



# Ending Segregated Workshops and Promoting Competitive Integrated Employment (CIE)

## *Legal Foundations for Protection and Advocacy Entities, Part 1*

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### I. Introduction

Sheltered workshops are segregated employment settings that confine tens of thousands of people with disabilities, and routinely relegate them to a lifetime of tedious work at indecent wages – frequently less than a dollar an hour – and rarely lead to meaningful work. Although federal law<sup>1</sup> has long authorized these workshops and allowed the payment of sub-minimum wages only to people with disabilities, more recent laws,<sup>2</sup> regulations,<sup>3</sup> and policies<sup>4</sup> now discourage sheltered workshops and make it clear that they are a form of segregated services.

### II. The Americans with Disabilities Act's (ADA) Integration Mandate Requires States to Provide Employment Services in the Most Integrated Setting

#### A. *The ADA's Integration Mandate Applies to Employment Services*

In 1990, the United States Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). As the legislative history, express Findings, and specific mandates of Title II of the Act demonstrate, the ADA

This brief is the first in a four-part series created to help people with disabilities, families, professionals, providers, and stakeholders develop strategies to reduce reliance on sheltered workshops.

This first brief addresses the relevant laws, legal decisions, and legal strategies for challenging unnecessary segregation in sheltered workshop.

The second outlines the centrality of competitive, integrated employment (CIE) for people with disabilities, the importance of pursuing system reform initiatives that promote CIE, and suggestions for how to develop, implement, and manage these initiatives in legal rights organizations. The third paper identifies the core components of an integrated employment system and methods for transforming state employment systems. It also discusses the remedies generated by litigation in Oregon and Rhode Island. The final paper analyzes how the Home and Community-based Services (HCBS) Settings Rule can be used to reduce reliance on sheltered workshops.

This series is designed to provide people with disabilities and their advocates the information, tools, and strategies to end sheltered workshops as an acceptable work placement and to encourage the provision of supports that allow people with disabilities to obtain a real job, at real wages, in competitive employment.

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<sup>1</sup> Section 214(c) of the Fair Labor Standards Act, 29 U.S.C., § 214(c) (2000).

<sup>2</sup> Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and the Workforce Innovation and Opportunities Act (WIOA), 42 U.S.C. § 3101.

<sup>3</sup> Home and Community-Based Services Settings Rule, 42 C.F.R. § 441.530.

<sup>4</sup> Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, available at [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm) ("DOJ Olmstead Guidance")



prohibits discrimination in both employment and employment services provided by a public entity. In the Findings and Purpose section of the ADA, Congress demonstrated its concern for the employment and economic self-sufficiency that comes with employment of people with disabilities and expressed a heightened concern that people with disabilities are improperly segregated in our society. 42 U.S.C. § 12101(a)(2), (3), (5) & (7).

Courts have applied Title II of the ADA broadly to cover all forms of state programs, activities, and benefits.<sup>5</sup> As the Ninth Circuit has stated:

Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless hair-splitting arguments. The focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity.<sup>6</sup>

While there were initially few cases involving state-sponsored employment programs, recent court decisions in Oregon and the Department of Justice (DOJ) *Olmstead v L.C. (Olmstead)* Guidance make it clear that Title II's broad scope encompasses employment services.<sup>7</sup>

## 1. The ADA's Integration Mandate

As directed by Congress, the Attorney General promulgated regulations necessary to implement Title II, including its integration mandate: "A public entity shall administer services, programs, disabilities." 28 C.F.R. § 35.130(d). Title II's integration mandate reflects the recognition that "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status." 28 C.F.R. Pt. 35, App. B. The regulations implementing Title II define the "most integrated setting appropriate to the needs of qualified individuals" as "a setting that enables individuals with disabilities to interact with non-disabled persons to fullest extent possible." *Id.* Like the scope of Title II, courts have interpreted both the integration mandate and the scope of Title II's coverage expansively.<sup>8</sup>

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<sup>5</sup> See *Tennessee v. Lane*, 541 U.S. 509, 524 (2004) (Title II of the ADA was enacted to remediate a wide range of disability discrimination including unjustified civil commitment, abuse and neglect of institutionalized individuals with disabilities, and discriminatory zoning laws.); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (correctional settings and services). For a range of covered activities and programs, see *Kerrigan v. Philadelphia Bd. of Election*, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008) (elections); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009) (adult day health care.); *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9<sup>th</sup> Cir. 2010) (a state prison's grievance system and program for tracking the needs of disabled prisoners); *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9<sup>th</sup> Cir. 2001) (police arrests); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F. 3d 725, 731 (9<sup>th</sup> Cir. 1999) (zoning).

<sup>6</sup> *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9<sup>th</sup> Cir. 2002) (sidewalk accessibility).

<sup>7</sup> *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1202 (D. Or. 2012).

<sup>8</sup> *Frederick L. v. Department of Public Welfare of Pennsylvania*, 422 F.3d 151, 157 (3d Cir. 2005) (nursing facility); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009) (adult homes); *Kerrigan*, 2008 WL 3562521 at \*18-19 (voting booths); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (adult day health care); *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) (in-home supportive services); *Oster v. Lightbourne*, 2012 WL 691833 \*15-16 (N.D. Cal. Mar. 2, 2012) (public parks).



## 2. *The Supreme Court's Decision in Olmstead v. L.C.*

In *Olmstead*, the Supreme Court, after citing the integration regulation and the Attorney General's authority to promulgate it, plainly stated, "Unjustified isolation [...] is properly regarded as discrimination based on disability."<sup>9</sup> The Supreme Court reviewed the harm of segregation, declaring that it "perpetuates unwarranted assumptions that persons so isolated are incapable or trustworthy of participating in community life" and that it "severely diminishes the everyday life activities of individuals including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."<sup>10</sup> The Court held that Title II requires States to provide services in the most integrated setting possible, including shifting programs and services from segregated to integrated settings, unless such a shift would result in a fundamental alteration to their service systems.<sup>11</sup>

## 3. *Olmstead Prohibits Unnecessary Segregation in Employment*

The DOJ *Olmstead* Guidance sets forth the Department's official understanding and regulatory application of the Supreme Court's decision in *Olmstead*. The *Olmstead* Guidance describes the Supreme Court's *Olmstead* decision as prohibiting "the unjustified segregation of individuals with disabilities." It repeatedly refers to the prohibition on segregation throughout its six pages. Significantly, prohibited segregation is not limited to institutions or residential settings. Rather, the *Olmstead* Guidance defines segregated settings as those that have "qualities of an institutional nature." It then identifies segregated settings as including:

(1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for *daytime* activities primarily with other individuals with disabilities.<sup>12</sup>

The DOJ has interpreted its own Guidance broadly to include employment. In fact, the Guidance specifically states that a sheltered workshop is a segregated setting for which an *Olmstead* plan is appropriate.<sup>13</sup> While an earlier DOJ Guidance noted that the ADA did not entirely prohibit separate schools, special programs, or sheltered workshops,<sup>14</sup> the more recent *Olmstead* Guidance makes clear that sheltered workshops are not consistent with the integration mandate of Title II.<sup>15</sup>

Moreover, as the *Lane* court has held, "the broad language and remedial purposes of the ADA," as well as the isolation and segregation occasioned by sheltered workshop, compel the conclusion that

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<sup>9</sup> *Olmstead v. L.C.*, 527 U.S. 581, 593 (1999).

<sup>10</sup> *Id.* at 600–01.

<sup>11</sup> *Id.* at 607.

<sup>12</sup> *Id.* at 2 (emphasis added).

<sup>13</sup> *Id.* at 4.

<sup>14</sup> See Nondiscrimination of the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 8538-01, 8543, 1991 WL 311707.

<sup>15</sup> *Lane*, 841 F. Supp. 2d at 1204 (no conflict exists between the two DOJ Guidances, since both stress the need for integrated options and choice).



the integration mandate applies equally to employment, and requires the provision of employment services in the most integrated setting.<sup>16</sup> The court rejected arguments that the integration mandate was inapplicable to sheltered workshops because participants were not at risk of residential institutionalization or were not involuntarily confined in those settings.<sup>17</sup>

## **B. Sheltered Workshops Are Segregated Settings**

One of the most salient features of sheltered workshops is the segregation and congregation of people with disabilities in a setting that is divorced from all contact with real workplaces and people without disabilities. In a typical sheltered workshop, individuals with disabilities work in congregate settings, often demarcated in practice, if not by official policy, from other program areas or settings.<sup>18</sup> Most publicly-funded sheltered workshops where workers with developmental disabilities perform their duties in congregate settings alongside other people with disabilities and where their only opportunity for interaction with non-disabled individuals is with their fully-compensated managers or supervisors do not meet the ADA's integration regulation.<sup>19</sup>

By separating people with developmental disabilities from their non-disabled persons, sheltered workshops engage in what Justice Ginsburg explained as one of the most pernicious consequences of segregation:

Second, [segregation] severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.<sup>20</sup>

When people with disabilities are denied the opportunity to interact with citizens without disabilities – as they invariably are in most state-funded and licensed sheltered workshops – the very purpose of the ADA is thwarted.

While a finding that sheltered workshops do not provide the maximum opportunity possible for interaction with non-disabled peers is sufficient to label it a segregated setting and to demonstrate a violation of Title II of the ADA, it is also significant that sheltered workshops share a number of additional attributes with the residential institutions that have been discredited and emptied in recent decades, as well as with the large adult homes that have more recently been criticized, despite their physical location in communities. These attributes are precisely what the DOJ *Olmstead* Guidance notes distinguishes segregated settings from integrated ones.<sup>21</sup>

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<sup>16</sup> *Id.* at 1205-06.

<sup>17</sup> *Id.* at 1206.

<sup>18</sup> Michelle Morris, Heather Ritchie, & Lisa Clay, SECTION 14C OF THE FAIR LABOR STANDARDS ACT: FRAMING POLICY ISSUES, National Center on Workforce and Disability, Institute for Community Inclusion (2002) at 14, available at [http://bbi.syr.edu/publications/morris/Policy\\_Report\\_042002.doc](http://bbi.syr.edu/publications/morris/Policy_Report_042002.doc).

<sup>19</sup> See Albert Migliore, David Mank, Teresa Grossi, & Patricia Rogan, *Integrated Employment or Sheltered Workshops: Preferences of Adults with Intellectual Disabilities, Their Families, and Staff*, 26 J. Vocational Rehabilitation 5, 6 (2007) [hereinafter Migliore, Mank, Grossi, & Rogan]; see also Zana Marie Lutfiyya, Pat Rogan, & Bonnie Shoultz, Center on Human Policy, *Supported Employment: A Conceptual Overview* (1988), available at <http://thechp.syr.edu/workovw.htm> [hereinafter Lutfiyya, Rogan, & Shoultz].

<sup>20</sup> *Olmstead*, 527 U.S. at 601.

<sup>21</sup> DOJ *Olmstead* Guidance at 2.



Many of the indices of institutionalization and segregation found applicable to residential institutions find ready parallels in the sheltered workshop context. In both institutions and sheltered workshops, large numbers of people are congregated in separate settings where only people with disabilities live or work. Both settings are usually large, often noisy, and quite unlike ordinary residential or commercial establishments. In both residential institutions and sheltered workshops, activities are highly regimented, with fixed schedules dictated by staff or supervisors, often for the convenience of staff. Individualization in routines, activities, preferred patterns, or leisure time is noticeably absent. People spend their entire time living or working in the sheltered setting, with virtually no opportunity for contact with other residential or employment settings or local resources. They do not learn or gain independence, but instead, practice dependency and "learned helplessness." There are few opportunities to engage in other community activities or experiences. The training that is provided is not designed to, and clearly does not have the effect of, allowing people with disabilities to learn skills that can be used in integrated settings. Not surprisingly, few individuals in residential institutions or sheltered workshops actually transition to more integrated settings.<sup>22</sup> Finally, contrary to their proffered purpose, sheltered workshops are, in almost all States and all programs, a permanent relegation to a separate and unequal job. By any measure, they are dead-end programs which participants rarely, if ever, leave.<sup>23</sup>

### **C. Persons with Disabilities Are Unnecessarily Segregated in Sheltered Workshops**

The Supreme Court's *Olmstead* decision establishes two criteria for determining if individuals are unnecessarily segregated or institutionalized: (1) the person must be qualified to participate in the more integrated program or setting; (2) the person must not oppose transition to that program or setting.<sup>24</sup> By definition, people with disabilities in sheltered workshop are qualified for the State's employment services system, since they already are being served by a component of that system. There are rarely separate or more stringent qualifications for integrated employment services, like supported employment, than there are for segregated services like workshops. Moreover, professional research consistently confirms that virtually all persons with disabilities can be properly and appropriately served by integrated employment programs, and certainly all people

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<sup>22</sup> Research demonstrates that no more than 5% of individuals in sheltered workshops ever transition into integrated employment. See Testimony of Senator Michael Enzi, *Opportunities Too Few? Oversight of Federal Employment Programs for Persons with Disabilities*, Hearing Before S. Comm. On Health, Education, Labor, and Pensions, 109<sup>th</sup> Cong. 3 (2005), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg24480/html/CHRG-109shrg24480.htm> (noting that fewer than 5% of participants in the federal Javits-Wagner-O'Day program move into supported or competitive employment in a given year); Michael Gill, *The Myth of Transition, Contractualizing Disability in the Sheltered Workshop*, 20 *Disability & Soc'y* 613 (2005) (citing a 2003 study which found that only 3.5% of sheltered workshop employees in the United States transitioned into community-based settings per year).

<sup>23</sup> See, e.g., Jacobus tenBroek, *The Character and Function of Sheltered Workshops*, National Federation for the Blind (1995) (discussing conflicting purposes of sheltered workshops: to provide transitional services on a path toward competitive employment or to offer an indefinite opportunity for paid work to people with disabilities), available at <http://www.blind.net/resources/employment/the-character-and-function-of-sheltered-workshops.html>; Thomas Simmons & Robert Flexer, *Business and Rehabilitation Factors in the Development of Supported Employment Programs for Adults with Disabilities*, *J. Rehabilitation* (Jan-Mar. 1992), available at 1992 WLNR 4695411; Lutfiyya, Rogan, & Shoultz.

<sup>24</sup> *Olmstead*, 527 U.S. at 602.



participating in sheltered workshops can be served by these programs.<sup>25</sup> Since sheltered workshops are segregated settings, all people in those workshops are unnecessarily segregated, unless they make an informed and meaningful choice to explicitly oppose working in integrated employment settings.

#### ***D. States are Required to Provide Employment Services in Integrated Settings***

Sheltered workshops provide employment services to individuals with disabilities in segregated settings with the full knowledge, active support, and explicit authorization of governmental entities, such as federal agencies that fund, and state agencies that serve, people with developmental disabilities. Indeed, very few workshops would have the financial means to continue operating if they were not both: (1) permitted to pay their “employees” less than the minimum or prevailing wage by the federal government, and (2) reimbursed by applicable state or local agencies for their function as state-certified providers of day services for people with developmental disabilities.<sup>26</sup> Studies show that nationally, 84% of 14(c) special wage certificate holders operate sheltered workshops, that sheltered workshops employ 95% of all 14(c) workers, and that these workshops receive 46% of their funding from state and local governments.<sup>27</sup> Thus, the segregation which occurs, the exemption from equal pay which is authorized, the isolation and congregation which is endorsed, and the separation from the mainstream of economic activity which results in sheltered workshops are the direct and intentional effect of governmental action.<sup>28</sup>

As noted above, States have a statutory obligation under Title II of the ADA to provide the governmental services and benefits that they offer in the most integrated setting. Since virtually all States provide supported employment services, either as part of their HCBS waiver programs for persons with disabilities or their vocational training programs, they must provide these services to all people in sheltered workshops who do not knowingly refuse them.<sup>29</sup>

#### ***E. Providing Integrated Employment Services is Not a Fundamental Alteration of the State’s Employment Service System***

The Supreme Court in *Olmstead* relieved States from their obligation to provide services in the most integrated setting if they could demonstrate that to do so would constitute a fundamental alteration of their program.<sup>30</sup> Courts have upheld fundamental alteration defenses in two circumstances: (1) if the cost of providing the integrated program far exceeds that of the segregated

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<sup>25</sup> There is now almost universal agreement that supported employment can serve individuals with disabilities of all levels of severity. See, e.g., David Mank, *Alderbrook 2007*, 29 *Journal of Vocational Rehabilitation* 53–62, 53 (2008); Paul Wehman, W. Grant Revell, and Valerie Brooke, *Competitive Employment: Has It Become the “First Choice” Yet?*, 14:3 *Journal of Disability Policy Studies* 163–173 (2003); Lutfiyya, Rogan, & Shoultz.

<sup>26</sup> See Testimony of William E. Kiernan, Institute of Community Inclusion, *Hearing before the S. Comm. of Health, Education, Labor and Pensions* (2011).

<sup>27</sup> See U.S. Gen. Accounting Office, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, but Labor Should Improve Oversight* 26–34 (2001).

<sup>28</sup> For a comprehensive review of the statutory basis and professional literature concerning sheltered workshops from the perspective of the ADA, see Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U.L. REV. 875 (2010).

<sup>29</sup> *Lane*, 841 F. Supp. 2d at 1207-08.

<sup>30</sup> *Olmstead*, 527 U.S. at 603-04.



one, thereby requiring the State to deny other persons whom it serves basic benefits and services;<sup>31</sup> (2) if the nature of the integrated program is fundamentally different from existing programs provided by the State, such that providing services in the most integrated setting would require the State to effectively create an entirely new program.<sup>32</sup> Neither of these circumstances are applicable to integrated employment services.

First, professional research and academic literature have confirmed that the cost of supported employment services is equal or less than the cost of sheltered workshops, particularly when costs are calculated over time.<sup>33</sup> Second, since States routinely provide integrated employment services as part of their vocational rehabilitation (VR) programs, and now must provide CIE under Workforce Innovation and Opportunities Act (WIOA), there is no credible argument that providing integrated employment would require it to create a new program. Thus, States should not be able to assert a successful fundamental alteration defense to a claim that it must provide integrated employment services to all persons in sheltered workshops.

#### **F. The Limitations of *Olmstead***

In addition to the fundamental alteration defense, the Supreme Court's decision in *Olmstead* contains a cautionary caveat: nothing in the ADA requires States to provide a standard of care or a particular level of benefits.<sup>34</sup> This caveat may preclude challenges to the amount or quality of supported employment services, but it hardly limits the States obligation to provide those services to all persons in segregated workshops, or its obligation to do so with the frequency, intensity, and duration appropriate to individuals' needs and as necessary to achieve CIE.<sup>35</sup>

Finally, the Title II's integration mandate is limited to the provision of governmental benefits and services. It does not guarantee outcomes, and certainly not outcomes beyond the scope of the public program or the control of the public entity. Thus, while States must provide integrated employment services sufficient to allow individuals with disabilities to obtain CIE, the ADA does not require them to guarantee a job with a competitive employer.<sup>36</sup> However, WIOA does, at least for those individuals qualified for the State's VR program.

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<sup>31</sup> See *Townsend v. Quasim*, 328 F. 3d 511 (9<sup>th</sup> Cir. 2003); *Fisher v. Oklahoma Health Care Authority*, 335 F. 3d 1175 (10<sup>th</sup> Cir. 2003); *Frederick L. V. Department of Public Welfare*, 364 F. 3d 487 (3d Cir. 2004).

<sup>32</sup> See *Rodriguez v. City of New York*, 197 F. 3d. 611 (2d Cir. 1999).

<sup>33</sup> Cimera, R.E., *The Economics of Supported Employment: What New Data Tells Us*, 37 J. Voc. Rehab. 109-118 (2012); Cimera, R.E., *Supported Versus Sheltered Employment: Cumulative Costs, Hours Worked, and Wages Earned*, 35 J. Voc. Rehab. 85-92 (2011); Cimera, R.E., *Supported Employment's Cost Efficiency to Taxpayers*, 34 Research and Practice for Persons with Severe Disabilities, 13-20 (2009); Cimera, R.E., *The Cost Trends of Supported Versus Sheltered Employment*, 28 J. Voc. Rehab. 15-20 (2008); Cimera, R.E., *The Cumulative Cost-Effectiveness of Supported and Sheltered Employees with Mental Retardation*, 32(4) Research and Practice for Persons with Severe Disabilities, 247-252 (2007).

<sup>34</sup> *Olmstead*, 527 U.S. at 603, n.14.

<sup>35</sup> *Lane*, 841 F. Supp. 2d at 1207-08.

<sup>36</sup> *Id.*





### III. The Workforce Innovation and Opportunities Act (WIOA) Requires States to Provide Competitive, Integrated Employment (CIE)

Enacted in 2014, WIOA represents a major reform and consolidation of various employment training programs for adults and youth, including those with disabilities. It focuses on the unique skills and abilities of all citizens, requires training and support services on a local, regional, and state level to enhance those skills, and identifies the desired outcome of CIE for all workers.

WIOA made substantial revisions to the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, that uniquely impact persons with disabilities, including major changes to: (1) the State VR program, including emphasizing the achievement of CIE; (2) supported employment services; and (3) subminimum wage. To clarify and implement those revisions, the Secretaries of the Department of Labor and Department of Education issued joint regulatory amendments to 34 C.F.R. Parts 361, 363, and 397 which govern the State VR program.<sup>37</sup> As outlined in the Executive Summary, the regulatory amendments implement each of the three central revisions.

First, the amendments expand and revise State VR Program requirements in a number of important ways, as outlined in Figure 1 on page 9.

Second, the regulatory amendments mandate that States expand Supported Employment Services by requiring that supported employment be in CIE, or at least in an integrated setting that is designed to lead to CIE within 12 months;<sup>38</sup> extending time for funding supported employment services to two years;<sup>39</sup> requiring States to reserve 50% of VR funding for supported employment services;<sup>40</sup> and requiring States to reserve 10% of VR funding for youth with the most significant disabilities.<sup>41</sup> These are outlined in Figure 2 on page 10.

Third, the amendments specifically limit the use of subminimum wage. Section 511 of WIOA limits the use of subminimum wage certificates, authorized by Section 14(c) of the Fair Labor Standards Act (FLSA), for employers who seek to hire youth with disabilities or retain adults with disabilities. Pursuant to this Section, new requirements are established for the State VR program in a new subpart of the regulations,<sup>42</sup> as outlined in Figure 3 on page 10.

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<sup>37</sup> See 81 FR 55630 (Aug. 19, 2016).

<sup>38</sup> 34 C.F.R. § 363.1.

<sup>39</sup> 34 C.F.R. § 363.50(b)(1).

<sup>40</sup> 34 C.F.R. § 363.22.

<sup>41</sup> 34 C.F.R. § 363.23.

<sup>42</sup> 34 C.F.R. Part 397.



## Figure 1. Expanded and Revised State VR Requirements as a Result of WIOA

1. Integrating the VR program with other workforce programs by requiring that all plans, reports, data, outcomes, delivery mechanisms, and accountability measures for the VR program are integrated and consistent with those required by WIOA for all workforce programs.
2. Elevating CIE, including:
  - a. defining CIE;<sup>43</sup>
  - b. incorporating the principle that all individuals with disabilities, including those with the most significant disabilities, are capable of achieving CIE;<sup>44</sup>
  - c. requiring that the Individualized Plan for Employment (IPE) include a goal of CIE;<sup>45</sup>
  - d. requiring that an “employment outcome” be in CIE or supported employment;<sup>46</sup>
  - e. prohibiting consideration of uncompensated employment as an acceptable employment outcome;<sup>47</sup> and
  - f. expanding employment support services that will maximize the potential of persons with disabilities to obtain, retain, and advance in high quality jobs.<sup>48</sup>
3. Expanding transitional employment services for students and youth with disabilities, including:
  - a. expanding the definition of student with a disability;<sup>49</sup>
  - b. requiring the VR program to reserve 15% of funding for students;<sup>50</sup>
  - c. assessing needs of students and youth with disabilities, including their need for pre-employment transition services;<sup>51</sup> and
  - d. clarifying the technical assistance offered by VR agency to schools. Integrating the VR program with other workforce programs by requiring that all plans, reports, data, outcomes, delivery mechanisms, and accountability measures for the VR program are integrated and consistent with those required by WIOA for all workforce programs.<sup>52,53</sup>

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<sup>43</sup> 34 C.F.R. § 361.5(c)(9).

<sup>44</sup> 34 C.F.R. § 361.1.

<sup>45</sup> 34 C.F.R. § 361.46(a).

<sup>46</sup> 34 C.F.R. § 361.5(c)(15).

<sup>47</sup> *Id.*

<sup>48</sup> *See generally*, 34 C.F.R. § 361.

<sup>49</sup> 34 C.F.R. § 361.5(c)(51).

<sup>50</sup> 34 C.F.R. § 361.48(a).

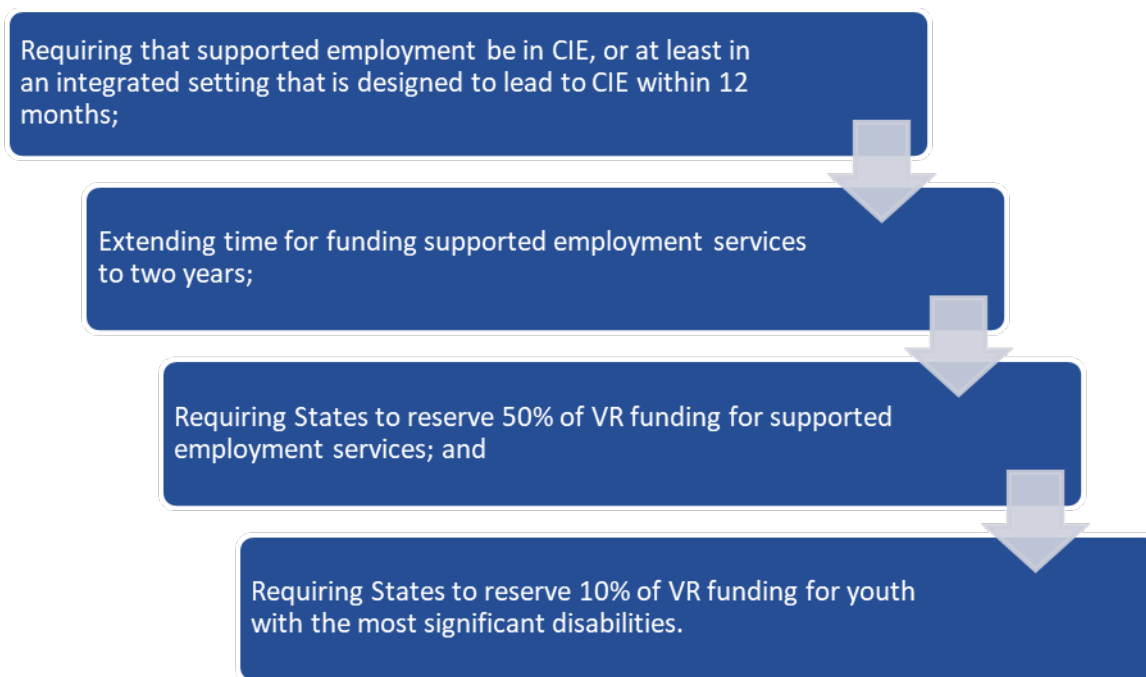
<sup>51</sup> 34 C.F.R. § 361.29(a).

<sup>52</sup> 34 C.F.R. § 361.49.

<sup>53</sup> 34 C.F.R. §§ 10, 20, 23, 29, & 40.



**Figure 2. How WIOA Mandates States to Expand Supported Employment Services**



**Figure 3. Requirements for State VR Programs related to Limiting the Use of Subminimum Wage**

- WIOA requires State VR programs to:
- Ensure that youth receive transition services;
  - Establish activities that must be completed before a youth can be hired at subminimum wage, including the provision of transition services and a determination of eligibility for VR;
  - Provide and documenting that career counseling, information, and referral to VR has been provided to persons with disabilities of all ages;
  - Prohibit the use of 14(c) employers to offer career counseling;
  - Prohibit contracts between Local Educational Agencies (LEAs) and 14(c) employers; and
  - Authorize VR entities to review documentation by 14(c) employers.

## IV. Conclusion

Title II of the ADA, its integration mandate, the Supreme Court’s decision in *Olmstead*, and recent cases applying these legal principles to publicly-funded employment systems require States to provide employment services in the most integration setting for all people with disabilities who currently are in sheltered workshops, unless the person makes an informed choice to remain in the segregated setting. Integrated employment services should meet the definition, and achieve the outcomes, of CIE. The WIOA amendments to the Rehabilitation Act, coupled with their implementing regulations, require State VR programs to provide counseling, information, referral, and then CIE to adults and youth who are in, or who might enter, sheltered workshops.

