U.S. Department of Justice

Civil Rights Division

DJ 204-66-55

Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

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VIA U.S. MAIL AND E-MAIL

Mr. Marc DeSisto, Esq.
DeSisto Law Offices
211 Angell Street
Providence, RI 02906

On behalf of the Honorable Peter F. Kilmartin
Attorney General for the State of Rhode Island
Office of the Attorney General
150 South Main Street
Providence, RI 02903

Re: **United States' Title II ADA Investigation of Employment, Vocational, and Day Services for Persons with Intellectual and Developmental Disabilities in Rhode Island**

Dear Mr. DeSisto:

We write to report the findings of the Civil Rights Division's investigation of the State of Rhode Island's ("the State" or "Rhode Island") 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 services in segregated day activity service programs, including sheltered workshops and facility-based day programs. We have assessed the State's compliance with Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 et. seq., as interpreted by Olmstead v. L.C., 527 U.S. 581 (1999), which requires 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. The Department of Justice (the "Department") is authorized to seek a remedy for violations of Title II of the ADA. 42 U.S.C. § 12133.

We further write to provide you with notice of the State's failure to comply with the ADA and of the minimum steps that Rhode Island must take to meet its civil rights obligations under the law.

Before proceeding with our findings, we would like to thank the State for the assistance and cooperation extended to us during this investigation. We would also like to acknowledge the courtesy, professionalism, and commitment of the State officials and counsel involved in this matter to date. Further, we would like to thank providers, stakeholders, families, and service recipients for their candor and cooperation in assisting our investigation. Since the initiation of

our investigation, Rhode Island has demonstrated significant leadership in taking critical steps to implement the Interim Settlement Agreement between the United States, the State, and the City of Providence ("the City") in United States v. State of Rhode Island and City of Providence, No. 1:13-cv-00442 (D.R.I. July 11, 2013), a matter pertaining to the adult service provider Training Thru Placement, Inc. ("TTP") and the Harold A. Birch Vocational Program at Mount Pleasant High School ("Birch"). We look forward to continuing to work amicably with the State to resolve the violations described below.

I. INTRODUCTION

Title II of the ADA prohibits discrimination in all "services, programs, or activities of a public entity." 42 U.S.C. § 12132. Title II's integration mandate requires that the "services, programs, or activities of a public entity" be provided "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). Such a setting is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" 28 C.F.R. pt. 35, app. B at 673. Based on Title II and its integration mandate, the United States Supreme Court held that the "unjustified isolation" of persons with disabilities by State and local governments constitutes discrimination under Title II. Olmstead v. L.C., 527 U.S. 581, 597 (1999). Accordingly, the civil rights of persons with disabilities are violated by unnecessary segregation in a wide variety of non-residential settings, including in segregated employment, vocational, and day programs.

Over twenty years ago, Rhode Island was a national leader in shifting its state service system away from segregated residential care. The State closed its state institution for individuals with developmental disabilities, the Ladd School, "through strong collaboration with multiple stakeholders, including self-advocates, family members . . . providers, and community leaders."[1] Rhode Island is one of a minority of states that no longer has any state-operated institutions for people with I/DD, and is one of an even smaller number with no state-funded, privately-operated institutions for this population.[2] In this regard, Rhode Island has demonstrated strong commitment to the benefits of transitioning individuals with I/DD into integrated residential settings. However, Title II of the ADA and Olmstead mandate that individuals be given the opportunity for meaningful community integration in all areas of life, not just where they live.

The ADA establishes a broad mandate, including that citizens with disabilities have the right to live integrated lives. See, e.g., 42 U.S.C. §§ 12101(a)(2), (b)(1)-(2). Title II is part of the ADA's "clear and comprehensive national mandate" to end the segregation of persons with disabilities in virtually all aspects of American life, including employment, public accommodations, and transportation. See id. § 12101. "Quite simply, the ADA's broad language brings within its scope anything a public entity does." Lee v. City of Los Angeles, 250 F.3d 668,

[1] Dep't of Behavioral Health, Developmental Disabilities & Hosps. ("BHDDH"), "Employment First Rhode Island State Policy and Five Year Implementation Plan" (Feb. 2013) (on file with BHDDH) [hereinafter "Employment First Five Year Implementation Plan"].

[2] Id.; see also United Cerebral Palsy, "The Case for Inclusion," at 3 (2013), available at http://www.ucp.org/the-case-for-inclusion/2013/images/Case_For_Inclusion_Report_2013.pdf ("As of 2011, 13 states have no state institutions to seclude those with ID/DD, including Alabama (new this year), Alaska, Hawaii, Maine, Michigan, Minnesota (which closed its last remaining institution in June 2011), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, West Virginia and DC."); K. Charlie Lakin et al., "Residential Services for Persons with Disabilities: Status and Trends Through 2009," at iii, available at http://rtc.umn.edu/risp/docs/risp2009.pdf.

691 (9th Cir. 2001) (internal quotations omitted); see also Iverson v. City of Boston, 452 F.3d 94, 99 (1st Cir. 2006). It is the State's obligation to fulfill this mandate on behalf of its citizens, whether they receive services during the day or in residential settings at night, and regardless of the severity of their disabilities. The Supreme Court recognized in Olmstead that "social contacts, work options, economic independence, . . . and cultural enrichment" are among the "everyday life activities" severely diminished by unnecessary segregation. Olmstead, 527 U.S. at 600-01. For many people with disabilities, including individuals with I/DD, these are the very everyday life activities made possible by the availability of integrated employment and day services.

In Rhode Island, in spite of the State's significant commitment to ensuring that people can live in integrated settings, thousands of individuals still spend the majority of their daytime hours receiving employment and day services in segregated sheltered workshops and facility-based day programs, even though they are capable of and want to receive employment and day services in the community. Many such individuals have been relegated to these segregated programs for decades. For example, nearly half (46.2%) of individuals in facility-based employment in Rhode Island have been there for a decade or longer, and just over one third (34.2%) of individuals have been there for fifteen or more years.[3] As they are confined to these settings indefinitely, individuals are prevented from advancing towards independence and economic self-sufficiency. Individuals in Rhode Island segregated sheltered workshop settings earn an average of $2.21 per hour; by contrast, persons who receive individualized supported employment services in integrated settings earn an average of $8.92 per hour.[4] Individuals in segregated non-work day programs are cut off from earnings or interacting with nondisabled peers altogether, even though many of these individuals can and want to work and receive integrated day services in the community. Such unjustified daily segregation firmly places many of the benefits of community life beyond the reach of people with disabilities, even though they are residing in the community. This segregation also deprives the greater community of the benefit of such persons' participation in the everyday life of the community.

Likewise, many youth with I/DD throughout Rhode Island can and want to work and experience full and meaningful participation in their communities after exiting school. More than any generation before them, these young persons have benefitted from civil rights protections that were designed to contribute to their preparedness for integrated post-secondary lives. Accordingly, they desire the employment and day services necessary to allow them the opportunity to work in integrated settings and to participate in activities of their choosing when they are not working. In fact, many such youth have long expected to receive such services following their exit from secondary school. Yet, the State service system has failed to offer them the critical transition, vocational, and employment services necessary to make work and participation in post-secondary integrated employment and day settings a reality. Consequently, many young people with I/DD have been placed at risk of unnecessary segregation in facility-based sheltered workshops and day programs where they will experience a serious and permanent restriction on the quality and trajectory of their adult lives.

[3] Paul V. Sherlock Ctr., 2012 RI DD Employment and Day Activity Data Summary (on file with the Paul V. Sherlock Center) [hereinafter "2012 Sherlock Survey"].

[4] Id.

People with disabilities in Rhode Island are talented and able people. If given access to the appropriate community-based services and supports, they will bring diversity and value to the community workplace, contribute to the "bottom line" of businesses, and strengthen and enrich communities throughout the Ocean State as citizens, co-workers, customers, and peers. By receiving services that will allow them to access competitive wage jobs and, when they are not receiving employment or residential services, to participate in meaningful activities in the community, these individuals also will gain economic independence and freedom.

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. Many adults and youth with I/DD across Rhode Island can and want to receive employment and day services in integrated settings. As the Department of Justice has previously advised the State of Rhode Island, 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. Moreover, as in the context of residential service settings, administering and funding day activity services, including employment services, in integrated settings is not only practicable but has been shown to lower costs over the longer term, and does not fundamentally alter state service systems.

When publicly funded State service systems 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. In doing so, the State deprives the greater community and marketplace of the potential economic and social contributions of such individuals, and the individuals themselves are denied the opportunity to "move proudly into the economic mainstream of American life"—one of the primary purposes of the ADA.[5]

The below findings summarizing our statewide investigation of Rhode Island's employment and day services system follow the Department's related findings in June 2013 regarding TTP and Birch—two of the largest I/DD programs in the State. On June 7, 2013, the Department issued a Letter of Findings to the State of Rhode Island, and a separate Letter of Findings to the City of Providence. The Department found that the State violated Title II of the ADA by unnecessarily segregating approximately 90 individuals with I/DD at TTP, and found that the State and City placed approximately 85 Birch students at serious risk of unnecessary segregation at TTP because of the lack of integrated transition services, integrated employment opportunities, and appropriate referrals to prepare students with I/DD for transition into work in integrated settings.

Following issuance of the June 7, 2013 Letters of Findings, the United States engaged in rapid but sustained efforts to resolve the violations identified with respect to the approximately 200 people at TTP and Birch. The United States focused on TTP and Birch more immediately—

[5] See Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), available at http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

while continuing its statewide investigation—because of issues that directly impacted the ability of those programs to continue to operate. On June 13, 2013, the State and City entered into a court enforceable Interim Settlement Agreement with the United States to resolve the identified violations, providing relief to the approximately 200 Rhode Islanders with I/DD who received services from TTP and Birch, and requiring the State and City to provide adults and youth in transition with robust and person-centered career development planning, transition services, supported employment placements, and integrated day services. Under the Interim Settlement Agreement, "[t]he parties expressly acknowledge[d] and agree[d] that the United States w[ould] continue its investigation of the remainder of the State's day activity service system and w[ould] seek to remedy any and all violations of Title II of the ADA and Olmstead identified at the conclusion of the United States' continuing investigation."[6] We make the following findings pursuant to our statewide investigation of the remainder of Rhode Island's day activity service system.

II. SUMMARY OF FINDINGS

We have concluded that the State 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 segregated sheltered workshops and facility-based day programs, rather than in integrated employment and day settings. Sheltered workshops and facility-based day programs segregate individuals from the community and provide little or no opportunity to interact with persons without disabilities, other than paid staff. Many persons with I/DD in, or at risk of entering, sheltered workshops and facility-based day programs in Rhode Island 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 minimum wage or higher, and integrated community activities, including self-directed activities in the community at times, frequencies, and with persons of their choosing when they are not receiving employment or residential services.

Our investigation found that Rhode Island provides some integrated services to some persons with I/DD, including persons with significant support needs. These services have succeeded in allowing such persons to work in jobs in the community alongside non-disabled workers and to participate in meaningful day activities in the community at times when they are not working or receiving residential services. Nevertheless, most persons with I/DD receiving employment, vocational, and day services from the state remain unnecessarily—and often indefinitely—confined to facility-based settings. In addition, people with I/DD newly entering, or about to enter, the adult service system from schools are at risk of unnecessarily entering segregated sheltered workshops and facility-based day programs.

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

- The State's failure to develop a sufficient quantity of integrated transition, employment, vocational, and day services and supports for individuals with I/DD;

[6] Interim Settlement Agreement, United States v. State of Rhode Island and City of Providence, No. 1:13-cv-00442 (D.R.I. July 11, 2013), § I(D).

- The State's direction of available employment resources to segregated sheltered workshops rather than to integrated employment services;

- The State's direction of available day program resources to segregated facility-based day programs rather than to integrated day services;

- The State's use of systemic 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.

These findings are consistent with a survey report commissioned by the State, which demonstrates that in 2012, of 3,235 respondents in the employment and day activity service system for persons with I/DD, just 383 individuals (approximately 12%) reported that they participated in individualized, integrated paid employment; by contrast, 2,572 individuals (approximately 80%) reported participating in facility-based day programs, and 839 individuals (approximately 26%) reported participating in sheltered workshops.[7] This reliance on segregated employment and day programs appears contrary to the preferences and interests of participants, and, for many, it is contrary to their experiences prior to entry into these programs. For instance, after interviewing individuals with I/DD at seven different Rhode Island sheltered workshop providers, one survey found that approximately 43% of individuals reported that they had experienced integrated employment in the past, and in many cases just prior to their current placement in the workshop.[8] Regardless of an individual's previous work experiences, however, entry into a segregated sheltered workshop or facility-based day program is often determinative of one's continued segregation there. As previously indicated, individuals tend to remain in facility-based day activity service programs for decades at a time, and Rhode Island offers very few services and supports to assist individuals to transition back to integrated employment and day settings from segregated employment and day settings.

Rhode Island has recently recognized that "employment opportunities in fully integrated work settings shall be the first and priority option explored in the service planning for working age adults with developmental disabilities in Rhode Island."[9] The Rhode Island Employment First Policy recognizes that, "While all options are important and valued, integrated employment is more valued than non-employment, segregated employment, facility-based employment, or day habilitation . . . ."[10]

Despite these policy statements, thousands of individuals with I/DD are unnecessarily segregated in sheltered workshops and facility-based day programs throughout Rhode Island. While many in sheltered workshops and 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

[7] 2012 Sherlock Survey, supra note 3. This data includes duplicate counts for individuals who participate in more than one service setting.

[8] Information on file with R.I. Disability Law Ctr. (2013).

[9] BHDDH, "Rhode Island Employment First Policy: A Time for Action," available at www.riddc.org/downloads/BHDDHEmploymentFirstPolicy21213.doc [hereinafter "Employment First Policy"].

[10] Id.

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.

The experiences of individuals in Rhode Island, including those already receiving relief under the Interim Settlement Agreement, have demonstrated that persons with I/DD can be reasonably accommodated in integrated employment and day settings. As a result of the Interim Settlement Agreement, some individuals have already begun to transition from sheltered workshops to competitive wage jobs in the community. For instance, individuals from TTP and Birch have received services and supports to allow them to find, obtain, and maintain competitive wage jobs in clerical/office positions, food service and customer service positions. Individuals have obtained jobs working for the State; local governments; small businesses; and some individuals are preparing to work for large corporations. Also as a result of the Interim Settlement Agreement, some former sheltered workshop participants work full-time in competitive wage jobs in their supported employment placements and will be eligible to receive employer-based health care and other benefits, while others work part-time in competitive wage jobs and participate in integrated day activities during the hours that they are not working. Furthermore, some individuals have acclimated to their new positions and to the integrated work setting to such an extent that their job coaches have started to fade their on-site services and co-workers have begun to provide them with natural supports while on the job. Other individuals have requested specific training in particular tasks to allow them to qualify for advancement and promotion opportunities in the workplace. Accordingly, the individuals from TTP and Birch that have already begun to receive relief under the Interim Settlement Agreement have demonstrated effectively that reasonably accommodating individuals with I/DD in integrated employment and day settings is achievable within Rhode Island's day activity service system.

III. INVESTIGATION

On January 14, 2013, the U.S. Department of Justice notified the State that we were opening an investigation into whether the State's reliance on day activity services provided in facility-based settings, including sheltered workshops and day programs, violated Title II of the ADA. In that letter, we specifically stated that our investigation "will examine whether Rhode Island unjustifiably and unnecessarily segregates persons with I/DD in sheltered workshops [and facility-based day programs] . . . as part of its Day Activity Services, 46-1-14 R.I. Code R. § 43.0, instead of providing such persons the opportunity to receive integrated, supported employment and day services that would enable them to interact with non-disabled individuals to the fullest extent possible." Accordingly, we requested documents and data from the State pertaining to its day activity service system.

In January and February 2013, our staff, along with a consulting expert, conducted on-site visits to day activity service providers in Rhode Island for individuals with I/DD, including sheltered workshops and facility-based day programs, as well as supported employment and integrated day programs. The programs that we toured were geographically and demographically diverse. During these visits we interviewed administrators, executives, board members, and direct support staff; we toured facilities and programs; and we observed and spoke with participants engaged in activities typical to their normal schedules and routines. As part of the investigation, we also interviewed numerous other providers, stakeholders, individuals with I/DD, transition experts, academics, state officials, and parents and family members of service recipients knowledgeable about Rhode Island's day activity service system and transition

services for persons with I/DD. Throughout the remainder of 2013, our staff continued to visit providers and interview additional direct support staff and individuals with I/DD, as well as numerous parents and family members.

IV. BACKGROUND

A sheltered workshop is a segregated facility that exclusively or primarily employs persons with disabilities. Sheltered workshops are usually located in large institutional facilities in which persons with disabilities have little to no contact with non-disabled persons besides paid staff. In sheltered workshops, persons with disabilities typically earn wages that are well below minimum wage.[11] Similarly, in facility-based day programs, where individuals participate in non-work daytime activities, individuals with disabilities have little or no contact with non-disabled persons besides paid staff. In Rhode Island, sheltered workshops and facility-based day programs are typically co-located.[12]

By contrast, supported employment services typically include the services necessary to place, maintain, and provide ongoing support to individuals with I/DD in integrated employment settings in the community. Rhode Island defines supported employment services as:

> activities needed to help the Participant(s) develop the specific job skills necessary to sustain paid employment, earning at least 50% of the state minimum wage and working in an integrated environment. This includes regular contacts at a Participant job site that is outside of a center based day service site. Supported employment can also be provided to support Participants who create their own business or micro-enterprise. Supported employment may be delivered one-on-one to a Participant or shared with two or more Participants.[13]

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[11] Under the Fair Labor Standards Act, workers are paid based on their measured productivity when compared to non-disabled workers performing similar work. See 29 U.S.C. §§ 214(c)(1)-(2). Thus, for a job that is compensated at Rhode Island's minimum wage of $8.00 per hour, a disabled worker in a sheltered workshop who is determined to be half as productive as a non-disabled worker would earn $4.00 per hour. The employer must measure the productivity of disabled workers every six months. Id. § 214(c)(2)(A).

[12] Rhode Island defines a "Center-Based Day Program Service" as a "facility-based day program where services are delivered by a licensed [Developmental Disability Organization] on behalf of Participants." 46-1-14 R.I. Code R. § 1.14. Although this definition omits reference to "sheltered workshop programs," in practice, center-based day programs in Rhode Island are structured, licensed, and funded to include both facility-based sheltered workshop and day program services.

[13] The State has also submitted to the federal Centers for Medicare and Medicaid Services ("CMS") the following description of supported employment services:

> Supported Employment: Includes activities needed to sustain paid work by individuals receiving waiver services, including supervision, transportation and training. When supported employment services are provided at a work site in which persons without disabilities are employed, payment will be made only for the adaptations, supervision and training required by individuals receiving waiver services as a result of their disabilities, and will not include payment for the supervisory activities rendered as a normal part of the business setting.

Rhode Island Global Consumer Choice Compact Section 1115 Demonstration Approval Documents, Attachment B (Jan. 16, 2009), at 51, available at http://www.eohhs.ri.gov/documents/documents10/RI_1115_Demo_GW_12_09.pdf.

46-1-14 R.I. Code R. § 1.95 ; see also id. §§ 45.05-.06. In addition to supported employment services, Rhode Island also provides integrated day services, or "Community-Based Day Program Services." Integrated day services are services that allow persons with I/DD to engage in self-directed activities in the community at times, frequencies, and with persons of their choosing, and to interact to the fullest extent possible with non-disabled peers.[14]

The State manages its vocational, Medicaid, employment, and day services for persons with I/DD through its Executive Office of Health & Human Services ("EOHHS"). EOHHS coordinates several State agencies in their delivery of services to adults with I/DD, including: (1) the Department of Human Services, in which the Office of Rehabilitation Services ("ORS") is a sub-agency; and (2) the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals ("BHDDH"), including its Division of Developmental Disabilities ("DDD"). These agencies determine the amount and allocation of funding for the above-mentioned services, including the range of employment and day services, the licensing of employment and day service providers, and the level of funding for sheltered workshops and facility-based day programs versus integrated supported employment and integrated day programs.

ORS provides services to individuals with disabilities, including individuals with I/DD, through its Vocational Rehabilitation Program. The services provided through this program focus on initial job readiness and placement. See 39-1-112 R.I. Code R. § 101.2(II)(B). The vocational rehabilitation services provided by ORS pursuant to an Individual Plan for Employment ("IPE") are time-limited to a maximum of eighteen months. See id. § 115.14(III)(B)(1); see also 34 C.F.R. §§ 363.6(c)(2)(iii)–(iv).

BHDDH is the state agency responsible for providing day activity services and supports to approximately 3,600 adults with I/DD who, under the Medicaid Waiver, may direct their own services through one of approximately 40 BHDDH-licensed agencies.[15] The types of services that the BHDDH-licensed service providers may provide to individuals with I/DD who are their customers include (1) residential support services, 46-1-14 R.I. Code R. §§ 39.0-42.0; and (2) non-residential supports, which are called "day activity services," id. §§ 43.0-45.0.

In Rhode Island, individuals with I/DD seeking day activity services can theoretically choose among a variety of day activities, including facility-based sheltered workshop services, facility-based day program services, integrated supported employment, or integrated day services within the State's system. 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 services with virtually no choice other than segregated programs.

[14] Rhode Island defines Community-Based Day Program Services as, "day program services provided in the community, delivered by a licensed developmental disability organization on behalf of a Participant." 46-1-14 R.I. Code R. § 1.17.

[15] See Rhode Island's Response to the United States' Jan. 14, 2013 Doc. Req. p.3 question 2 (on file with BHDDH); BHDDH, DDD, "Agencies Licensed to Provide Support and Services to People with Developmental Disabilities" (Mar. 28, 2012). The current list, dated Jan. 6, 2014, is available at: http://www.bhddh.ri.gov/apps/DDDAgencyList.php.

In addition to the State's delivery of services to adults with I/DD, the State—through the Rhode Island Department of Education ("RIDE"), BHDDH, and ORS—administers, oversees, and provides transition services for students with I/DD in secondary schools to prepare students to leave school and enter post-secondary employment or education. Transition services are "a coordinated set of activities for a young person with a disability, designed within an outcome oriented process, that promotes movement from school to post-school activities including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation." R.I. Gen. Laws § 16-24-18(e)(1).

Rhode Island law requires local school districts to conduct individualized planning for children with I/DD regarding their post-secondary employment and education goals. This process of transition planning must begin by the time a child with I/DD is fourteen years of age. Id. § 16-24-18(d). Also, pursuant to Rhode Island law, ORS vocational rehabilitation counselors and BHDDH representatives must be included in the individualized transition planning process when they are "party to the delivery and implementation of the individual plan." Id.

As discussed above, in March 2013, after the initiation of this investigation, BHDDH adopted an Employment First policy, which prioritizes integrated work above all other service options and which includes a priority for integrated activities during non-working hours:

> It is expected that through implementation of this policy, individuals will be engaged primarily in paid employment. However, it is recognized that for individuals who are working on a part time basis, employment may not fully occupy their weekday hours. For these individuals, it is expected that the priority for activities during non-working daytime hours should be on supporting individuals in other typical adult activities in the community, including volunteer work, recreation, and daily living activities.[16]

Accordingly, the BHDDH Employment First Policy recognizes the importance of and prioritizes integrated employment and integrated day services.

V. FINDINGS

We conclude that the State fails to provide employment, vocational, and day services to persons with I/DD in the most integrated setting appropriate to their needs. Under Title II of the ADA, 42 U.S.C. § 12131 et seq., a public entity must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).[17] The "most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" 28 C.F.R. pt. 35, app. B at 673. As explained below, sheltered workshops and facility-based day programs fail to provide this required level of integration and interaction between persons with and without disabilities.

Title II of the ADA states as follows: "no qualified individual with a disability shall, by

[16] Employment First Five Year Implementation Plan, supra note 1.

[17] The implementing regulations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), contain a similar requirement. See 28 C.F.R. § 41.51(d).

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." Id. § 12132. As Congress found, "[i]ntegration is fundamental to the purposes of the ADA. Provision of segregated accommodations and services relegate persons with disabilities to second-class citizen status." See H.R. Rep. No. 101-485(III), at 56 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 479; see also 28 C.F.R. pt. 35, app. B at 673 (same); Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995) ("The ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them.").

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. Olmstead v. L.C., 527 U.S. 581, 587 (1999). In so holding, the Court explained that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." Id. at 600. The Court also recognized the harm caused by unnecessary segregation: "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." Id. at 601.

The Olmstead principles apply to day activity programs, such as segregated sheltered workshops and day programs. In Lane v. Kitzhaber, 841 F. Supp. 2d 1199 (D. Or. 2012), persons with I/DD who are in, or who have been referred to, Oregon sheltered workshops sued under Title II of the ADA and Olmstead. The Lane plaintiffs alleged that the State had failed to provide them with employment and vocational services in the most integrated setting appropriate to their needs—namely, supported employment. Id. at 1206. The Court found that the "broad language and remedial purposes of the ADA" support the conclusion that the integration mandate applies to employment services. Id. at 1205. The court declined to find that the application of the Supreme Court's holding in Olmstead was limited to residential settings, and instead concluded "that the risk of institutionalization addressed in [Olmstead] includes segregation in the employment setting." Id. In holding that Olmstead applies to employment settings, the court in Lane specifically stated that, "[a]lthough the means and settings differ [from the residential context], the end goal is the same, namely to prevent the unjustified institutional isolation of persons with disabilities." Id. (internal quotation omitted).

The Department of Justice has made clear that Olmstead principles apply to all the services, programs, and activities of state and local governments, including employment and day services. The Department has provided guidance stating: "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."[18]

[18] "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.," Question 1 (June 22, 2011), available at http://www.ada.gov/olmstead/q&a_olmstead.htm.

Other federal agencies have also applied Olmstead principles to employment services. The Centers for Medicare and Medicaid Services (CMS), which oversees Medicaid, has recognized Olmstead's application to non-residential employment and vocational services provided under Medicaid. CMS has announced that States "have obligations pursuant to . . . the Supreme Court's Olmstead decision" requiring that "an individual's plan of care regarding employment services should be constructed in a manner that . . . ensures provision of services in the most integrated setting appropriate."[19] CMS has specifically addressed the applicability of Olmstead to integrated employment and day services provided through the 1115 Waiver Demonstration Program, stating in recent guidance:

> All [Managed Long Term Services and Supports ("MLTSS")] programs must be implemented consistent with the Americans with Disabilities Act (ADA) and the Supreme Court's Olmstead v. L.C. decision. Under the law, MLTSS must be delivered in the most integrated fashion, in the most integrated setting, and in a way that offers the greatest opportunities for active community and workforce participation.[20]

In addition, since January 22, 2001, the Rehabilitation Services Administration has prohibited federal vocational rehabilitation funds from being used for long-term placement of persons with disabilities in "extended employment," meaning sheltered workshops and other segregated settings.[21]

Likewise, the Olmstead analysis applies to segregated day programs. In holding that Olmstead applies to employment settings, the court in Lane noted that there exists "no statutory or regulatory basis for concluding that the integration mandate to provide services in the most integrated setting appropriate applies only where the plaintiff faces a risk of institutionalization in a residential setting." Lane, 841 F. Supp. 2d at 1206. Indeed, the plain language of Title II and Olmstead ensure individuals the right to live integrated lives—where they reside, where they work, and where they spend the remainder of their daytime hours.[22]

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[19] U.S. Dep't of Health & Human Servs. ("HHS"), CMS Info. Bulletin, "Updates to the § 1915 (c) Waiver Instructions and Technical Guide regarding employment and employment related services," at 5 (Sept. 16, 2011), available at http://downloads.cms.gov/cmsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf.

[20] HHS, CMS Info. Bulletin, "Guidance to States Using 1115 Demonstrations or 1915(b) Waivers for Managed Long Term Services and Supports Programs," at 3 (May 20, 2013), available at http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Downloads/1115-and-1915b-MLTSS-guidance.pdf.

[21] See 66 Fed. Reg. 7250; see also 29 U.S.C. § 720(a)(1), (3)(B) (Title I of the Rehabilitation Act) ("Individuals with disabilities must be provided the opportunities to obtain gainful employment in integrated settings."); U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs., Rehab. Servs. Admin., Technical Assistance Circular, 06-01 (Nov. 21, 2005), available at http://www2.ed.gov/policy/speced/guid/rsa/tac-06-01.doc.

[22] See "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.," supra note 18 ("Integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible. . . . Segregated settings include, but are not limited to . . . settings that provide for daytime activities primarily with other individuals with disabilities."). The United States has entered into

As earlier stated, in June 2013, the Department of Justice entered into a court enforceable Interim Settlement Agreement with Rhode Island and the City of Providence after finding the State and City in violation of Title II of the ADA and Olmstead for unnecessarily segregating individuals in two particular facility-based employment and day settings and placing those individuals at risk of such segregation.[23] The Interim Settlement Agreement, entered by Order of the United States District Court for the District of Rhode Island on July 11, 2013, will provide relief to approximately 200 Rhode Islanders with I/DD who received services from (1) a segregated sheltered workshop and day program provider, and (2) a special education program which ran a segregated sheltered workshop inside a Providence public high school. Pursuant to the Interim Settlement Agreement, the State and City will provide adults and youth in transition with robust and person-centered career development planning, transitional services, supported employment placements, and integrated day services.

A. Day Activity Service Programs, Including Sheltered Workshops and Facility-Based Day Programs, are Segregated Settings

For the following reasons we find 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.

1. Isolation from Non-disabled Peers

Facility-based day activity programs, including sheltered workshops and facility-based day programs, do not provide persons with disabilities the opportunity to interact with non-disabled persons to "the fullest extent possible." See 28 C.F.R. pt. 35 app. B, at 673; see also Lane v. Kitzhaber, 283 F.R.D. 587, 599 (D. Or. 2012) ("With respect to the [defendants' contention that there is work in a sheltered workshop that can be truly integrated,] plaintiffs' evidence supports their allegation that no sheltered workshop is truly integrated."). Observations made at numerous facilities during the course of our investigation support this conclusion. For instance, of the hundreds of individuals observed by our staff and consulting expert in sheltered workshop and facility-based day program settings, nearly all of the individuals observed were persons with I/DD, with the exception of a handful of paid staff in each facility. Service recipients in facility-based day activity programs are isolated from interactions with non-disabled peers, often by the very location and placement of the sheltered workshop and day program facilities, many of which are located in self-contained industrial parks or isolated residential neighborhoods, apart from other businesses, restaurants, or public spaces. Cf. Benjamin v. Dep't of Pub. Welfare, 768 F. Supp. 2d 747, 750 (M.D. Pa. 2011) (adopting plaintiffs' finding of fact that plaintiffs are segregated because, inter alia, they "do not have as much opportunity to

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several court-enforceable agreements with public entities that include the provision of integrated employment and day activity services. See, e.g., Consent Decree, United States v. Virginia, 3:12CV059 (E.D. Va. 2012), p.11 ("Within 180 days of this Agreement, the Commonwealth shall develop, as part of its Employment First policy, an implementation plan to increase integrated day opportunities for individuals in the target population, including supported employment, community volunteer activities, community recreational opportunities, and other integrated day activities.") (emphasis added).

[23] Interim Settlement Agreement, United States v. State of Rhode Island and City of Providence, 1:13-cv-00442 (D.R.I. July 11, 2013).

interact with a wide range of people."). Individuals typically spend most of their daytime hours at the facilities.

2. Institutional Nature of the Settings

Day activity service programs are structured and function like other institutions in that the service recipients' days are inflexible and highly regimented. In Rhode Island's sheltered workshop settings, individuals routinely engage in rote manual tasks, including assembling, sorting, packaging, and labeling, while typically sitting at cafeteria-style tables. For instance, we observed service recipients engaged in such repetitive and mundane tasks as assembling cardboard jewelry boxes, putting tops on lotion bottles, placing stickers on boxes of dog biscuits, placing stoppers onto medical syringes, and taking wrappers off bars of soap. The tasks are frequently not matched by the provider to individuals' abilities and strengths. Service recipients typically work in crowded, shared spaces, occupied only by other individuals with disabilities, except for paid staff. Most staff members serve as supervisors, monitoring production and supervising the behavior of adult service recipients. Individuals usually perform tasks on a fixed schedule, wherein all service recipients work the same shifts, take designated breaks on the premises, arrive and depart from the facility mostly in provider-owned vehicles, and eat lunch all at approximately the same times. In totality, these factors reveal the institutional nature of Rhode Island's sheltered workshop settings.[24] See Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, at 199-201 (E.D.N.Y. 2009) vacated on other grounds sub nom. DAI v. N.Y. Coal. for Quality Assisted Living, 675 F. 3d 149 (2d Cir. 2012) (describing institutional characteristics which include, inter alia, inflexible routines and regimented daily activities with little autonomy, or being subject to an "extensive and significant set of rules" limiting individuals' freedom to make choices about how they spend their time).

The facility-based day program settings that we observed throughout Rhode Island had many of the same institutional features as the sheltered workshops. All of the sheltered workshops that we visited were co-located with facility-based day programs, and a significant portion of service recipients split their daytime hours between both settings. Instead of piecework or assembly work, individuals with I/DD in Rhode Island day program settings engage in non-work activities like coloring, playing children's games, and watching television. Like sheltered workshops, the facility-based day programs are crowded, shared spaces occupied exclusively by other individuals with disabilities, except for paid staff. Most individuals receive transportation to and from the day program through provider-owned vehicles, and once at the facility individuals' schedules are fixed. They typically engage in organized, structured activities, eat lunch, and arrive and depart from the facility nearly at the same times. Staff members in the day program serve as room monitors, organizing games or activities and seeking to resolve any behavioral or health issues that may arise throughout the day.

We observed that the lines between sheltered workshop and day program activities were often blurred throughout the State system. Like the sheltered workshops, the facility-based day programs that we visited maintained strong institutional characteristics. In some day program

[24] 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.

rooms, individuals performed tasks identical to tasks in the sheltered workshop across the hallway. In multiple other locations, we observed individuals working in provider-owned greenhouses with only individuals with I/DD, other than paid staff, on a regular, fixed schedule. These individuals typically paint the bases of pots, make potpourri, and pick dead leaves off of plants, in support of goods which are eventually sold to the public in attached retail stores. We were told that these individuals are not paid, however, as the greenhouse work is considered a therapeutic day program activity. These individuals—like those people that we observed in more traditional sheltered workshops and day programs—could not easily leave the facility to take a break, eat lunch, or socialize with non-disabled peers in public spaces when they were not working. See id. at 200-07 (describing characteristics of institutions to include, inter alia, large numbers of individuals with disabilities congregated together with few opportunities to interact with individuals outside of the institution).

Individuals in sheltered workshops have limited freedom to choose the tasks that they perform or the activities that they engage in. Service recipients at each of a sheltered workshop's various work stations are typically made to perform nearly identical tasks at the same time as the other individuals at their station. The only flexibility afforded individuals in sheltered workshops in terms of the tasks that they perform is the choice in materials they may sort or package, depending on the availability of contracts. Nevertheless, for most service recipients, the manual movements required in the sheltered workshop, whether placing objects in boxes, placing labels on bags or boxes, or sealing bags or boxes, remain nearly the same, regardless of the station where individuals are working.

In the facility-based day programs, individuals have limited freedom to participate in activities of their choosing, as most activities, like coloring or participating in games, are fixed activities which are scheduled and arranged by staff for the larger group of day program service recipients. In several instances, we observed individuals who were not engaged in the activities that were planned and arranged for the group. Consequently, these individuals sat idly off to the side of the day program floor, in relative isolation from all other service recipients and staff.

The physical layout of sheltered workshops and facility-based day programs are institutional in nature. Both sheltered workshop and day program facilities frequently contain separate office spaces, conference rooms, and separate restrooms for management and staff, apart from the workshop and day program floor. Also, in the sheltered workshop, service recipients' workspace bears little resemblance to most work settings in the community, as there are no private areas or private places for individuals to store personal items. Instead, people with disabilities sit, communally, at cafeteria-style tables in large, and typically noisy, rooms. Also, unlike most jobs in the community, service recipients are made to work within the constant, unobstructed view of paid staff monitoring their activities. Id. at 199-201 (describing institutional characteristics that evidence segregation, which include, inter alia, the physical layout of a facility, furnishings, and general lack of privacy, including private spaces).

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. Altogether, these factors make the sheltered workshop setting tantamount to an institution and not a typical work setting.

Similarly, the design of most facility-based day programs lacks the privacy, autonomy, and control that are afforded to individuals who participate in socially and culturally normative daytime activities in the community. Like sheltered workshops, most day program facilities do not provide service recipients with the opportunity to engage in meaningful activities outside of a group setting. Individuals in facility-based day programs typically spend the majority of their day in large indoor spaces with only other people with I/DD, other than paid staff, where they engage in planned activities, oftentimes in classroom settings or at large communal tables. In one day program, we observed rows of individuals with I/DD in oversized recliners in a large open area as they watched a children's video while under the supervision of paid staff. There appeared to be very few spaces in that facility where individuals could retreat should they desire not to participate in the planned activity or to engage in an activity of their choosing apart from a group.

3. Lengthy and Protracted Placements

Individuals are often relegated to facility-based day activity service programs for decades, representing a permanent placement. As stated earlier, nearly half (46.2%) of individuals in Rhode Island facility-based employment have received services in that setting for ten or more years, and just over one-third (34.2%) of individuals in facility-based employment have been there for fifteen or more years.[25] Individuals in facility-based day programs face a similar reality. We met with, and were told about, scores of individuals who have received services from facility-based day programs for one or more decades. One provider characterized her facility-based program as providing services from "birth to death" for individuals with I/DD. Indeed, we observed a group of young adults at this day program who had received services from the provider together in a group since they were children.

4. Negative Consequences of Segregation

In addition to their isolation from non-disabled peers and protracted placements, service recipients also have been subjected to other significantly negative consequences as a result of obtaining services in a segregated, sheltered workshop and/or day program. Rhode Island service recipients in sheltered workshops earn exceedingly low wages when compared to persons with I/DD in integrated employment throughout the State. According to data obtained as part of our investigation, the average hourly wage of sheltered workshop participants in Rhode Island is approximately $2.21 per hour.[26] By contrast, persons with disabilities who receive individualized supported employment services in integrated settings earn approximately $8.92 per hour,[27] which is more than Rhode Island's minimum wage of $8.00.[28] Further, individuals with disabilities in Rhode Island facility-based day programs earn no wages at all, even though many can and want to work. Accordingly, the significantly low wages of sheltered workshop

[25] 2012 Sherlock Survey, supra note 3.

[26] Id.

[27] Id.

[28] Rhode Island's minimum wage was increased from $7.40 per hour in 2012, to $7.75 per hour in 2013, to $8.00 per hour as of January 1, 2014. See R.I. Dep't of Labor & Training, Workforce Regulation & Safety, Labor Standards, Minimum Wage, http://www.dlt.ri.gov/ls/minwage.htm (last visited Jan. 5, 2014).

participants and the complete lack of earnings of day program participants are negative consequences of such individuals' unnecessary and unjustifiable segregation.

Individuals with disabilities are able to achieve economic independence by accessing minimum or competitive wages, and such compensation can allow them greater participation in the community. As Rhode Island's own policies have recognized, "All people, including those with disabilities, gain many benefits from having a job. . . . Many people with disabilities live at or below the poverty level, and earning income from paying jobs helps supplement their resources and improves the quality of their lives."[29] For example, we met with one individual with I/DD at a diner as he was participating in a breakfast club program, where he meets up with other individuals with I/DD and direct support staff once per week to socialize and start his day in the community. This service recipient is one of the small number of individuals who have been able to access supported employment services and integrated day services through the State service system. According to his employment specialist, this individual is well-matched to his retail job because of his outgoing and sociable personality, and enjoys speaking and interacting with customers. As he calculated the gratuity on his bill—a skill that he had learned in the breakfast club—he informed us that he worked at a large clothing retailer earning $10 per hour. He has been awarded several pay raises since he began working in this job, and he receives paid sick and vacation days—the kind of advancements and benefits that are extended neither to individuals in Rhode Island sheltered workshops nor to any individuals in day programs. He said that he routinely used the money he earned from his job to pay for breakfast and to engage in other recreational activities like going to the local bowling alley, taking sailing lessons, and engaging in impromptu activities with his friends. The money earned from his job appears to help him extend his opportunities to socialize beyond the limits of his working hours. In a facility-based day activity program, however, this same individual would be unlikely to earn the disposable income to afford such recreational activities, and even with adequate financial support, he would not possess the freedom to leave the facility to engage in such activities.

We met with another individual who formerly lived as a dependent of her adult son and participated in a day program, having never worked before reaching her fifties. She previously did not believe that she could attain a job at all, let alone one that paid competitive wages, and was fearful of working; however, with the encouragement of her peers, she sought the services of an employment specialist. She obtained a job at a fast food restaurant four days per week for 15 to 20 hours per week. With bi-weekly visits from her employment specialist to provide support, including job coaching, she has retained this job for eight years, and received holiday bonuses and recognition as "Employee of the Month." She explained how her life has improved since she began receiving supported employment services. She can now afford to live independently in an apartment with "big windows" and in close proximity to her job, allowing her to walk to and from work; she also engages in numerous recreational and other opportunities that she previously could not access, having never previously earned an income. For instance, she now goes to the theater, on boating trips, and to outdoor concerts. Accordingly, competitive wages have enabled her to participate to a greater extent in the community.

[29] Employment First Policy, supra note 9.

B. The Majority of Rhode Island's Employment and Vocational Services Are Delivered in Sheltered Workshop and Facility-Based Day Program Settings

Considerable evidence indicates that only a small portion of persons with I/DD in Rhode Island can access integrated supported employment services and integrated day services that would allow them to work or engage in daytime activities in the community. This is in spite of Rhode Island's recently adopted Employment First Policy, which emphasizes that: (1) work in integrated settings should be the first and priority service option explored in service planning for individuals with I/DD; (2) "the optimal employment status" for individuals with disabilities is working "the maximum number of hours [that] they are capable of working, and earning the prevailing wage with any associated benefits;" and (3) individuals should be supported in "other typical adult activities in the community, including volunteer, recreation, and daily living activities" during non-work hours.[30] According to data provided directly by the State in response to this investigation, in July 2011, 83% of the individuals with I/DD in the day activity service system accessed "non-integrated day activities."[31]

As earlier stated, Rhode Island's over-reliance on segregated settings is confirmed by a 2012 State-commissioned survey which demonstrates that of 3,235 respondents in the employment and day service system, just 383 individuals (or approximately 12%) reported that they participated in individualized integrated paid employment.[32] By comparison, 2,572 individuals (or approximately 80%) reported participating in facility-based day programs, and 839 individuals (or approximately 26%) reported participating in sheltered workshops.[33]

The State's over-reliance on segregated settings is even more pronounced in the number of hours that participants reportedly spend in each service setting. According to State documents, "[o]nly a small portion of all hours billed for day activities (less than 10%) are for supported employment or prevocational training."[34] The State-commissioned survey of program participants reveals that in one month, the respondents who reported participating in facility-based day programs averaged approximately 80 hours in facility-based and/or home-based non-work activities and 38 hours engaged in facility-based jobs. The respondents who reported participating in individualized integrated employment averaged only approximately 42 hours in

[30] Employment First Five Year Implementation Plan, supra note 1.

[31] BHDDH, Project Sustainability: Funding Initiatives Supporting Inclusion, Community Integration and Supported Employment, Feb. 14, 2013, at 7 (on file with the BHDDH) [hereinafter "Project Sustainability Funding Initiatives"].

[32] 2012 Sherlock Survey, supra note 3.

[33] Id. The study includes duplicate counting for individuals accessing one or more service settings.

[34] Project Sustainability Funding Initiatives at 7, supra note 31. Because this figure includes prevocational training (i.e., sheltered workshop activities), the number of hours billed for individual supported employment is actually far smaller. Due to the lack of qualitative standards attached to the meaning of Community-Based Day Program Services, it is difficult to measure the number of individuals receiving meaningful community-based day services. However, one State document claims that "[c]lose to 20% of all units . . . are billed for community-based day programs." Id. We have questions about the quantity and quality of the services being measured as Community-Based Day Program Services; nonetheless, that the data reflects that only 20% of all units billed are Community-Based Day Program Services indicates that the vast majority of all day services are provided in segregated facility-based settings. Accordingly, despite the lack of clarity in the data, we maintain that the State has over-relied on facility-based programs to the exclusion of integrated day service options.

community-based work activities.[35] Accordingly, day activity service program participants spend the vast majority of their daytime hours in segregated settings.

C. Many Persons in Sheltered Workshops and Facility-Based Day Programs Could Be Served in Integrated Work and Day Settings

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. In promulgating Title I of the Rehabilitation Act, the federal statute governing the administration of vocational rehabilitation services for people with disabilities, Congress advanced the principle that even "individuals with the most significant disabilities[] are generally presumed to be capable of engaging in gainful employment and the provision of individualized vocational rehabilitation services can improve their ability to become gainfully employed." 29 U.S.C. § 720(a)(3)(A). Federal courts have also recognized that facility-based programs, including sheltered workshops, are no longer considered the first or priority service option for individuals with disabilities. See Homeward Bound, Inc. v. Hissom Mem. Ctr., No. 85-C-437-E, 1987 WL 27104, at *38 (N.D. Okla. Jul. 24, 1987) ("Whereas sheltered workshops and work activity centers were previously considered the only possible place in which to employ people with disabling conditions, now many professionals consider these places the last resort when every other employment option has failed."). Employment First Policies, stating that employment in integrated settings is the first and priority service option for individuals with disabilities, have been officially adopted in 26 states, and Employment First efforts have been identified in 42 states.[36] Rhode Island's Employment First Policy states, "It is recognized that full implementation of this policy will be a long-term process, requiring a fundamental shift in thinking from a mind-set of integrated employment as an option for some individuals, to employment as a goal for all."[37]

Our investigation revealed that Rhode Island service providers are capable of providing services in integrated settings, and that service recipients are capable of receiving services in integrated settings. Both have done it before. Several large Rhode Island day activity service providers told us that they historically served a much larger percentage of persons with I/DD in their programs in integrated employment settings.[38] And, as mentioned earlier, close to half of individuals recently interviewed at sheltered workshop providers reported working in integrated employment before.[39] This reality further confirms that many persons in sheltered workshops and day programs do not need to be served in segregated settings. Further, we observed few, if any, providers opposed 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. With the elimination of critical systemic

[35] 2012 Sherlock Survey, supra note 3.

[36] State Employment Leadership Network (SELN), Employment First Resource List (Sept. 2013), available at http://www.selnmembers.org/components/com_wordpress/wp-content/uploads/2013/10/seln-ef-2013-09.pdf.

[37] Employment First Five Year Implementation Plan, supra note 1 (emphasis in original).

[38] See, e.g., BHDDH, "Real Jobs for Real Pay: Success Stories," http://www.bhddh.ri.gov/ddd/pdf/Trudeau_RealJobs%20Real%20Pay1.pdf (last visited Jan. 5, 2014).

[39] Information on file with R.I. Disability Law Ctr. (2013).

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.

Through our investigation, we confirmed that Rhode Island provides integrated employment and day services to a small portion of individuals, including individuals with significant support needs who both work in the community and participate in day activities in integrated settings when they are not working. For these few individuals, such services have allowed them to work in competitive employment in typical work settings alongside non-disabled peers and to participate in self-directed activities in the community at times, frequencies, and with persons of their choosing when they are not working or receiving residential services. For instance, we met with individuals with I/DD who earned competitive wages working in retail stores, restaurants, movie theaters, bowling alleys, supermarkets, and offices. Other services enable these individuals to participate in meaningful social and recreational activities of their choosing when they are not working, like internships, community volunteer experiences, cooking classes, athletic events, and job clubs. Some Rhode Islanders also receive services and supports to participate in self-directed daytime activities, apart from a group, at times and frequencies of their choosing. For instance, we met a man with I/DD who planned to celebrate his wife's birthday and their anniversary and arranged for support staff to assist him in his celebratory outing with his wife. Our investigation revealed that other individuals have access to support staff when participating in activities with friends, going to church, or running errands. Nevertheless, most persons with I/DD in segregated sheltered workshops and day programs remain unnecessarily, and often indefinitely, confined to those settings without such services and supports.

Our consulting expert observed and/or spoke with hundreds of sheltered workshop and facility-based day program participants and noted that they have disabilities similar to persons being served successfully in integrated employment and day settings in Rhode Island. She found that the overall level of need of persons in sheltered workshops and their abilities rendered them capable of working in the community. Additionally, she found that the overall level of need of persons in facility-based day programs and their abilities rendered them capable of working in the community. In fact, 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 that she observed in sheltered workshops and day programs could not work in competitive employment. Many providers of both sheltered workshops and facility based day program services told us that they, too, believed that most persons with I/DD in their programs could, with appropriate supports and services, be served successfully in the community.[40]

[40] 2012 Sherlock Survey, supra note 3. Data indicates that individuals who already work in individualized integrated employment are largely indistinguishable from those in sheltered workshops and facility-based day programs. According to a 2012 State commissioned survey, approximately 53% of consumers in individualized integrated employment spend one or more hours in facility-based or home-based non-work activity per week. Id. Likewise, there is significant overlap in the populations served in Rhode Island's sheltered workshops and facility-based day programs. According to the same survey, approximately 86% of individuals in sheltered work also spend one or more hours in facility-based and/or home-based non-work activities per week. Id. Finally, the survey shows that, like individuals in integrated employment, at the end of the day many of the individuals in sheltered employment and facility-based day programs return to their own homes or apartments, where they live and care for themselves independently. Id.

In addition, we uncovered no evidence that persons with I/DD in sheltered workshops and day programs would oppose supported employment and integrated day services that would allow them to work in an individual job and participate in integrated activities during times when they were not working, if given the choice and opportunity to do so. See Olmstead v. L.C., 527 U.S. 581, 607 (1999). Rhode Island's Employment First Five Year Implementation Plan states, "It is not sufficient to say 'Fred doesn't want to work' if Fred has never experienced work that matches his interests outside of a sheltered setting, or if Fred's only understanding of the word 'work' is attending a [day program] or sheltered workshop."[41] We agree. However, a State-commissioned survey revealed that, in 2012, fewer than 4% of individuals in facility-based Developmental Disability Organization ("DDO") programs spent any time looking for a job,[42] meaning they were not actively engaged by provider staff in the process of identifying and locating employment.

Our investigation further revealed, and our expert concluded, that few persons in the employment and day service system are provided a meaningful and informed choice of supported employment and integrated day services. For example, we observed one day program participant engaged in completing a crossword puzzle while others around her colored and played games. She said, "crossword puzzles keep my mind sharp." When asked about her tenure in the day program, the individual revealed that she formerly worked in the sheltered workshop but she did not like the experience of doing piecework. Despite her apparent capabilities, there was no evidence that she had ever been introduced to or engaged in a plan to secure supported employment or integrated day services in the community, where she could engage in a job and/or day activities aligned with her preferences and skills.

We met another person who has been in a sheltered workshop and day program for 38 years and observed him operating a heat sealing machine. He told us that he has been performing the same tasks in the workshop for many of his 38 years there, but that his preference is, and has always been, to work with bicycles. According to program staff, this service recipient possesses great skill with the complex tasks involved in fixing and repairing bicycles. We were told that the agency's job developer tried to assist him securing a job in a local bike shop, but the job developer could never access the appropriate services and supports for the individual, including behavioral supports, to allow him to work at the bike shop. Further, due to severe budget cuts, the agency was unable to keep several of its job developers on staff, including the job developer who tried to facilitate this service recipient's transition into competitive employment.[43] Consequently, the service recipient, an outgoing and friendly man, continues as he has for years to operate the heat sealing machine on the program's workshop floor, and there are no known plans to secure him the services and supports he needs to obtain and maintain competitive employment.

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[41] Employment First Five Year Implementation Plan, supra note 1.

[42] 2012 Sherlock Survey, supra note 3.

[43] See Paul V. Sherlock Ctr., "A Profile of the RI Developmental Disabilities Service System, at 4 (Nov. 5, 2013) (on file with the Paul V. Sherlock Center) [hereinafter "Profile of the RI DD System"] ("Rhode Island has experienced a greater decrease in [DD] funding than neighboring states. The change in total inflation-adjusted DD spending from 2006-2011 has been a decrease of 20% for RI. Massachusetts experienced an increase of 2% and Connecticut had an increase of 1% over the same time period.") (internal citation omitted).

D. Rhode Island Administers Its Employment, Vocational, and Day Services in a Manner that Segregates Persons with I/DD in Sheltered Workshops and Day Programs

Under the ADA, states may not "utilize criteria or methods of administration" that subject individuals to "discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(3)(i). Such illegal discrimination includes, inter alia, unnecessary segregation in sheltered workshops or day programs. See Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013); see also M.R. v. Dreyfus, 697 F.3d 706, 734 (9th Cir. 2012) (recognizing claim under Olmstead for persons at risk of segregation); Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1205-06 (D. Or. 2012) (recognizing that ADA's integration mandate regulation extends beyond residential settings to the employment service system). Based on our investigation, we have concluded that the State is responsible, through its methods of administering its employment and day services system, for violating this provision with regard to the placement of persons with I/DD in segregated sheltered workshops and facility-based day programs.

While Rhode Island provides supported employment and integrated day services to some persons with disabilities, it has not developed adequate capacity to provide these services to all persons in sheltered workshops and day programs, or to all persons at risk of entering sheltered workshops and day programs, who could benefit from these settings and would not oppose being served in the community. See Olmstead, 527 U.S. at 587. Many day activity service providers that we interviewed 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. Moreover, we were told of service recipients' lack of access to information about or opportunities to enroll in the Medicaid Buy-in program or to receive benefits planning services to allow them to maintain access to important public benefits, including health care, while earning income from work in the community.[44] We were also told by numerous providers, staff, and stakeholders that, under the current rate structure, 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.[45] Due to the significantly reduced rates, employment specialists have been forced to seek employment in other states, take second jobs, or leave the profession altogether. Also, providers and stakeholders consistently identified BHHDH's overall lack of consistent communication with, and the absence of concrete efforts to collaborate with, the provider and stakeholder community as a significant barrier to systems change.

[44] Currently, the Rhode Island Medicaid Buy-in Program, also known as the "Sherlock Plan," has a significantly low enrollment rate. Numerous stakeholders stated that the program's under-utilization is the result of two primary factors: (1) the need for Rhode Island's regulations to be updated to clarify the purpose of and to incentivize the use of the Sherlock Plan; and (2) the need for computer software programs, used by state front-line staff, to include the Sherlock Plan as an option in its drop-down menus.

[45] We heard from a range of providers, stakeholders, and families that, under the current service system's rate structure and following precipitous state budget cuts in 2011, the problem of retaining qualified and trained staff has been exacerbated by the comparatively generous compensation afforded day and residential provider staff at the State-funded Rhode Island Community Living and Supports (RICLAS). Several providers that we met with noted that they have lost qualified staff to RICLAS, and fear that they will not be able to attract new staff in the future because they cannot compete with the State-funded provider's compensation package.

Our investigation also revealed that, for most staff, the current service system does not support adequate opportunities for training, professional development, or introduction to best practices in supported employment or integrated day services. Currently, there appear to be no state certification requirements for job coaches, job developers and other employment specialists who work with individuals with I/DD.[46] This has resulted in the lack of a professionalized workforce that is trained to respond to the specific needs of individuals with I/DD who seek employment and integrated day services. Also, during our investigation, we were unable to identify any meaningful or effective financial incentive by the State that would encourage sheltered workshop and facility-based day programs to move consumers into integrated services in the community. In addition to the overall lack of service capacity and integrated supported employment and day services, our investigation revealed a number of policies, practices, or omissions by the State that further the unnecessary segregation of persons with I/DD in segregated sheltered workshops and day programs.

1. Failure of BHDDH Social Workers and Case Managers to Interact with Supported Employment and Integrated Day Providers to Identify and Locate Opportunities for Individuals with I/DD

Throughout our investigation, we were consistently informed that BHDDH social workers typically do not provide information to service recipients and their families about integrated employment and integrated day service options. Moreover, we were informed that BHDDH staff rarely link individuals directly by referral with supported employment or integrated day providers. Instead, individuals are usually handed the BHDDH provider agency flyer that includes a list of approximately 40 Developmental Disability Organizations, the majority of which are facility-based providers, and are instructed to select a provider in their area from the list without much more consultation.

One supported employment provider stated that individuals usually have to learn of supported employment services on their own—through informed family members, advocates, or teachers—and then directly contact supported employment providers. According to the provider, this often means that the supported employment provider must contact BHDDH to obtain the necessary referral paperwork, long after the client has made his or her way to the program without BHDDH's assistance.

At most, our investigation revealed that BHDDH social workers take new or prospective entrants to the system on tours of facility-based programs in their geographic area, without ever introducing such persons to integrated alternatives. Even once linked, it is not uncommon for

[46] While there are no specific certification requirements for employment professionals in the field of I/DD direct services, the State already maintains detailed training qualifications for employment professionals in the field of mental health and substance abuse services. Compare 46-1-14 R.I. Code R. § 45.08 (enumerating the following qualifications for supported employment professionals who work with persons with I/DD: "a) Be certified by the state, which includes the completion of a criminal, abuse/neglect registry and professional background check; b) Be at least eighteen (18) years of age; c) Have a high school diploma or GED certification; d) Have education or experience to illustrate the skills required to perform the job; e) Receive specialized training from the licensed developmental disability organization."), with 46-1-13 R.I. Code R. § 9.14 (requiring that no less than 50% of employment staff at a behavioral health organization "[h]ave a relevant Master's Degree, or a certificate as a career development facilitator" or "have Rhode Island certification as a Supported Employment Professional . . . . The remaining fifty percent (50%) shall be actively engaged or enrolled, within eighteen (18) months of hire, in training leading to a relevant degree or certification.").

BHDDH's delays in processing the paperwork to force individuals to wait additional weeks and even months before they are approved to begin receiving services.

We found that the 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. The small number of BHDDH social workers, their lack of training and specialization in working with individuals with I/DD, and the absence of a uniform, professionally appropriate vocational assessment, discovery, and career development planning process are critically significant barriers to the referral and placement of individuals with I/DD in integrated settings. As a consequence of historically having no such systems firmly in place, individuals have been routinely evaluated in segregated settings, have received too few opportunities to discover their career interests and goals in integrated settings, and have been referred to segregated facilities as a matter of course.

Further, BHDDH has critically failed to link individuals who have been in facility-based programs, some for many years, with supported employment and integrated day services in the community. As mentioned earlier, a state-commissioned survey shows that very few individuals in facility-based programs are actively engaged with their caseworkers in job searches, revealing that the State relies on such programs for long-term, and not temporary, placements. Finally, the State has critically 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.

2. Failure of ORS to Assist Individuals with I/DD to Enroll in Supported Employment Services in Order to Exit Segregated Sheltered Workshops and Facility-Based Day Programs

ORS is a valuable resource available to persons with I/DD in Rhode Island, as it can supply eligible individuals up to 18 months of initial funding for supported employment services, including initial vocational assessment and placement, as well as job coaching and job training in integrated work settings. However, ORS has failed to assist service recipients currently in segregated sheltered workshops and day program settings with the services and supports necessary to leave such settings. Consequently, most service recipients have been unable to leverage available vocational and employment resources for which they are eligible because ORS has not extended its services to individuals who have been unnecessarily segregated in employment and day programs, and who can and want to leave. Further, service recipients have been deprived of the opportunity to benefit from ORS' established vocational assessment process, which has functioned in the past as the only organized system of vocational and situational assessment and career planning for individuals with disabilities in the State. Likewise, many service recipients have been unable to access the assistance of ORS' available supply of vocational rehabilitation counselors—as well as ORS-funded job developers, job coaches, and other employment professionals—to assist individuals in transitioning from segregated to integrated employment and day settings. This is amply supported by evidence that in 2012, when surveyed, approximately 94% of respondents of the day activity service system had not been ORS clients within the past year, while just 2.8% had been ORS clients during the same period.[47]

[47] 2012 Sherlock Survey, supra note 3.

As such, the State, including ORS, has failed to ensure that service recipients can meaningfully access the resources that they need to transition to more integrated settings.

3. Failure of the State Employment and Day Service System to Meet the Needs of People with Severe Disabilities

Our investigation revealed that the few individuals with I/DD who were referred by the State service system to individual supported employment typically had mild to moderate I/DD, and in large part, these referrals were made to the exclusion of referrals for individuals with more severe disabilities. Information provided by the State to the United States on February 14, 2013, confirms this bias. A BHDDH report states that the new Supports Intensity Scale ("SIS") service packages—the lodestar of one's resource and personal budget allocation within the system—were based on recommendations from a clinical validation study advising that the State should incentivize supported employment for "participants at the lower SIS levels, while community-based day programs pertained to participants at all SIS levels."[48] Given the limitations of the individual budgets allocated to them by the State, it appears that 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. It is clear that many individuals with even the most severe disabilities can successfully work in integrated employment settings; as evidence, we look no further than the numerous Rhode Islanders with severe disabilities we met who successfully work in competitive wage jobs with the appropriate services and supports. By systemically designing its system of supported employment services without individuals with the most severe disabilities in mind, the State has unjustifiably excluded such individuals from work without individual consideration. This constitutes discrimination against individuals with severe disabilities, including individuals with I/DD.[49]

Our investigation also revealed many examples of individuals with I/DD who are deaf or have hearing impairments and who face considerable barriers to accessing the interpretation services necessary to allow them to work in integrated settings. While the State will often provide interpretation services in segregated settings, it typically will not provide them in integrated settings. [50] It appears that many individuals with co-occurring I/DD and deafness in Rhode Island are capable of work, and may desire to be placed in community jobs, but they have not been allowed access to the interpretation and other services that they need to do so, contributing to their unnecessary placement in facility-based settings.

[48] Project Sustainability Funding Initiatives at 4, supra note 31.

[49] In fact, federal vocational rehabilitation funding requires individuals with the most significant disabilities to be given priority in state vocational rehabilitation systems.

[50] One provider told us of a client with I/DD and deafness who had gone to college and worked for a time in a retail job stocking shelves. Due to the lack of available interpretation services and extended supports, she could not understand her boss' instructions, leading her to lose the job. She was forced to return to a facility-based day program, where she could access appropriate interpretation services.

4. Failure of the State's Current Rate Setting Methodology and Reimbursement Model to Promote Integrated Supported Employment and Day Services

The process by which the State's new rate system is administered under "Project Sustainability" has the effect of discouraging individuals with I/DD from accessing integrated employment and day services.[51] Our investigation revealed that BHDDH staff maintains primary responsibility for administering the Supports Intensity Scale, and they are also part of the agency that administers the statewide budget for developmental disability services. This is a seeming conflict of interest because the need to keep consumers' resource allocations within budget may influence staff to administer the SIS in a way that reaches the pre-determined budgetary result.[52] Numerous persons stated that this lack of neutrality, and apparent tension between the need to assess the full spectrum of an individual's support needs and state efforts to cut costs, has negatively impacted the resources individually allocated to people with I/DD.[53]

Further, we received considerable feedback from parents, family members, advocates, direct support staff, and providers that the individuals administering the SIS lack the training, qualification, or experience working with individuals with I/DD necessary to make resource allocation decisions on behalf of individuals with I/DD. Moreover, our investigation revealed that the SIS has in many cases been administered without access to translation or interpretation services. We also heard widespread complaints about the frequent failure of BHDDH staff to include essential participants in the SIS administration, including family members, guardians, and individuals knowledgeable about the service recipient's preferences, skills, and abilities. We were informed of one instance where an individual with I/DD eloped during the early portion of the SIS administration, but nevertheless, a budget allocation decision was made by BHDDH staff based on the assessment's results. Many families also said that the State's requirement that the SIS assessment take place during restrictive business hours posed a logistical challenge to their participation. Accordingly, we find that several formative practical and procedural barriers currently exist under Project Sustainability that contribute to individuals' inability to access the resources, including funding allocations, that they need to purchase services like supported employment and integrated day programming.

We also find the inflexibility of the State's reimbursement model to be a significant barrier to integrated employment and day opportunities for individuals with I/DD. For instance, under the current system, job developers and job coaches cannot be reimbursed for services that

[51] Rate setting and reimbursement methodologies are critical components of any state's employment and day service systems, and they are essential to ensuring access to integrated settings. Rates determine the level of resources that individuals with disabilities may access, including the services and supports that will allow them to work or fully participate in their communities.

[52] The SIS assessment is fundamentally a resource allocation tool in Rhode Island. The American Association on Intellectual and Developmental Disabilities ("AAIDD"), the originator of the SIS assessment, encourages states to, "[d]etermine strategies for managing potential real or perceived conflict of interest. In situations where states . . . will use state staff to conduct interviews, an inherent conflict of interest may exist. This is especially true when the SIS is being used for resource allocation purposes." AAIDD, "Safeguarding your investment: Guidelines for selecting trainers for the Supports Intensity Scale," available at http://aaidd.org/sis/training/articles/safeguarding-your-investment#.Uo1gMVOkajR.

[53] See, e.g., Profile of the RI DD System at 5, supra note 43 ("37.5% of respondents to a survey of self-directed support users indicate that the level of community participation has changed since the implementation of regulatory changes in 2011. 62.5% indicate that the dollar value of their service package has changed and that they could not as a result maintain the same level of community activity.") (internal citation omitted).

they provide at times when they are not "face-to-face" with their client at the job site. This practice discourages employment specialists from engaging in negotiation or dialogue with the employer; it does not promote cultivation of natural supports through co-workers; and it does not incentivize counseling the client remotely (e.g., by phone). The absence of these important services runs contrary to best practices in the provision of supported employment services. At the same time, nearly all of the employment specialists that we met with in the State, including job coaches and job developers, said that under the current rate structure they struggle to avoid operating at a loss when it comes to the transportation costs incurred while visiting their clients at various job and day activity sites. Finally, the inflexibility of the State's reimbursement model has made it exceedingly difficult for providers to expand and convert their service structure from primarily facility-based services to include integrated employment and integrated day services.

E. Youth with I/DD Exiting the School System Are at Risk of Placement in Sheltered Workshops and Facility-Based Day Programs

Due to the State's failure to promote the availability of sufficient integrated transition services, or to link students in school districts across Rhode Island with appropriate post-secondary services and supports like supported employment or integrated day services, youth with I/DD are at serious risk of entering segregated sheltered workshops and facility-based day programs in violation of Title II of the ADA. See Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013) ("In sum, individuals who must enter institutions to obtain Medicaid services for which they qualify may be able to raise successful Title II . . . claims because they face a risk of institutionalization.") (emphasis added); M.R. v. Dreyfus, 697 F.3d 706, 734 (9th Cir. 2012) ("An ADA plaintiff need not show that institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutional care in order to state a violation of the integration mandate[;] [r]ather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization."); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003) ("[P]rotections [of the ADA's integration mandate] would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation. . . . [N]othing in the Olmstead decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements."); Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1205 (D. Or. 2012) ("the risk of institutionalization addressed in both Olmstead and Dreyfus includes segregation in the employment setting.").

According to records produced by RIDE in response to this investigation, hundreds of youth with I/DD transition from secondary school to Rhode Island adult day and employment service providers each year. However, based on data produced by the State, only approximately 5% of the youth with I/DD who transitioned from Rhode Island secondary schools between 2010 and 2012 transitioned into jobs in integrated settings.[54] Under the current system, the majority of transition-age youth with I/DD transition to facility-based providers, including sheltered workshops and facility-based day programs, to receive adult services. Other data offer proof of this well-worn path from school to facility-based adult programs: in 2012, almost 8% of

[54] State's document production in response to Letter from Regina Kline to William J. Conley, Jr. (Mar. 4, 2013), Request "G" (on file with RIDE).

individuals with I/DD in the day activity service system were reported to be youth age 24 or under.[55]

Many parents and families that we interviewed informed us that the State—via its vocational rehabilitation counselors and BHDDH social workers—frequently fails to present transition-age students with I/DD with viable alternatives to segregated sheltered workshops. Moreover, the State often fails to provide the appropriate transition services[56] necessary to inform the employment-related recommendations contained in students' post-secondary planning documents.[57] These practices curtail students' access to post-secondary employment. Families also told us of a general lack of ORS and BHDDH presence in schools across Rhode Island to assist with the Individualized Education Program ("IEP") planning process and with students' enrollment in the adult system. When such staff is present, we learned that they often encourage segregated post-secondary placements for students. For instance, we were told that BHDDH social workers often take youth to visit facility-based programs, including sheltered workshops and day programs, as part of the referral process directly from high school. Other students are assessed by vocational rehabilitation counselors in segregated settings to determine their eligibility for ORS services, frequently leading to permanent placement in segregated rather than integrated employment settings.

Our investigation revealed another significant factor placing students at risk: despite Rhode Island's express requirement that transition planning begin at age 14,[58] the State has often failed to ensure that students are given meaningful information about, and opportunities to experience, integrated employment and day services early enough to make an informed choice to transition to an integrated setting—instead of to a sheltered workshop or facility-based day program—following their exit from school. Individuals become eligible for ORS services at age 16,[59] and for services through BHDDH at age 18.[60] However, we were told that many students

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[55] 2012 Sherlock Survey, supra note 3.

[56] According to Rhode Island statute, "[t]ransition services . . . means a coordinated set of activities . . . that promotes movement from school to post-school activities including . . . vocational training . . . [and] adult services . . . ." R.I. Gen. Laws § 16-24-18(e)(1) (emphasis added). As mentioned, pursuant to Rhode Island law, ORS vocational rehabilitation counselors and BHDDH representatives must be included in the individualized transition planning process if they provide, or will provide, services to the young person with a disability under the individual's plan. Id. § 16-24-18(d). ORS provides "Transition Services from School to Career" and "ORS Counselors provide technical assistance, consultation, information and referral services to school systems and work in close partnership with the 5 Regional Educational Collaboratives, netWORKri and other agencies to improve transition planning." See ORS, Vocational Rehabilitation Program, http://www.ors.ri.gov/VR.html (last visited Jan. 5, 2014); ORS, Transition, http://www.ors.state.ri.us/Transition.html (last visited Jan. 5, 2014). BHDDH administers services for individuals age 18 and older to assist in career planning and the formulation of vocational goals as part of the development of the Individual Support Plan ("ISP").

[57] Post-secondary planning documents can include an ISP or IPE. Individualized Education Programs ("IEPs") are also a potential vehicle for post-secondary planning.

[58] R.I. Gen. Laws § 16-24-18(d).

[59] 46-1-5:4 R.I. Code R. § 4.1; 46-1-5:2 R.I. Code R. § 2.8.

[60] See generally, U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs., Rehab. Servs. Admin., "Fiscal Year 2012 Monitoring Report on the Rhode Island Department of Human Services, Office of Rehabilitation Services Program" (July 16, 2012), available at http://www.ors.ri.gov/PDFfiles/2012%20ri%20monitoring%20visit.pdf; R.I. Disability Law Ctr., "A Consumer's

throughout Rhode Island only receive employment-related transition planning or are enrolled in ORS or BHDDH services one year or less before their exit from school, if at all. 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.

We acknowledge that, although few in number, there are pockets of excellence in Rhode Island where transition planning adheres to best practices by including the introduction of integrated work placements and work-based learning experiences. Many of the individuals with I/DD that we met with at their individual supported employment placements transitioned into those settings directly from a few high-performing schools that offered integrated work-related transition programs. However, our investigation revealed that in most Rhode Island schools, the State did not present students with a meaningful choice to participate in integrated alternatives, and the State, including RIDE, has not embedded into State policy that integrated work placements and work-based learning experiences are critical to mitigating the risk of unnecessary post-secondary placement in sheltered workshops and facility-based day programs. Some students still perform in-school jobs designated for students with disabilities (instead of performing those same jobs in the community); others acquire work-related skills in a special education classroom without ever being presented with the choice to exercise those skills in a community job; while still others receive work-related transition services from facility-based adult service providers, including sheltered workshops and segregated day programs.

The State, including BHDDH, has also failed to provide integrated and transition-related adult services to many students with I/DD who are eligible for them, further advancing the risk that such students will transition to segregated settings following their exit from school. Specifically, even though individuals become eligible for Medicaid services at age 18, BHDDH does not administer services to eligible youth with I/DD until they are 21 years old. Numerous parents, families, and service recipients informed us that this service gap has caused many students who exit high school prior to 21 years old to either sit at home without services, or to later enroll in sheltered workshop and day programs in order to receive employment services at all. The service gap has caused considerable entropy in the transition process for many youth who can and want to work. They are incentivized either to stay in the education system unnecessarily until they are 21 years old or exit school between the ages of 18 and 21 and experience the loss of educational benefits and the concomitant and unnecessary lack of access to the adult system. The failure to serve youth with I/DD who are eligible for adult services places them at serious risk of unnecessary segregation.

F. Serving Persons with I/DD in Integrated Employment Settings Can Be Reasonably Accommodated

Providing integrated services to adults in sheltered workshops and day programs and to students at risk of placement in such settings can be reasonably accommodated without a fundamental alteration to the state service system. The types of services needed to support adults and students with I/DD in integrated employment and day settings—including individualized

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Guide to Rhode Island State Vocational Rehabilitation Services," available at http://www.ridlc.org/publications/Consumers_Guide_to_RI_Voc_Rehab.pdf.

transition services, supported employment, and community-based day services—already exist in Rhode Island's employment and day service system. The State could redirect the funds that it already expends supporting the State's current facility-based employment and day programs, to provide transition, employment, and day services in integrated settings.

The State already provides some integrated employment-related transition, supported employment, and integrated day services and supports to persons with I/DD. Expanding those services to serve adults currently in sheltered workshops and facility-based day programs, and youth who will transition from schools into the adult system, and who are at risk of unnecessary segregation in segregated sheltered workshops and facility-based day programs, is a reasonable modification of the State's day activity service system. See DAI v. Paterson, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009), vacated on other grounds sub nom. DAI v. N.Y. Coal. for Quality Assisted Living, 675 F.3d 149 (2d Cir. 2012) ("Where individuals with disabilities seek to receive services in a more integrated setting—and the state already provides services to others with disabilities in that setting—assessing and moving the particular plaintiffs to that setting, in and of itself is not a 'fundamental alteration.'") (emphasis in original); see also Messier v. Southbury Training School, 562 F. Supp. 2d 294, 344-45 (D. Conn. 2008) (noting that the defendant state agency's "fundamental alteration claim [was] entirely inconsistent with its public commitment to further enhancing a system of community placement programming.").

Accordingly, redirecting and expanding resources currently expended upon 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.[61]

VI. RECOMMENDED REMEDIAL MEASURES

To remedy the deficiencies discussed above and to protect the civil rights of individuals with I/DD who receive services in segregated sheltered workshops and day programs, the State should immediately implement the minimum remedial measures set forth below.

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. Supported employment services are services provided in the amount, duration, and intensity to allow persons with I/DD to work the maximum number of hours consistent with their abilities in integrated employment settings. Supported employment services include services necessary to place, maintain, and provide

[61] One study found that in Rhode Island, persons with I/DD in supported employment returned $1.43 for every dollar spent on them. Robert E. Cimera, "National Cost Efficiency of Supported Employees with Intellectual Disabilities: 2002 to 2007," Am. J. of Intellectual and Developmental Disabilities, vol. 115, no. 1, at 26 (Jan. 2010), available at www.mig-rats.org/uploads/TheNationalCost-EfficiencyofSupportedEmployeeswithMR.pdf. Additionally, because supported employment helps persons with I/DD to secure competitive employment with higher wages and benefits, such services may assist some persons to become less dependent on public benefits, including state-funded health insurance and transportation subsidies. Id. at 23. Also, for many individuals, the amount of required support is likely to decrease over time, thus lowering costs over the longer term. Id. at 27. Conversely, the per-person cost of sheltered workshops tends either to stay the same or increase over time. Id.

ongoing support to an individual with I/DD in an integrated employment setting. The unmistakable core of these services is support in an integrated employment setting; and absent on-the-job support that is uniquely tailored to the individual in integrated employment settings, the employment services do not and cannot be recognized as supported employment services.

The State must also 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. Such services must be provided in the amount, duration, and intensity to allow persons with I/DD to engage in activities in the community at times, frequencies, and with persons of their choosing during hours when they are not receiving employment or residential services. The unmistakable core of these services is support in an integrated day setting; and absent support provided in integrated settings in the community where individuals may access activities that are uniquely tailored to their interests and preferences, the day services cannot be recognized as integrated day services.

The State must also 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.

Furthermore, the State must develop an effective plan to serve the thousands of 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: (1) ensure that all individuals in sheltered workshops and facility-based day programs are offered a meaningful opportunity to access integrated supported employment and day services and that no individuals remain unnecessarily in segregated programs; and (2) 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.

The State should also develop policies and procedures to implement these statewide directives, including technical assistance to employment and day services 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.

Additionally, 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 many individuals who can and want to participate in integrated employment and community-based day activities.

Finally, 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 should include requirements for effective outreach and in-reach, 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.

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.

VII. CONCLUSION

Please note that this findings letter is a public document. It will be posted on the Civil Rights Division's website.

We hope to continue working with Rhode Island in an amicable and cooperative fashion to resolve our outstanding concerns with respect to the services the State provides to persons with intellectual and developmental disabilities. We hope that you will give this information careful consideration and that it will assist in furthering the dialogue already begun by counsel to swiftly and resolutely address the areas that require immediate attention.

We are obligated to advise you that, in the event that we are unable to reach a resolution regarding our concerns, the Attorney General may initiate a lawsuit pursuant to the ADA once we have determined that we cannot secure compliance voluntarily, 42 U.S.C. § 2000d-1, to correct deficiencies of the kind identified in this letter. We would prefer, however, to resolve this matter by working cooperatively with the State and are hopeful that we will be able to do so. If you have any questions regarding this letter, please call Rebecca Bond, Chief of the Civil Rights Division's Disability Rights Section, at (202) 307-0663.

Sincerely,

Jocelyn Samuels
Acting Assistant Attorney General