



June 17, 2013

Description and Analysis of DOJ Letter of Findings Against, and Interim Settlement Agreement with, the State of Rhode Island and the City of Providence Pertaining to Sheltered Workshops and Day Activity Centers

Introduction:

On June 7, 2013, the Department of Justice (DOJ) presented an official report containing the findings of the Civil Rights Division's investigation of the City of Providence and the Providence Public School District's system of providing transition-related educational services, including employment, vocational, and day services to persons with intellectual or developmental disabilities (I/DD). The focus of the report was on whether the State of Rhode Island and the City of Providence, including the Providence public school system, violated the obligation under the Americans with Disabilities Act (ADA), as interpreted by the U.S. Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999) that public entities must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

In particular, the focus of the investigation was on the "serious risk" of unnecessary segregation imposed by the city and school district on students in the sheltered workshop at the **Birch Vocational Program**, a special education program for students with I/DD, ages 14-21, located inside a self-contained wing of a high school. Birch has been in operation for approximately 40 years, and has been designated exclusively for students with significant disabilities. As stated in a City-commissioned report, "almost all of the district's students identified as having an intellectual disability at the secondary level attend Birch."

The investigation also focused on the "serious risk" of unnecessary placement in segregated adult day activity service programs, including in particular the sheltered workshop and day program "**Training Thru Placement, Inc. (TTP)**." Birch served as a direct pipeline to TTP.

On June 13, 2013, DOJ filed a lawsuit in U.S. District Court, District of Rhode Island seeking declaratory and injunctive relief. The complaint, consistent with DOJ's official report, alleges discrimination on the basis of disability in violation of ADA and *Olmstead*.

On June 13, 2013, the State of Rhode Island, the City of Providence, and the DOJ entered into an **interim settlement agreement**. This settlement agreement resolves the DOJ's findings of violations by the State and City with respect solely to individuals served by TTP and Birch programs. The parties acknowledge and agree that DOJ will continue its investigation of the remainder of the State's day activity service system and will seek to remedy any and all violations of the ADA identified at the conclusion of its continuing investigation.

The purpose of this memorandum is to:

- Describe DOJ's major findings and conclusions in its official report and complaint filed in district court;
- Describe the major provisions of the settlement agreement; and
- Analyze the implications of the report and settlement agreement.

DOJ's Findings and Conclusions:

1. The City of Providence has failed to meet its obligation under the ADA and Olmstead to provide individuals with I/DD with services, programs, and activities in the most integrated setting appropriate to their needs. Instead, the City, in part by operating an in-school sheltered workshop at Birch, has planned, structured, administered, and funded its transition service system in a manner that imposes serious risk of unnecessary segregation upon Birch students, who comprise virtually all students with I/DD in the Providence Public School District.
 - Students were given little choice but to participate in Birch's in-school sheltered workshop, often in spite of their preference to receive integrated transition services and experiences and to acquire the skills necessary to transition to postsecondary integrated employment and day settings.
 - Records reflect that Birch students who earned wages were typically paid between 50 cents and \$2 per hour, no matter what job functions they performed or how productive they were in the performance of that function.¹
2. Further, the City has actively participated in the development and maintenance of a direct pipeline to Training Thru Placement, Inc., (TTP) a provider of segregated sheltered workshop and facility-based day services. In addition, there is little evidence that the City has

¹ It should be noted that the US Department of Labor's Wage and Hour Division revoked authorization allowing TTP to pay less than the current federal minimum wage to its workers after an investigation of the center found willful violations of Section 14(c) of the Fair Labor Standards Act. Based on the severity and willful nature of the violations, the division issued a retroactive revocation of TTP's authorization to pay sub-minimum wages between June 1, 2010 and January 31, 2013. As a result, all FLSA-covered employees performing work for TTP during that time period are owed no less than the federal minimum wage of \$7.25 per hour for all hours worked. In a press release dated June 13, 2013, DOL states that the Wage and Hour Division is pursuing new strategies to strengthen compliance with Section 14(c) and maximize the impact of its benefits for workers with disabilities, their employers, families, and communities. These strategies include training more investigators on the provisions of the law; using all available enforcement tools to remedy and deter future violations; providing new compliance assistance materials and tools; and hosting new compliance conferences for employers, community rehabilitation programs, advocates, workers and other interested parties.

made any efforts to actively link Birch students to integrated employment or other day services. DOJ's investigation confirmed that Birch students were routinely informed that if they wanted to work following exit from Birch, their choices would be limited to TTP or another sheltered workshop.

3. Under the ADA and Olmstead, public entities are required to provide community-based services to persons with disabilities when:

- Such services are appropriate;
- The affected persons do not oppose community-based treatment; and
- Community services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities.

4. Provision of appropriate services. DOJ found that at Birch, students are denied integrated transition services while at school.

- The City has failed to provide Birch students with I/DD with employment-related transitional assessments, including situational and community-based vocational assessments necessary to transition into work in integrated settings.
- Many Birch students' IEP postsecondary plans reflect the explicit and exclusive goal of transitioning to segregated settings. There was little or no evidence that such students were ever introduced to integrated alternatives, or that they expressed an interest in postsecondary placement in a segregated setting.
- This demonstrates that the Birch IEP process was, at times, neither meaningful nor exploratory of students' individual interests and preferences.
- As a result, students were deprived of the opportunity to make the informed choice to participate in postsecondary integrated employment and/or day settings.

5. Students capable of and do not oppose receiving integrated transition services and preparation for integrated postsecondary placements. DOJ concluded that few, if any, of the students in Birch's sheltered workshop are incapable of receiving integrated transition services while in school, or of working in integrated employment or receiving integrated day services after they exit Birch. Moreover, the students at Birch do not oppose participating in integrated programs.

- Birch operated as a feeder to TTP, in spite of some students' specific requests to work and receive services in more integrated settings.
- Overwhelmingly, Birch students' IEPs evidence no person-centered employment planning to assist students in reaching their post-secondary integrated employment goals.
- Families of current or former Birch students informed DOJ that their requests to seek postsecondary work in integrated settings were often dismissed by the Birch principal as unrealistic for children with disabilities, and that segregated placements during and after school were encouraged instead.

6. Serving Students in Integrated Employment and Day Settings Can Be Reasonably Accommodated. Providing services to Birch students at risk of placement at TTP integrated work and day settings can be reasonably accommodated.

- The city could redirect the funds that it already expends supporting Birch’s current work-related programs, including its in-school sheltered workshop, to provide transition services in integrated employment and day settings.
- The city already provides integrated employment-related transition services to youth in Providence and could expand those services to serve youth at Birch.

7. Summary of Recommended Remedial Measures

- Ensure sufficient integrated transition services are provided to prepare students at Birch to participate in employment and day services in the most integrated setting appropriate to their needs upon leaving Birch;
- Ensure that such transition services are provided early enough and consistently throughout students’ tenure at Birch;
- Ensure that Birch students have the opportunity to engage in work in an integrated setting prior to exit from school;
- Develop sufficient linkages between Birch and adult day activity services, including with VR and MR/DD/MH agencies, and to supported employment and integrated day service providers; and
- Develop and implement effective transition assessment and planning processes, including discovery, vocational and situational assessment, and person-centered planning, to assist individuals served at Birch to transition to integrated employment and day services consistent with their needs and informed choices.

Major Provisions of Settlement Agreement:

1. Scope. The interim agreement between DOJ and the State of Rhode Island and the City of Providence only resolves findings of violations of ADA by the State and City with respect to individuals served by Birch and TTP. The parties acknowledge and agree that DOJ will continue to investigate the State’s day service system and will seek to remedy any and all violations identified at the conclusion of its investigation.

2. Outcomes.

- By September 1, 2013 all individuals in the Birch exit population will be provided specified services and supports necessary to introduce them to work in integrated settings and they will become eligible for a supported employment placement upon their exit from Birch.
- By September 1, 2013, all individuals in the Birch transition target population will be provided specified services and supports necessary to introduce them to work in integrated settings.
- A person-centered planning process will be engaged in every year a student attends Birch, starting at age 14. The person-centered planning process will include the

opportunity to access integrated transition work placements and information about post-secondary work in integrated settings.

- Individuals at Birch will be offered meaningful options for post-secondary supported employment and integrated day services beginning no later than the start of the school year in which they turn 18.
- These individuals and their families must be provided information through person-centered planning process sufficient to make a meaningful informed choice between such services and remaining in school.
- Effective April 12, 2013, the Superintendent of Schools ordered the cessation of providing sheltered work at the Birch sheltered workshop. The school system will continue not to provide services to individuals at Birch in a sheltered workshop setting.
- The State will no longer provide placement or funding for new entrants to sheltered workshop or segregated day activity services at TPP.
- By September 1, 2013, the State will provide career development plans for each individual in the TPP target population.
- By September 30, 2013, for all individuals in the Birch exit target population and all individuals in the TTP target population, such persons shall receive benefits planning information and counseling.
- By specified dates (phase-in over time), the State will provide supported employment services and placements e.g., by July 1, 2013, the State jointly with the school system will provide supported employment placements to all individuals in the Birch exit target population who left, or will leave, school during the 2012-2013 school year.

3. Supported Employment Services and Placements

- Defines “supported employment services” to include, among other things, job discovery and development, job carving, job coaching, benefits counseling, personal care services, career exploration, job customization.
- Defines “transitional services and supports” to include, among other things, job shadowing, internships, youth leadership including self-advocacy training, self-determination, and conflict resolution skills, exposure to post-school educational and community services.
- Supported employment services must be individualized and flexible and must be available as needed and desired.
- Supported employment services must be provided in the amount, intensity, and duration necessary to place, maintain, and provide ongoing support.
- Defines “supported employment placement” as the provision of supported employment services in an integrated employment setting where the individual is, among other things, compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals without disabilities.
- All supported employment placements must be based on an individual’s capabilities, strengths, and preferences and shall be individually tailored to each person and may include self-employment.

- The State and school district must establish and implement a policy that includes the presumption that all individuals covered by the Interim Agreement are capable of working in integrated employment settings.
- Supported employment placements cannot be in:
 - facility-based work/sheltered workshops,
 - group enclaves,
 - mobile work crews,
 - time-limited work experiences (internships), or
 - facility-based day programs.
- By May 1, 2014, all individuals in the TPP and Birch Exit Target Population that receive a supported employment placement must average work in an integrated employment setting for at least 20 hours per week.

4. Array of Services Based on Informed Choice

- Any individual eligible for supported employment placement, but who makes an informed choice for placement in a sheltered workshop, group enclave, mobile work crew, time-limited work experience (internship) or facility-based day program, or other segregated setting may seek a variance allowing such placement.
- Variances may only be granted after an individual has:
 - Participated in at least one vocational or situational assessment
 - Completed one trial work experience
 - Received outreach, education and support services
 - Received a benefits counseling consultation
- If a variance is granted, the individual must be reassessed by a qualified professional and the revised goal reevaluated within 180 days and annually thereafter for the individual to have the meaningful opportunity to choose to receive supported employment services in an integrated work setting.

5. Integrated Day Services

- Defines “integrated day services” to include, among other things, community-based recreational, social, educational, cultural, and athletic activities, including community volunteer activities, and training activities, as well as other non-facility based activities of a person’s choosing that are provided in integrated settings during the day with appropriate services and supports.
- Integrated day services shall not be services provided as part of a sheltered workshop, day services, group home, or residential service provider’s on-site program.

6. Career Development Planning and Presumption of Employability

- The State and school district shall adopt and implement policies and procedures for developing career development plans.
- The policies must include a presumption that all individuals covered by the Interim Agreement are capable of working in an integrated employment setting and that all such individuals will be ensured an active and leading role in the process.

- The policies also will include a provision that no readiness criteria will be used in pre-eligibility determinations to assess an individual's ability to work in an integrated setting and all such individuals will be presumed ready for employment.
- No vocational or situational assessment shall be conducted in segregated work settings, including in sheltered workshops.
- If, after discovery, and a vocational or situational assessment, an individual expresses that a particular job setting does not match his or her interests, strengths, or abilities, the person-centered planning process shall resume, the reasons that the individual did not prefer the work placement shall be documented, and all planning shall proceed with goals that have been adjusted based on the information revealed through the discovery and assessment process.

7. Transition Planning for Youth

- The State and school district shall adopt an Employment First Policy, making work in integrated employment settings the first and priority service option for youth seeking transition work placements.
- All youth in transition must have a meaningful opportunity to experience one or more vocational and/or situational assessments in an integrated employment setting prior to exit from Birch.
- All youth in transition must have a meaningful opportunity to experience at least two trial work experiences, where each trial work experience is approximately 60 days duration.
- Such trial work experiences may include full-time, part-time, or seasonal work on a paid or unpaid basis, including internships, summer work experiences, or volunteer/community service experiences.
- Such trial work experiences cannot be positions of employment that are controlled by an employer that is a provider, school, or school district for the purpose of employing individuals with disabilities.
- The State and school district must prohibit vocational assessments of transition age youth in segregated work settings.

8. Training

- By October 1, 2013, the State and school district must establish competencies, and will develop and implement competency-based and value-based training programs for TTP and Birch staff.
- The State and school district must ensure that all persons involved in the discovery and assessment process, the preparation and implementation of career development plans, and the provision of supported employment and integrated day services have completed the necessary training, have attained and retain the required competencies, and are otherwise qualified to perform their respective responsibilities with respect to employment services.

9. Outreach, Education, and Support

- By September 1, 2013, the State and school district must develop an outreach, in-reach, and education program that explains the benefits of supported employment, that

addresses concern of families and perceived obstacles to participating in supported employment programs; encourages individuals and their families to understand the objectives of Employment First Policy; and provide the opportunities for individuals to visit and observe integrated employment.

- The State will support personal networks and use family to family and peer to peer programs to link families and individuals with I/DD who obtain competitive employment with families and individuals at TTP and Birch, in order to explain the benefits and opportunities of supported employment.

10. Provider Capacity and Public/Private Employment Initiatives

- The State and school district will ensure that it supports and maintains a sufficient capacity to deliver supported employment and integrated day services to individuals at TTP and Birch.
- The State will ensure that the supported employment providers and/or integrated day providers and transition service providers have a sufficient array of trained staff, adequate staff supervision, appropriate policies, a quality improvement program, and the capacity to deliver supported employment and integrated day services.
- The State will establish and implement and enforce pre-qualification requirements for all supported employment and integrated day services providers.
- The State will create incentives to encourage transition of individuals from TTP to integrated employment settings.
- Supported employment providers shall use evidence-based employment practices and the State will provide monitoring, oversight, and technical assistance to ensure that supported employment providers have adequate staffing, organizational support and supervision, and use of effective business models.
- The State will establish public and private sector initiatives to support the employment of individuals in the target populations.

11. State Agency Actions

- By September 1, 2013, the State and school district must identify and pursue a contract with a technical assistance provider or access the services of an existing technical assistance provider to provide leadership, training, and technical assistance to employment providers and State, school district, and TTP staff.
- The technical assistance provider will assist and support employment providers to transition individuals, programs, staff, and resources from sheltered workshops at TTP and Birch to supported employment and integrated day services.

12. Interagency Collaboration

- By September 1, 2013, the State will develop and implement one or more interagency agreements or memoranda of understanding between MR/DD/MH agency, VR and ED.

13. Funding and Performance-Based Contracts

- The State and school district must ensure that all individuals in their target populations with a career development plan have an ongoing allocation from available funding/budgets that is dedicated to supports for gaining, maintaining, or improving employment outcomes and for integrated day services.
- The State and school district must timely fund the necessary services and supports according to the standards and timelines set forth in the Interim Agreement.
- The State shall develop and implement performance-based contracts for supported employment services to individuals in the target populations, linking funding to the provider’s achievement of numerical targets and implementation timelines.
- The State will reallocate resources expended on TTP to fund supported employment as individuals in the target populations transition from TTP to supported employment, in order to have funding “follow the person.”

14. Quality Improvement

- The State will implement a quality improvement initiative to ensure that individual integrated supported employment placements and supported employment and integrated day services are developed, implemented, and evaluated.
- The State will establish detailed program standards for supported employment and integrated day services.
- The State will conduct on-site reviews.
- The State will issue reports.
- The State will conduct appropriate follow-up reviews.

15. Data Collection and Reporting

- The State and school district must collect data where applicable
- The State and school district must monitor the monthly progress implementation of the Settlement Agreement.
- The Agreement specifies the data to be included.

16. Implementation Timeline

- The implementation of the Interim Settlement Agreement must begin immediately.
- The parties to the agreement anticipate that the State and City will have substantially complied with all provisions of the Agreement by July 1, 2020, unless the Agreement is otherwise terminated, cancelled, or extended.

Analysis and Implications:

Based on a review of the DOJ complaint filed in US District Court, the DOJ report documenting the findings of its investigation, and the settlement agreement between DOJ, the State of Rhode Island, and the City of Providence relating solely to individuals served by the TTP and Birch programs, we have identified the following critical implications to help guide future actions by ACCSES and ACCSES members.

1. The fundamental legal interpretations included in the DOJ complaint and letter of findings are sound and well established. The DOJ re-affirmed (in its complaint and report of findings) its previously-stated position that the ADA, as interpreted by the U.S. Supreme Court in *Olmstead*, not only applies to residential services but also applies to day services, including employment and day habilitation services. [This conclusion was most recently reached by the court in the Oregon lawsuit, at the urging of DOJ and reflects sound legal analysis.] More specifically:

- Individuals with disabilities must be placed in the most integrated setting appropriate to meet their needs. What is appropriate for the individual must be determined based on a person-centered plan, consistent with the individual’s strengths, priorities, interests, needs, abilities and capabilities. Evidence to establish that an integrated setting is appropriate includes a reasonable objective assessment by a public entity’s treating professionals who are knowledgeable about the range of supports and services. People with disabilities can also present their own independent evidence, including evidence from their own treatment providers.
- The State may not adopt a service system that results in the overreliance on sheltered workshops or segregated day habilitation programs—individuals with disabilities may not be unnecessarily, unjustifiably, inappropriately placed in a separate or different program e.g., sheltered workshop.
- In considering options, the individual must be provided every opportunity to make an informed choice consistent with the principle of self-determination. An informed choice includes, but is not limited to, adequate information about the options that are considered, including the opportunity to explore and discover the range of options; sufficient resources to support the choice; willingness to accept the choice and the reasonable risks associated with the choice; and information on the parameters of the choice and the relevant options considered consistent with the capabilities of the individual involved in the choice-making process.
- State systems must encourage and facilitate efforts to support competitive integrated employment as the optimal, presumptive and priority outcome. Other outcomes are also appropriate, e.g., sheltered workshops based on the needs and preferences of the individual.

2. The settlement agreement is truly “landmark” (quoting a DOJ official announcing the agreement) because of the degree of specificity delineating:

- Presumptions including the presumption that all individuals with disabilities covered by the Settlement Agreement are capable of working in integrated settings and that competitive integrated employment should be the presumed, priority placement.
- Definitions including definitions for such terms as supported employment services, transitional services and supports, career development plan, individual learning plan, and person-centered planning.

- Essential components of the public system/infrastructure and methods for administering public programs (particularly for youth) and the factors used to determine “informed choice” including components such as outcomes; supported employment services and placements; integrated day services; career development planning; transition planning for youth; training; outreach, education, and support; provider capacity; interagency collaboration; funding and performance-based contracts; quality improvement; and data collection and reporting.

Thus, providers can expect the issuance of a plethora of new policies and the adoption of new implementation strategies.

- 3. The settlement agreement is also noteworthy because it recognizes the “range of options” articulated in the Olmstead decision, including the viability of individuals with disabilities making an informed choice for placement in sheltered workshops in addition to making an informed choice for placement in competitive integrated employment.** The Supreme Court held as follows: “Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But, we recognize, as well, the State’s need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the State’s obligation to administer services with an even hand.” Thus, in addition to establishing the presumption and priority of competitive integrated employment and integrated day services, the settlement agreement also recognizes the viability of individuals with disabilities making an informed choice for placement in a sheltered workshop.
- 4. The settlement agreement will likely serve as the template for future actions taken by DOJ with respect to state and local systems providing day services, including employment and day habilitation services. The settlement agreement may also serve as a “safe harbor” for other states, cities, and public school systems desiring to avoid litigation.**
- 5. Finally, assuming other states, localities, and school systems adopt some or all of the provisions in the Interim Settlement Agreement, one can expect a substantial increased demand for the types of community-based services and supports described in the Settlement Agreement and thus extensive new business opportunities for qualified community rehabilitation providers serving people with intellectual and developmental disabilities.**

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