

# UNDER THE MICROSCOPE

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## FEDERAL ADVISORY COMMITTEE OUTLINES HUGE SHIFT IN EMPLOYMENT POLICY FOR ID/DD DISABLED PERSONS TO REALIZE COMPETITIVE, INTEGRATED EMPLOYMENT

### ISSUE

The Workforce Innovation and Opportunity Act (WIOA), signed into law by President Obama on July 22, 2014, makes significant improvements in federal law for Americans with disabilities, including youth with disabilities, as they transition from education to employment. WIOA does so by helping to ensure these citizens have opportunities to acquire the skills and training they need to maximize their potential and enter competitive integrated employment (CIE). Among the many provisions in WIOA designed to strengthen and improve employment for all persons with disabilities was the establishment of an Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (the “Committee”) under Section 609 of the Rehabilitation Act of 1973, as amended by Section 461 of WIOA.

Within WIOA, competitive integrated employment generally means work performed on a full or part-time basis (including self-employment) for which an individual is:

- (1) Compensated at not less than federal minimum wage requirements or the customary local rate;
- (2) Located where the employee interacts with other persons who do not have disabilities; and,
- (3) Presented opportunities for advancement similar to those for other non-disabled individuals.

Among those with disabilities, persons with ID/DDs have the lowest employment and compensation rates, and are the least likely to be engaged in CIE. At present, some 229,000 of these Americans are working for subminimum wages under Section 14(c) certificates, which allow subminimum wages to be paid when an individual’s disability impairs their productivity for a specific job. Nearly all those employed by 14(c) programs (which were created under the Fair Labor Standards Act, last amended in 1989), are working in sheltered workshops funded in part by federal Medicaid and Vocational Rehabilitation dollars.

The purpose of the Advisory Committee has been to prepare findings, conclusions and recommendations for the Secretary of Labor on:

- Ways to increase employment opportunities in CIE for individuals with ID/DD or other individuals with significant disabilities;
- The usefulness of certificate programs carried out under Section 14(c) of the FLSA for the employment of individuals with ID/DD or other individuals with significant disabilities; and
- Ways to improve oversight of the use of such certificates.

At present, the Advisory Committee is completing a summary report, including detailed recommendations, for presentation to Tom Perez, Secretary of the U.S. Department of Labor. That report is expected to be submitted sometime in August, with final DOL approval by fall, at which time the final report will be made public. For access to interim report drafts, and to the final report when it is published, visit <https://www.dol.gov/odep/topics/wioa.htm>.

## ANALYSIS

To get additional perspective on issues surrounding the work of the Advisory Committee on Increasing CIE, NACBHDD contacted Patrick Hendry, Vice President of Peer Advocacy, Supports, and Services for Mental Health America in Alexandria, VA. Hendry has served on the Committee and was a member of its Complexity and Needs in Delivering CIE subcommittee. Hendry explains that the Advisory Committee broke down its work into four subcommittees that included:

- Transition to Careers
- Complexity and Needs in Delivering CIE
- Marketplace Dynamics
- Building State and Local Capacity

In addition, the committee also examined and made recommendations about the ongoing value of two significant employment programs for those with disabilities: Section 14(c) programs and Ability One, a program that sets aside some federal service and supply procurement programs to be fulfilled by organizations that employ disabled Americans, some of whom work under Section 14(c) subminimum wage certificates.

The **Transition to Careers Subcommittee** focused closely on how young people with ID/DDs transition from the educational world to the world of employment. Historically, this group has not fared well, despite more than a generation of federal policy aimed at helping them advance to post-secondary education (PSE) or CIE.

The subcommittee found that the best predictor of post-school CIE outcomes was work experience and CIE during high school years, starting around age 14. Other contributors to CIE success included early access to vocational counseling, access to PSE courses and programs (both two-year and four-year), high family expectations and family-focused career planning (and knowledge of support systems), integrated service planning/seamless services between agencies, and the availability of workforce development professionals who are properly trained to work with people who have ID/DDs.

Among the most significant recommendations of the Transitions subcommittee, Hendry said, was that “transition to 14(c) employment should no longer be considered an acceptable goal for educational programs.” He added that while many older disabled Americans have come to rely on these programs, the Committee is calling for their gradual, eventual phase out, starting immediately where possible with school-aged youth today. Other recommendations include grants to increase family access to education and training supports, and better system integration, to eliminate buck-passing between agencies that has caused some to fall between the cracks of dueling service agencies and conflicting eligibility requirements.

The **Complexity and Needs in Delivering CIE Subcommittee** was charged with examining how to sustain a shift from current practices in disability employment, where segregated workshops prevail, to a future where competitive integrated employment is the expectation and the result. Ultimately, the committee (of which Hendry was a member) honed in on three very complex areas: funding, data and outcomes, and the future of Section 14(c) programs.

The subcommittee's report began by recognizing a series of federal programs--the Workforce Innovation and Opportunity Act (WIOA), the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), guidance from the Centers for Medicare & Medicaid Services (CMS), and the Achieving a Better Life Experience (ABLE) Act – that make CIE a priority for people with significant disabilities. Then it recommended a reexamination of the funding rules, together with expanded technical assistance, so that agencies and states could blend or braid funding to incentivize CIE. The group found that, despite recent advances in disability policy, there's still a high likelihood that disabled individuals will be placed in segregated employment or, worse, in non-employment day programs.

The subcommittee also identified disability support programs, including SSI and SSDI, and noted that they are seen by disabled people as discouraging, rather than encouraging employment, savings, and financial independence. These programs contrast with newer laws like the ACA and the ABLE Act that enable people with disabilities to save money and keep healthcare benefits while working. The subcommittee recommends interdepartmental action that encourages and enables people to pursue CIE without fear of losing benefits and living in poverty. "There's a huge fear factor among those receiving disability and health benefits that they can't trust the system," said Hendry. "It will take a huge amount of work to build trust and assure people that they can take the risk of trying competitive employment."

The subcommittee also recommends increased interagency collaboration to address a lack of knowledge within agencies and states about available best practices and evidence-based programs that have been effective in gaining CIE for people with disabilities. Interagency cooperation around defining CIE outcomes and collecting a wide range of CIE-related data is also recommended, along with publication of comparative performance data from states, agencies, and providers.

Hendry said that while much is possible through interagency cooperation (the committee recommends an interagency task force-see below), "there are still lots of legislative changes that will be needed, more changes than we initially thought, on the Congressional level."

**The Marketplace Dynamics Subcommittee** examined how proponents of CIE could better work with the business community and ways the federal government could support that work. This group focused on two key questions:

- 1) What do employers need to successfully meet their diversity goals and to increase the hiring, onboarding, and retention of people with significant disabilities?
- 2) How can businesses succeed with CIE without relying on FLSA Section 14(c) subminimum-wage certificates?

This subcommittee will recommend a marketing/awareness program aimed at highlighting businesses that have created successful CIE programs and sharing the business models that stand behind them. Workforce development professionals will be the target of new educational programs to help them better understand how to work with people with disabilities, while disability services professionals will be subject to new national training requirements to ensure a more consistent level of service and support nationwide.

"The subcommittee found that the level of supported employment services available to an individual varies a lot from place to place, with service professionals not always being well informed or aware of available programs and funding mechanisms," said Hendry of the recommendation for new training requirements. "We also felt that programs ought to be much better at communicating with the business community. They should be better able to talk about the full range of disabilities so that some people aren't left out, and that they needed to be better at communicating with businesses about what's needed to guide them through starting and sustaining the CIE process."

Another “huge” area, said Hendry, deals with “the lack of access to transportation, which is a major barrier to CIE nationwide.” The subcommittee is recommending that Congress appropriate new funding to the DOT and states to incentivize and ensure better access to transit and paratransit resources across the country—including the development of “paratransit and other transit options throughout rural America” . . . “so that transportation for people with ID/DD and other significant disabilities is seamless and uninterrupted.” The subcommittee also recommends that workforce development personnel identify and work to place disabled individuals at businesses that provide employee transportation benefits.

There’s also a focus on high-growth industries. “The healthcare industry is the fastest growing industry in the US, and the Committee wants to emphasize strategies that help boost employment in that field,” said Hendry. “We want to emphasize the importance of workforce development people understanding the opportunities and encouraging healthcare professionals to hire more people with disabilities. We are also asking that the DOL increase its support for internship and apprenticeship programs within the healthcare industry,” he added. Expansion of current tax deductions and credits aimed at job creation for large and smaller businesses in all industries are also among the recommendations.

Hendry highlighted the opportunities in behavioral health, citing Dr. Manderscheid’s assertion that trained peers could well comprise 25% of the future workforce. “That’s a huge number and an important opportunity for a large group of people with disabilities,” he noted. (Note: Hendry is also playing a leading role in the development the MHA National Certified Peer Specialist [MHA NCPS] professional credentialing program, which will be the first national, fully accredited certification program recognizing peer specialists qualified to work in both public and private whole health practices. For the latest reports on this vitally important program, visit: [www.mentalhealthamerica.net/national-certified-peer-specialist-credential](http://www.mentalhealthamerica.net/national-certified-peer-specialist-credential).)

**The Building State and Local Capacity Subcommittee** shaped its recommendations around expanding available support services for people with disabilities and developing more local competitive employment opportunities by better educating businesses on existing employment law.

The Committee found that the existing service culture, built largely around subminimum-wage workshops, has tended to perpetuate a segregated employment model and “low expectations for the achievement of CIE.” The committee recognizes that a fundamental shift – away from a culture of segregated employment and toward CIE – is essential for CIE’s future success.

It cites some states that are actively dismantling segregated employment structures. New Hampshire now prohibits wage discrimination based on disability. Vermont closed its workshops in 2002 and today, wages for those persons with ID/DD exceeds the minimum wage. Many other states are in some stages of dismantling past structures and promoting more CIE.

The Committee focuses a lot of attention on CMS, whose Home and Community Based Services (HCBS) Waiver programs fund rates for “vocational” services that vary widely among the states. At present, the Committee warns, CMS HCBS waivers are paying for services, not outcomes, and notes that CMS lacks “a standard data collection system to track employment services rendered to Medicaid beneficiaries participating in HCBS Waiver programs.”

“We hope that CMS will play a bigger role, through HCBS waivers, which have the ability to promote a lot more employment for people with disabilities. One of the ways is to make sure that states are knowledgeable about the waiver system, and another is to work with the interagency task force that is recommended by the Committee,” Hendry said.

**Interagency Task Force.** Among the crucial recommendations of the Advisory Committee is the creation of an interagency Task Force to link key functions of DOL, HHS, Education, and the Social Security Administration and improve interagency collaboration in support of expanding CIE. Key tasks for the task force include:

- Identifying and focusing legislative changes that will require Congressional debate and approval.
- Identifying and streamlining policy and regulations to allow for more braided funding, so that separate and often underfunded programs can better coordinate their resources for maximum reach and impact;
- Clarifying and demarcating agency roles and responsibilities with regard to improving support for CIE and deemphasizing institutionally-focused programs and supports;
- Targeting and developing approaches for the collection of additional data and statistics needed to track outcomes and progress in increasing CIE nationwide;
- Improving joint decision making in support of CIE, including development of more consistent standards and measures between employment-related programs.

**Future of Section 14(c) and Ability One programs.** As noted above, the Advisory Committee was asked to take a close look at two aging federal disability employment programs: Section 14(c) subminimum wage programs and the Ability One program.

After discussion in each of the four subcommittees, Section 14(c) subminimum wage provisions of the FLSA came in for sharp criticism from Advisory Committee members, who view Section 14(c) provisions as the most prominent symbol of “old” disability policy that assumed segregated, low-wage jobs were all that disabled people should hope for. Among the 19 preliminary recommendations regarding the future of Section 14(c) were these:

- Section 14(c) subminimum wage provisions and employment programs should be phased out.
- The phase-out should be gradual for those whose employment would be adversely affected, so as to allow time to develop CIE alternatives. However, the use of 14(c) employment as a transition path for young people should be curtailed immediately whenever possible, in favor of best practice alternatives, including early work experience starting at the age of 14.
- Congress should appropriate financial resources to the DOL so that it can assist states in developing new systems to help people transition to CIE.
- DOL, DOE, and HHS should provide additional enforcement or technical assistance to help states reduce the use of subminimum wage employment and expand CIE opportunities in accord with *Olmstead*.

Ability One is a federal initiative established under the Javits-Wagner-O’Day (JWOD) Act that requires federal agencies to purchase “set asides” of specified services and supplies from nonprofits where persons with blindness or other significant disabilities contribute at least 75% of the labor hours. The program allows for payment of subminimum wages based on Section 14(c) authority, though recent figures show that 80 percent of these workers receive minimum wage or higher.

- The committee found that JWOD dates from 1971 and has not been updated since, so it reflects prevalent attitudes of the time, namely low expectations for the disabled population that are out of step with modern disability policy as embodied in the ADA and the Supreme Court’s *Olmstead* decision.

- It recommended that Congress should amend the JWOD to align it with current federal disability goals, establish CIE as an expected outcome for Ability One workers, and require that Ability One work be conducted in integrated settings.
- It asked that the President phase out subminimum wage certificates “expeditiously” and that plans be developed to transition subminimum-wage workers to at least minimum wage.
- Finally, it recommended that JWOD regulations be updated to ensure that all Ability One participating organizations provide qualified support staff, support transition of workers to CIE, and that data be collected to ensure adherence to program changes and CIE-related goals.

## **ACTION**

The Advisory Committee on Increasing Competitive Integrated Employment has, through its policy analysis and preliminary recommendations, put one more nail in the coffin of subminimum wage employment as an acceptable path for Americans with significant disabilities. But the complexities involved with obtaining needed legislative changes, sustaining interagency cooperation, and of ending a culture of segregated employment for those with disabilities ensure that progress toward CIE will be challenging and probably uneven.

At present, here’s how you can take action:

- 1) Learn more by following the approval of the final Advisory Committee report at: <https://www.dol.gov/odep/topics/wioa.htm>.
- 2) Obtain and review a final copy of the report when it is released.
- 3) Work with NACBHDD/NARMH and other organizations to lobby for additional technical assistance from HHS regarding the best ways to comply with Olmstead and support the evolution of new CIE programs and measures.
- 4) Support and encourage the efforts of state and county workforce development personnel as they struggle with the scope and complexity of a major evolution toward CIE.
- 5) Seek out early opportunities to get involved with local high-school and college educators, since CIE expectations, requirements, and outcome measures will change soonest for young people with significant disabilities.
- 6) Keep abreast of legislative and regulatory changes that will make it possible for more and more persons with disabilities to pursue competitive employment without undue hardship due to positive changes in the management of disability and healthcare benefits.

*Researched and Written by Dennis Grantham*