LIVING ON A DIME AND LEFT BEHIND

How a Depression-Era Labor Law Cheats Texas Workers with Disabilities

An investigative report published July 12, 2016 by

Disability Rights TEXAS

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About Disability Rights Texas
Disability Rights Texas (DRTx) is the federally designated legal protection and advocacy agency (P&A) for people with disabilities in Texas. Congress created a national network of protection and advocacy organizations to help secure and advance the rights of people with disabilities. DRTx's mission is to help people with disabilities understand and exercise their rights under the law, ensuring their full and equal participation in society.

DRTx would like to thank the State Bar of Texas Labor and Employment Law Section for its generous grant that helped make this project possible.

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EXECUTIVE SUMMARY

Introduction

For many years people with disabilities have fought for equality and full integration into society. While our nation has made important strides in fighting disability discrimination, people with disabilities still struggle to access meaningful employment.

For more than 70 years, employers holding special "certificates" issued by the Department of Labor (DOL) have been allowed to pay less than the minimum wage to workers with disabilities, in many cases as little as a penny an hour. These certificates are issued in accordance with Section 14(c) of the Fair Labor Standards Act, a law enacted in 1938 during an era in which people with disabilities were routinely segregated and excluded from the job market.

Today, most employers paying subminimum wage under Section 14(c) keep their employees segregated from the community. Workers with disabilities making subminimum wage are employed in sheltered workshops, which intentionally isolate workers with disabilities from the rest of their communities. Their co-workers consist exclusively of other individuals with disabilities, and they perform tedious and unfulfilling work, sometimes for state government contracts.

In light of the isolation and nature of the work performed, workers are at a high risk for exploitation. Though the U.S. has made substantial progress towards community integration, sheltered workshops continue to operate under an antiquated philosophy. People with disabilities are being underpaid to an extreme degree, are not developing any meaningful job skills and are denied the opportunity to find competitive, integrated employment.

Competitive integrated employment means jobs in a typical workplace setting in the community, for which individuals are hired based on a set of skills and experiences. In these jobs, individuals are paid directly by their employer, earn at least minimum wage, and are paid based on the competitive labor market.

Investigation

Under federal law, Disability Rights Texas has the authority to investigate incidents of abuse or neglect of people with disabilities, and to pursue administrative and legal action to ensure that the rights of people with disabilities are protected.

Protection and Advocacy organizations (P&As) like DRTx monitor facilities and organizations that serve people with disabilities. P&As also represent individuals with disabilities on a variety of disability related claims like employment discrimination claims under Title I of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and similar state laws.

As part of a national effort to examine the treatment of people with disabilities in sheltered workshops, DRTx initiated this investigation to better understand how sheltered and subminimum-wage work impacts Texans with disabilities. The agency created a monitoring plan to collect data and information from sheltered workshops operating in Texas. It interviewed people with disabilities in sheltered workshops, as well as their employers to obtain a more comprehensive analysis of sheltered work in Texas. DRTx monitored 12 facilities as part of the investigation.

Findings

The investigation identified five critical and overarching concerns:

- Sheltered workshops do not provide meaningful opportunities for skill advancement to Texans with disabilities.
- Sheltered workshops create a segregated and isolated environment ripe for exploitation.
- Wages in sheltered workshops are minimal, frequently miscalculated, and exclusively controlled by the provider.
- Sheltered work is not leading to competitive integrated employment in the community.
- Texas state vocational rehabilitation services are not providing vocational services to Texans with disabilities leaving many individuals stuck in workshop settings.

This report provides:

- A comprehensive look at Section 14(c), including its history and initial purposes;
- An examination of the societal and legal changes that have occurred since its enactment;
- An explanation of how these changes have redefined how people with disabilities participate in society;
- Results of the investigation and monitoring of 12 facilities across Texas;
- Personal stories and input of people with disabilities working in sheltered workshops in Texas; and

- Recommendations for what Texas can do to become a leader in ensuring all people with disabilities have access to meaningful, fair, and integrated employment.

Recommendations

DRTx's investigation and findings underscore that Texas is at a turning point, with a chance to make a critical difference in the lives of Texans with disabilities. Texas has before it both an opportunity, and an obligation, to ensure people with disabilities have access to the same employment opportunities as all other Texas citizens.

Texas has made initial progress by instituting the Employment First Task Force, an interagency group initiated through the passage of Senate Bill 1226 in 2013. The law also established that employment is the first and preferred option for working-age Texans with disabilities and should be the expected outcome of education and publicly funded services for working-age youth and adults. More than 40 states in the U.S. now have an initiative focusing on Employment First.

The findings in this report support the goal of the Employment First Task Force to fully include Texans with disabilities in the workplace.

DRTx further recommends that Texas should:

1. Phase out of the subminimum wage and sheltered work system, and move toward fully competitive integrated employment;
2. Provide more job training and development in state-funded programs;
3. Overhaul day habilitation services; and
4. Remove barriers to hiring individuals with disabilities in state agencies.

Implementing DRTx's recommendations will have a direct and positive impact on Texans with disabilities by supporting meaningful work, fair pay, and integrated community services.

I. History of Section 14(c)

The Origin of 14(c)

In 1938, the Fair Labor Standards Act (FLSA) established the legal requirement to pay a minimum wage. Congress enacted the FLSA to protect all covered workers from labor conditions that were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[1] The law set basic standards for wages, including establishing a minimum wage. But it also allowed employers to pay workers with disabilities *below* minimum wage, based on the assumption that people with disabilities would otherwise be unable to find any work at all. This subminimum wage provision was found in Section 14(c) of the FLSA.

The idea that people with disabilities are unable to work in the community at a competitive wage is inconsistent with a contemporary understanding of what people with disabilities are capable of.

While the benefits of a minimum wage are almost universally accepted, historically the value of a *subminimum* wage has been heavily disputed. Moreover, the idea that people with disabilities are unable to work in the community at a competitive wage is inconsistent with a contemporary understanding of what people with disabilities are capable of. It is also inconsistent with the legal developments under the ADA and other laws, establishing the right of persons with disabilities to be integrated into the community, and to be provided reasonable accommodations.

Changes to Section 14(c) Over the Years

Subsequent changes to the law made this discriminatory treatment in wages even worse. When it was first passed, the law set a floor for the permissible subminimum wage for workers who were considered permanently disabled. Such wages could not be less than 75% of the federal minimum wage.[2] For workers with temporary disabilities that could be rehabilitated, no wage floor was set. But in the decades that followed, those distinctions were first reduced and then eliminated. Since 1986, there has been no wage floor for workers with temporary *or* permanent disabilities.[3]

During the same time, efforts to reform the law failed, largely as a result of efforts by those with an economic incentive to continue this discriminatory arrangement—the 14(c) certificate holders. Despite evolving regulations and laws governing Section 14(c), the debate has consistently excluded input from the people most impacted by these regulations: workers employed under the Section 14(c) system. Instead, the government has relied on sheltered workshop supporters and 14(c) certificate holders to speak on behalf of the workers. Relying solely on input from the sheltered workshops themselves presents various problems. Sheltered workshops are, at the end of the day, businesses. Though the business may take into account the wishes

of its workers with disabilities, the business must also promote practices that benefit its financial sustainability. As a result, change for workers with disabilities has been slow.

In 1965, Senator Wayne Morse suggested a change to the subminimum wage practice that would bring "moderately" disabled workers up to the full minimum wage over a three-year period. Workers with the most severe disabilities could still be employed under a certificate, but would be required to be paid at least 50 percent of the federal minimum wage.[4]

The National Federation for the Blind argued that workers with disabilities should be given the same protection under federal laws that are enjoyed by workers without disabilities.

Section 14(c) employers criticized the proposed change as "unrealistic," arguing that if enacted, "would deprive severely disabled people of the opportunity for employment."[5] By contrast, the National Federation for the Blind (NFB) argued that workers with disabilities should be given the same protection under federal laws that are enjoyed by workers without disabilities.[6] The NFB argued that the system was ripe for abuse and exploitations, particularly because of the lack of federal oversight.[7]

By the time it was enacted, the Morse proposal had been substantially revised; the modified version provided for no wage floor in "work activity centers," while work outside these centers would be paid at least 50 percent of minimum wage.[8] There was no mechanism to assist workers in moving out of work shelters so that they could earn a higher wage.[9] The term "work activity center" was previously used to describe what are now known as sheltered workshops.

Employers seized on the opportunity to pay lower wages; consequently, employment in work activity centers increased dramatically.[10] The DOL acknowledged that the new regulations resulted in more people with disabilities being denied the opportunity to earn minimum wage. But rather than promote practices that brought people out of work activity centers, the DOL instead suggested wage supplements for disabled workers, as well as an increase in funding for social services, improved equipment, and manager training.[11]

In 1978, U.S. Representative Phillip Burton proposed additional changes to the 14(c) regulations. His proposal would have limited the type of worker who could be paid subminimum wage and would have mostly impacted workers with blindness.[12] But again, 14(c) facilities opposed the changes, arguing for the therapeutic rather than economic value of work. During the legislative process, the DOL acknowledged several problems with the oversight and operation of the 14(c) program.[13] Unfortunately, these problems

were not addressed, and workers with disabilities continued to be exploited as a result of lax 14(c) regulations.

How 14(c) Currently Works

Before an organization may pay subminimum wage, it must first apply for and receive a 14(c) certificate. The Secretary of the DOL may issue 14(c) certificates when "necessary to prevent curtailment of opportunities for employment."[14] The individuals paid a subminimum wage must be "impaired by age, physical or mental deficiency, or injury," and the wage must be "commensurate with those paid to non-handicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and … related to the individual's productivity."[15] "Impairment" may include blindness, intellectual disability, mental illness or even alcoholism. An employer cannot decide that a worker with a disability should be paid subminimum wage simply because of his or her disability. The identified impairments must severely affect the work being performed in order to warrant the payment of a subminimum wage. Workers who are able to perform the essential duties of their job with reasonable accommodations under Title I of the ADA must earn the legal minimum wage.[16]

An employer cannot decide that a worker with a disability should be paid a subminimum wage simply because of his or her disability. The identified impairments must severely affect the work being performed in order to warrant the payment of a subminimum wage.

After it has been determined that an employer may pay a subminimum wage, the 14(c) organization must follow the correct procedures to ensure that the wage paid is commensurate with what workers who do not have disabilities and who perform the same work are paid. In most circumstances, a 14(c) employer must determine the "prevailing wage." The prevailing wage is the wage paid to an experienced worker without a disability for the same work within the same geographic area, and it must be reviewed and updated at least once a year.[17] Additional consideration may be taken into account if the 14(c) pays its workers by a piece rate. The 14(c) organization is required to maintain specific documentation of the process used to determine the prevailing wage.

Next, the 14(c) organization must convert the prevailing wage into a commensurate wage. To do this, the organization must first measure the productivity of an employee without disabilities who performs the same work. The 14(c) organization must measure the productivity of the worker with a disability by comparing it to the productivity of a non-disabled work to set the wage. These measurements are often called "time studies," either Modular Arrangement of Predetermined Time Standards or Method-Time Measurement. Time studies must be performed within the first month of employment, and at least every six months of continued employment to ensure an accurate commensurate wage is being paid.[18]

The DOL is responsible for overseeing the provisions of section 14(c), and the DOL's Wage and Hour Division (WHD) is responsible for administering the program.[19] The WHD's responsibilities include reviewing applications for new 14(c) certificates and renewals, issuing the certificates, providing guidance and training to its own staff and to employers, and monitoring and enforcing compliance by employers to ensure wages are being paid correctly.[20]

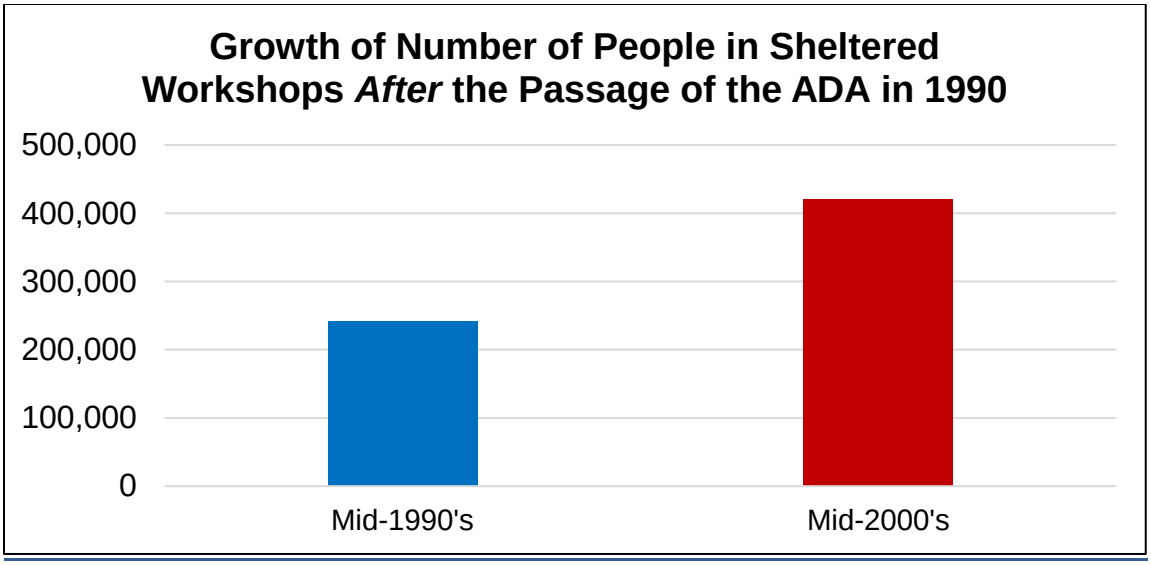
The WHD sets out the requirements and monitoring procedures in Chapter 64 of the WHD Field Operation Handbook (FOH). The FOH reiterates that the purpose of the minimum wage exemption is to help people with disabilities find work by encouraging employment opportunities that otherwise might not exist.[21] Given the potential for abuse, the FOH states that the WHD will "carry out a vigorous, consistent, and effective enforcement program with respect to employment of workers with disabilities."[22] This level of oversight is "essential" given that "many of the workers with disabilities paid at [a subminimum wage] have little knowledge of their rights."[23]

Moving Away from 14(c)

In 1938, when 14(c) regulations were first enacted, people with disabilities were consistently denied the opportunity to participate in society. Fortunately, since 1938, our country has made advances in ensuring equal opportunity for people with disabilities. In 1973, Congress passed the Rehabilitation Act, which prohibits recipients of federal funding from discriminating against people with disabilities.[24] In 1991, Congress enacted the Americans with Disabilities Act (ADA), later amended in 2008 by the ADA Amendments Act (ADAAA). The ADA mandated "equality of opportunity, full participation, independent living, and *economic self-sufficiency* for … individuals" with disabilities.[25]

Title I of the ADA prohibits an employer from discriminating "against a qualified individual on the basis of disability."[26] A qualified individual under the ADA is an individual who can perform the essential functions of a particular job, with or without reasonable accommodations. After the ADA was enacted, the Office of the Solicitor at the U.S. Department of Labor reviewed the ADA to determine whether it would conflict with Section 14(c).[27] The Solicitor's Office argued the ADA did not nullify Section 14(c) because it is not discriminatory to pay someone commensurate with their production.[28]

The ADA, (and the ADAAA), underscore our move to a more inclusive and equal society. Given the advances the ADA made towards increasing opportunity for people with disabilities, we would expect the number of people working in sheltered workshops to have decreased since the passage of the ADA. *Yet, the number has steadily increased, from approximately 241,000 people in the mid-1990s to 420,000 people in the mid-2000s.*[29]



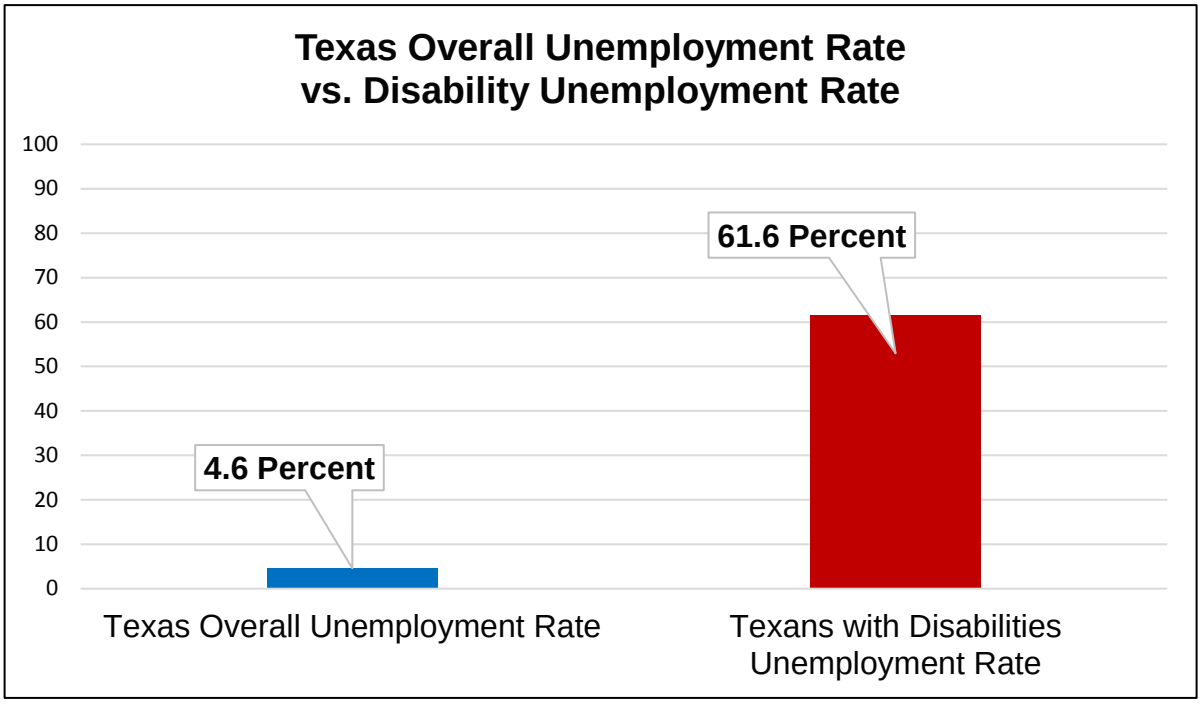
II. Employment of People with Disabilities in Texas

Vocational Rehabilitative Services in Texas

The Texas Department of Assistive and Rehabilitative Services, or DARS[30], administers programs that help Texans with disabilities find jobs through vocational rehabilitation; these programs are intended to ensure that Texans with disabilities have an equal opportunity to live independently in their communities along with all Texans.[31] Even though DARS exists to help Texans with disabilities secure jobs in the community, the unemployment rate of Texans with disabilities is staggering.

Texas Employment Statistics

In the fall of 2015, Texas boasted an overall 4.6 percent seasonally adjusted unemployment rate.[32] The latest figure for the unemployment rate for Texans with disabilities (2014) is reported to be more than 60 percent.[33] Given this disparity, there is a clear need for initiatives to improve employment opportunities and outcomes for people with disabilities.



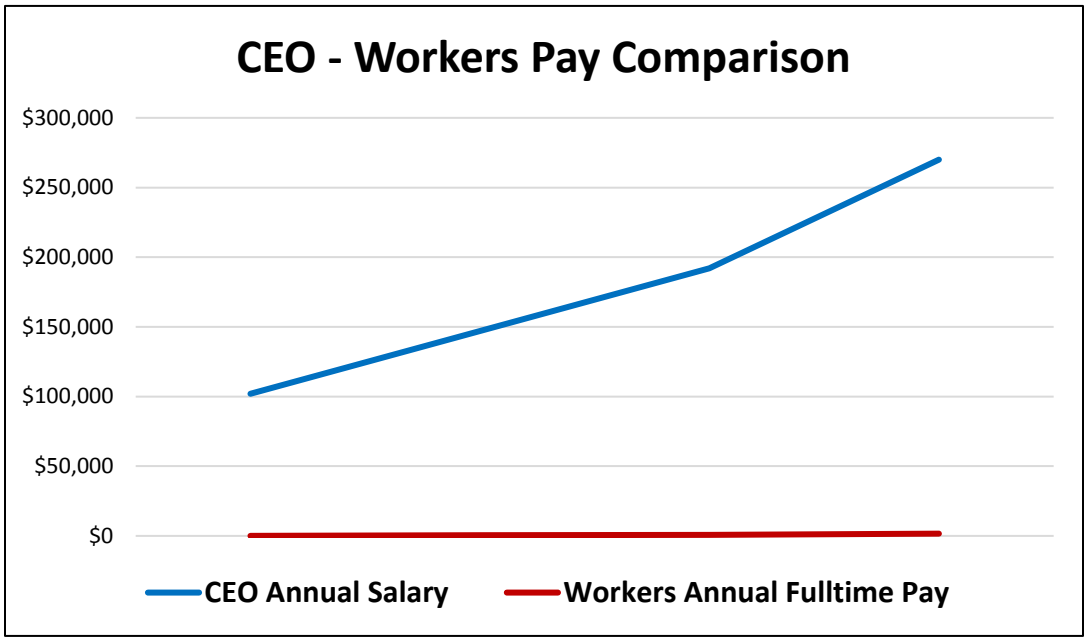
Use of 14 (c) in Texas

Based on April 2015 data from the DOL's Wage and Hour Division (WHD), there are approximately 109 subminimum wage certificate holders in Texas. Ninety percent of these entities are Community Rehabilitation Programs (CRPs), which are work centers (also referred to as sheltered workshops) that specialize in the employment of workers with disabilities and may also provide rehabilitation. Six percent of certificate holders employed state hospital patients, 1 percent were private employers, and 1 percent were schools.

There are nearly 10,000 individuals in Texas sheltered workshops being paid subminimum wages according to the latest DOL figures.[34] Two-thirds of the 14(c) organizations in Texas do not pay minimum wage or above to a single one of their employees. Moreover, 44 of the 76 organizations reporting wage information pay 50 cents or less per hour. Even more troubling, according to 14(c) application documents, 18 of the 72 reporting organizations admit that they also serve as the Representative Payee agency for their workers (A Representative Payee is an organization or individual appointed to receive the Social Security benefits for an individual).

Texas law supports 14(c) organizations by requiring state agencies to purchase the products and services produced by workers being paid subminimum wage. Under Texas law, state agencies are exempt from competitive bidding requirement when purchasing products and services from persons with disabilities and must report all exceptions.[35] The Texas Council on Purchasing from People with Disabilities is the program that manages these "state use" contracts that implement this Texas law.

Unfortunately, the state of Texas gives some of these "state use" contracts to entities paying subminimum wages. There are 12 entities in Texas with state use contracts that hold 14(c) certificates to pay subminimum wages. A review of the data reveals that some of these entities pay as little as 3 cents per hour, while the employing organizations' leadership is making six-figure annual salaries. State agencies and local governments are using Texas taxpayer money to pay these contracting organizations for the services provided by individuals with disabilities. The State Use contracts paying subminimum wages totaled over $5 million.



DRTx reviewed data from the Employment First Task Force, the Texas Sunset Commission, as well as the IRS 990 reports of several nonprofit organizations with State Use contracts, and found a huge difference between the pennies being paid to the workers with disabilities and the hundreds of thousands being paid to the organizations' CEOs. Some CEOs received compensation of $102,000, $147,000, $192,000 and $270,000 annually. In addition, TIBH Industries, the central nonprofit entity negotiating and approving the contracts under the State Use program, boasts a CEO compensation of over $300,000 per year.

In fiscal year 2013, state agencies and political subdivisions paid $40.8 million for products, and $93.6 million for services, from the State Use program, or a total of $134.4 million. TIBH Industries collected a 6-percent fee for these contracts. There is an enormous amount of money being made through these contracts, but the people with disabilities working for subminimum wages are not seeing any of it.

The federal government put an end to the practice of using taxpayer funds to pay subminimum wages for goods and services through federal contractors. In Texas, 55 organizations are listed as entities that are allowed to apply for federal contracts. They are now required to pay at least minimum wage for their federal contracts.

III. INVESTIGATING 14(C) IN TEXAS

Purpose

In 2001, the U.S. Government Accountability Office (GAO) released a report on the 14(c) program. The GAO report found that:

- The wages paid to workers under a 14(c) certificate were very low (more than half the workers earned below $2.50 an hour);
- Workers were almost exclusively housed in segregated environments (only 5 percent of 14(c) work was performed in the community);
- Workers who entered a sheltered workshop very rarely transitioned jobs at or above minimum wage in the community;[36] and
- Once people entered work shelters, it was common for them to stay there for the rest for their lives.[37]

The GAO found that the DOL "has not effectively managed the special minimum wage program to ensure that 14(c) workers receive the correct wages because … the agency placed a low priority on the program in past years."[38] The report also found that the DOL was not doing all it could to ensure employer compliance with 14(c) rules. The DOL failed to systematically conduct self-initiated investigations, failed to follow up with employers who did not reply to renewal notices, and failed to adequately train its own staff on the requirements of the special subminimum wage program.[39]

Generally, sheltered workshop employees are not aware of their legal rights, and several of the workers demonstrated a diminished self-worth. Unfortunately, federal and state agencies still do not provide much oversight of the 14(c) program.

Today, the majority of employees who work in sheltered workshops perform monotonous, repetitive tasks and continue to be paid well below minimum wage. Generally, employees are not aware of their legal rights, and several of the workers DRTx interviewed demonstrated a diminished self-worth. Unfortunately, federal and state agencies still do not provide much oversight of the 14(c) program. This lack of oversight created an environment where employers could get away with egregious human rights abuses. One of the most gut-wrenching examples is Henry's Turkey Farm.

Eight years after the GAO report, in 2009, the state of Iowa discovered a work shelter named Henry's Turkey Farm. Henry's Turkey Farm employed about 60 men with intellectual disabilities, and housed them in a 106-year-old, cockroach-infested home.[40] Hundreds of Texas men were placed at Henry's Turkey Farm over the years.[41] Many workers had tooth decay, dried blood under their nails, and soiled beds.[42] These men were paid an average wage of 41 cents an hour and were physically and verbally abused on a daily basis. After taking into account food and lodging, the men were paid only $65 a month.[43] Henry's Turkey Farm also employed workers without disabilities who were paid $9—$12 an hour for performing the exact same work. Due to a lack of agency oversight, the Turkey Farm operated for over 30 years without anyone noticing.

Workers with disabilities went to great lengths to escape the conditions. One of the workers, Gene Berg, ran away multiple times after repeated verbal abuse, and although he was often found quickly, he cherished his small moments of freedom.[44] Another worker, Alford Busby Jr., ran away into a snowstorm after being sent to his room. His body was found 3 months later; he had died from hypothermia.

Henry's Turkey Farm was shut down in 2009, and the Equal Employment Opportunity Commission (EEOC) subsequently filed a lawsuit against them to resolve the claims of disability discrimination and severe abuse.[45] A jury ultimately awarded $240 million in damages, the largest verdict in the federal agency's history.[46] The plaintiffs included 32 men who had suffered years of severe mistreatment at the hands of Henry's Turkey Farm.[47]

A view outside at Henry's Turkey Farm

In response to the Henry's Turkey Farm scandal, the National Disability Rights Network (NDRN) sent out a call to action. In its 2011 report, *Segregated and Exploited: The Failure of the Disability Service System to Provide Quality Work*, the NDRN examined the inability of sheltered workshops/segregated employment settings to meet the needs of workers with disabilities. Its 2012 follow-up report, *Beyond Segregated and Exploited*, challenged all states to take action to end segregated work, the subminimum wage, and the further exploitation of workers with disabilities.

DRTx responded by initiating an investigation of sheltered employment in Texas. In addition to researching and analyzing trends of sheltered workshops, DRTx created a task force that visited and monitored sheltered workshops across Texas.

Sites Investigated

To implement this investigation, DRTx obtained a grant from the State Bar of Texas Labor and Employment Law Section to fund a legal intern, training, and travel expenses for the project. The task force members received training from NDRN on the monitoring protocol. After gathering and analyzing data from the DOL about sheltered workshops, the DRTx task force selected 12 workshops for monitoring in Texas. This diverse list was based on:

- Location (goal to visit at least two per region including both urban and rural)
- Inclusion of both non-profit, for-profit and quasi-governmental organizations;
- Inclusion of some organizations with 'state-use' contracts;
- Settings with a high percentage of workers being paid subminimum wages;
- Locations with a high percentage being paid less than 50 cents per hour; and
- Employers making substantial profits and/or paying high wages to executive staff.

An on-site monitoring tool was developed with the assistance of NDRN. This tool standardized the gathering of information at each site, and provided specific questions for the individual interviews of employees and employers. The purpose of the tool was to gather comprehensive information about each organization's employment services and the workers' experiences. At least three task force members participated in the site visits for each sheltered workshop.

The 12 sheltered workshops visited were located in Brookshire, Brownwood, El Paso (2), Ft. Worth (3), Lubbock, Lufkin, San Antonio (2) and Victoria. A total of 1,830 individuals were reported as working at these sheltered workshops.

IV. FINDINGS

"Segregated, subminimum wage work is just an expression of low expectations that instills a false sense of incapacity in individuals who could become competitively employed with the proper training and support."

– United States Representative Gregg Harper (R-Mississippi)

During the monitoring visits, task force members met and interviewed 100 people. Participation in the individual interviews was voluntary. After each visit the data collected was entered into the NDRN online database. Data gathered from the 100 individual interviews included demographic information as well as individual experiences. Sixty percent of the individuals interviewed were male and 40 percent were female. They were broken down by the following race/ethnic categories: 46 percent white, 25 percent African-American, 19 percent Hispanic, and 10 percent other or unknown. Fifty-five percent of the individuals lived in group home residential settings, 32 percent lived in a family home, 12 percent lived at the onsite residential setting and one percent lived in their own apartment.

Each site had unique attributes, but universal themes emerged:

1. Sheltered workshops do not provide meaningful opportunities for skill advancement to Texans with disabilities.

"The fact that a worker is a 'client' or 'consumer' of a facility specializing in rehabilitation, teaching independent living skills, and/or job training in and of itself does not make the worker a worker with a disability and eligible to be paid a subminimum wage. The worker must still have a disability for the work he or she is employed to perform."

– From the Wage and Hour Division Field Operations Handbook

Sheltered workshops provide minimal opportunity for individuals to develop their skills. The work performed in workshops sets expectations low; workers shred paper, fill containers, or sort small items. The investigation found many workers with disabilities who were very adept at performing the work given to them. Yet despite these workers' abilities, they were not given the opportunity to advance their skills. The investigation found some workers who had been performing the exact same task for five or ten years with no opportunity to develop their skills or earn more than subminimum wage.

For example, one employee quickly and deftly sorted the products as required by the contract. The employer said this worker had trouble staying on task and sometimes preferred talking to his friends. The employer did not acknowledge that perhaps the work was beneath the worker's skill level and a subminimum wage pay did not motivate the worker. This worker was not given the opportunity to develop his skills beyond the basic

sorting. Another employee was described as a “good worker” by the workshop. She also quickly and deftly sorted the products as required by the contract. It seemed evident she was capable of much more, but was stuck performing the task in front of her, without the opportunity to develop her skill set.

Interestingly, there were a few workshops in which the work was relatively complex and challenging. The complexity of the work being performed raised question if workers are actually “disabled for the work being performed” as is required under 14(c), and whether they should be paid the legal minimum wage instead. For example, we observed an employee who was deaf who worked moving heavy machinery. He was skilled at this type of manual labor, yet he was being paid subminimum wages. It was doubtful that his disability impacted the work being performed.

Further, sheltered workshops do not consistently provide workers with an opportunity to earn meaningful income. Not only are workers earning subminimum wage, they are also not spending the entire work-day on wage earning activities. The majority of sheltered workshops reported that workers spend less than 50 percent of their time on “wage activities.” Texans with disabilities are being promised the opportunity to work and earn wages, but instead are spending the majority of their time on non-wage activities.

When wage-earning work is not available, many of the workshops serve as day habilitation facilities. Day habilitation facilities are supposed to provide assistance by helping individuals to acquire skills needed to reside, integrate, and participate successfully in the community. However, the day habilitation activities observed were most often playing games, watching television, playing video games, or coloring in coloring books. The investigation did not reveal any day habilitation services that actually assisted individuals to integrate and participate successfully in the community. The investigation also did not observe day habilitation activities that developed skills that would apply to jobs or work in the community.

Jane is in her early forties, but still remembers fondly the day she graduated from high school. She remembers how her friends and family went to celebrate her graduation. After graduation she worked as a nursing home aide, but eventually ended up working at a sheltered workshop. Now she counts assembly parts all day. She says she wants a job helping people and she hopes to one day go back to school. She has never had a DARS counselor.*

2. Sheltered workshops create a segregated and isolated environment ripe for exploitation.

Texans with disabilities in sheltered workshops are segregated from their communities and do not have the opportunity to interact with people who do not have disabilities. Most workshops observed were in large, open warehouses and all the individuals working were individuals with disabilities. Workers do not work next to or with people who do not have disabilities. There are a few individuals without disabilities who oversee the workshop floor. Workshop managers, who generally do not have visible disabilities, occasionally

will leave their separate office area and observe or visit the workshop area. This segregated environment does not replicate what it would be like to work in the community.

The workshops were mostly in industrial or rural areas of town and consisted of concrete or linoleum flooring with folding tables spread throughout the room. Workers did not leave for lunch, either because they were not allowed to or there was no process for them to enjoy lunch in the community.

Commercial contracts fulfilled in workshop settings actually move work away from the community. Nothing about the work being performed necessitates that it be done in a sheltered workshop. DRTx frequently observed shredding, assembly, and packaging work, which was always determined by the contracts held by the organizations. The contracts were secured through government programs like TIBH or Source America, and also through private companies including Kohler, Caterpillar, Shave Secret, Balfour, Tyco, and Bahama Bucks.

One workshop segregated individuals by gender. This workshop referred to their adult employees as “boy and girls,” and placed them in separate areas to minimize “behavioral issues.”

Some sheltered workshops are run by residential service providers. These workshops are populated by the residents, and participation in the workshop is considered mandatory. These individuals are particularly segregated since they both live and work with the same individuals.

DRTx observed workshops that maintained institutional control over virtually all aspects of their employees’ lives. The employer served as the representative payee, residential provider, transportation provider, and employer. Given the control that the workshop had over the employees’ lives, the environment is ripe for exploitation with no oversight. Further, in some workshops there was little freedom of movement. Parts of the building were locked and not accessible to workers with disabilities, though they were accessible to workshop administrators.

Sam is a talkative young man who has been working at the workshop for 11 years. He wants “to get out of here” and “move on” to something better. He says he has tried to “escape” the workshop but has been unsuccessful. His workshop is in a rural area, miles from accessible transportation options or community services. He says that the job skills he has learned at the workshop are “hanging out with friends and chilling.” He had no trouble recounting that he gets paid $179 for 30 hours of work, but is only “allowed” to receive $25 and doesn’t know why. He would love to work at a gift shop, but can’t get out.*

3. Wages in sheltered workshops are minimal, frequently miscalculated, and exclusively controlled by the provider.

"It is the policy of the Wage and Hour Division (WHD) to carry out a vigorous, consistent, and effective enforcement program with respect to employment of workers with disabilities under section 14(c). This policy is essential because many of the workers with disabilities paid at [subminimum wages] have little knowledge of their rights under the various Acts enforced by Wage Hour or may be unable to exercise them."

– From the Wage and Hour Division Field Operations Handbook

The wages paid in sheltered workshops are very low. The wage information reported to the DOL by the 12 monitored organizations showed that wages were as low as one cent per hour. The average lowest wage was 15 cents per hour. This means that if an employee works 40 hours a week, he or she would bring home a weekly paycheck of $6.00. No monitored workshops provided 40 hours of weekly work to its employees. Half of these organizations reported paying 100 percent subminimum wages, while the remaining organizations on average paid subminimum wages to 89 percent of their employees.

In certain circumstances, wages are supposed to be paid commensurate with the production of each individual employee, yet DRTx's survey found that many of the employees were paid the exact same amount. Further, DRTx found that some workshop managers did not appear to monitor the time employees spent working and consequently, their wages would not be calculated accurately.

The DOL has specific requirements for time studies to calculate the appropriate wages to be paid. Although all certificate holders are required to submit this information in the certification process, DRTx observed or was directly told by some of the organizations that they were not calculating the wages as required. Some sheltered workshops explained how they calculated the rate of pay for employees working as part of a team. The wages were divided equally among the whole team and did not account for the individual contributions of each team member. This calculation is not in accordance with DOL requirements.

Some of the residential providers that operated sheltered workshops appeared misinformed about how earnings might impact employees' benefits. They indicated a need to control the wages and job assignments, stating incorrectly, "If we pay them too much they will lose their benefits." This type of unilateral control over wages disempowered employees from wanting to earn more.

Julie is an articulate young woman who has been working at her current workshop for two years. She graduated from high school and went to work in the fast food industry. She says that she used to earn about $300 every two weeks at the fast food restaurant. But since her guardian moved her to the sheltered workshop, she receives $30 every two weeks. She wants to earn more but feels like she is trapped. At one point she had a DARS counselor but he told her that he couldn't help her. She dreams of leaving the workshop and working with animals in the community.*

4. Sheltered work is not leading to integrated employment in the community.

"Some workers, after acquiring proper training and/or experience, successfully overcome disabilities in the workplace and should no longer be paid a subminimum wage."

– From the Wage and Hour Division Field Operations Handbook

Seventy five percent of workshops monitored reported that individuals had been working at the facility for six years or more. Out of that 75 percent, 58 percent had been working for more than 11 years, with 31 years being reported as the longest tenure.

Half of the workshops monitored reported that no individuals had moved from subminimum wage to minimum wage in the last 12 months. Some workshops incorrectly indicated that moving individuals from subminimum to minimum wage was "not the intent of [the] program." Only 17 percent of workshops reported more than 10 individuals moving from subminimum wage to minimum wage in the last 12 months, and 25 percent reported moving 5 to 10 individuals from subminimum to minimum wage.

Though an overwhelming majority of sheltered workshops report providing supports to prepare individuals for employment in the community (83 percent of the agencies monitored reported that they have additional supports available for this), the low number of individuals actually making the move to minimum-wage work suggests the employment and job supports provided are not adequate. Sheltered workshops reported providing training on resume building and interviewing techniques, but the success in moving to minimum wage positions is low.

DRTx observed many employees who had evident abilities to work in the community. Many had worked in the community in the past. Given that sheltered workshops are supposed to provide proper training and experience, one would expect that employees would be moving out of workshops more frequently. This is especially true given the number of employees encountered who were very high-functioning and motivated to work elsewhere.

Bob is a bright, 21-year-old man. He graduated from high school and has taken some online courses towards a post-secondary degree. For fun he likes to play video games and hang out with friends. He wants an "outside job," but needs help with interviewing skills. He has never had a DARS counselor or anyone to help him with interviewing. One day he says he would like to be a park ranger.*

5. Texas state vocational rehabilitative services are not providing vocational services to Texans with disabilities leaving many individuals stuck in workshop settings.

Only 19 percent of all the individuals interviewed had, or had previously had, a DARS counselor. In addition, 15 percent of the agency representatives explained that they had only limited success in clients receiving vocational services through DARS. These agency representatives had contacted DARS but never received a response or any meaningful assistance from DARS for their employees. Seventy five percent of the agencies reported that they refer individuals to DARS for employment services, but few of the individuals surveyed currently had a DARS counselor. Forty percent of the individuals interviewed told us they were currently looking for other work on their own.

To better understand the employment goals of workshop employees, DRTx asked all employees interviewed what their "dream job" would be. Almost universally, they responded with a job that was both achievable, and available in the community. The majority dreamt of attainable positions such as working at McDonald's, H-E-B, Walmart, Pizza Hut, Taco Bell, Chuck E. Cheese's, or Big Lots. Others wanted to be a cook, wash dishes, work on cars, babysit, or work in an office. These jobs are all jobs DARS could assist them in attaining.

Joe is 21 years old and recently graduated from high school. He is not happy at his workshop placement. He would prefer to be in the integrated workforce, but he ended up at the workshop right after high school. He has never worked with DARS to help him find integrated competitive employment. Joe is discouraged because he has not learned any job skills at the workshop. The workshop provider told him they have a book on workforce skills he could look through, but offered him no help or training beyond that.*

The stories used in the preceding section are real but names have been changed to protect the individuals' privacy.

V. Looking Ahead

In the last several years there has been progress around sheltered workshops in other parts of the country. On the federal level, the Workforce Innovation Opportunity Act and Executive Order 13548 have had an impact on subminimum wage work. In addition, the Department of Justice (DOJ) has investigated the sheltered workshop system in Rhode Island and Oregon, and these investigations have prompted changes in those states.

The Workforce Innovation Opportunity Act

The Workforce Innovation and Opportunity Act (WIOA) of 2014 includes provisions designed to help ensure alternatives to sheltered workshops and subminimum wage. The WIOA provisions are focused on young people with disabilities who are transitioning from education to employment. Beginning July 22, 2016, any student with a disability, prior to being able to work for a subminimum wage, must be provided an opportunity for pre-employment services (e.g. work learning experiences, counseling, and supported employment). In addition, individuals currently in sheltered workshops will be afforded the same opportunity for pre-employment services. They would only be allowed to remain in sheltered work if the vocational rehabilitation agency determined them to be ineligible for services, or if they were not successful through a vocational rehabilitation agency placement.

Beginning July 22, 2016, any student with a disability, prior to being able to work for a subminimum wage, must be provided an opportunity for pre-employment services and individuals currently in sheltered workshops would be afforded the same opportunity.

Executive Order 13548

Executive Order 13548 of 2010 directed the federal executive branch to increase recruitment and retention of people with disabilities in competitive positions. The passage of a subsequent executive order in 2014 required that all federal contractors be paid a minimum wage of $10.10 per hour.

Oregon and Rhode Island Settlements

In Olmstead v. L.C., the Supreme Court held that services, programs, and activities provided by public entities must be delivered in the most-integrated setting appropriate to the needs of a person with a disability.[48] The "integration mandate" applies to people who receive employment services through the state or other public entities. In 2012, eight named plaintiffs with developmental disabilities receiving employment services from the state of Oregon brought a claim that they (and thousands of similarly situated individuals) remained unnecessarily segregated in sheltered workshops.[49] The district court held that the integration mandate is not limited to residential institutional settings, but also applies to vocational programs.[50] The court reasoned, "Although the means and settings differ, the end goal is the same, namely to prevent the 'unjustified institutional isolation of persons with disabilities.'"[51]

During the litigation, the DOJ conducted an investigation of Oregon's vocational services for people with disabilities.[52] The DOJ recognized that people in America spend most of their time working, which promotes "self-sufficiency, independence, personal growth, and self-esteem."[53] The DOJ made several important findings.

First, it found that work shelters in Oregon were a segregated setting. The DOJ relied on several factors to reach this finding. For one, the sheltered workshops system directly limited contact with people without disabilities. The data collected during the investigation showed that 85 percent of people in sheltered workshops had fewer than 5 people without disabilities in their immediate environment.[54] Furthermore, sheltered workshops were structured in a way that did not allow people with disabilities to interact with staff who do not have disabilities. People in work shelters were found to be in a repetitive and fixed schedule. Also, break and lunch areas were typically on one side of the appointed workspace. Workers had similar shifts and breaks, consequently their interaction with people outside the institution was limited.[55] Several workshops had separate facilities (lunch rooms, conference room, etc.) for the management and staff without disabilities.[56]

In Oregon, the district court held that the most integrated setting appropriate requirement is not limited to residential institutional settings. The court reasoned, "Although the means and settings differ, the end goal is the same, namely to prevent the 'unjustified institutional isolation of persons with disabilities."

The DOJ further determined that the business nature of sheltered workshops promoted the segregation of people with disabilities. The large size of most segregated workshops required that they be located in areas set aside from other businesses and from public transportation. As a result, workers were forced to rely on the workshops for their transportation, further segregating people with disabilities.[57] Also, the DOJ discovered that workers in sheltered workshops earned very little, a few only pennies an hour.[58] By not paying a minimum or competitive wage, the segregated workshops perpetuated the system of segregation by cutting off economic independence. [59]

Additional DOJ findings included: the majority of Oregon's employment/vocational services are delivered in work shelters; many people in sheltered workshops could be served through supported employment; Oregon administered its employment/vocational services in a way that segregated people with disabilities; transition youth (people with disabilities exiting the K—12 school system) are at an increased risk of sheltered workshop placement, namely because of the lack of transition options available under state law; and serving people with disabilities in an integrated employment setting can be reasonably achieved.[60]

After two years of litigation, the case ended with a historic settlement agreement.[61] The agreement focused primarily on ending the pipeline from schools to sheltered workshops, and on helping transition-age youth. It further required that at least 1,115 working age individuals, who had previously been served in a sheltered workshop, would obtain competitive integrated employment over the next seven years.[62] The agreement provided that over half the youth who received employment services must be provided an Individual Plan for Employment (IPE), and that all transition youth must be provided a career development plan.[63] Additionally, Oregon would no longer fund sheltered workshop placement for transition-age youth, for individuals who are newly eligible for vocational services, or for anyone else receiving services.[64]

The DOJ also investigated a Rhode Island sheltered workshop, Training Thru Placement (TTP), as well as the school that provide most of its workers, the Birch Vocational Program. Birch was a special education program located in an isolated corner of a Rhode Island high school.[65] The investigation focused on the "serious risk" of unnecessary segregation by the City of Providence, the school district, and particularly TTP.[66] Similar to the DOJ findings in Oregon, the DOJ found that the City of Providence failed to meet its obligations under the ADA by imposing a serious risk of unnecessary segregation on people with disabilities, particularly students at Birch.[67] Also similar to Oregon, the DOJ and the City of Providence reached a settlement agreement providing for the dismantling of the school-to-sheltered-workshop pipeline.[68] Rhode Island and the City of Providence must now provide a robust person-centered system of career development for transition youth, and former employees at TTP, in order to move them into competitive integrated employment.[69] Individuals who spent the last 30 years of their life at TTP are now in competitive integrated jobs, and nearly 100 individuals have been placed in competitive integrated positions.[70]

During the investigation of the City of Providence, Birch, and TTP, the DOJ initiated an investigation of the state of Rhode Island to determine whether it violated Title II of the ADA through its use of day services and vocational services systems.[71] Again, the DOJ discovered a system that over-relied on sheltered workshops. Eighty percent of people with intellectual and developmental disabilities who received vocational services from the state were segregated into sheltered workshops.[72] Only 5 percent of students with disabilities in secondary schools were transitioned into integrated jobs between 2010 and 2012.

In Rhode Island, the DOJ found that 80 percent of people with intellectual and developmental disabilities (IDD) who receive vocational services from the state were segregated into sheltered workshops. It also found that only 5 percent of students with disabilities in secondary schools between 2010 and 2012 were transitioned into competitive integrated jobs.

The DOJ and Rhode Island entered into a consent decree that set up a 10-year plan to move people out of sheltered workshops and into competitive integrated employment.[73] The consent decree also requires protection for transition-age youth.[74]

VI. RECOMMENDATIONS: MOVING TEXAS FORWARD

In 2015, the Employment First Task Force in Texas issued a report[75] recommending the full inclusion of individuals with disabilities in the workplace by ending sheltered employment and subminimum wage for people with disabilities. In addition, as part of its review of the Texas Council for Purchasing from People with Disabilities, the Texas Sunset Commission recommended the elimination of this state agency and the transfer of its functions to another state agency with an advisory committee to redirect the activities to implement employment activities closer aligned with Employment First policies.

DRTx fully supports the goals of the Employment First Task Force, and the full inclusion of Texans with disabilities in the workplace, through the following recommendations:

1. Texas should develop a 5-year plan to transition people with disabilities out of subminimum wage and segregated work environments and into competitive integrated employment.

- The Texas Department of Assistive and Rehabilitative Services and the Texas Workforce Commission should conduct outreach to persons currently in sheltered workshops to determine what services, reasonable accommodations, or assistive technology are needed. This may include supported employment in order to increase participants' marketable job skills and productivity, and community-based work options or other support programs.
- Revenue generated from "state use" contracts administered by the Texas Council on Purchasing from People with Disabilities should be used to fund individualized, supported employment for persons with disabilities who are currently working in segregated settings. The funds should also be used to create community-based employment opportunities that pay workers at least the minimum wage.
- State agencies utilizing "state use" contracting services should be prohibited from executing contracts with organizations that are paying subminimum wages.
- The Texas Education Agency should end the pipeline from schools to sheltered workshops by prohibiting the use of funding subminimum wage environments for youth with disabilities transitioning out of public education.

2. Texas state programs need a greater emphasis on job development, job placement, and training on financial planning options for individuals with disabilities.

- Consistent with rules implementing Texas' Home and Community Based Services program, prevocational services funded by Medicaid in segregated settings should be phased out.

- Individualized plans should be developed to integrate and support full access to the community. The plans should:
  - Allow individuals to select their setting, and options should include non-disability specific settings;

- Ensure rights of privacy, dignity and respect, and freedom from coercion and restraint;
- Optimize autonomy and independence in making life choices; and
- Facilitate choice regarding services and service providers.

- Residential providers should not operate sheltered workshops, in order to ensure independence and choice, and eliminate an institutional model of service delivery.
- Sheltered workshop providers should not serve as Representative Payees for workers, in order to prevent a conflict of interest.
- Providers should be trained on the Social Security Administration work incentives, which allow individuals receiving Supplemental Security Income to exclude resources from total earned income.
- Individuals, families, and providers should be trained on the opportunities available through the ABLE Act, to invest earned income without jeopardizing benefits.
- Employment specialists should be required to use established best practices, including spending time with individuals in community settings, working with families, and negotiating job responsibilities with an employer.
- Outreach, training, and other information should be given to individuals with disabilities, families, and employment services providers, about local job opportunities, negotiating job responsibilities, job coaching, and other employment assistance and supported employment services.
- DARS should be required to meet with individuals in sheltered workshops to offer supported employment services options.

3. Integrated day habilitation services should be developed in the community rather than segregated facilities.

- Consistent with Home and Community Based Services rules, day habilitation services should not provide training and community integration opportunities in a segregated facility.
- Sheltered workshop and day habilitation services should not be located in the same or adjacent facility.
- Providers should ensure that individuals know that participation in day habilitation services is optional and not required, based on each individual's person-centered plan. For those who choose day habilitation, allow self-direction of services to participate in activities of shared interest with other individuals.
- The state of Texas should review best practices, and should set standards and set performance measures for day programs, and should adjust rates accordingly to accurately reflect a growing emphasis on community presence.
- The state of Texas should require registration of day habilitation providers and an annual inspection of day habilitation locations.

4. Texas should develop state policies to remove barriers to state agencies hiring people with disabilities.

- State agencies should track outreach, hiring, and retention of persons with disabilities in integrated work environments at comparable wages.
- The Texas Education Agency should renew and improve its efforts to employ people with disabilities as required under the Individuals with Disabilities Education Act.

DRTx's investigation and findings underscore that Texas is at a turning point, and its policy choices can make a critical difference in the lives of Texans with disabilities. Texas has before it both an opportunity and an obligation to ensure people with disabilities have access to the same employment opportunities that all other Texas citizens have.

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