

Sheltered Workshops are private non-profit, state, or local government entities that provide employment opportunities for individuals with disabilities. Persons served in this environment may include those with developmental, physical, and/or mental impairments, ranging from mild to extreme/profoundly affected individuals. Sheltered workshops:

- Provide prevocational training, with the goal to prepare for competitive employment for available jobs in the open labor market
- Emphasize support of individual needs, based on ability to choose work activities that fit with a person's skills
- Often include additional training in personal care, living skills and developing social skills
- Honor the depth and scope of the DD population, recognizing that some individuals may not ever be able to be competitively employed

After completing a rehabilitation program, many individuals are able to leave the workshop environment and enter regular employment, if there is a job available for which they qualify. Individuals unable to obtain regular employment because of the severity of their impairments or unavailability of jobs can remain in the workshop environment. Individuals performing services are paid a fraction of, or up to minimum wage, depending on their capacity to perform the services.<sup>1</sup>

While work is the main focus at facility based programs, sheltered workshops also provide opportunities for people with disabilities to challenge themselves, further their self-esteem and self-confidence, develop friendships and engage in their communities. Because of the supports and protections in place, those with more severe/profound impairments can find success in meaningful and productive activities which may not otherwise be possible for them in mainstream businesses. Sheltered workshops often include adult day services which include personal care, living skills, developing social skills, etc.

Often, individuals with disabilities too severe for sheltered work rely on day programs for community integration and meaningful and constructive activities during the day. These facility-based programs also provide opportunities for building self-esteem, confidence, social skills and friendships so important for both mental and physical health.

### **Specialized Supports**

For those individuals with intellectual and developmental disabilities (I/DD) who enter the competitive workforce, specialized supports are often required to ensure a successful work experience. Proponents of “supported employment” contend that as long as the appropriate supports are in place, the goal of “real” employment should be achievable for everyone with a disability. While this is a laudable goal, society must recognize the pressures that exist in business that are driven by economic issues, deadlines and competition in the market. For many with I/DD, these realities interfere with their ability to maintain competitive jobs long-term and for a full eight-hour workday.

### **Eliminating Special Minimum/Commensurate Wages**

Provisions for Special Minimum Wage Certificates, under the Department of Labor, Fair Labor Standards Act (FLSA) of 1938, Section 14(c), help people with disabilities obtain jobs in a competitive workforce. Employers who receive a certificate from the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) have the ability to pay special minimum wages (below the federal minimum wage) to employees who have disabilities, if the disability affects job performance.<sup>2</sup>

<sup>1</sup> Social Security, Program Operations Manual System, RS 02101.270 <https://secure.ssa.gov/apps10/poms.nsf/lnx/0302101270>

<sup>2</sup> Goodwill Industries, “Employment of People with Disabilities through FLSA Section 14 (c) <http://www.goodwill.org/wp-content/uploads/2013/06/Goodwill-14c-Fair-Wages-Position-Paper.pdf>

This provision of the FLSA is often inaccurately referred to as offering a “Sub-Minimum Wage” in what appears to be an intentionally derogatory manner to dampen public support for the program. There have been formal attempts to eliminate Special Minimum Wage Certificates altogether. One example, H.R. 831, is a bill intended to phase out special wage certificates under the Fair Labor Standards Act.

Efforts to end the provision of special minimum wage certificates could adversely affect individuals with significant and profound disabilities if they are unable to produce goods at the same rate as less disabled or non-disabled workers. Liability issues, and the additional costs involved with providing necessary specialized supports in the work environment can also become disincentives to hire individuals with the most significant needs. Offering a special minimum wage incentivizes and enables employers to provide employment to individuals with disabilities who may not otherwise be given the opportunity to work.

### **Why You Should Be Concerned**

Many of the taxpayer-funded government agencies and non-profit organizations that disparage Intermediate Care Facilities (ICF’s) as “isolating” use the same criteria to stigmatize sheltered workshops. They deliberately disregard the importance of sheltered workshops and facility-based day programs to the portion of the I/DD population who depend upon them. These organizations, often taxpayer funded entities, have legislated against sheltered workshops in the same manner in which they have attacked ICF’s, despite the lack of employment opportunities for individuals with I/DD, and the fact that few employers have an incentive or the ability to hire individuals with profound disabilities. Integration into a non-disabled workplace is not the primary goal for all individuals with I/DD, and should not be given precedence over safety, productivity, or a sense of community among one’s peers.

The continued, and many believe intentional, misinterpretation of the Supreme Court’s *Olmstead* decision permeates numerous policies, including the **Work Innovation and Opportunities Act (WIOA)**, which severely limits work settings and rehabilitation programs for disabled persons. Such policies negatively affect individuals with the most extreme and profound disabilities by eliminating the individual’s right to choose the work environment most appropriate to their unique needs.<sup>3</sup>

In its recently released 13-page Guidance document on Employment<sup>4</sup>, the **Department Of Justice (DOJ)** uses the word “segregated” or “segregation” no less than 40 times when referring to sheltered workshops. At the same time, it picks and chooses selective passages from *Olmstead*, deliberately ignoring those passages that address the needs of those individuals with disabilities who rely upon higher levels of care. In doing so, the DOJ marginalizes our most vulnerable citizens and even puts them at risk by ignoring warnings that permeate *Olmstead*’s majority and concurring opinions.

DOJ’s selective interpretation of the Supreme Court *Olmstead* Decision amounts to an unwarranted attack on the portion of the I/DD population with the most complex need, in that it eliminates the settings that best support them. The DOJ refuses to acknowledge that individual choice is paramount in both residential and employment options, and thereby violates the civil and human rights of vulnerable citizens by refusing to meet the need for a wide range of programs to support that choice. People with significant disabilities deemed not qualified to work would be forced to stay at home, receive no wages, and be denied the tangible and intangible benefits of work.

### **States Must Stand Up for Their Citizens with I/DD**

Families seeking answers when they find their loved one’s sheltered workshop or day program under attack are often told of recent CMS rule changes by state officials. State officials, however, often fail to take advantage of the opportunities CMS provides within the rule changes to allow states to maintain these programs with adjustments.

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<sup>3</sup> U.S. Department of Labor Wage and Hour Division Fact Sheet #39H <https://www.dol.gov/whd/regs/compliance/whdfs39h.pdf>

<sup>4</sup> DOJ Statement on Application of Integration Mandate of Title II of the ADA and *Olmstead* to State and Local Governments’ Employment Service System for Individuals with Disabilities [https://www.ada.gov/olmstead/olmstead\\_guidance\\_employment.pdf](https://www.ada.gov/olmstead/olmstead_guidance_employment.pdf)

The Centers for Medicare and Medicaid Services (CMS) makes clear in their guidance that facility based settings are not prohibited and that states have flexibility in determining what those services look like. In fact, CMS guidance states, *“The rule creates a more outcome-oriented definition of home and community-based settings, rather than one based solely on a setting’s location, geography, or physical characteristics.”*<sup>5</sup>

CMS’ publication of “HCBS FINAL REGULATIONS 42 CFR Part 441: Questions and Answers Regarding Home and Community Based Services”<sup>6</sup> provides further clarification to the new rules:

**Question 4, page 10:** “Does the regulation prohibit facility-based or site-based settings?”

**Answer:** No.

*“The regulation requires that all settings, including facility- or site-based settings, must demonstrate the qualities of HCB settings, ensure the individual’s experience is HCB and not institutional in nature, and does not isolate the individual from the broader community. In particular, if the setting is designed specifically for people with disabilities, and/or individuals in the setting are primarily or exclusively people with disabilities and on-site staff provides many services to them, the setting may be isolating unless the setting facilitates people going out into the broader community.”*

*“We note, however, that states have flexibility in determining whether or when to offer HCBS in facility-based or site-based settings, as the regulation only establishes a floor for federal participation.”*

**Question 5, Page 10:** “Do the regulations prohibit individuals from receiving pre-vocational services in a facility-based setting such as a sheltered workshop?”

**Answer:** No

*“Therefore, a state could allow pre-vocational services delivered in facility-based settings that encourage interaction with the general public...”*

*“We note, however, that pre-vocational services may be furnished in a variety of locations in the community and are not limited to facility-based settings, and that states have flexibility in determining whether and when to use facility-based settings.”*

**Question 6, Page 11:** “Will CMS allow dementia-specific adult day care centers?”

*“The HCBS regulations do not prohibit disability-specific settings... the setting must meet the requirements of the regulation, such as ensuring the setting chosen by the individual is integrated in and supports full access of individuals...to the greater community...”*

**Question 7, Page 11:** “Can a day service that has both HCBS waiver participants and ICF residents provide Medicaid-covered HCBS in an ICF/IID?”

*“If the state believes that the setting meets the HCB settings requirements and does not have characteristics of an institution, the state can follow the process to provide evidence and demonstrate that the setting can or will comply with the HCB setting requirements or regulations.”*

**VOR encourages families to point this guidance out to state officials and hold them accountable for their duty to provide safe and appropriate services for the vulnerable individuals they serve.**

## Conclusion

VOR asserts that sheltered workshops and facility-based day programs **are also supported employment services**, allowing individuals with intellectual and developmental disabilities to pursue their skills and interests in the most integrated setting possible according to their individual needs and capabilities. They provide hundreds of thousands of individuals with productive employment, responsibility, necessary structure and the opportunity to achieve and to measure their own skills and to work toward improving them.

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<sup>5</sup> CMS Fact Sheet: Summary of Key Provisions of 1915(c) HCBS Waivers Final Rule <https://www.medicaid.gov/medicaid/hcbs/downloads/1915c-fact-sheet.pdf>

<sup>6</sup> CMS, HCBS Final Regulations 42 CFR Part 441: Questions & Answers Regarding HCBS Settings <https://www.medicaid.gov/medicaid/hcbs/downloads/q-and-a-hcb-settings.pdf>

VOR believes in providing more, not fewer, service options to meet the wide range of intellectual and developmental disabilities. While expanding programming for individuals that can benefit from it should also be pursued, vital existing services that are clearly meeting needs should be retained.

VOR asserts that programs and services for people with disabilities, whether residential or employment focused, must be based on individual choice, need and capabilities in order to be successful, as stated in Olmstead

VOR supports supported employment services in community settings for individuals who are capable of working in this capacity and can benefit from these services.

There is a place for both integrated and facility-based employment services, as we as a society provide for the full continuum of care for individuals with disabilities as required by the U.S. Supreme Court Olmstead decision.