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### Memorandum

**To:** Nils Richardson: President and CEO; ACCSES New Jersey

**From:** Terry R. Farmer: CEO; ACCSES  
Bobby Silverstein: Legislative Counsel; ACCSES

**Date:** April 19, 2013

**Re:** The continued viability of sheltered workshops, work crews/enclaves paying subminimum wage, and day habilitation programs and the rights of individuals with disabilities under Federal law to a full array of employment-related services.

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You asked ACCSES and its legislative counsel to address the question whether under existing Federal laws [the Americans with Disabilities Act, as interpreted by the U.S. Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), recent Department of Justice (DOJ) policy pronouncements and actions, and the Medicaid Home and Community-Based Services regulations and policy guidance issued by the Centers for Medicare and Medicaid Services (CMS)] the state of New Jersey may legally continue to fund an array of prevocational and employment-related services and supports and a continuum of placement options for individuals with intellectual and developmental disabilities and others that includes skill development centers (e.g., “sheltered workshops”), work crews/enclaves paying subminimum wages, and day habilitation programs, in addition to self-employment and supported employment? Phrased differently, does Federal law compel the closing of sheltered workshops and the elimination of work crew/enclaves paying subminimum wages and day habilitation programs?

In addressing these questions, it is important to recognize that employers, not state agencies, make job offers and determine who is qualified. Under the ADA a person is qualified if he or she can perform the essential functions of a job, with or without reasonable accommodation. Under ADA regulations, deference is provided to employers to determine qualification standards, including productivity standards. State agencies do not guarantee jobs; state agencies provide services and supports that enable individuals with disabilities to explore a full range of job opportunities, to develop skills that make them qualified, to find jobs, and fund extended services and supports to retain jobs.

The answers to these two related questions are:

- ✓ Federal laws, including recent DOJ and CMS policy pronouncements and actions, permit the provision of services and supports and placement in skill development centers (e.g., sheltered workshops), work crew/enclaves, and day habilitation programs and the payment of subminimum wages in addition to self employment and supported employment at or above minimum wage.
- ✓ Federal laws, including recent DOJ and CMS policy pronouncements and actions, do not compel the closing of sheltered workshops or the elimination of work crew/enclaves, and day habilitation programs or the payment of subminimum wages.

With respect to the rights of individuals with disabilities, Federal law requires the following:

- 1) Individuals with disabilities must be placed in the most integrated setting appropriate to meet their needs. What is appropriate for the individual must be determined based on a person-centered plan, consistent with the individual's strengths, priorities, interests, needs, abilities and capabilities. Evidence to establish that an integrated setting is appropriate includes a reasonable objective assessment by a public entity's treating professionals who are knowledgeable about the range of supports and services. People with disabilities can also present their own independent evidence, including evidence from their own treatment providers.
- 2) The state may not adopt a service system that results in the overreliance on sheltered workshops—individuals with disabilities may not be unnecessarily, unjustifiably, inappropriately placed in a separate or different program e.g., sheltered workshop.
- 3) In considering options, the individual must be provided every opportunity to make an informed choice consistent with the principle of self-determination. An informed choice includes, but is not limited to, adequate information about the options that are considered, including the opportunity to explore and discover the range of options; sufficient resources to support the choice; willingness to accept the choice and the reasonable risks associated with the choice; and information on the parameters of the choice and the relevant options considered consistent with the capabilities of the individual involved in the choice-making process.
- 4) State systems must encourage and facilitate efforts to support competitive integrated employment as the optimal, presumptive and priority outcome.

Consistent with these policies, the right of an individual with a disability to make an informed choice may include the option to work in a skill development center (sheltered workshop) or work crew/enclave operated by an accredited community rehabilitation program as well as the options to receive supported employment services provided by these CRPs and to pursue self-employment. These CRPs use qualified rehabilitation professionals to provide individualized jobs, ongoing services and supports (including door-to-door transportation), and job stability and security.

- ❖ For example, the opportunity to work in a skill development center may be temporary while individuals develop job skills, explore the world of work, and identify their own interests and talents. For these individuals, CRPs facilitate placement in competitive, integrated employment, either directly or through support by, collaboration with, or referral to publicly-supported programs providing funding for vocational rehabilitation and necessary ongoing services and supports.
- ❖ For other individuals with significant disabilities, the opportunity to work in a skill development center may be long term given the individual's strengths, interests, capacities, desires, and ongoing needs for supports and services. This same right to informed choice and self-determination may extend to employment opportunities that include job crews and enclaves at commensurate wages.

## **Americans with Disabilities Act**

With respect to the ADA, the Supreme Court in its *Olmstead* decision succinctly states the overarching policy that the state should maintain a range of options in order to address the needs of individuals with disabilities, consistent with the individual's preference:

“Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But, we recognize, as well, the State's need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the State's obligation to administer services with an even hand.”

“Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated taking into account the resources available to the State and the needs of others with mental disabilities.”

See also the legislative history accompanying the passage of the ADA. After listing the various forms of discrimination, the House and Senate Reports accompanying the ADA state:

“Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others based on among other things, presumptions, patronizing attitudes, fears and stereotypes about individuals with disabilities. Consistent with these standards, covered entities are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals can and cannot do.

The Committee wishes to emphasize that these provisions should not be construed to jeopardize in any way the continued viability of separate private schools providing special education for particular categories of children with disabilities, sheltered workshops, special recreational programs, and other similar programs.

At the same time, the Committee wishes to reaffirm that individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Committee’s bill. Separate, special, or different programs are designed to make participation by persons with disabilities possible. Such programs are not intended to restrict the participation of disabled persons in ways that are appropriate to them.”

Senate Report No. 101-116 at pages 60-61

The August 6, 2012 opinion of the Federal Magistrate in *Lane v. Kitzhaber* (Case No. 3:12-cv-00138-ST) regarding the motion for class certification includes the following statement at page 23 regarding the continued viability of sheltered workshops:

“With respect to the third category, plaintiffs do not seek to close all sheltered workshops or force people to leave the workshop if that is not their preference. They simply seek the opportunity to leave a sheltered workshop by receiving those services. Due to their disability, many individuals with I/DD may not ask for supported employment services because they are unaware of them or because they are not aware that they have any choices as to services that they are entitled to receive.”

### **Medicaid Home and Community-Based Services Program**

The regulations authorizing the funding of prevocational services as a form of “expanded habilitation” services under the Medicaid Home and Community-Based Services program explicitly recognize the viability of sheltered workshops and the payment of a sub-minimum wage consistent with the Fair Labor Standards Act. The regulations explain that **prevocational services** means services that prepare an individual for paid or unpaid employment and are not job-task oriented but instead are aimed at a generalized result. For example, prevocational services may include teaching an individual such concepts as compliance, attendance, task completion, problem solving, and safety. Prevocational services are distinguishable from noncovered vocational services by the following criteria:

- (1) The services are provided to persons who are not expected to be able to join the general work force or participate in a transitional sheltered workshop within one year (excluding supported employment programs);
- (2) If the recipients are compensated, they are compensated at less than 50 percent of the minimum wage;
- (3) The services include activities which are not primarily directed at teaching specific job skills but at underlying habilitative goals (for example attention span, motor skills); and
- (4) The services are reflected in a plan of care directed to habilitative rather than explicit employment objectives.

The CMS Information Bulletin related to this program explicitly recognizes the continued viability of sheltered workshops and the payment of subminimum wage, while at the same time expressing a priority for competitive integrated employment.

- ❖ Prevocational services should enable each individual to attain the highest level of work in the most integrated setting and with the job matched to the individual's interests, strengths, priorities, abilities, and capabilities, while following applicable federal wage guidelines. [Attachment 1 at page 7]
- ❖ Competitive integrated employment is considered to be the optimal outcome of prevocational services. [Attachment 1 at page 7]
- ❖ Prevocational services are associated with building skills necessary to perform work **and** optimally to perform competitive, integrated employment. [Attachment 1 at page 8]
- ❖ Individuals participating in prevocational services may be compensated in accordance with applicable federal laws and regulations and the optimal outcome of the provision of prevocational services is permanent integrated employment at or above minimum wage in the community. [Attachment 1 at page 8]
- ❖ Prevocational services are expected to occur over a defined period of time and with specific outcomes to be achieved, as determined by the individual and his/her services and supports planning team through an ongoing person-centered planning process. [Attachment 1 at page 7]
- ❖ Prevocational services may be furnished in a variety of locations in the community and are not limited to fixed-site facilities. [Attachment 1 at page 8]

## Resources

For a detailed discussion of these issues, we have included links to the following documents:

### Array of Service Options

[ACCSES Position Paper on the Array of Employment Opportunities for Persons with Significant Disabilities: Principles, Positions, and Recommendations](#)

### Americans with Disabilities Act and Olmstead

[Applicability of the ADA and Olmstead Decision to Community Rehabilitation Programs – The Department of Justice Technical Assistance Guide](#)

[DOJ Letter of Findings Regarding the Provision of Vocational and Employment Services by the State of Oregon to Persons with Intellectual and Developmental Disabilities](#)

[Court Grants Class Certification in Lane v. Kitzhaber, Lawsuit Challenging the System for Delivering Employment Services Used by the State of Oregon](#)

[ACCSES Memorandum – Significance of DOJ’S Statement of Interest in Lane v. Kitzhaber](#)

[Preliminary Description and Analysis of the ADA/Olmstead Settlement Agreement between Virginia and the DOJ](#)

### **Medicaid Home and Community-Based Services**

[ACCSES’ Description and Analysis of CMS’ Information Bulletin Regarding Updates to the Section 1915\(C\) Waiver Instructions and Technical Guide Regarding Employment and Employment Related Services](#)