



January 14, 2014

## **DOJ Letter of Findings Regarding Rhode Island's System of Providing Employment, Vocational, and Day Services**

States across the country are re-assessing their systems for delivering day and residential services to individuals with disabilities, particularly individuals with intellectual and developmental disability (I/DD). These re-assessments include a review of the extent to which their systems are in compliance with the Americans with Disabilities Act (ADA), the Supreme Court decision in *Olmstead v. L.C.* and interpretations of the ADA by the Department of Justice (DOJ). These state re-assessments also include a review of recent policy pronouncements by the Centers for Medicare and Medicaid Services (CMS) regarding the Medicaid Home and Community-Based Services (HCBS) program.

To enable ACCSES members to fully and effectively participate in their state's re-assessment process, the ACCSES Policy team periodically provides analyses regarding DOJ and CMS policy pronouncements. The purpose of this memorandum is to analyze DOJ's most recent statement of policy regarding state systems of providing employment, vocational, and day services to persons with I/DDs. A separate memorandum will analyze the recent issuance of final regulations relating to the HCBS program.

On January 6, 2014, the Department of Justice issued a Letter of Findings (LOF) reporting the Civil Rights Division's findings of its investigation of the State of Rhode Island's system of providing employment, vocational, and day services to persons with intellectual and developmental disabilities (I/DD) and, in particular, the State's provision of such service in day activity service programs, including sheltered workshops and facility-based day programs.

This memorandum provides a comprehensive review and analysis of this LOF. More specifically, the memo highlights DOJ's:

- Assessment of compliance with the ADA and *Olmstead*;
- Conclusions; and
- Recommended remedial measures.

In addition, the memo highlights references in the LOF to topics of particular importance to ACCSES members, including:

- Continued viability of sheltered workshops and facility-based day programs under ADA;
- Informed, meaningful, and real choice; and
- Reported statements by disability service providers.

Finally, the memorandum includes an analysis of the key implications of the LOF for ACCSES members.

### **Assessment of Compliance with ADA and Olmstead:**

The LOF issued by DOJ assesses the State of Rhode Island’s compliance with Title II of the Americans with Disabilities Act (ADA), as interpreted by the U.S. Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999). The ADA and *Olmstead* require that services, programs, and activities provided by public entities, including States, be delivered in the most integrated setting appropriate to the needs of persons with disabilities. [page 1]

In *Olmstead*, the Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (1) such services are appropriate, (2) the affected persons do not oppose community-based treatment, and (3) community services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. [page 11]

In general, the civil rights of people with disabilities is violated when there is an over-reliance on the provision of services and supports in segregated settings. More specifically, the Civil rights of people who can and want to receive employment services in the community are violated when they are unnecessarily segregated in facility-based sheltered workshops. Likewise, the civil rights of people who can and want to receive day services in the community are violated when they are unnecessarily segregated in facility-based day programs. [page 4]

According to DOJ:

- Integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities.
- Segregated settings include, but are not limited to, settings that provide for daytime activities primarily with other individuals with disabilities. [page 11]

### **Conclusions:**

DOJ concluded that the State of Rhode Island has failed to provide employment, vocational, and day services to persons with I/DD in the most integrated setting appropriate to their needs, in violation of the ADA. The State plans, structures, and administers its system of providing employment, vocational, and day services in a manner that delivers such services primarily in sheltered workshops and facility-based day programs, rather than in integrated employment and day settings, notwithstanding that many persons with I/DD in, or at risk of entering sheltered

workshops and facility-based day programs are capable of, and not opposed to, receiving such services in the community where they would have the opportunity to access individual jobs that pay at or above the minimum wage and integrated community activities. [page 5]

Individuals are in, or at risk of unnecessarily and unjustifiably entering sheltered workshops facility-based day programs due to systemic State actions and policies, which include:

- The State’s failure to develop sufficient quantity of integrated transition, employment, vocational, and day services and supports for individuals with I/DD;
- The State’s direction of available employment resources to sheltered workshops rather than to integrated employment services;
- The State’s direction of available day program resources to facility-based day programs rather than to integrated day services; and
- The State’s use of systematic criteria and methods of administration that unnecessarily require persons with I/DD to attend sheltered workshops and facility-based day programs in order to access and receive employment, vocational, and day services. [pages 5-6]

While many in sheltered workshops and facility-based day programs can and want to work and engage in meaningful activities in the community, the State has denied or failed to provide such persons with services and supports that would enable them to do so. Instead the State has dedicated significantly more resources to sheltered workshops and facility-based day programs than it has to supported employment and integrated day services. [page 6-7]

“While sheltered workshops and facility-based day programs may be permissible placements for some individuals with I/DD who make an informed choice to rely on them, the State of Rhode Island has unnecessarily and unjustifiably over-relied on such programs to the exclusion of integrated alternatives like supported employment and integrated day services.” [page 4]

More specifically, DOJ made the following findings.

(1) DOJ found that Rhode Island’s facility-based day activity service programs, including sheltered workshops and facility-based day programs to be segregated settings that are designed and function like most institutional settings. [page 13]

- Isolation from non-disabled peers. [page 13]
- Institutional nature of the settings—importantly, unlike most factory workers, service recipients in sheltered workshops do not have access to competitive wages, health insurance, employee benefits, vacation days, unionization or collective bargaining, and they experience virtually no opportunities for advancement within the work setting. These aspects of working in a sheltered workshop also reveal the institutional nature of the setting. [page 14 and footnote 24]
- Lengthy and protracted placements. [page 16]
- Negative consequences of segregation. [page 16]

- (2) The majority of Rhode Island’s employment and vocational services are delivered in sheltered workshops and facility-based day program settings. There is an over-reliance on segregated settings.[page 18-19]
- (3) Many persons in sheltered workshops and facility-based day programs could be served in integrated work and day settings. [page 19-21]
- It has been nationally recognized that most, if not all, persons with I/DD are capable of working in integrated settings and engaging in integrated day activities in the community. [page 19]
  - Facility-based programs, including sheltered workshops, are no longer considered the first or priority service option for individuals with disabilities. [page 19]
  - Employment First policies state that employment in integrated settings is the first and priority service option for individuals with disabilities. [page 19]
  - With the elimination of critical systemic barriers, Rhode Island can expand the presence and availability of integrated service options, including supported employment and integrated day services, enabling those who can and want to work and participate in the community to do so. [page 19-20]
  - DOJ’s expert found that the overall level of need of persons in sheltered workshops and facility based day programs and their abilities rendered them capable of working in the community. She found that the support needs and capabilities of individuals in sheltered workshops and individuals in day programs were largely indistinguishable and it was her professional opinion that very few, if any, of the individuals in sheltered workshops and day programs could not work in competitive employment. [page 20]
  - Few persons in the employment and day service system are provided meaningful choice of supported employment and integrated day services. [page 21]
- (4) Rhode Island administers its employment, vocational, and day services in a manner that segregates persons with I/DD in sheltered workshops and day programs. [page 22]
- Failure of MR/DD agency social workers and case managers to interact with supported employment and integrated day providers to identify and locate opportunities for individuals with I/DD. [page 23]
  - Failure of MR/DD to link individuals who have been in facility-based programs with supported employment and integrated day services in the community. [page 24]
  - The State has failed to invest resources in providing integrated vocational assessment, discovery and career planning services to individuals in facility-based programs who can and want to leave such programs to work and participate in the community. [page 24]
  - Lack of statewide infrastructure for staff, tools, and resources specifically tailored to individuals with I/DD has prevented some service recipients from being placed in integrated employment and day settings. [page 24]
  - Failure of state VR agency to assist service recipients currently in segregated sheltered workshops and day program settings with the services and supports necessary to leave such settings. [page 24]
  - Many individuals with the most severe disabilities have been “screened out” of receiving supported employment services in integrated work settings, and will be forced to receive

primarily day services, even if they can and want to work because of how the “Supports Intensity Scale” is being used. [page 25]

- Failure of the State’s current rate setting methodology and reimbursement model to promote integrated supported employment and day services. [page 25-27]

(5) Youth with I/DD exiting the school system are at risk of placements in sheltered workshops and facility-based day programs.

- The VR counselors and MR/DD agency social workers frequently fail to present transition-age students with I/DD with viable alternatives to segregated sheltered workshops. [page 28]
- The state often fails to provide the appropriate transition services necessary to inform the employment-related recommendations contained in students’ post-secondary planning documents. [page 28]
- The State has often failed to ensure that students are given meaningful information about, and opportunities to experience, integrated employment and day services earlier enough to make an informed choice to transition to an integrated setting—instead of to a sheltered workshops or facility-based day program—following their exit from school. [page 28]
- Even students who receive some transition planning services generally do not participate in integrated transition work placements and work-based learning experiences such as
  - site visits,
  - job shadowing,
  - soft skill and job skill development,
  - internships,
  - part-time employment,
  - summer employment,
  - youth development and leadership,
  - peer and adult mentoring, and
  - benefits planning. [page 29]

(6) Serving persons with I/DD in integrated employment settings can be reasonably accommodated. [page 29]

- Redirecting and expanding resources currently expended on segregated sheltered workshops and facility-based day programs to integrated transition, supported employment and community-based day services for those individuals who are in or at risk of unnecessary segregation, will not be a fundamental alteration of the State’s day activity service system. [page 30]

### **Recommended Remedial Measures:**

1. The State must identify, locate, and develop sufficient integrated supported employment services to enable those individuals who are unnecessarily segregated in sheltered workshops

and facility-based day programs, and who can and want to work, to receive services in the most integrated setting appropriate to their needs. [page 30]

2. The State must identify, locate, and develop sufficient integrated day services to enable those who are unnecessarily segregated in facility-based sheltered workshops and day programs to access integrated activities when they are not working or receiving residential services. [page 31]
3. The State must identify, locate, and develop sufficient transition services to enable those students who are at risk of unnecessary segregation in sheltered workshops and facility-based day programs to access the appropriate transition services and supports necessary to allow them to participate in employment and day services in the most integrated setting appropriate to their needs upon exiting school. The unmistakable core of these services is support provided to a student early enough to make the informed choice to work or participate in an integrated post-secondary setting; the opportunity to work in an integrated setting prior to exit from school; and sufficient linkages to integrated employment and day settings through effective transition assessment and planning processes, including discovery, vocational and situational assessment, and person-centered planning in integrated settings. [page 31]
4. The State must develop an effective plan to serve individuals in segregated sheltered workshops and facility-based day programs or at risk of placement in such programs, in appropriate integrated employment and day settings when they so choose. Such a plan should include directives sufficient to:
  - Ensure that all individuals in sheltered workshops and facility-based programs are offered meaningful opportunity to access integrated supported employment and day services and that no individuals remain unnecessarily in segregated programs; and
  - Ensure that no youth are unnecessarily placed in sheltered workshops and segregated day programs after transitioning from Rhode Island secondary schools, now or in the future. [page 31]
5. The State should develop policies and procedures to implement these statewide directives, including:
  - Technical assistance to service providers;
  - Conditioning funding on the achievement of numerical targets;
  - Well-defined and measurable outcomes;
  - Education about and support of individuals' informed choice of service options; and
  - Implementation timelines. [page 31]
6. The State should incrementally shift its current funding of segregated sheltered workshops and facility-based day programs to integrated supported employment and community-based day services, allowing the money to follow the individuals who can and want to participate in integrated employment and community-based day activities. [page 31]

7. The State must implement an effective plan to transition individuals unnecessarily segregated in sheltered workshops and facility-based day programs to integrated employment and day settings in the community. The plan to include requirements for:
- Effective outreach and in-reach; and
  - Transition, discovery, and vocational and situational assessment for service recipients and their families. All vocational assessments and evaluations should be conducted in integrated settings, where appropriate, and be based on the principle that, with sufficient services and supports, individuals with I/DD can work and spend their days in integrated settings. [page 31-32]

### **Continued Viability of Sheltered Workshops and Facility-Based Day Programs:**

DOJ recognizes the continued viability of sheltered workshops and facility-based day programs:

“Sheltered workshops and facility-based day programs may be permissible placements for some individuals with I/DD who make an informed choice to rely on them.” [page 4]

No one who is qualified for integrated supported employment and/or day services should remain in segregated sheltered workshops and facility-based day programs, unless after being fully informed, he or she declines the opportunity to receive services in an integrated work or day setting with access to appropriate services and supports, including supported employment and integrated day services. [page 32]

### **Informed, Meaningful, and Real Choice:**

DOJ made the following statements, among others, regarding informed, meaningful, and real choice:

“While sheltered workshops and facility-based day programs may be permissible placements for some individuals with I/DD who make an informed choice to rely on them, the State of Rhode Island has unnecessarily and unjustifiably over-relied on such programs to the exclusion of integrated alternatives like supported employment and integrated day services.” [page 4]

When publically funded State service system impose a false and unnecessary choice upon individuals with disabilities, between accessing valuable employment and day services or accessing integrated settings—it violates both individuals’ civil rights and the public’s trust. [page 4]

The Civil rights of people who can and want to receive employment services in the community are violated when they are unnecessarily segregated in facility-based sheltered workshops. Likewise, the civil rights of people who can and want to receive day services in the community are violated when they are unnecessarily segregated in facility-based day programs. [page 4]

Individuals with I/DD can theoretically choose among a variety of day activities, including integrated supported employment, integrated day services, sheltered workshops, and facility-based day programs. In practice, however, this theoretical choice has been largely undermined by the State's significant over-reliance on sheltered workshops and facility-based day programs, leaving individuals who want to avail themselves of employment and day programs with virtually no choice other than segregated programs. [page 9]

While some competitive wage jobs in industrial plants or factories similarly provide for limited personal space, and perhaps even include constant monitoring, for most Rhode Island service recipients, this environment is the only work setting made available to them, as integrated alternatives do not exist in sufficient supply. This leaves service recipients with little choice but to work in a facility-based setting. [page 15]

DOJ and its expert concluded that few persons in the employment and day service system are provided meaningful choice of supported employment and integrated day services. [page 21]

MR/DD social workers typically do not provide information to service recipients and their families about integrated employment and integrated day services. [page 23]

The State has often failed to ensure that students are given meaningful information about, and opportunities to experience, integrated employment and day services earlier enough to make an informed choice to transition to an integrated setting—instead of to a sheltered workshops or facility-based day program—following their exit from school. [page 28]

### **Reported Opinions By Disability Service Providers:**

DOJ observed that few, if any, providers expressed opposition to offering more integrated services. For the most part, providers expressed a willingness to convert their service models if given the appropriate technical assistance, incentives, and support from the state. [page 19]

DOJ reported that many providers of both sheltered workshops and facility-based day program services believed that most persons with I/DD in their programs could, with appropriate supports and services, be served successfully in the community. [page 20]

Many service providers interviewed by DOJ identified as a barrier to serving sheltered workshop and day program participants in the community a lack of resources to provide job coaches, job developers, behavioral supports, transportation, and other necessary services and supports. [page 22]

Numerous service providers and staff also told DOJ that under current rate structures providers face difficulty retaining qualified or trained staff who can serve as community-based employment specialists, including job coaches and job developers, because of low reimbursement rates. [page 22]

## **Analysis and Implications:**

Set out below are the most important “take-aways” from a review of DOJ’s LOF regarding Rhode Island’s system of providing employment, vocational, and day services to persons with I/DDs.

1. DOJ’s general interpretations of the ADA are not new or different i.e., they reiterate previous statements that focus on the following key concepts—the civil rights of people with disabilities who can and want to receive services and supports are violated when they are unnecessarily and unjustifiably segregated and the state system perpetuates an over-reliance on segregated settings.
2. DOJ frequently referred to sheltered workshops and facility-based day programs as “segregated day activity service programs” and such programs “are designed and function like most institutional settings.”
3. DOJ recognized the Employment First policy that employment in integrated settings is the first and priority service option for individuals with disabilities while at the same time DOJ recognized that sheltered workshops and facility-based day programs as viable options for individuals with I/DD who make an informed choice to rely on them.
4. DOJ recognized that individuals with disabilities must be provided choice, but the choice must be informed, real, and meaningful, not theoretical, false or unnecessary.
5. This LOF is significant because it is the most comprehensive statement by DOJ specifically applicable to employment, vocational, and day services, including an articulation of specific practices that violate the ADA and specific recommended remedial steps. Of particular significance is DOJ’s focus on systemic governance issues, including :
  - Sufficiency of resources;
  - Current rate setting methodology and reimbursement model;
  - Capacity, including provision of technical assistance to providers;
  - Education of service recipients to ensure informed choice;
  - The need for targets and measurable outcomes; and
  - The implementation of timelines.
6. Disability service providers should use the Rhode Island LOF as a template for assessing the continued legality of their own state’s system of employment, vocational, and day services.

## **Contact:**

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