September 18, 2014

To the Division of Services for People with Disabilities, and other interested parties,

Supporting individuals with disabilities through transition to adult life is a vital component of building a system that promotes independence, productivity, and inclusion for everyone; however, it is only one piece of the puzzle. The Disability Law Center (DLC) wants to ensure that once students leave the school transition environment, they have every opportunity to succeed in an integrated employment setting where they are compensated at a competitive wage. The DLC recently completed a survey of transition programs in Utah schools. The purpose of this project was to assess what opportunities exist for transition-age students to find integrated and competitive employment once they leave the transition setting. The findings of the project are summarized in “Utah Transition Today, A 2014 Report of Opportunities and Barriers.” This letter is a companion piece to that report on the project. It focuses on the state’s legal obligation to provide integrated and competitive employment opportunities to individuals currently receiving services.

The Olmstead context

In 1999, a case went before the Supreme Court which resulted in a landmark decision for people with disabilities. The court concluded that Title II of the Americans with Disabilities Act (ADA) gives people with disabilities the right to receive services in the most integrated setting possible. In January of 2012, the DLC’s sister agency, Disability Rights Oregon, (DRO), filed Lane v. Kitzhaber, a historic class action lawsuit seeking to extend the principles of the Olmstead decision to vocational, as well as residential settings. DRO argued that the state of Oregon was violating the ADA by “unnecessarily segregating the named plaintiffs and members of the plaintiff class in sheltered workshops.” DRO’s Complaint additionally alleges that the “most integrated setting” means one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible ...." Under the standard so eloquently expressed in the Lane v. Kitzhaber Complaint, any state would arguably be in violation of Title II if its system of delivering vocational services to people with disabilities does not provide for substantial interaction with nondisabled peers.

The U.S. Department of Justice (DOJ) has echoed these sentiments, and furthered the argument that the Olmstead integration mandate extends to work settings that include people with disabilities. Notably, the DOJ issued its findings from an investigation into the service delivery of employment services for people with disabilities in Rhode Island. The DOJ concluded that Rhode Island’s system unnecessarily segregated individuals with intellectual disabilities in sheltered workshops and day programs, in violation of the ADA. Subsequently, Rhode Island entered into a consent decree to remedy the problems cited by the DOJ. In part, the state agreed to provide employment opportunities for individuals with disabilities in more integrated, community-based settings.
Utah’s Non-Integrated Work Settings

The Division of Services for People with Disabilities’ (DSPD) 2013 Annual Report (“the Report”) demonstrates just how little progress has been made toward ensuring Utahans with disabilities are receiving employment services in the most integrated setting possible. Utah’s current service delivery system funds supported employment services at only one-sixth (1/6) of the amount it dedicates to segregated settings. In this respect, Utah’s system relies on a segregated service delivery structure in much the same way as Oregon or Rhode Island.5

The Report outlines the budget for different service groupings. The Supported Employment grouping is described as follows: “Supported employment helps an adult obtain, maintain, and advance in competitive employment in an integrated work setting at a job paying minimum wage or more.” Interestingly, the report does not appear to distinguish between day programs and sheltered workshops, given that its description of this grouping states, “people receiving day supports are generally supported in a group setting with others who have similar disabilities. These services may include contract work and payment of sub-minimum wages for piece-rate work based on individual productivity.”6

The Report indicates that 707 individuals are being served through supported employment, with a total “$5.2 Million dollars being spent by the agency.” Contrast this with the information on the “Day Supports” service grouping. There are a reported 2,424 people being served in these settings, with a total agency cost of $34.4 Million dollars. This number represents an increase in funding from 2012, in which DSPD spent a total of $32.08 million on non-integrated day support settings.7

The disparity between these numbers is stark and disturbing nearly fifteen (~15) years after Olmstead. It demonstrates that Utah’s system is not making notable progress toward decreasing its support for segregated settings. When these numbers are considered with the additional data on page 21 of the Report, the picture worsens: the number of consumers who participate in supported employment has declined from nearly 1000 in 2009 to 707 in 2013.8 These statistics are even more troubling given the time elapsed between the passage of Utah’s Employment First Priority legislation, and its implementation. They indicate the initiative has not statistically increased the numbers of individuals served in integrated settings, despite that being the explicit goal.

Employment First

As discussed extensively in the DLC’s accompanying Report, “Utah Transition Today”, there is substantial national momentum to encourage inclusive workplaces for people with disabilities. Specifically, President Obama signed the Workforce Innovation and Opportunity Act (WIOA) on July 22, 2014. This legislation promotes the standards expressed by the Supreme Court in the Olmstead decision, and places limits on the use of the subminimum wage for individuals with disabilities.

In an effort to become a national leader in integrated and community-based employment services for people with disabilities, Utah enacted Employment First Priority legislation in 2011 and 2012. The “Employment First” initiative requires the DSPD and other state divisions to “…give priority to providing services that assist an eligible recipient in obtaining and retaining meaningful and gainful employment that enables the recipient to earn sufficient income to purchase goods and services, establish self-sufficiency; and exercise economic control of the recipient’s life.” It also requires these agencies to “arrange sub-minimum wage work or volunteer work only when employment at market rates cannot be obtained.”9

While the DLC applauds this effort, and supports the goals identified by Utah’s Employment First Priority legislation, we are concerned that the numbers outlined above indicate that, since the enactment
of this standard, there are actually more funds being allocated toward, and more individuals working in, segregated settings. If fewer individuals with intellectual disabilities are being served in integrated employment settings than before the law was enacted, it is not being effectively or meaningfully implemented. While we know DSPD has convened a workgroup to address implementation, we have yet to see recommendations demonstrating how funding codes, or other system mechanisms can be modified to promote customized and/or supported employment in integrated settings at a competitive wage.

While we are disappointed that more progress has not been made on this initiative three (3) years after it was enacted, the DLC believes Utah can still be a leader in providing innovative and integrated employment opportunities at competitive wages for people with disabilities. For example, DSPD could prohibit the use of future funding for new sheltered workshop placements. DSPD could also develop and publicize administrative rules or other criteria more explicitly defining the statutes’ intent regarding the appropriateness of a segregated setting. Specifically, the provision allowing segregation, “only when employment at market rates cannot be obtained,” should be clarified to give support coordinators, and DSPD staff better guidance on what specific efforts to gain integrated and competitive employment must be made before a placement in a segregated setting can be considered. Such steps would demonstrate a good faith effort to implement the current law, and would underscore DSPD’s commitment to the promise of an inclusive, integrated community for all Utahans, regardless of ability.

Ultimately, in order to ensure Utah is a leader in promoting independence, and to avoid inevitable Olmstead challenges in court, substantial changes must be made to the current system. “Employment First” must be more than a catchy phrase, or a set of ideas that are given lip service in monthly meetings. The philosophy must be the driving force behind a fundamental shift in attitude—a shift that begins by recognizing that the current imbalance in funding and placement between integrated and non-integrated settings is unacceptable. The promise of an integrated community for all is not an impossible aspiration or standard. It is a completely achievable goal that, given the proper attention, support, and prioritization, our communities can, and will embrace. The question, is whether or not we are truly committed to doing the hard work that is necessary. The DLC, believes we can, and must, do better.

4 Press Release, Department of Justice Reaches Landmark Americans with Disabilities Act Settlement Agreement with Rhode Island Tuesday, April 8, 2014.