



U.S. Department of Justice

Civil Rights Division

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

June 7, 2013

VIA U.S. MAIL AND E-MAIL

Mary Ann Carroll, Esq.
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362 Broadway
Providence, RI 02909

Re: **Title II ADA Investigation of the City of Providence Regarding the Harold A. Birch Vocational Program at Mount Pleasant High School**

Dear Ms. Carroll:

We write to report the findings of the Civil Rights Division's investigation of the City of Providence's ("City" or "Providence"), including the Providence Public School District's ("PPSD"), system of providing transition-related educational services, including employment, vocational, and day services to persons with intellectual or developmental disabilities ("I/DD"). We report here about the serious risk of unnecessary segregation imposed by the City upon students in the sheltered workshop at the Harold A. Birch Vocational Program ("Birch"), a special education program for students with I/DD, ages 14 to 21, located inside a self-contained wing of Mount Pleasant High School.

We thank the City of Providence, including all counsel for the City, Superintendent Lusi, and other City officials and staff for engaging in rapid, sustained efforts to address the immediate and unique needs of the individuals with disabilities at Birch.

Title II of the Americans with Disabilities Act ("ADA") requires that services, programs, and activities provided by public entities, including municipalities, be delivered in the most integrated setting appropriate to the needs of persons with disabilities. 42 U.S.C. §§ 12131-34; 28 C.F.R. § 35.130(d). 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 have assessed the City's compliance with Title II as interpreted by *Olmstead v. L.C.*, 527 U.S. 581 (1999), as it applies to sheltered workshop services provided at Birch. We have concluded that the sheltered workshop at Birch puts students with I/DD at serious risk of unnecessary placement in segregated adult day activity service programs, including, in particular, the segregated sheltered workshop and day program Training Thru Placement, Inc. ("TTP"). We have investigated the State of Rhode Island's ("State") day activity service system, and TTP in particular, and we will continue to investigate the remainder of that system, including facility-based sheltered workshops and facility-based day programs for people with I/DD.

In recognition of the urgency surrounding TTP and Birch, however, we are reporting our current findings regarding those providers now. We report here the findings of our investigation only as it relates to the City, and set forth the minimum steps the City must take to rectify violations found with its transition services system as it pertains to Birch. Under separate cover, we have given written notice to the State of Rhode Island of our findings and the minimum remedial steps that it must take to rectify violations found with its day activity service system as it pertains to Birch and TTP.

As you know, the United States has engaged in numerous in-person and telephone meetings with the City of Providence with regard to its findings pertaining to Birch. The City has been forthright and cooperative in its efforts to resolve this matter. On April 9, 2013, we participated in a teleconference with counsel for the City, where the United States orally presented its findings pertaining to Birch. On April 29, 2013, we met in-person with counsel for the City, the Solicitor of the City, and representatives from Providence Public School District, and, again, we orally presented our findings pertaining to Birch. During the April 9, 2013 teleconference and during the April 29, 2013 in-person meeting, the Department provided the City with oral notice of its failures to comply with the ADA, and outlined the minimum steps necessary for the City to meet its obligations under the ADA. The Department also communicated that, in the event that resolution could not be reached by voluntary means, the Department may initiate a lawsuit. This letter serves to memorialize the findings and remedial measures previously detailed to the City.

I. INTRODUCTION

The ADA established a mandate to ensure that citizens with disabilities can 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). It is the City's obligation to fulfill this mandate on behalf of its citizens, including when they receive employment, vocational, and other services during the day in schools. The civil rights of students with disabilities who can and want to access services to help them successfully transition into integrated adult lives are violated when publicly funded service systems impede their ability to do so. These violations also have a lasting impact on the broader public, as the greater community and marketplace are deprived of their potential contributions now and well into the future.

We conclude that the City has failed to meet its obligation to provide individuals with I/DD with services, programs, and activities in the most integrated setting appropriate to their needs. 28 C.F.R. § 35.130(d). Instead, the City, in part by operating an in-school sheltered workshop at Birch, has planned, structured, administered, and funded its transition service system in a manner that imposes a serious risk of unnecessary segregation upon Birch students, who comprise virtually all students with I/DD in the Providence Public School District.

The City has actively participated in the development and maintenance of a direct pipeline to TTP, a provider of segregated sheltered workshop and facility-based day services,

and there is little evidence that the City has made any efforts to actively link Birch students to integrated employment or other day services. Evidence obtained during the course of this investigation has revealed that over the past approximately 25 years, only a handful of Birch students have ever been placed in individual supported employment after exiting Birch. Consequently, the City has violated the civil rights of the approximately 85 students with I/DD currently at Birch. By failing to ensure that students who can and want to work and engage in integrated day services in the community have the opportunity to do so, the City has also violated the rights of people who have recently exited Birch, as well as those who may attend Birch in the future.

When the expectations that public entities have for students with disabilities are unjustifiably low, significant negative consequences are often imposed upon such young people. For example, many students with I/DD experience a permanent restriction on the quality and trajectory of their adult lives as a consequence of not receiving effective or appropriate employment-related transition services while in school. Failure to prepare students with disabilities for integrated adult lives virtually guarantees that they will experience indefinite confinement in segregated adult sheltered workshop and day programs following their exit from school. In the City of Providence, through the Birch sheltered workshop, this is exactly what occurred. By vindicating the civil rights of Birch students with I/DD, the United States seeks to ensure that such students have the freedom, and the supports and services that they need, to meet their own highest expectations.

II. INVESTIGATION

On January 14, 2013, the Department 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. On January 22, 2013, our staff, along with our consulting expert, visited TTP and spoke with TTP's then Executive Director, as well as TTP staff and service recipients. Our staff and consulting expert also toured the TTP premises, including the sheltered workshop and food products business. We observed TTP service recipients engaged in activities typical to their normal schedules and routines. On February 14, 2013, our staff, along with our consulting expert, visited Birch and spoke with Birch's principal, as well as Birch teachers, staff, and students. Our staff and consulting expert also toured the Birch and Mount Pleasant High School premises, including the in-school sheltered workshop. We observed Birch students engaged in activities, including in the sheltered workshop, typical to their normal school schedules and routines.

Our investigation also included extensive review of documents provided by the State and City regarding services provided at TTP and Birch, and interviews of consumers, family members, and others.

III. BACKGROUND

In Rhode Island, students with I/DD transitioning from school into the adult I/DD service system 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. Unfortunately, as this letter explains, that theoretical choice has been largely undermined in Providence, leaving students who attend Birch with practically no choice other than sheltered workshop and facility-based day programs.

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. 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.¹ Both TTP and Birch operate sheltered workshop programs.² TTP also operates a facility-based day program.

By contrast, supported employment services typically include the services necessary to place, maintain, and provide ongoing support to an individual with I/DD in an integrated employment setting 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.³

18-020-005 R.I. Code R. pt. 1, § 1.95 (amended Aug. 3, 2011); see also 18-040-001 R.I. Code R. pt. 2, § 37.4. In addition to supported employment services, Rhode Island also provides integrated day services, or "Community-Based Day Program Service." Integrated day services

¹ Pursuant to 18-020-005 R.I. Code R. pt. 1, § 1.14, 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." 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.

² The in-school sheltered workshop at Birch is not a part of the State's adult day activity service system.

³ 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.eobhs.ri.gov/documents/documents10/RI_1115_Demo_GW_12_09.pdf.

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.⁴

In addition to the State's delivery of services to adults with I/DD, the State and the City, through the Providence Public School District, administer, oversee, and provide transition services for students with I/DD in secondary schools to prepare students to leave school and enter postsecondary 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."⁵ Rhode Island law requires local school districts to conduct individualized planning for children with I/DD regarding their postsecondary goals; and this process of transition planning must begin by the time a child with I/DD is fourteen years of age.⁶

Birch has been in operation for approximately 40 years, and has been designated exclusively for students with significant disabilities. As stated in a City-commissioned report, "[a]lmost all of the [Providence public school] district's students identified as having an intellectual disability at the secondary level attend Birch Vocational Center."⁷ Approximately 85 students with I/DD, ages 14 to 21, currently attend Birch.

IV. FINDINGS

We conclude that the City has failed to provide transition-related services to persons with I/DD at Birch that would prepare those students for anything other than sheltered work and facility-based day services upon their exit from Birch. As a result, the City has placed such students at serious risk of unnecessary segregation at TTP. As discussed, the State has played a significant role in creating this risk of segregation for Birch students; however, as noted above, the State's role is addressed in a separate Letter of Findings.

Under Title II of the ADA, 42 U.S.C. §§ 12131-34, 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). The "most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest

⁴ 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." 18-020-005 R.I. Code R. § 1.14.

⁵ R.I. Gen. Laws § 16-24-18(e)(1).

⁶ R.I. Gen. Laws § 16-24-18(d).

⁷ Improving Special Education Services in the Providence Public School District: Report of the Strategic Support Team of the Council of the Great City Schools, 84 (Summer 2011), available at <http://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/4/Providence%20Special%20Education%20Report.pdf>.

extent possible[.]” Id. pt. 35 app. B, at 673.

Congress enacted the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]” 42 U.S.C. § 12101(b)(1), including, specifically, “segregation” and actions that prevent persons with disabilities from “fully participat[ing] in all aspects of society[.]” Id. §§ 12101(a)(1), (5). Furthermore, Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.” Id. § 12101(a)(7).

Title II of the Americans with Disabilities Act states as follows:

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

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. 485, at 26 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 449; see also 28 C.F.R. Pt. 35, App. B (same); see also 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 (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment, and (c) community services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. 527 U.S. at 587. 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. It 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 segregated day activity programs such as sheltered workshops. In Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1201 (D. Or. 2012), persons with intellectual or developmental disabilities 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. The Court found that the “broad language and remedial purposes of the ADA” support the conclusion that the integration mandate applies to employment services.⁸ The court declined to find that the

⁸ Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1205 (D. Or. 2012).

application of the Supreme Court’s holding in Olmstead was limited to residential settings, and instead “conclude[d] that the risk of institutionalization addressed in . . . Olmstead . . . includes segregation in the employment setting.”⁹

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.”¹⁰ In doing so, the court 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.”¹¹

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. “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.”¹²

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 stated 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.”¹³ CMS has specifically addressed the applicability of Olmstead to integrated employment and day services provided through the 1115 Waiver Demonstration Program, stating in a recent guidance, “All [Managed Long Term Services and Supports] 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.”¹⁴ In addition, since

⁹ Id.

¹⁰ Id. (internal quotation omitted).

¹¹ Id. at 1206.

¹² “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.” 3 (June 22, 2011), available at http://www.ada.gov/olmstead/q&a_olmstead.htm.

¹³ CMS Informational Bulletin 5 (Sept. 16, 2011), available at <http://downloads.cms.gov/cmcsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf>.

¹⁴ U.S. Department of Health & Human Services (“HHS”), CMS, CMCS Informational Bulletin, “Guidance to States Using 1115 Demonstrations or 1915(b) Waivers for Managed Long Term Services and Supports [“MLTSS”]

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.¹⁵

A. TTP Is a Segregated Setting

TTP provides segregated sheltered workshop and facility-based day program services to approximately 90 adults with I/DD in a former elementary school facility in close proximity to Birch. TTP is a facility-based sheltered workshop and day program in North Providence, Rhode Island, and is one of the largest adult sheltered workshop and day programs in the State. TTP is a segregated setting with many of the hallmarks of other segregated settings: the physical layout is institutional in nature without access to the general community; individuals are required to follow fixed, highly regimented schedules and routines; individuals with disabilities do not have private or personal space and are separated from spaces for managers and staff without disabilities; individuals exercise very limited choice over the activities that they engage in throughout the day; individuals remain at the facility for long periods of time; and importantly, at TTP, individuals with disabilities are not able to interact with individuals without disabilities to the fullest extent possible. In addition, individuals at TTP are paid extremely low wages, far below subminimum wage rates. See Letter of Findings to the State of Rhode Island Regarding TTP and Birch, dated June 7, 2013.

B. The City Places Birch Students at Serious Risk of Unnecessary Segregation at TTP

Almost all of the school district’s secondary students with I/DD attend Birch. Currently, approximately 85 students, ages 14 to 21, attend Birch.¹⁶ Over the past approximately 25 years, only a handful of Birch students have ever been placed in individual supported employment after exiting Birch.

Due to the City’s failure to develop sufficient integrated transition services or to link Birch students with appropriate postsecondary services and supports like supported employment or integrated day services, Birch youth with I/DD are at serious risk of entering the segregated provider TTP, a 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, 663 F.3d 1100, 1117 (9th Cir. 2011) (“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[;

Programs,” (May 20, 2013), available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Downloads/1115-and-1915b-MLTSS-guidance.pdf>.

¹⁵ 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. Department of Education, Office of Special Education and Rehabilitative Services, Rehabilitation Services Administration, Technical Assistance Circular, 06-01 (Nov. 21, 2005), available at <http://www2.ed.gov/policy/speced/guid/rsa/tac-06-01.doc>.

¹⁶ See *supra* note 6.

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.”).

The City, including PPSD, has planned, structured, administered, and funded the transition services at Birch in a manner that has created a direct pipeline from Birch to the segregated TTP facility. This places Birch students at serious risk of unnecessary segregation. Records representing all individuals served by TTP over the past three years reveal that 47% of those individuals transitioned to TTP from Rhode Island public schools. Of these Rhode Island public school students, approximately 70% transitioned to TTP from Birch. Thus, of the individuals served by TTP over the past three years, approximately one third (32%) transitioned from Birch to TTP. A postsecondary placement at TTP has lasting consequences, as individuals typically remain at TTP for 15 to 30 years and receive few opportunities to experience integrated services or settings.

The City, via PPSD and Birch staff, have failed to present many transition-age Birch students with I/DD with viable alternatives to receiving postsecondary employment and day services at TTP. Birch staff confirmed that each year some of its students, typically after turning 21 years old, exit Birch and are directly referred to either TTP or another sheltered workshop in the North Providence region. Our investigation confirmed that Birch students were routinely informed that if they wanted to work following exit from Birch, their choices would be limited to those two providers.

Birch’s principal and staff facilitated on-site tours of TTP for Birch students as part of the direct referral process. Several stakeholders and providers, as well as the Birch staff also confirmed that Birch staff, rarely, if ever, sought to link Birch students with postsecondary integrated employment or integrated day options prior to making referrals to TTP. In fact, Birch’s principal could only remember three individuals over the past twenty-six years who were ever placed in individual supported employment after leaving Birch.

1. The Structure and Function of Birch’s In-School Sheltered Workshop Places Students at Serious Risk of Unnecessary Segregation

The structure and function of Birch’s in-school sheltered workshop has created the risk of students’ unnecessary segregation at TTP. One large classroom, with several communal cafeteria-style tables, has been reserved for use as a sheltered workshop inside Birch. Birch obtains contracts with private businesses to perform work, such as bagging, labeling, collating, and assembling jewelry. This work is very similar to the work performed at TTP and, at times, TTP has subcontracted some of its contract work to Birch. Students are supervised in the workshop by school special education staff that monitor their production and ensure that the

requirements of each contract are met. Most students participate in the sheltered workshop every school day. Records reveal that, in addition to operating during regular school hours, Birch's sheltered workshop has operated on weekends.

Students in each of Birch's classrooms minimally spend between one and two 55-minute periods per day in the school's sheltered workshop, performing workshop tasks in exchange for subminimum or no wages.¹⁷ Thus, students with I/DD age 16 or over spend approximately one third of their classroom instruction time in the sheltered workshop. However, one former student stated that she was required to spend a much greater portion of her school day in the workshop, including full days, when the workshop had important production deadlines. The workshop's records pertaining to student hours are extremely limited; as it appears that no actual records were kept for each individual student's time in the workshop.

Furthermore, records reflect that, like most adult sheltered workshop participants, most Birch students earn exceedingly low wages. Birch students who earned wages were typically paid between 50¢ and \$2 per hour, no matter what job function they performed or how productive they were in the performance of that function. This is in stark contrast to other students with and without disabilities throughout Rhode Island, including in the Providence Public School District, who have access to competitive work experiences while in school and earn Rhode Island's minimum wage or above. As a result of their in-school experiences earning competitive wages, these other students acquire the expectation, skills, and competencies to participate in integrated employment services following their exit from school. Many Birch students, however, have been conditioned to have low expectations as a consequence of their low wages, making their transition into adult segregated programs like TTP all the more likely.

2. The Lack of Appropriate Opportunities for Integrated Experiences for Birch Students Places Them at Risk of Unnecessary Segregation

Students are given little choice but to participate in Birch's in-school sheltered workshop, often in spite of their preference to receive integrated transition services and experiences and to acquire the skills necessary to transition to postsecondary integrated employment and day settings. Our investigation revealed that students were often required to participate in the in-school sheltered workshop even though they would have preferred a real job experience. One such student said that she frequently responded to the pressure to keep pace with production deadlines imposed by school staff, even though she disliked the repetitive tasks that she was made to perform. According to the student, her hands would frequently ache by the end of the school day from the repetitive work. Students, including this former student, were made aware that they would have no services if they left school before age 21.

¹⁷ According to its principal, Birch students are divided into separate classrooms based on their IQ. We were told by the Birch Program's staff that five classrooms are reserved for students with IQs that are less than 70, and three classrooms are reserved for students with IQs less than 40. There are approximately 24 to 27 students in the workshop at any given point of the day. Students who are 14-15 years old spend at least 55 minutes in the workshop per day; whereas students who are 16 years old or more spend at least 110 minutes in the workshop per day. Accordingly, students over the age of 14 typically spend at least sixteen percent of all classroom instruction time in the sheltered workshop, and students age 16 or over spend at least one third of all classroom instruction time in the sheltered workshop.

At one time, some Birch students were given the opportunity to work in community settings. However, those opportunities appear to have been short-lived. For example, a handful of Birch students were previously engaged in integrated work at a hospital, but were discouraged from continuing those placements. The principal explained that a reason for discontinuing students' work placements was that the hospital required the students to obtain immunizations. Yet, after Birch students were removed from their hospital work placements, no alternate placements were ever offered.

The mandate that Birch students spend practically all of their employment-related training time in Birch's sheltered workshop, despite some students' disinterest or discomfort with workshop tasks, has severely limited Birch students' opportunity to be successfully matched with integrated work placements that are better suited to their particular preferences, interests, and skills. By contrast, trial work experiences that are individually tailored to students' interests and support needs are more often successful in leading to integrated placements in postsecondary employment settings.

3. Erroneous Assumptions About, and Low Expectations for, Birch Students with Disabilities Places Them at Risk of Unnecessary Segregation

While most Birch students are paid sub-minimum wages for the completion of tasks in the sheltered workshop program, some students are given tasks similar to their paid peers, but are paid no wages at all based on the severity of their disabilities. These students face an enhanced risk of postsecondary placement in a segregated setting, as they have been erroneously labeled by school staff as unemployable. For example, such students have been instructed to place buttons in plastic bags, a task of similar quality to the tasks assigned to their peers, only to have their work dumped back into a pile at the end of the period or day, while their peers' work is used to meet contract requirements. School staff explained to us that these students were selected for "training" based on their perceived capabilities or lack thereof. However, we observed, and our consulting expert concluded, that these unpaid students were not so severely disabled as to be incapable of receiving integrated transition and supported employment services, and they demonstrated very few differences in ability from the students who were paid subminimum wages. The mother of one former student who participated in the Birch sheltered workshop for two periods every day for one year and never received a paycheck, informed us that her child previously had a job in the community as part of the transition services of the child's previous district. There, this student worked in a restaurant cleaning tables, and was paid. Accordingly, the erroneous assumptions and low expectations imposed by the Birch sheltered workshop have contributed to an increased likelihood that such students will be placed at serious risk of unnecessary segregation.

C. The City of Providence's Actions and Failures to Act Cause Birch Students To Be at Serious Risk of Unnecessary Segregation at TTP

Under the ADA, states and cities may not "utilize criteria or methods of administration" that subject persons with disabilities to illegal discrimination, 28 C.F.R. § 35.130(b)(3)(i). Such illegal discrimination includes, *inter alia*, the risk of 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, 663 F.3d 1100, 1116 (9th Cir. 2011) (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 regulation extends beyond residential settings to the employment service system). As discussed above, public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment, and (c) community services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities.

Based on our investigation, we have concluded that the City has violated this provision with regard to the serious risk of unnecessary segregation of Birch students with I/DD at TTP.

1. Timely Transition Services to Birch Students to Prepare Them for Integrated Post-Secondary Integrated Settings Are Appropriate and the City Has Failed to Provide Such Services

At Birch, students are denied integrated transition services while in school. Non-disabled students at Mount Pleasant High School engage in integrated activities and experiences. In addition, students with and without disabilities throughout Rhode Island receive integrated services, such as transition work placements with competitive wages, paid internships, and career learning experiences; building resumes; volunteering; and acquiring important work-related skills while still in school. However, Birch students generally only learn work tasks that will prepare them for postsecondary placements in segregated work settings.

Numerous services could be made available to meaningfully integrate Birch students while in school and prepare them for integrated postsecondary placements. However, the City has failed to provide those services to Birch students. For example, the City has failed to provide Birch students with I/DD with employment-related transitional assessments, including situational and community-based vocational assessments, necessary to transition into work in integrated settings. Records obtained as part of this investigation reveal that only two out of 120 (1.7%) Birch students over the past four academic years received community-based employment assessments. Instead, most assessments were based upon teacher observations at Birch, or “pen and paper” and web-site based assessments. Accordingly, many students have exited Birch without having their employment-related skills and abilities evaluated outside Birch’s in-school sheltered workshop.

Furthermore, the City failed to exercise proper oversight over the Individualized Education Plan (“IEP”) process at Birch, in violation of its statutory obligation to do so,¹⁸ and consequently, many Birch students’ IEP postsecondary plans reflect the explicit and exclusive goal of transitioning to segregated settings. There was little or no evidence that such students were ever introduced to integrated alternatives, or that they expressed an interest in postsecondary placement in a segregated setting. Specifically, approximately one quarter (23%) of all Birch student IEPs completed over the last four calendar years specifically identified sheltered work as a postsecondary goal. For example, many IEPs included the same boilerplate language stating that the student’s goal was to “receive on the job training at a sheltered

¹⁸ R.I. Gen. Laws § 16-24-18(d).

workshop” and “develop improved rate, productivity, and compliance levels.” This demonstrates that the Birch IEP process was, at times, neither meaningful nor exploratory of students’ individual interests and preferences. As a result, students were deprived of the opportunity to make the informed choice to participate in postsecondary integrated employment and/ or day settings.

The City also has failed to provide the appropriate transition services necessary to inform the employment-related goals and recommendations of students’ relevant planning documents,¹⁹ in direct contravention of its statutory obligation to do so. R.I. Gen. Laws § 16-24-18. Also, despite Rhode Island’s express requirement that transition planning begin at age 14,²⁰ the City failed to ensure that students were given 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 TTP—following their exit from school. Instead, many Birch students only received employment-related transition planning one year or less before their exit from school, if at all. Generally, Birch students do not participate in integrated transition work placements. Other than the in-school sheltered workshop, the nearest experience that some Birch students are offered to a transition work placement is assisting the Mount Pleasant High School cafeteria staff with emptying the school’s trash.

Birch students have been given very limited, if any, access to integrated 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. Additionally, the evidence shows that Birch students have not been provided with the opportunity to participate in the State’s transition academies, including the transition academy at Johnson and Wales University.

Birch students have even been excluded from the opportunity to receive high school diplomas, and are only awarded certificates of attendance. As a consequence of this practice, Birch students are exposed to the significant and often lasting stigma attached to not receiving a diploma. This stigma likely constricts students’ postsecondary employment options, as it is widely accepted that the lack of a high school diploma impacts negatively upon employers’ perceptions of potential employees.

Unfortunately, the City has continued to advance these practices at Birch despite a stark warning from the Council of the Great City Schools that such a practice was concerning. The 2011 report commissioned by the City stated that “[c]oncerns about the [Birch] school’s provision of instruction and transitional activities and services for students...include (1) access to the curriculum ‘at a very low level,’ (2) no expectation that students graduate with a regular diploma, (3) the fact that only one student takes public transportation to school, (4) access only to a sheltered workshop experience, (5) an attitude that immunizations required for hospital and medical center worksites would be harmful to students, and (6) limited interaction with the

¹⁹ Post-secondary planning documents can include an Individual Support Plan (“ISP”), Individual Education Plan (“IEP”), and Individual Plan for Employment (“IPE”).

²⁰ R.I. Gen. Laws § 16-24-18.

community. There appears to be no real desire to change the situation.”²¹

Our investigation revealed that participation in integrated work while in school has greatly assisted some Rhode Island students with disabilities to enter integrated employment following their exit from school. For example, we met with adults with I/DD who received both supported employment services in integrated work settings and integrated day services that allowed them to engage in meaningful activities when they were not working. Many of these adults explained that they were able to find integrated postsecondary services because their school districts had linked them to paid internship programs, volunteer opportunities, and transition academies. Several other adults with I/DD stated that high school volunteer opportunities gave rise to their eventual placement in postsecondary supported employment. Unfortunately, however, for students at Birch, the City has taken virtually no steps to link them with in-school integrated work and volunteer opportunities.

Further, the City, including Birch staff, made practically no effort to link Birch students to available resources within the adult system to assist their transition. For instance, the Birch principal acknowledged that the Office of Rehabilitation Services (“ORS”) had no established presence at Birch and that no vocational rehabilitation counselors presently service the program. This is consistent with the Birch principal’s apparent belief that Birch students are too severely disabled to benefit from employment.

Likewise, school staff made few, if any, efforts to develop relationships with supported employment providers, parent information and technical assistance groups, or other valuable community stakeholders to assist students in accessing integrated supported employment and day services following their exit from school.

The extent of the transition-related information or services that are made available to Birch students and parents about post-secondary integrated employment and day services is: (1) a list of approximately 38 adult service providers, the vast majority of which are segregated facility-based programs, in which TTP is listed as one of two available providers located in North Providence, and (2) a letter from the Birch principal that is sent home with students approximately one to two months prior to their exit from Birch informing families of the telephone number for the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals (“BHDDH”) to seek more information about postsecondary employment services. The City, including PPSD, has failed to ensure that Birch students have access to the types of transition services necessary for students to make the informed choice to work in integrated postsecondary settings.

2. Students at Birch Are Capable of, and Do Not Oppose Receiving, Integrated Transition Services and Preparation for Integrated Postsecondary Placements

²¹ Supra note 7 at 84 (emphasis added). The same report recommended that the Providence Public School District “[d]evelop a working group of diverse stakeholders (including business, community, state agencies, special education personnel, staff from high schools, and the Birch Vocational Center) to review district practices in community-based work and employment, and establish measurable standards for school-based practices at every high school.” Id. at 85.

We concluded that few, if any, of the students in Birch's sheltered workshop are incapable of receiving integrated transition services while in school, or of working in integrated employment or receiving integrated day services after they exit Birch. In fact, some Birch students have already demonstrated that they qualify for, and are not opposed to, working in integrated employment. As mentioned earlier, a handful of Birch students were even previously engaged in integrated work at a hospital before their placements were discontinued.

Moreover, we found that the students at Birch are not significantly different, in terms of diagnoses or abilities, from the students with I/DD of other schools that provide integrated employment services and preparation for integrated post-secondary placements. The most prevalent diagnoses at Birch included autism and Down syndrome, and our consulting expert observed that most students appeared to have the same level of disability as many individuals that we observed receiving supported employment services and integrated day services in Rhode Island.

Moreover, the students at Birch do not oppose participating in integrated programs. During the IEP process, the majority of Birch students (65%) expressed a desire for competitive employment and/or stated the goal of working in integrated settings. It is likely that even more Birch students would have expressed such a desire if they were engaged in a meaningful person-centered planning process to explore their preferences for postsecondary placements. Of the students that did express a desire to work in integrated settings, they stated their intentions to work in a daycare, a supermarket, a hardware store, a movie theater, a hospital, a florist, with animals, and with computers.

Statistical evidence derived from TTP service recipients' Individual Support Plans ("ISPs") shows that Birch acted as a feeder to TTP, in spite of some students' specific requests to work and receive services in more integrated settings. One student who recently transitioned from Birch to TTP indicated in his IEP that he wanted to work "at Kmart" after graduation. However, he did not receive transition-related services to assist him in achieving this goal. Instead, like most students at Birch, he was referred to a website to learn about employment, and at most was recommended to participate in community outings to "develop his money management skills." Overwhelmingly, Birch student IEPs evidence no person-centered employment planning to assist students in reaching their post-secondary integrated employment goals.

In addition, families of current or former Birch students informed us that their requests to seek postsecondary work in integrated settings were often dismissed by the Birch principal as unrealistic for children with disabilities, and that segregated placements during and after school were encouraged instead.

D. Serving Birch Students in Integrated Employment and Day Settings Can Be Reasonably Accommodated

Providing services to Birch students at risk of placement at TTP in integrated work and day settings can be reasonably accommodated. The types of services needed to support Birch students in integrated work and day settings, including integrated, individualized transition

services such as internships, trial work experiences, job shadowing, soft skill and job skill development, already exist in Providence’s educational and transition programs. The City could redirect the funds that it already expends supporting Birch’s current work-related programs, including its in-school segregated sheltered workshop, to provide transition services in integrated employment and day settings.

The City already provides integrated employment-related transition services to youth in Providence. Expanding those services to serve youth at Birch, and youth who imminently will transition from Birch into the adult system, who are at risk of unnecessary segregation at TTP, is a reasonable modification of the City’s transition service system. See Disability Advocates Inc. v. Paterson, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009), vacated on other grounds sub nom. 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 formerly expended upon Birch to integrated transition services for those individuals who are at risk of unnecessary segregation, will not be a fundamental alteration of Providence’s transition-relation educational system.²²

V. RECOMMENDED REMEDIAL MEASURES

We recognize that, in response to our investigation, the City and PPSD have now closed the sheltered workshop at Birch. The United States has already discussed at length and with great specificity the minimum remedial steps that the City of Providence must take to meet its obligations under the ADA regarding transition of students to integrated postsecondary placements. To summarize those remedial steps, the State must:

- Ensure sufficient integrated transition services are provided to prepare students at Birch to participate in employment and day services in the most integrated setting appropriate to their needs upon leaving Birch;
- Ensure that such transition services are provided early enough and consistently throughout students’ tenure at Birch;

²² 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 <http://www.aamr.org/media/PDFs/ajmr11501021REV.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 some 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 to increase over time. Id.

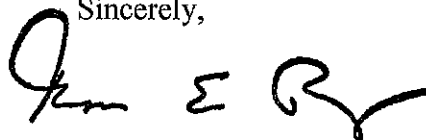
- Ensure that Birch students have the opportunity to engage in work in an integrated setting prior to exit from school;
- Develop sufficient linkages between Birch and adult day activity services, including through ORS and BHDDH, and to supported employment and integrated day service providers; and
- Develop and implement effective transition assessment and planning processes, including discovery, vocational and situational assessment, and person-centered planning, to assist individuals served at Birch to transition to integrated employment and day services consistent with their needs and informed choices.

VI. CONCLUSION

Please note that this findings letter is a public document. In the future, it may be posted on the Civil Rights Division's website.

We appreciate that, since we orally notified the City of Providence of the findings of this investigation in April 2013, the City has proceeded with alacrity in a cooperative fashion to resolve this matter, and has expressed its commitment to transparency and to bringing immediate relief to Birch students now and going forward. We look forward to continuing to work with the City to resolve this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom E Perez', written in a cursive style.

Thomas E. Perez
Assistant Attorney General

cc: Peter F. Neronha
United States Attorney, District of Rhode Island

Michael Iannotti
Assistant United States Attorney, District of Rhode Island