com/psychoeducation/; *see also* Timothy Pratt, *The Separate, Unequal Education of Students with Special Needs*, HECHINGER REP. (Mar. 21, 2017), http://www.hechingerreport.org/georgia-program-children-disabilities-separate-unequal-education.

de jure segregation.[4] As if that particular irony were not enough, GNETS students are also disproportionately African American.[5]

Students in GNETS schools also have unequal access to extracurricular activities and "do not have any opportunity to participate in art, music, foreign language, vocational courses, . . . honors courses, or other electives. To the extent that GNETS programs offer elective courses, they are generally limited exclusively to computer-based courses," which offer no interpersonal interaction.[6] Investigations revealed that some GNETS schools required students to undergo psychological experiments[7], and that students at one GNETS school, Fitzhugh Lee, had been restrained with dog leashes.[8]

In 2016, the Department of Justice initiated a novel lawsuit against the State of Georgia, alleging that the GNETS program's segregation and inferior services violated the Americans with Disabilities Act (ADA)[9] without alleging any violation of the Individuals with Disabilities Education Act (IDEA).[10] In its prayer for relief, the complaint asks that Georgia be required to "[p]rovide appropriate, integrated mental health and therapeutic educational services and supports that are designed to allow students with behavior-related disabilities to be placed in integrated general education classroom settings, and access to equal

4. Civil Rights Div., U.S. Dep't of Justice, Letter of Findings on United States' Investigation of the Georgia Network for Educational and Therapeutic Support, D.J. No. 169-19-71, 3 (July 15, 2015), https://www.ada.gov/olmstead/documents/gnets_lof.pdf [hereinafter Letter of Findings].

5. Judd, *supra* note 3. In fact, African American children are disproportionately placed in special education across the country. *See* NAT'L ALL. OF BLACK SCH. EDUCATORS ET AL., ADDRESSING OVER-REPRESENTATION OF AFRICAN AMERICAN STUDENTS IN SPECIAL EDUCATION 5 (2002).

6. Letter of Findings, *supra* note 4, at 15.

7. Judd, *supra* note 3. For a description of one such proposed test, see *infra* Part II.A.

8. Alan Judd, *In Psychoeducational School, Behavioral Experiment for Troubled Child*, ATLANTA J.-CONST. (May 5, 2016), https://specials.myajc.com/psychoedexperiment/.

9. 42 U.S.C. §§ 12101–12213 (2012).

10. 20 U.S.C. §§ 1400–1482 (2012); *see* Complaint ¶ 1, United States v. Georgia, No. 1:16-cv-03088 (N.D. Ga. Aug. 23, 2016), https://www.justice.gov/crt/file/887356/download [hereinafter U.S. Dep't of Justice Complaint]. As of this writing, the State has closed a number of GNETS schools, but has also moved to dismiss the suit, asserting that the Department of Justice lacks standing. Alan Judd, *States' Rights? Georgia Seeks To Dismiss Federal Suit over Schools for Disabled Students*, ATLANTA J.-CONST. (Nov. 2, 2016), http://investigations.blog.ajc.com/2016/11/02/states-rights-georgia-seeks-to-dismiss-federal-suit-over-schools-for-disabled-students.

educational opportunities, to those in or at serious risk of entering the GNETS Program."[11]

The story of GNETS and the lawsuit it has spawned are emblematic of countless other stories of segregation, abuse, restraint, and seclusion that drive litigation designed to protect the rights of persons with disabilities across the United States. These suits, commonly referred to as "*Olmstead* litigation" after the landmark Supreme Court Case, *Olmstead v. L.C. ex rel. Zimring*,[12] rely on Title II of the Americans with Disabilities Act[13] and its implementing regulations[14] to assert that government programs are failing to "provide community-based treatment for persons with mental disabilities" even though "such [treatment] is appropriate."[15]

Olmstead litigation has helped litigants with disabilities successfully sue, inter alia, prisons,[16] sheltered workshops,[17] hospitals and treatment facilities,[18] and residential facilities[19] to

11. U.S. Dep't of Justice Complaint, *supra* note 10, at 26.

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

13. 42 U.S.C. §§ 12131–12134.

14. *See* Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35 (2017).

15. *Olmstead*, 527 U.S. at 607.

16. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998) (holding that "the plain text of Title II of the ADA unambiguously extends to state prison inmates").

17. *See* Lane v. Kitzhaber, 283 F.R.D. 587, 602 (D. Or. 2012). In *Lane v. Kitzhaber*, the District of Oregon certified a class of "'all individuals in Oregon with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops' and 'who are qualified for supported employment services.'" *Id.* (quoting First Amended Complaint ¶¶ 32–33, *Kitzhaber*, 283 F.R.D. 587, No. 3:12-cv-00138-ST). Class certification is often the same as a victory in class actions, and a settlement agreement was recently announced. *Lane v. Brown Landmark Settlement Agreement Announced*, DISABILITY RIGHTS OR. (Dec. 30, 2015), https://droregon.org/lane-v-brown-settlement. Governor Brown replaced former-Governor Kitzhaber as named plaintiff in the suit after Kitzhaber's resignation in 2015. *See id.*

18. *See, e.g.*, Day v. District of Columbia, 894 F. Supp. 2d 1, 25 (D.D.C. 2012) (permitting an integration claim against nursing facilities to survive multiple dispositive motions).

19. *See, e.g.*, Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009), *vacated* 675 F.3d 149 (2d Cir. 2012) ("The adult homes at issue are institutions that segregate residents from the community and impede residents' interactions with people who do not have disabilities. DAI has proven that virtually all of its constituents are qualified to receive services in supported housing, a far more integrated setting in which individuals with mental illness live in apartments scattered throughout the community and receive flexible support services as needed.").

obtain better treatment or placement in a different, more agreeable setting.[20]

This Note examines the potential for *Olmstead* to be used to challenge a form of segregation and isolation that is still common across the country: segregating children with disabilities in schools that only serve students with disabilities ("segregated-site" or "separate-site" schools).[21] In addition, this Note will discuss some of the strategic and doctrinal issues that underpin such a lawsuit. Part I provides an introduction to the ADA and its implementing regulations, to *Olmstead* and its rationale, and to IDEA, the primary federal special education law.[22] Part II argues that *Olmstead* and the ADA forbid schools from operating segregated facilities that only enroll students with disabilities, rather than placing them in similar classrooms in integrated schools in their community.[23] Finally, Part III examines the

20. The litigants in *Olmstead* were placed in an institution against their will. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 588 (1999). The purpose of the suit was to obtain a placement in a less restrictive environment. *See id.*

21. The Department of Education collects a broad set of data on special education in the United States. *IDEA Section 618 Data Products: State Level Data Files*, U.S. DEP'T EDUC., https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html (last visited Jan. 30, 2018) [hereinafter *Data*]. In 2015, 146,581 children ages six through eighteen were in segregated schools for students with disabilities across the United States and Puerto Rico. *See id.* (download 2015 file on Child Count and Educational Environments). The Department of Education maintains this data in a comma separated value (CSV) file. *See id.* A spreadsheet compiling this data is on file with the author.

22. 20 U.S.C. §§ 1400–1482 (2012).

23. This line of reasoning may also raise a potential challenge to segregated classrooms, which would be an argument in favor of a concept called full-inclusion. Full-inclusion is the idea that all children with disabilities should be included in the general education classroom. *See, e.g.*, *Special Education Inclusion*, WIS. EDUC. ASS'N COUNCIL, http://www.weac.org/articles/specialedinc ("Full inclusion means that all students, regardless of handicapping condition or severity, will be in a regular classroom/program full time. All services must be taken to the child in that setting."). Using *Olmstead* for a full-inclusion lawsuit is more difficult because there is a body of IDEA case law that upholds the segregated classrooms as a necessity for some students to receive a free appropriate public education. *Cf., e.g.*, Oberti v. Bd. of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993) ("We construe IDEA's mainstreaming requirement to prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily."). Despite decades of IDEA-based litigation, segregated special education classrooms persist across the country. In addition, full-inclusion is a controversial and fraught topic. *See* Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 210–14 (providing a discussion of the larger debate around full-inclu-

most salient defenses and challenges to such a claim: the need for administrative exhaustion, a state's ability to rely on the determinations of its own treating professionals, and the fundamental alteration defense. Although the issues surrounding the interaction of the ADA and IDEA are complicated, students' right to integration is independently grounded in the ADA, separate from the protections of IDEA.

I. *OLMSTEAD* AND ITS FOUNDATIONS

The *Olmstead* decision is, in part, the result of changing societal attitudes about how the state and its citizens can best meet the needs of persons with disabilities. This Part addresses the legal underpinnings of *Olmstead* litigation. Section A provides an overview of Title II of the ADA, which *Olmstead* interprets. Section B provides a brief overview of institutionalization, which underpins the rationale of *Olmstead* and much of its progeny. Section C provides an in-depth overview of *Olmstead* itself. Finally, Section D offers a basic explanation of IDEA, which has traditionally been the main vehicle for special education litigation, and a discussion of the material distinctions between the ADA and IDEA for purposes of the need for *Olmstead* litigation in the field of education.

A. TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND THE INTEGRATION MANDATE

In 1990, Congress passed the ADA,[24] "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[25] In passing the ADA, Congress expressly found that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society," and that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[26]

sion); *see also* Megan Roberts, Comment, *The Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041, 1055 (2008) (providing another discussion of these tensions). Because of the complexity of the topic and the limited scope of the subjects covered here, this Note limits its discussion to challenging separate, segregated sites.

24. 42 U.S.C. §§ 12101–12213 (2012).

25. *Id.* § 12101(b)(1).

26. *Id.* § 12101(a)(1)–(2).

For *Olmstead* claims, the most important provisions of the ADA are found in part A of Title II.[27] These sections apply to any "public entity," which is defined as "any State or local government."[28] Under § 12132, "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."[29] The text of the Act frames discrimination as an issue of exclusion, that is, a denial of "benefits."[30] To prevent this exclusion, states are required to make "reasonable modifications" to their programs or services that facilitate access.[31]

This text itself is remarkably broad, but there are two nuances that are important to grasp. First, Title II of the ADA does not apply to the federal government—the statute unambiguously references only "State or local government."[32] The Rehabilitation Act of 1973 ("Section 504")[33] covers the Federal government instead, providing protections from discrimination that according to the Department of Justice (DOJ), are "at least equal" to those available under Title II.[34] Therefore, discrimination under color of federal law will implicate different legal provisions than improper action by a state, but will provide functionally the same standards of liability and the same relief. Disability rights claims are often referred to as ADA or Section 504 litigation with little to distinguish them.[35]

Second, it is important to understand that the ADA's protections are to be read broadly. The ADA protects all individuals with a "physical or mental impairment that substantially limits

27. *Id.* §§ 12131–12134.
28. *Id.* § 12131(1)(A).
29. *Id.* § 12132.
30. *Id.*
31. *Id.* § 12131(2).
32. *Id.* § 12101(b)(1).
33. 29 U.S.C. §§ 701–797 (2012).
34. *The Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services*, ADA.GOV, https://www.ada.gov/taman2.html (last visited Jan. 30, 2018); *see also* 29 U.S.C. § 701(c) ("It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of . . . respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities . . . .").
35. *See, e.g.*, *A Comparison of ADA, IDEA, and Section 504*, DISABILITY RTS. EDUC. & DEF. FUND, http://www.dredf.org/advocacy/comparison.html (last visited Jan. 30, 2018) (comparing and contrasting IDEA, the ADA, and Section 504).

one or more major life activities of such individual."[36] After passage of the ADA, in several cases, the Supreme Court limited the scope of the phrase "substantially limits," by requiring a case-by-case determination of disability which included mitigating factors (for example, the effect of glasses for those who have impaired vision).[37] This functionally reduced the number of individuals covered by the ADA. Congress disapproved of the Court's decision to narrow the scope of the ADA, and in 2008 it amended the Act "[t]o restore the intent and protections of the Americans with Disabilities Act of 1990."[38] These amendments added § 12102(4)(A) to the act, which declares that Congress intends that the "definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[39]

The ADA is also broad in its condemnation of segregation. Section 12134 of the ADA authorizes the Attorney General to promulgate regulations implementing the ADA.[40] Among those regulations is an important provision found at 28 C.F.R. § 35.130(d), commonly referred to as the "integration mandate" of Title II.[41] The integration mandate declares that "[a] public entity shall administer services, programs, and activities *in the most integrated setting appropriate to the needs of qualified individuals with disabilities*."[42] This provision enshrines a "broad view of discrimination."[43] People with disabilities have a right,

36. 42 U.S.C. § 12102.

37. *See, e.g.*, Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (holding that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment"); *see also* Albertson's, Inc. v. Kirkinburg, 527 U.S. 555, 567 (1999) (requiring those "claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial" rather than a per se rule based on specific disabilities).

38. ADA Amendments Act of 2008 § 1.

39. 42 U.S.C. § 12102(4)(A); *see also* ADA Amendments Act of 2008 § 3(4)(A).

40. 42 U.S.C. § 12134.

41. *See, e.g.*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, 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.* 1, https://www.ada.gov/olmstead/q&a_olmstead.pdf.

42. General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(d) (2017) (emphasis added).

43. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 624 (1999) (Thomas, J., dissenting).

not just to receive services without discrimination based on their disabilities, but to receive those services in the "most integrated setting."[44] The integration mandate equates segregation from people without disabilities as a form of impermissible discrimination. The definition of disability discrimination enshrined in the ADA "encompasse[s] disparate treatment among members of the *same* protected class" by scrutinizing how the state treats certain citizens with disabilities in comparison to others.[45] For purposes of the integration mandate, access to the larger community of people without disabilities is the opposite of this segregation.

Despite its breadth, the integration mandate is limited in one important way, referred to as a "fundamental alteration defense."[46] The mandate requires states to offer services in the "most integrated setting," but these provisions are subject to the requirement that courts weigh "the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."[47] ADA regulations instruct that, "[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."[48]

B. INSTITUTIONALIZATION AND ITS EFFECTS

To understand why *Olmstead* ended up before the Supreme Court, it is important to understand a bit of the history of custodial care for people with disabilities in the United States. Likewise, to understand why institutionalization should be opposed, it is helpful to understand its inefficiency and injustice and inequities. This Section provides a brief outline of Medicaid and its interactions with institutionalization (which led to *Olmstead*) as well as a summary of the problems with segregated, institutional care as a general matter.

44. 28 C.F.R. § 35.130(d).

45. *Olmstead*, 527 U.S. at 616 (Thomas, J., dissenting).

46. *See* 28 C.F.R. § 35.130(b)(7).

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

48. 28 C.F.R. § 35.130(b)(7) (emphasis added). For more on the fundamental alteration defense, see *infra* Part III.C.

The *Olmstead* decision resulted, in part, from the enactment of Medicaid. The Social Security Amendments of 1965 provide for the administration of Medicaid.[49] Because people with developmental disabilities, debilitating mental health challenges, and other severe disabilities are often indigent, many persons with disabilities are Medicaid recipients. The passage of the ADA entitled Medicaid recipients with disabilities to receive Medicaid services in an integrated setting, which led to lawsuits seeking integrated services, like *Olmstead* and its progeny.

Originally, Medicaid provided for the comprehensive long-term care of persons with disabilities exclusively through services offered in institutions—like mental hospitals and nursing facilities.[50] The exact definition of what constitutes an "institution" is murky, but regulation indicates that they have the effect of "isolating individuals receiving Medicaid . . . from the broader community of individuals not receiving Medicaid."[51] Isolation

49. 42 U.S.C. § 1396, (a), (b), (c), (d) (2012).

50. Social Security Amendments of 1965, Pub. L. No. 89-97 § 1902(a)(13), 79 Stat. 286, 345 (1965) (stating that State plans for medical assistance must "provide . . . for . . . institutional . . . care"); *id.* § 1905(a)(1), (4) 79 Stat. at 351 (requiring medical assistance plans to provide "inpatient hospital services" and "skilled nursing home services").

> Medicaid covers certain inpatient, comprehensive services as institutional benefits. The word "institutional" has several meanings in common use, but a particular meaning in federal Medicaid requirements. In Medicaid coverage, institutional services refers to specific benefits authorized in the Social Security Act. These are hospital services, Intermediate Care Facilities for People with Intellectual disability (ICF/ID), Nursing Facility (NF), Preadmission Screening & Resident Review (PASRR), Inpatient Psychiatric Services for Individuals Under Age 21, and Services for individuals age 65 or older in an institution for mental diseases. Institutions are residential facilities, and assume total care of the individuals who are admitted.

Institutional Long Term Care, MEDICAID.GOV, https://www.medicaid.gov/medicaid/ltss/institutional/index.html (last visited Jan. 30, 2018). This shift in policy is, in part, what led to the decision in *Olmstead*, 527 U.S. 581. As part of that ruling the court examined the State of Georgia's insistence that Medicaid was designed with a preference for institutional care:

> The State urges that, whatever Congress may have stated as its findings in the ADA, the Medicaid statute "reflected a congressional policy preference for treatment in the institution over treatment in the community." The State correctly used the past tense. Since 1981, Medicaid has provided funding for state-run home and community-based care through a waiver program.

Id. at 601 (citations omitted).

51. Contents of a Request for a Waiver, 42 C.F.R. § 441.301(c)(5)(v) (2017). *Compare* 42 C.F.R. § 441.301(c)(5)(i)–(iv) (describing settings that are not home and community based), *with* Basis and Purpose, 42 C.F.R. § 441.300 (suggesting

and segregation are the hallmarks of institutionalization, and they are contrary to the integration mandate.

Of course, deinstitutionalization is not just a goal in itself. Institutions for people with disabilities have a dark history.[52] Though institutions have always given vulnerable populations a place to live, stories of maltreatment and abuse of people with mental illnesses, as well as people with intellectual and developmental disabilities, are commonplace even today.[53] Institutions

that Medicaid waiver programs "permit[] States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization").

52. *See generally* E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS (1997) (providing a history of the struggle for deinstitutionalization).

53. *See* NORA J. BALADERIAN, ABUSE OF PEOPLE WITH DISABILITIES: VICTIMS AND THEIR FAMILIES SPEAK OUT: A REPORT ON THE 2012 NATIONAL SURVEY ON ABUSE OF PEOPLE WITH DISABILITIES, SPECTRUM INST. 2 (2013), http://www.disability-abuse.com/survey/survey-report.pdf ("The bottom line is that abuse is prevalent and pervasive, it happens in many ways, and it happens repeatedly to victims with all types of disabilities."); John Rudolf, *Where Mental Asylums Live On*, N.Y. TIMES (Nov. 1, 2013), http://www.nytimes.com/2013/11/03/opinion/sunday/where-mental-asylums-live-on.html ("The United States began emptying out its vast asylum system in the 1960s, spurred by scathing reports of abuse and neglect, like a 1946 Life magazine exposé that described many institutions as 'little more than concentration camps.'"); *see also Abuse and Exploitation of People with Developmental Disabilities*, DISABILITY JUST., http://www.disabilityjustice.org/justice-denied/abuse-and-exploitation (last visited Jan. 30, 2018) (explaining that people with developmental disabilities are "are four to ten times more likely to be abused than their peers without disabilities" and are otherwise vulnerable to abuse and mistreatment). For example, in Minnesota, patients at a state-run program for people with disabilities called METO, "were being routinely restrained in a prone, face down position and placed in metal handcuffs and leg hobbles." STATE OF MINN., OMBUDSMAN FOR MENTAL HEALTH & DEVELOPMENTAL DISABILITIES, JUST PLAIN WRONG: EXCESSIVE USE OF RESTRAINTS AND LAW ENFORCEMENT STYLE DEVICES ON DEVELOPMENTALLY DISABLED RESIDENTS AT THE MINNESOTA DEPARTMENT OF HUMAN SERVICES MINNESOTA EXTENDED TREATMENT PROGRAM (METO) CAMBRIDGE, MN 17 (2008). This abuse was only noticed when one patient's mother noticed that her child was coming home with "marks and bruises" around his wrist, caused by the restraints. Sasha Aslanian, *Lawsuit Settled Over Treatment of Disabled Residents in State-Run Institution*, MPR NEWS (Dec. 1, 2011), https://www.mprnews.org/story/2011/12/01/lawsuit-settled-state-institution (providing further information on the "improper and inhumane" treatment of patients with developmental disabilities at METO, which closed in 2011). This occurred, despite the recognition nearly sixty years prior that the use of mechanical restraints for the institutionalized mentally ill was morally adverse. *See* Statement by Governor Luther W. Youngdahl at the Burning of Restraints (Oct. 31, 1949), https://mn.gov/mnddc/past/pdf/40s/49/49-SGL-Youngdahl.pdf (describing an event where people gathered "to destroy the strait-jackets, shackles, and manacles" once used in Anoka State [Mental] Hospital and to decry the devices as "barbarous").

keep people with disabilities out of sight and out of mind while also perpetuating societal stigmas against those who suffer from mental health challenges or other disabilities.[54] These drawbacks are not the result of a trade-off. Institutional care is expensive, restrictive, and often has inferior health outcomes for residents than less restrictive and less costly alternatives.[55] One intuitive reason that institutional care is so expensive is that it isolates people with disabilities from friends and family who would ordinarily aid in their care, forcing the state to pay for that service.[56] The institutionalization of people with disabilities

54. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 424–25 (2000) (discussing in general the "systematic disadvantage experienced by people with disabilities"); *see also id.* at 446 ("Individuals with [disabilities] are likely to be deemed outside of the norm for which social institutions and physical structures are designed. To safeguard their access to opportunities, they are therefore likely to need the ADA's protection against discrimination and its requirement of accommodation."). This belief that people with disabilities are not designed for normal society is exactly what permits segregation in institutions. This stigmatization is expressed in a myriad of other ways. For example, "In some cases, [people with disabilities] were required by law to stay at home; as late as 1974, some major American jurisdictions still maintained 'ugly laws' that prohibited 'unsightly' people—a category that encompassed people with disabilities—from appearing in public." *Id.* at 442 (quoting Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 n.2 (1987)).

55. *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604 (1999) ("[C]ommunity placements cost less than institutional confinements."). Numbers from states bear this out. *See, e.g.*, Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1186 n.2 (10th Cir. 2003) ("In Oklahoma, it costs approximately $28,000 per year to provide care to a disabled individual in a nursing home, and $14,000 to provide care through the Home and Community Based Waiver program."); *see also* Michael J. Berens & Patricia Callahan, *A Troubled Transition: In the Rush to Close Institutions, Illinois Ignored Serious Problems in Group Homes*, CHI. TRIB. (Dec. 30, 2016), http://www.chicagotribune.com/news/watchdog/grouphomes/ct-group-home-investigations-cila-met-20161229-htmlstory.html ("In [Illinois in] 2012, state officials calculated the annual cost of care for an institutionalized resident was about $219,000, compared with $84,000 at a group home.").

56. Andrew I. Batavia, *A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and the Independent Living Model of Long-term Care*, 27 AM. J.L. & MED. 17, 18 (2001) (describing how "informal caregivers in 1997, provid[ed] the economic value of $196 billion in uncompensated services"). This is not to say that those caregivers should necessarily remain unpaid. One waiver program in Minnesota, called Consumer Directed Community Supports, permits waiver recipients to hire and pay their own caregivers, including friends and family. *See* MINN. DEP'T OF HUM. SERVS., CONSUMER DIRECTED COMMUNITY SUPPORTS CONSUMER HANDBOOK 10 ("The person or persons you hire could be immediate family members, friends, neighbors or coworkers."). *See generally Consumer Directed Community Supports*, MN.GOV, https://mn.gov/dhs/people-we-serve/people-with-disabilities/services/

is not limited to residential settings. For example, many adults with intellectual disabilities spend their working hours in segregated workshops[57] and, as will be discussed further below, many students with disabilities are placed in separate, segregated educational settings.[58] In passing the ADA, Congress also found that "discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[59]

Critics of institutionalization note that people with disabilities experience isolation and discontent,[60] and that that disability integration results in prosocial outcomes.[61] The congressional findings that accompany the ADA in 42 U.S.C. § 12101(a) demonstrate that Congress considered these problems in passing the law.[62] Congress declared that isolation, segregation, and institutionalization are a "serious and pervasive social problem," that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally," and

> the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on

home-community/programs-and-services/cdcs.jsp (last visited Jan. 30, 2018) (providing information on the Consumer Directed Community Supports program).

57. Laura C. Hoffman, *An Employment Opportunity or a Discrimination Dilemma?: Sheltered Workshops and the Employment of the Disabled*, 16 U. PA. J.L. & SOC. CHANGE 151, 153 (2013) (providing a brief history and overview of sheltered workshops in the United States).

58. *See Fast Facts*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=59 (last visited Jan. 30, 2018) (indicating that 13.8% of students with disabilities spend "less than 40%" of their educational time in integrated general education classrooms and providing other similar statistics).

59. 42 U.S.C. § 12101(a)(3) (2012).

60. *See, e.g.*, NAT'L DISABILITY RIGHTS NETWORK, SEGREGATED & EXPLOITED: THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK 8 (2011), http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf ("Segregated work facilitates feelings of isolation for many people and impinges on the natural desire to connect with others. Sheltered workshops have replaced institutions in many states as the new warehousing system and are the new favored locations where people with disabilities are sent to occupy their days.").

61. *See, e.g.*, Donna Kam Pun Wong, *Do Contacts Make a Difference? The Effects of Mainstreaming on Student Attitudes Toward People with Disabilities*, 29 RES. DEV. DISABILITIES 70, 71–73 (2008) (providing a literature review indicating that "[s]ocial contact with peers with disabilities is considered to be a key variable in shaping [positive] attitudes" toward disability).

62. 42 U.S.C. § 12101(a).

> an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.[63]

As will be shown in Section C, *Olmstead* is proof that the ADA provides for the legal redress of these wrongs.

C. *OLMSTEAD V. L.C. EX REL. ZIMRING*

In *Olmstead v. L.C. ex rel. Zimring*, the Supreme Court examined the plight of two institutionalized women, L.C. and E.W.,[64] who each had developmental disabilities and mental health issues.[65] In 1992 and 1995 respectively, L.C. and E.W. were admitted to Georgia Regional Hospital at Atlanta for psychiatric treatment.[66] In both cases, treating physicians determined that the women could be appropriately treated in a non-institutional, community-based setting, but they remained institutionalized for a long period of time after that determination had been made.[67] In May 1995, three years after her original institutionalization at Georgia Regional Hospital, L.C. filed suit in the United States District Court for the Northern District of Georgia, arguing that her segregated confinement violated Title II of the ADA and the integration mandate.[68] E.W. intervened and alleged the same claims.[69]

The nub of the dispute in *Olmstead* was whether, given Title II of the ADA and the integration mandate, "undue institutionalization qualifies as discrimination by reason of . . . disability"[70] such that the State of Georgia could be sued pursuant to

63. *Id.* § 12101(2), (6), (8).

64. Lois Curtis and Elaine Wilson are the full names of these women. David G. Savage, *ADA Umbrella Starting To Close Multiple Rulings Say Act Does Not Cover Those with Correctable Impairments*, 85 ABA J., Aug. 1999, at 44. Consistent with the text of the *Olmstead* decision, I will use their initials throughout.

65. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 593 (1999).

66. *Id.*

67. *Id.*

68. *Id.* at 593–94.

69. *Id.*

70. *Id.* at 597–98.

42 U.S.C. § 1983[71] to require the state to cease violating Title II.[72] Put another way, the court asked "whether the [ADA's] proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions."[73] The Court held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability,"[74] subject to three considerations: (1) the fitness of the person for a noninstitutional placement; (2) the state's commitment to provide treatment for other people with disabilities; and (3) whether the person desires to be deinstitutionalized.[75] The Court concluded:

> under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[76]

The *Olmstead* decision was a "defining moment."[77] The Court's holding opened the door wide for people in institutions and their advocates to sue and seek services integrated into the community under Title II. Relying on the strength of *Olmstead*, advocates have won victories for broad classes of people from AIDS patients in New York[78] to segregated workers in Oregon.[79]

71. The statute states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2012).

72. *Olmstead*, 527 U.S. at 597–98.

73. *Id.* at 587.

74. *Id.* at 597.

75. *Id.* at 607.

76. *Id.*

77. David Ferleger, *The Constitutional Right to Community Services*, 26 GA. ST. U. L. REV. 763, 770 (2010). Ferleger is critical of *Olmstead* for various reasons, largely because of the caveats employed by Justice Ginsburg to limit the scope of the ruling. *See id.* at 771–78. Yet, even as a critic of the decision, he does not diminish the importance of its holding. *See id.* at 771.

78. *See* Henrietta D. v. Bloomberg, 331 F.3d 261, 265 (2d Cir. 2003).

79. Lane v. Kitzhaber, 283 F.R.D. 587, 590 (D. Or. 2012).

D. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Having covered the ADA, it is now time to turn to its educational analogue, IDEA. Though the ADA and IDEA are both expressly intended to protect the rights of people with disabilities, they are distinct—both in the level of protection they provide and in the standards that govern their enforcement. This Section provides an overview of IDEA. Subsection 1 outlines the structure and design of IDEA and Subsection 2 discusses the salient distinctions between it and the ADA.

1. Understanding IDEA's Statutory Mandates

IDEA[80] is the primary federal statute governing special education.[81] It was originally passed as the Education for All Handicapped Children Act,[82] and now exists in its current form as a result of a number of amendments.[83]

IDEA was passed to guarantee students with disabilities the right to a "free appropriate public education" (FAPE).[84] This guarantee imposes a number of duties on the public schools of a state, including not only provision of a FAPE, but the duty to find all children with disabilities within their boundaries (Child Find)[85] and provide them with individualized services called an

80. 20 U.S.C. §§ 1400–1482 (2012).

81. For a general overview of IDEA, see Therese Craparo, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, 472–92 (2003).

82. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1461 (1976)).

83. *See* Craparo, *supra* note 81, at 474–77 (providing a history of IDEA and its predecessors).

84. 20 U.S.C. § 1400(d)(1) (stating that the law was passed to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living").

85. The statute provides:

> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3)(A).

Individualized Education Program (IEP).[86] An IEP is a document which is assembled by a group of school officials (IEP team),[87] with input from parents and—as appropriate—the student, designed to provide each child with educational services adapted to meet individual needs.[88] An IEP contains, inter alia: a description of the child's present academic performance; goals; current progress; required services and supports; individual accommodations; and a specific description of how the program will be administered.[89] States delegate Child Find and IEP duties to school districts or other such organizations, which IDEA refers to as Local Educational Agencies (LEA or LEAs).[90]

Under IDEA, a FAPE must

> (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) [be] provided in conformity with the individualized education program.[91]

In addition, a FAPE must "to the maximum extent appropriate" be provided in the "least restrictive environment" (LRE).[92] The baseline LRE is defined as the general education classroom.[93] The LRE requirement demonstrates "'IDEA's strong preference for "mainstreaming," or educating children with disabilities "[t]o the maximum extent appropriate" alongside their non-disabled peers.'"[94]

The decision of where to educate a child with an IEP "[i]s made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options."[95] However, parents do not have the final say; 20 U.S.C. § 1415 establishes grievance

86. *Id.* § 1412(a)(4) ("An individualized education program . . . is developed, reviewed, and revised for each child with a disability.").

87. *See* 34 C.F.R. § 330.321 (2017) (describing the makeup of an IEP team).

88. *See Contents of the IEP*, CTR. FOR PARENT INFO. & RES. (Sept. 2010), http://www.parentcenterhub.org/iepcontents.

89. *See* 20 U.S.C. § 1414(d)(1)(A) (listing the specific requirements of an IEP).

90. LEA are defined in 20 U.S.C. § 1401(19).

91. *Id.* § 1401(9).

92. *Id.* § 1412(a)(5)(A).

93. 34 C.F.R. § 104.34 (2017).

94. M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 224 (2d Cir. 2012) (quoting Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007)).

95. 34 C.F.R. § 300.116(a)(1).

procedures for parents who are dissatisfied with a LEA's handling of their child's education.[96] Before a lawsuit can be filed to vindicate a student's rights under IDEA, they must first exhaust the administrative remedies available under the statute.[97]

Despite IDEA's strong preference for mainstreaming and instruction in the general education classroom, IDEA's definition of a FAPE carries a weaker integration requirement than the ADA.[98] It is arguable that the LRE requirement is akin to the integration mandate, in that the LRE regulation asserts that students should be placed in the general education classroom to "the maximum extent appropriate"[99] and the integration mandate uses the phrase "most integrated setting appropriate."[100] On the other hand, IDEA's text explicitly discusses "separate schooling, or other removal of children with disabilities from the regular educational environment."[101] IDEA case law also holds that the Act allows for segregated settings.[102]

2. Distinguishing IDEA and the ADA

Where *Olmstead's* holding is that the ADA provides broad protections, the major Supreme Court case interpreting IDEA is

96. 20 U.S.C. § 1415.

97. *See id.* § 1415(*l*) (requiring exhaustion of the due process hearing and appeal under §§ 1415(f) and (g) prior to filing suit). The exhaustion requirement is discussed in more detail at *infra* Part III.A.

98. *See* 34 C.F.R. § 300.17; *see also* 34 C.F.R. § 104.34 (explaining that students with disabilities should be integrated with their peers without disabilities "to the maximum extent appropriate to the needs of the handicapped person . . . [and a] recipient shall place a handicapped person in the regular educational environment operated by the recipient *unless* it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services *cannot be achieved satisfactorily*." (emphasis added)).

99. 34 C.F.R. § 104.34.

100. 28 C.F.R. § 35.130(d) (2017).

101. 20 U.S.C. § 1412(a)(5)(A).

102. *See, e.g.*, Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) ("In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. . . . [S]ome handicapped children simply must be educated in segregated facilities . . . ."). For a review of the differing approaches of the circuits to the LRE requirement and IDEA compliance, see generally, Angela Estrella-Lemus, *An IDEA for Special Education: Why the IDEA Should Have Primacy over the ADA in Adjudicating Education Claims for Students with Disabilities*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 405, 440–42 (2014); Megan Roberts, *The Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041, 1059–72 (2008).

narrow. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Court set a low standard for determining whether a LEA is meeting the FAPE requirements of IDEA.[103] In *Rowley*, the Court was asked to determine if a LEA was providing a FAPE to a young deaf girl, where she was performing well in comparison to her peers, but below her own potential due to the classroom environment in which she was being educated.[104] The Court asked first if defendants had complied with IDEA's procedural requirements, and then inquired whether "the individualized educational program developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits" and nothing more.[105] After *Rowley*, the decisions of the IEP team need only provide "an appropriate education," not one "that provides everything that might be thought desirable by loving parents," or one that helps the child reach their full potential.[106]

Though *Rowley* does not interpret the LRE provisions of IDEA, the low standard it set has nonetheless had an effect on how the circuits have interpreted the LRE requirement:

> It is well settled that the LRE mandate does not require school districts to place students in their neighborhood schools in all situations. For financial reasons most school districts centralize many special education services. In the overwhelming majority of lawsuits in which a parent contests a placement in a school other than the neighborhood school, the courts have found that the student's IEP required the centralized placement.[107]

103. *See* 458 U.S. 176, 206–07 (1982).

104. *Id.* at 184–85.

105. *Id.* at 206–07.

106. Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (quoting Tucker v. Bay Shore Free Union Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1989)). The "loving parents" language is frequently used by courts in IDEA cases. *See, e.g.*, Cobb Cty. Sch. Dist. v. D.B. *ex rel.* G.S.B., No. 1:14-CV-02794-RWS, 2015 WL 5691136, at *9 (N.D. Ga. Sept. 28, 2015); J.R. *ex rel.* W.R. v. Sylvan Union Sch. Dist., No. 062136, 2008 WL 682595, at *10 (E.D. Cal. Mar. 10, 2008), *report and recommendation adopted sub nom.* J.R. v. Sylvan Union Sch. Dist., No. 06-2136, 2008 WL 2345103 (E.D. Cal. June 5, 2008); P.J. By & Through W.J. v. Conn. Bd. of Educ., 788 F. Supp. 673, 679 (D. Conn. 1992); Kerkam v. McKenzie, 862 F.2d 884, 886 (D.C. Cir. 1988).

107. Allan G. Osborne, Jr., *Is the Era of Judicially-Ordered Inclusion Over?*, 114 ED. L. REP. 1011, 1012 (1997). Osborne's article provides a useful discussion of competing standards for interpreting LRE requirements. *Id.* at 1015–25. The article is somewhat old, but the leading cases on LRE that it discusses remain good law.

The result of these interpretations is a powerful law that, as will be shown in Part II below, still seems to permit schools to segregate students from their peers without disabilities in separate school buildings.

II. INTEGRATION CHALLENGES TO SEGREGATED SCHOOLS FOR STUDENTS WITH DISABILITIES

Throughout the United States, state and local governments run special education programs for students that segregate students with disabilities into separate schools.[108] According to statistics published by the U.S. Department of Education in 2015, across the United States and Puerto Rico, 146,581 students with disabilities ages six to eighteen attended separate, segregated-site school buildings.[109] This Part will examine a surprisingly unexplored frontier in *Olmstead* litigation: applying the ADA integration mandate to educational segregation of students with disabilities. First, Section A explains that even though IDEA provides individual students with disabilities a substantive right to a FAPE,[110] that right has traditionally been interpreted to offer few remedies for students who end up placed in educational settings that they do not prefer. Section B will provide an overview of the two cases that have argued that segregated-site schools violate Title II of the ADA. It will then provide a summary of the argument that students who are displeased with their segregated educational placements can bring actions under Title II of the ADA, seeking to receive their educational services in the most integrated setting.

A. IDEA AND SEGREGATED EDUCATIONAL PLACEMENTS

Though IDEA protects many rights of students, it does not explicitly protect their rights to receive services in an integrated

108. *See, e.g.*, Emma Brown, *Justice Department Sues Georgia Over Segregation of Students with Disabilities*, WASH. POST (Aug. 23, 2016), https://www.washingtonpost.com/news/education/wp/2016/08/23/justice-department-sues-georgia-over-segregation-of-students-with-disabilities/?utm_term=75f7fd223abd (describing how GNETS segregates students with disabilities into separate school buildings).

109. *See Data*, *supra* note 21. The state of Georgia, where the GNETS program described in the introduction is located, accounts for only 2607, or 1.78% of those students. *Id.*

110. 20 U.S.C. § 1400(d)(1)(a) (2012).

environment.[111] As described above, aggrieved students and their families must exhaust IDEA's administrative remedies prior to filing suits challenging their educational placement.[112] In theory, this is a reasonable requirement:

> [i]t prevents courts from interrupting permanently the administrative process, it allows the agency to apply its specialized expertise to the problem, it gives the agency an opportunity to correct its own errors, it ensures that there will be a complete factual record for the court to review, and it prevents the parties from undermining the agency by deliberately flouting the administrative process.[113]

However, in practice this requirement can completely prevent a litigant from reaching court. Administrative exhaustion requires a student to remain in an educational placement that they dislike, while first going through the administrative process itself, and then while litigating the dispute in court.[114] Students are much more likely to settle, move away, or move to a charter or private school than reach the end of such a drawn-out legal process, even when the proposed placement is extremely unfavorable. For example, one student in Georgia, Libby Beem, was aggrieved when the state attempted to move her to GNETS.[115] As part of that move, the school district tried to require her to undergo a psychological experiment. In the proposed experiment a school psychologist named Whitmarsh, subjected Libby to great discomfort.

> Whitmarsh alone would sit with Libby three hours a day, for eight to 10 weeks, trying to figure out what might provoke her into an outburst. Then he would do whatever bothered her.

111. *See supra* Part I.D. As the statute explains,

> to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and *special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily*.

20 U.S.C. § 1412(5)(A) (emphasis added).

112. *See* § 1415(*l*) (laying out IDEA exhaustion requirements).

113. Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349, 360–61 (2009) (footnotes omitted).

114. 34 C.F.R. § 300.518 (2017) ("[U]nless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.").

115. Judd, *supra* note 8.

> He might make sudden loud noises or tell her she had performed tasks incorrectly. He might order her to complete assignments in subjects she hated. He might ignore her altogether.
>
> No matter how Libby responded, whether she threw school supplies or struck herself in the head, Whitmarsh would simply watch, he said later. A colleague in the next room would take notes on Libby's reactions. The notes could be used later to develop a treatment plan.
>
> . . . .
>
> . . . Julie Beem[, Libby's mother,] said that . . . Whitmarsh mentioned his plan to wear protective clothing—"so [Julie] didn't need to worry about him."[116]

The Beems disapproved of this unusual treatment plan and went through an IDEA due process hearing.[117] Although the administrative law judge agreed that the state should not force Libby to undergo the experiment, the judge said the state could nonetheless require her to enter the GNETS program.[118] Rather than face GNETS or continue to court, the Beems put Libby into an online charter school.[119]

This is not an unusual result:

> It is well settled that . . . school districts [are not required] to place students in their neighborhood schools in all situations. . . . In the overwhelming majority of lawsuits in which a parent contests a placement in a school other than the neighborhood school, the courts have found that the student's IEP required the centralized placement.[120]

As a result, a student with disabilities can end up in a segregated school, cut off from their nondisabled peers, based on determinations made by a child's IEP team but without parental approval. The parents can challenge it using IDEA's administrative process and ultimately discover that their objection to a segregated placement has no further recourse under IDEA. This is exactly what happened with the Beems.[121] However, as the lawsuit filed against GNETS by the Department of Justice shows, IDEA is not the only place to turn for a remedy.

B. APPLYING *OLMSTEAD* TO SEGREGATED SCHOOLS FOR STUDENTS WITH DISABILITIES

Surprisingly, *Olmstead* and the ADA have not been applied to public schools until very recently. As far as can be discerned, there have been only two attempts. One attempt is the suit filed

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. Osborne, Jr., *supra* note 107.
121. *See* Judd, *supra* note 8.

by the Department of Justice against the State of Georgia and GNETS.[122] In that case, the Department explicitly relied on *Olmstead* and the ADA without any reference to IDEA.[123] The case is still pending,[124] and it is currently unclear whether the recent change in presidential administrations will result in any change in approach to this particular type of civil rights enforcement at the Department of Justice.[125]

The Department of Justice complaint is an excellent blueprint for a challenge to segregated-site school placements under *Olmstead* and the ADA. Relying substantially on the rationale of *Olmstead*, the Department alleged four things that set up an effective claim. First, they alleged that GNETS programs are "[s]egregated, [i]nstitutional, [s]ettings."[126] Second, they alleged that "for over 40 years, the State has operated, administered, and funded the GNETS Program in mostly segregated settings, largely to the exclusion of integrated alternatives."[127] Third, they argued that GNETS students are "[q]ualified to [r]eceive [s]ervices in [m]ore [i]ntegrated [s]ettings and [d]o [n]ot [o]ppose [i]t."[128] Fourth and finally, they asserted that "[t]he State can reasonably modify its programs, policies, and services to remedy these Title II violations and avoid discrimination against students in or at risk of placement in the GNETS Program."[129] The course charted by the complaint hews closely to the course charted by the *Olmstead* plurality:

> [U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[130]

122. *See supra* notes 1–10 and accompanying text.

123. *See* U.S. Dep't of Justice Complaint, *supra* note 10, ¶¶ 1, 65. Count I alleges that "Defendant has violated and continues to violate the ADA by administering its mental health and therapeutic educational service system in a manner that fails to serve students in the GNETS Program in the most integrated setting appropriate to their needs." *Id.* ¶ 68.

124. *Id.*

125. *See* Pratt, *supra* note 3.

126. U.S. Dep't of Justice Complaint, *supra* note 10, at 12.

127. *Id.* ¶ 38, at 14.

128. *Id.* at 16.

129. *Id.* ¶ 57, at 21.

130. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 607 (1999).

The second example of a court challenge to segregated-site schools was in 2015, in *S.S. ex rel. S.Y. v. City of Springfield*.[131] There, a proposed class of plaintiffs with disabilities sued Springfield Public Schools, asserting that the defendants' decision to place them in segregated, educationally inferior separate school facilities, rather than "neighborhood schools"[132] violated Title II of the ADA.[133] This claim admitted that plaintiffs were receiving the services mandated by IDEA—a FAPE in the LRE—and thus relied totally on the integration mandate for the requested relief: placement in a more integrated environment.[134] Defendants filed a motion to dismiss for failure to state a claim under Title II, which the court denied.[135] In doing so, the court relied on a tried and true *Olmstead* rationale: "Plaintiffs have alleged that Defendants discriminated against S.S. in violation of Title II by placing S.S. in a segregated educational environment even though, had he been provided with reasonable accommodations, he could have been placed in a neighborhood school,"[136] and that "[p]laintiffs have adequately pled that the exclusion of S.S. from the neighborhood schools was by reason of his disability."[137]

These two examples illustrate the potential power of the integration mandate in the context of education. When school districts elect to congregate students with disabilities in separate-site schools, they are placing students in a facially less-integrated environment by limiting those students' ability to interact with their nondisabled peers. Segregated-site schools are, quite literally, segregated schools. As the preamble to Title II regulations provides, the most integrated environment is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[138] Segregated-site schools are unquestionably limiting students' peer groups, and thus they present a fertile ground for new integration suits.

131. S.S. *ex rel.* S.Y. v. City of Springfield, 146 F. Supp. 3d 414 (D. Mass. 2015).

132. S.S. *ex rel.* S.Y. v. City of Springfield, 318 F.R.D. 210, 214 (D. Mass. 2016) ("'Neighborhood school' is a term used in this litigation to refer to elementary and middle schools which primarily enroll students based on their residential address . . . .").

133. *S.S. ex rel. S.Y.*, 146 F. Supp. 3d at 416.

134. *Id.* at 425.

135. *Id.*

136. *Id.*

137. *Id.*

138. 28 C.F.R. Pt. 35, App. B (2017) (addressing § 35.130).

Even if a court were to consider a segregated classroom to be the most appropriate setting for a student, having such placements occur in a school with general education classrooms where the student has access to his or her nondisabled peers is simply more integrated than a segregated-site placement. Advocates can and should identify potential plaintiffs who are displeased with their separate-site placements and consider instituting litigation to help those students, at the very least, be integrated into schools that have both special- and general-education classrooms where they can seek to have access to the community, like the ADA requires. However, advocates should also be aware of the barriers to such lawsuits, discussed in Part III below.

III. POTENTIAL BARRIERS TO TITLE II CLAIMS AGAINST SEGREGATED-SITE SCHOOLS

This Part will examine three potential barriers to Title II integration mandate claims against segregated-site schools: (1) administrative exhaustion; (2) states' power to rely on the reasonable opinions of their reasonable treating professionals;[139] and (3) the fundamental alteration defense.[140] Section A will introduce IDEA's exhaustion requirement and discuss its potential effect on ADA suits against segregated-site schools, in both the individual and class action contexts. Then it will examine a newly decided Supreme Court case, *Fry v. Napoleon Community Schools*,[141] to consider potential arguments that IDEA exhaustion does not apply to integration suits against separate-site schools. Section B will argue that *Olmstead*'s discussion of reliance on the reasonable opinions of treating professionals should not pose a bar to integration suits against segregated-site schools. Finally, Section C will briefly introduce the concept of a fundamental alteration defense and argue that it is unlikely to be applicable in this context.

A. EXHAUSTION UNDER IDEA

1. Exhaustion and Its Application to IDEA

Exhaustion is an administrative law doctrine that requires parties to pursue all available avenues of administrative relief

139. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 602 (1999).
140. *See infra* Part III.C.
141. 137 S. Ct. 743 (2017).

before seeking judicial review.[142] Though exhaustion is a common law doctrine,[143] it is routinely enshrined in statutes as a prerequisite to suit.[144] There are two major purposes of exhaustion. The first is to tap into the expertise of agencies:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.[145]

The second rationale underlying exhaustion is efficiency-driven:

> [E]xhaustion promotes efficiency. Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court.[146]

One provision of IDEA, 20 U.S.C. § 1415(*l*), requires exhaustion of administrative remedies available under the statute before filing suit under the ADA, Rehabilitation Act, or other similar statute if the requested relief is "also available" under IDEA.[147] One barrier to Title II claims against schools has been

142. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) ("[T]he long-settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.").

143. *See Exhaustion of Remedies*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available.").

144. *See, e.g.*, 5 U.S.C. § 702 (2012) (providing the exhaustion requirement codified in the Administrative Procedure Act); 42 U.S.C. § 1997e(a) (2012) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

145. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); *see also* Woodford v. NGO, 548 U.S. 81, 89 (2006) ("[E]xhaustion protects 'administrative agency authority.'" (quoting McCarthy v. Madigan, 503 U.S. 140, 145 (1992))).

146. *Woodford*, 548 U.S. at 89.

147. Section 1415(*l*) (2012) provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], Title V of the Rehabilitation Act of 1973 [29 U.S.C. 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

courts' tendencies to read this provision very broadly, requiring that exhaustion is necessary unless the requested relief *could not* be available under IDEA[148] or potentially requiring exhaustion as long as IDEA could offer even de minimis relief.[149] This means that parties that want to sue separate-site schools alleging violation of the integration mandate could potentially be forced to face long administrative proceedings which are unlikely to provide the relief they seek.[150] Since IDEA regulations permit segregation, so long as the facilities are *comparable*.[151] "If a [federal IDEA funding] recipient . . . operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient."[152] By the same token, those defending Title II suits could deflect or delay judicial scrutiny by forcing administrative process on the plaintiffs.

A notable example of this kind of delay occurred in *S.S. ex rel. S.Y. v. City of Springfield*,[153] discussed in Part II above. After the plaintiffs had survived a motion to dismiss on the merits, the court denied the plaintiffs' motion to certify a class under Federal Rule of Civil Procedure 23 on the grounds that

> [w]hen a plaintiff brings a suit under a statute other than the IDEA, exhaustion is still required if the relief sought is also available under the IDEA. . . .
>
> . . . .

148. *See, e.g.*, Fry v. Napoleon Cmty. Sch., 788 F.3d 622, 623 (6th Cir. 2015), *vacated*, 137 S. Ct. 743 (2017) (requiring IDEA exhaustion where separate statutory claims are "essentially educational"); D.B. *ex rel.* Elizabeth B. v. Esposito, 675 F.3d 26, 39 n.5 (1st Cir. 2012) ("Like an IDEA claim, a non-IDEA claim that seeks relief also available under the IDEA must be exhausted administratively through the IDEA's due process hearing procedures before it can be brought in a civil action in state or federal court."); S.S. *ex rel.* S.Y. v. City of Springfield, 318 F.R.D. 210, 221 (D. Mass. 2016) ("When a plaintiff brings a suit under a statute other than the IDEA, exhaustion is still required if the relief sought is also available under the IDEA . . . .").

149. *See, e.g.*, Padilla *ex rel.* Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000) ("In essence, the dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to *any degree* by the IDEA's administrative procedures and remedies. If so, exhaustion of those remedies is required." (emphasis added)).

150. This is because, as noted above, courts have not interpreted FAPE requirements to provide an effective integration guarantee. *See supra* Parts I.D, II.A.

151. *Cf.* Brown v. Bd. of Ed., 347 U.S. 483, 488 (1954) (rejecting the notion of "separate but equal" in racially segregated schools).

152. 34 C.F.R. § 104.34(c) (2017).

153. 318 F.R.D. 210 (D. Mass. 2016).

> . . . . While Plaintiffs do not need to demonstrate a violation of the IDEA in order to prevail on their ADA claim, their claim does concern the delivery of services to students whose educational programs are governed by IEPs.[154]

The *S.S.* court's interpretation of § 1415(*l*) potentially presents a barrier to Title II suits against segregated-site schools because educational placement is an essential element of a FAPE, and therefore could feasibly always be challenged in an IDEA proceeding.[155] A strict reading of the IDEA exhaustion requirement is especially problematic for class action plaintiffs because putting together a class of plaintiffs who must first exhaust their administrative remedies would make finding and qualifying class members much harder. In addition, such a requirement would potentially slow down the entire process, since an influx of due process hearing requests all at once would likely bog down the exhaustion process.

2. Exceptions to Exhaustion Doctrines for Class Plaintiffs

Because of the novelty of this kind of litigation, it is not obvious if other courts will require classes to be limited only to parties who have previously exhausted, as happened in *S.S.*[156] There are persuasive arguments that a court should waive the exhaustion requirement as to class plaintiffs, provided at least one named plaintiff exhausts. For example, in the context of Social Security exhaustion, a party must either exhaust or have been unable to exhaust by the time of the filing of the suit to join a plaintiff's class,[157] meaning that some plaintiffs may join the

154. *Id.* at 221–22.

155. For example, 20 U.S.C. § 1415(k)(1)(A) (2012) provides that "[s]chool personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct." This lays the foundations of student placement decisions in IDEA and makes any child's dissatisfaction with her educational placement ostensibly remediable under IDEA.

156. For a discussion of the interaction of statutory exhaustion and class certification from the lens of the Prison Litigation Reform Act, see Elizabeth S. Hess, *Administrative Exhaustion and Class Actions: Rules, Rights, Requirements, Remedies, and the Prison Litigation Reform Act Issue Resolved*, 2003 U. CHI. LEGAL F. 773, 775 (2003). For a discussion of IDEA class actions generally, see Mark C. Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471, 475 (2014).

157. Hess, *supra* note 156, at 786 ("For class actions brought under the Social Security Act, membership is limited to claimants who have exhausted their remedies, as well as those who still had an opportunity to do so when the suit was filed.").

suit without being required to have exhausted administrative remedies.

In the context of employment law, some courts have examined the purposes of exhaustion requirements to conclude that requiring class-wide exhaustion under Title VII of the Civil Rights Act[158] is actually contrary to the intent behind the creation of a statutory exhaustion requirement.[159] "It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful[?]"[160] This rationale is arguably applicable under IDEA as well. If one plaintiff has sought an administrative remedy and found it unavailable, it is patently inefficient to force dozens or hundreds of other plaintiffs to pursue the same process. It flies in the face of the rationale of exhaustion, by reducing efficiency and adding little or no expertise to the process.

The legislative history of IDEA's predecessor statute, The Education for All Handicapped Children Act,[161] also supports the idea that class plaintiffs are not intended to be required to exhaust. During floor debates, the Act's author opined, "Nor is it intended that the availability of these administrative procedures be construed so as to require each member of the class to exhaust such procedures in any class action brought to redress an alleged violation of the statute."[162] Legislative history of amendments to the law also reflects this line of reasoning. In 1985, Senator Paul Simon opined, "[Section 1415] is also clearly *not intended* to modify traditional standards used by the courts for determining when a class action suit can be filed."[163] Furthermore, some courts have also reached the conclusion that exhaustion for all

158. 42 U.S.C. § 2000e-5(e)(1) (2012) (requiring plaintiffs to first seek administrative remedies through the EEOC before filing suit).

159. Foster v. Gueory, 655 F.2d 1319, 1322 (D.C. Cir. 1981).

160. *Id.* (quoting Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968)).

161. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1461 (1976)).

162. 121 CONG. REC. 37416 (1975) (statement of Sen. A. Harrison Williams).

163. 131 CONG. REC. 21393 (1985) (statement of Sen. Simon) (emphasis added).

class members is unnecessary, finding that the purposes of exhaustion make class-wide exhaustion unnecessary.[164] Forcing class plaintiffs to exhaust en masse opens the door for inconsistent rulings, confusion, and an incredible amount of wasted effort when a court finally hears a class action and ultimately resolves the case for the entire class. When considering all of these facts together, there is very little support for the idea that every class member in an IDEA class action should be forced to exhaust.

The plaintiffs in *S.S.* apparently failed to raise these issues, because the court, in denying certification on exhaustion grounds specifically noted that

> [w]hile [the named plaintiff] exhausted his administrative remedies prior to this litigation, Plaintiffs have not limited the proposed class to include only those who have exhausted their IDEA procedural remedies. Plaintiffs also have not argued that there is an exception to the exhaustion requirement applicable simply because Plaintiffs have framed this litigation as a class action, and the court has found no such exception. . . .[165]

Given the analysis above, it is fair to say that the court's position on class-wide exhaustion in *S.S.* was wrong both as a matter of policy and as a matter of law. However, in view of this ruling, and the plaintiffs' apparent failure to raise these issues before the court, future plaintiffs will do well to be aware of the potential problems IDEA's exhaustion requirement can cause class-litigants asserting ADA claims and to prepare to meet such challenges with thorough and well-reasoned arguments.

3. *Fry v. Napoleon Community Schools*: Evading IDEA Exhaustion for Suits Under the ADA

Another way to overcome the IDEA's exhaustion provision is to show that it is inapplicable to a suit under Title II of the ADA and the integration mandate. A recent development in case law governing IDEA now controls this corner of the legal landscape. On February 22, 2017, the Supreme Court decided *Fry v.*

164. *See, e.g.*, Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 59 (1st Cir. 2002) ("The requirement that plaintiffs exhaust administrative remedies available under the IDEA is not absolute."); L.M.P. *ex rel.* E.P. v. Sch. Bd., 516 F. Supp. 2d 1294, 1305 (S.D. Fla. 2007) ("To [require exhaustion by all class members] would expose the School Board to potentially inconsistent rulings on their standard policy, ultimately requiring an eventual resolution of the issue by a federal district court. Under the facts alleged here, exhaustion by class members would be needless and futile.").

165. S.S. *ex rel.* S.Y. v. City of Springfield, 318 F.R.D. 210, 221 (D. Mass. 2016).

Napoleon Community Schools.[166] In *Fry*, the Supreme Court clarified the legal standards that govern whether relief sought on ADA grounds is "also available under" IDEA.[167] This new test to determine if IDEA exhaustion requirements under 20 U.S.C. § 1415(*l*) apply to ADA claims says that, "exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—[a FAPE]."[168] In instituting this test, the Court rejected more stringent exhaustion standards, like those described above,[169] which, for example, ask if relief is "essentially educational."[170] In *Fry*, the Supreme Court has strengthened the argument that IDEA exhaustion under § 1415 is unnecessary for a suit based on Title II and the integration mandate.

In explaining how the standard operates, the Court noted that the exhaustion requirement hinges on whether a hearing officer in the IDEA's administrative process could grant any relief. Thus, the necessity of exhaustion depends on whether the complaint asserts a denial of a FAPE.[171] The Court explained:

> Suppose that a parent's complaint protests a school's failure to provide some accommodation for a child with a disability. If that accommodation is needed to fulfill the IDEA's FAPE requirement, the hearing officer must order relief. But if it is not, he cannot—even though the dispute is between a child with a disability and the school she attends. There might be good reasons, unrelated to a FAPE, for the school to make the requested accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might require the accommodation on one of those alternative grounds. . . . But still, the hearing officer cannot provide the requested relief. His role, under the IDEA, is to enforce the child's "substantive right" to a FAPE. And that is all.[172]

The idea, then, will be for plaintiffs to do as the Department of Justice did against the State of Georgia and rely only on the text of the ADA, rather than on any provision in IDEA.[173] However, it is not quite that simple, because the Court expressly disavowed attempts to merely end run the requirements: "If a law-

166. 137 S. Ct. 743 (2017).

167. 20 U.S.C. § 1415(*l*) (2012); *Fry*, 137 S. Ct. at 746 (2017).

168. *Fry*, 137 S. Ct. at 748.

169. *See supra* Part III.A.1.

170. Fry v. Napoleon Cmty. Sch., 788 F.3d 622, 623 (6th Cir. 2015), *vacated*, 137 S. Ct. 743 (2017).

171. *Fry*, 137 S. Ct. at 754.

172. *Id.* (citation omitted).

173. *See* U.S. Dep't of Justice Complaint, *supra* note 10.

suit charges such a denial [of a FAPE], the plaintiff cannot escape §1415(*l*) merely by bringing her suit under a statute other than IDEA."[174]

How does one differentiate between claims for denial of a FAPE and claims that substantively rely on the ADA? The Court's standard asks whether "the plaintiff [could or] could not get any relief from [IDEA] procedures."[175] Because part of a child's placement is an element of her IEP,[176] simply challenging a placement is likely relief "also available" under IDEA.[177] However, the Court adds that "[a] school's conduct toward such a child [with disabilities]—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE."[178] This is the key idea. Like the Department of Justice argued in Georgia, plaintiffs who oppose their placement in a segregated-site school may admit that the school is meeting its baseline FAPE requirements, but allege that the school placement injures them on integration grounds. Therefore, they would arguably be "alleg[ing] only disability-based discrimination, without making any reference to the adequacy of the special education services."[179]

This approach could potentially put plaintiffs seeking to bring a desegregation claim against a segregated-site school—without exhausting—in an unusual or even potentially inconsistent position. One way to attempt to avoid the exhaustion requirement is to assert that the separate-site school is successfully providing the student a FAPE, but is still violating the integration mandate, as the plaintiffs in *S.S.* did.[180] As a result, the antiexhaustion argument would assert that the school is meeting the requirements of IDEA and thus "the plaintiff could not get any relief from [IDEA's administrative] procedures."[181] Of course, this line of reasoning may be antithetical to the goals of plaintiffs who are both dissatisfied with the quality of education their child is receiving and dissatisfied with the setting in

174. *Fry*, 137 S. Ct. at 754.

175. *Id.*

176. 34 C.F.R. § 300.320(a)(7) (2017).

177. *See* 20 U.S.C. § 1415(*l*) (2012).

178. *Fry*, 137 S. Ct. at 754.

179. *Id.* at 758.

180. S.S. *ex rel.* S.Y. v. City of Springfield, 146 F. Supp. 3d 414, 424 (D. Mass. 2015) ("Plaintiffs have acquiesced to its ruling that S.S., even when placed in a segregated environment exclusively with other students with mental health disabilities, was provided with FAPE in the LRE . . . .").

181. *Fry*, 137 S. Ct. at 754.

which it is offered. On the other hand, IDEA exhaustion is a lengthy process and is more sympathetic to segregated facilities.[182] Therefore, challenging such settings for denial of a FAPE is not an obviously promising line of attack. Moreover, plaintiffs who want *both* IDEA and ADA relief are able to elect to exhaust if they so choose.

Of course, there are other ways to challenge the exhaustion requirement, and therefore creativity is powerful. For example, because IDEA and its implementing regulations require the LRE rather than simple integration, plaintiffs could rely on the distinction between the idea of a restrictive setting and an integrated setting as the basis for their suit. Plaintiffs may also reasonably argue that the complaint is "a suit brought under a different statute,"[183] seeking a different remedy, and therefore "the gravamen of the plaintiff's suit"[184] is to vindicate a right not offered under IDEA: to receive services in "the most integrated setting."[185] Under this approach, finding a way to stress that a segregated classroom and a segregated school building will offer functionally equivalent services will be a fact-specific inquiry. Because LEAs are just that, these comparisons will be necessarily context-specific.

To summarize, plaintiffs seeking to use Title II to challenge placement in a segregated-site school have a variety of ways to do it. Individual plaintiffs may elect to seek relief under the administrative process supplied by IDEA before bringing a Title II integration claim.[186] For individual plaintiffs who are unhappy with their placement, they are likely to have begun the negotiation portion of this process simply as a part of conflicts with a school district over where education will occur. However, if either class or individual plaintiffs want to evade exhaustion, they can argue that exhaustion does not apply under *Fry* because their claim does not plead a denial of a FAPE.[187] In addition, class plaintiffs can argue that exhaustion by a single plaintiff is enough to meet the requirements of the Act based on the doctrinal purposes behind exhaustion requirements, the legislative

182. *See supra* notes 150–51 and accompanying text.

183. *Fry*, 137 S. Ct. at 754.

184. *Id.* at 748.

185. 28 C.F.R. § 35.130(d) (2017).

186. 20 U.S.C. § 1415(f), (g) (2012) (detailing IDEA's administrative hearing and appeals process).

187. *See supra* Part II.B.

history of IDEA's predecessors, and case law that has upheld this principle.

B. THE STATE'S ABILITY TO RELY ON THE REASONABLE ASSESSMENTS OF TREATING PROFESSIONALS

A majority of the court in *Olmstead* held that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community-based program.[188] Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting."[189] One potential line of defense for a LEA in a Title II suit is that students' placement in a separate-site school is the result of the "reasonable assessments" of its own officials.[190] Therefore, the argument goes, such determinations are not open to challenge by plaintiffs where there is a properly instituted IEP.

There are three major weaknesses to this argument. The first is a logical inconsistency; simply comparing a segregated school building to a separate classroom in an otherwise integrated neighborhood school does not offer much in the way of difference between placements. Students in either environment will likely not receive a substantially different classroom experience, nor will they necessarily be subject to a less restrictive regimen in one or the other. Therefore, to the extent that the placement in a segregated-site facility is the result of the opinion of a treating professional, it is difficult to see how the eligibility requirements would differ between the two settings in a way that necessitates one placement over the other. This has the potential to be an evidence-sensitive examination, but to the extent that the two settings are equivalently restrictive and one is significantly more integrated than the other, there is fertile ground for an integration mandate claim.

188. "Habilitation services," according to Medicaid regulation, include "special education and related services." 42 C.F.R. § 440.180(c)(2)(ii) (2017).

189. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 602 (1999).

190. *Id.* Principles of agency seem to suggest that IEP teams would reasonably constitute a state's "treating professionals" under *Olmstead* for purposes of educational placements. *Cf.* 20 U.S.C. § 1401(19)(A) ("The term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State . . . .").

Second, it is not clear that such a placement could be deemed reasonable.[191] Because Title II and its implementing regulations enshrine a right to receive services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities,"[192] school districts face a high burden in attempting to argue that community placement in a nonsegregated school is inappropriate when most plaintiffs will be living in a community-based residential setting—at home with their parents. In addition, adult plaintiffs in *Olmstead* litigation have repeatedly argued, with success, that their placements in institutions like hospitals and nursing homes are inappropriate.[193] How can it be reasonable to place students in segregated, institution-like settings when they already live in an integrated community setting at home?

This same rationale applies to the daytime activities of people with disabilities as well. A recent case, *Lane v. Kitzhaber*, involved a successful *Olmstead* claim against sheltered workshops which segregate adults with disabilities from the community during working days.[194] Sheltered workshops are an easy analogue to schools, because schools fill the same part of the day for children as a workplace does for adults. Under this rationale, the holding in *Lane* is more problematic than it would be in the context of a case about schools. Potentially, sheltered workshops found to violate the integration mandate would end up being unusable for providing services to people with disabilities. However, because school districts are likely to already have special

191. *Olmstead*, 527 U.S. at 603. The reasonable assessments standard has been described as a "negligence standard." Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 37 (2012). This imposes a duty on states. Would a reasonable treating professional believe that a segregated school facility was more appropriate than a separate classroom in a neighborhood school?

192. 28 C.F.R. § 35.130(d) (2017).

193. *See, e.g.*, *Olmstead*, 527 U.S. at 581 (ordering integration for plaintiffs institutionalized in hospitals); Benjamin v. Dep't of Pub. Welfare, No. 1:09-CV-1182, 2014 WL 4793736, at *10 (M.D. Pa. Sept. 25, 2014) (giving final approval to a settlement agreement giving residents in Intermediate Care Facilities in Pennsylvania the right to more integrated placements); Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009) (finding that certain "adult homes" in New York "are institutions that segregate residents from the community and impede residents' interactions with people who do not have disabilities."). *See generally* Kevin M. Cremin, *Challenges to Institutionalization: The Definition of "Institution" and the Future of* Olmstead *Litigation*, 17 TEX. J. ON C.L. & C.R. 143, 144 (2012) (discussing deinstitutionalization litigation and its future).

194. 283 F.R.D. 587, 602 (D. Or. 2012).

education classrooms in neighborhood school buildings,[195] *Olmstead* claims against school districts should be much less controversial. A school building is useful to students no matter who attends it. All that the plaintiffs will be seeking to change is the demographics of students who attend particular buildings. By contrast, the sheltered workshops at issue in *Lane* require more complex—and potentially fraught—changes to government programs,[196] yet the plaintiffs were still met with success.

Finally, some case law suggests that the reasonable assessments standard imposes a duty on states, but is not itself a defense. For example, in a landmark *Olmstead* case, *Disability Advocates*, *Inc. v. Paterson*, Judge Garaufis of the Eastern District of New York wrote, "The court does not read *Olmstead* as creating a requirement that a plaintiff alleging discrimination under the ADA must present evidence that he or she has been assessed by a treatment provider and found eligible to be served in a more integrated setting."[197] The result of this holding is that the plaintiffs in *Paterson* were permitted to affirmatively prove during the course of litigation that they were eligible for a more integrated placement. To the extent that such a holding applies in the IEP context, an IEP itself would be no defense.[198]

C. THE FUNDAMENTAL ALTERATION DEFENSE

The fundamental alteration defense holds that the government does not have an absolute duty to limit discrimination by

195. According to U.S. Department of Education data, in 2011 there were 815,525 students in the general education classroom forty percent or less of the time nationwide. *See Data*, *supra* note 21 (download 2011 file on Educational Environments). The Department defines this category to include, "self-contained special classrooms with full-time special education instruction on a regular school campus." U.S. DEP'T OF EDUC., IDEA PART B CHILD COUNT AND EDUCATIONAL ENVIRONMENTS FOR SCHOOL YEAR 2014–2015, at 6 (2015), https://www2.ed.gov/programs/osepidea/618-data/collection-documentation/data-documentation-files/part-b/child-count-and-educational-environment/idea-partb-childcountandedenvironment-2014.doc.

196. *See* J. Gardner Armsby, *The War on Sheltered Workshops: Will ADA Title II Discrimination Lawsuits Terminate an Employment Option for Adults with Disabilities?*, 31 GA. ST. U. L. REV. 443, 450–52 (2015) (discussing how plaintiffs in *Lane* were met with hostile intervenors who were concerned that the suit would restrict their ability to work in sheltered workshops by leading to their closure).

197. 653 F. Supp. 2d 184, 258 (E.D.N.Y. 2009).

198. For further discussion of this subject, see Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 37 (2012) (discussing the "ambiguity" of the effect of "determinations of the state's treating professionals" under *Olmstead* in greater depth).

modifying its programs. In other words, this defense prevents litigants from identifying a service they would *like* to receive and/or a setting in which they would like to receive it in and suing to compel the state to provide it, whether or not it is a part of their programs.[199] The implementing regulations of the ADA say that "[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."[200] As one court put it, "This regulation acknowledges the States' interests in preserving the essential characteristics of their public programs and monitoring public expenditures."[201]

In addition to preventing plaintiffs from demanding services not already part of the state's programs, the fundamental alteration defense permits states to use budgetary constraints as a defense to integrations suits. "Court[s] must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."[202] Litigants cannot force the state to discriminate against another set of people with disabilities by demanding a remedy that would simply change the ratio of funds going to one program or another.

The fundamental alteration defense should not generally be successful in integration suits involving segregated-site schools. The reason for this is simple. LEAs are required by law to provide special education services. LEAs also likely provide some students with special education in classrooms in neighborhood schools. Given the fact that states are already providing the desired services to some students with disabilities, LEAs will have a difficult time asserting that changing the educational placements of students with disabilities will fundamentally alter their

199. *See, e.g.*, Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1208 (D. Or. 2012) (describing the "forbidden remedy" of "demand[ing] that defendants provide . . . a certain standard of care or level of benefits").

200. 28 C.F.R. § 35.130(b)(7) (2017).

201. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 489 (4th Cir. 2005).

202. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597 (1999).

programs and services. Even were a LEA required to stop operating a school building as a segregated-site school, it would likely still be a feasible location to operate as an integrated school. Requiring LEAs to provide educational services in the "most integrated setting" would not likely fundamentally alter their programs or services.[203]

CONCLUSION

Eighteen years after *Olmstead*, the landscape of disability law has changed drastically. There is a nuanced and thoughtful body of cases interpreting the decision, and there is a broad array of scholarship devoted to supporting legal innovation. Given the breadth of the ADA and the power of *Olmstead*'s holding, it is remarkable that schools have come under consideration only recently. Because separate-site schools so obviously segregate students with disabilities in a setting that is not the most integrated available, advocates can and should bring Title II challenges against such schools in their states.

People with disabilities deserve respect and autonomy. *Olmstead* and the ADA are an important vehicle for helping people with disabilities vindicate their rights and open the doors to independence and integration. Community and mutual respect are part of the "promise of *Olmstead*."[204] That respect cannot develop if kids with disabilities are kept out of sight, and out of mind. Providing for educational integration is one important way that the promise of *Olmstead* can be fulfilled.

203. *See* 28 C.F.R. § 35.130(d).

204. *See* MINN. OLMSTEAD SUBCABINET, PUTTING THE PROMISE OF *OLMSTEAD* INTO PRACTICE: MINNESOTA'S OLMSTEAD PLAN 13 (Feb. 2017), http://www.dhs.state.mn.us/main/groups/olmstead/documents/pub/dhs16_196300.pdf.