



**THE WRITING ON THE WALL  
NEARING THE END OF SHELTERED AND SEGREGATED EMPLOYMENT  
FEBRUARY 4, 2016**

After many decades in which businesses were lawfully permitted to pay people with disabilities well below the minimum wage, often in segregated workshops, the Protection and Advocacy (P&A) network and its allies are beginning to unravel the structural underpinning of this misguided policy.

It began with Section 14c of the Fair Labor Standards Act (FLSA) in 1938. Originally intended to provide job opportunities to people with disabilities unable to find work in the competitive job market, this well intentioned law developed into an industry that perpetuates the stereotype that people with disabilities cannot work in competitive and integrated employment.

After a series of scandals and instances of abuse and neglect by employers, Section 14c is now under intense scrutiny not only by the P&A network, but by the media, state and federal elected officials, the Department of Labor, the Department of Justice and others in the executive branch. This paper describes the major developments that have occurred which are advancing the decline of the system.

**National Disability Rights Network and the Protection and Advocacy Network**

Several years ago the National Disability Rights Network (NDRN) released two reports that began the discussion in earnest about the need to change this outworn and outdated system. The first report, *Segregated and Exploited: The Failure of the Disability Service System to Provide Quality Work* was issued in January 2011. The report called attention to the fact that programs that were initially designed to help people with disabilities learn meaningful skills and obtain gainful employment had evolved into perpetual segregation. They provided meaningless work and little hope for improving quality of life. NDRN's reports garnered much attention – support and opposition – but started a series of activities that have gotten the attention of the disability community, the media, policy makers, and the administration. The following year a second report, *Beyond Segregated and Exploited*, was issued. This report identified eight specific steps the Protection and Advocacy (P&A) network had taken to address the issues identified in the first NDRN report. In the following years, momentum has only continued to grow.

Monitoring sheltered workshops has been a P&A activity for several years. Disability Rights North Carolina, the North Carolina Protection and Advocacy agency, was actually the first state to commence a robust monitoring project of segregated employment. In June 2013, Disability

Rights North Carolina's work was highlighted in a monitoring session at the NDRN National Conference and in August they participated in a webinar for NDRN sharing their experiences and materials to date. These presentations furthered the impetus of the earlier reports and as a result, 18 P&A agencies began some formalized monitoring of segregated employment settings. Included in the 18 are the P&A agencies in: Connecticut, Florida, Oklahoma, Arkansas, Alabama, North Dakota, Texas, Wisconsin, South Carolina, California, Louisiana, Minnesota, Iowa, Indiana, and Michigan. In addition, P&A agencies in Massachusetts, Washington, and Ohio began approaching segregated workplaces in their states to specifically monitor and address wage and hour violations.

There are some common findings across the states that are conducting monitoring projects. While most facilities surveyed provide a combination of services including; Day Habilitation, Segregated Employment, Job Development, Supported Employment, Vocational Assessments, and enclave work, fewer provide quality pre-vocational training or work adjustment. Only a few of the sites monitored provided quality employment supports such as competitive community placement and/or career preparation. Almost every site monitored had 14c wage certificates allowing them to pay individuals a "special wage," rather than a minimum wage, for persons with disabilities based on productivity. Most of this work is not sufficient to allow people to work a full work day, let alone five days a week.

It is interesting to note that although many providers say they would like to provide more employment opportunities, none of them were participating in the Ticket to Work program as an Employment Network. These programs, under contract with the Social Security Administration (SSA), are designed to assist individuals with disabilities in achieving economic self-support through work.

Many providers also indicated that family members were often barriers to employment for their participants due to the fact that families did not want their family member with a disability working because of the potential for losing their benefits. However, a majority of providers monitored did not provide any type of benefits counselling and were unaware of Work Incentives Planning and Assistance (WIPA) program. The goal of the WIPA program, another program funded by SSA, is to provide information to individuals with disabilities and their family to make informed choices about work by providing in-depth counseling about benefits and the effect of work on those benefits. Protecting their benefits keeps individuals in poverty and denies them the opportunity of full inclusion as promised by the ADA.

Perhaps the most discouraging finding was that P&As found providers who expressed doubt about their participants' ability to work.

These segregated programs rely heavily on state or local development disabilities services agencies, mental health agencies, and high schools for not only participants but also funding. Only a few surveyed admitted getting referrals and/or funding from the state Vocational Rehabilitation agency (VR), the state agency designed to help individuals with disabilities meet their employment goals. The programs' description of their relationship with VR was

consistently described as one of awareness, rarely operationalized by regular communication or back and forth referrals. The majority of individual referrals to segregated programs came directly from the school districts. Programs often had high school students “interning” at least half a day in their programs before their graduation, in clear defiance of U.S. Department of Education Office of Special Education Programs (OSEP) guidance requiring that services, including work experience, be provided in integrated settings.

### **Subminimum Wage Advocacy**

In the summer of 2014, NDRN launched a new initiative to increase P&A involvement in subminimum wage advocacy efforts at both the state and federal level. Since that time NDRN is aware of at least seven states and the District of Columbia either actively engaged or taking steps towards active engagement in subminimum wage advocacy.

Recently, Disability Rights Ohio (DRO) (the Ohio Protection and Advocacy Agency), the National Federation of the Blind, the Autistic Self Advocacy Network, and the Baltimore law firm of Brown, Goldstein & Levy, LLP filed for an Administrative Law Judge hearing challenging the payment of subminimum wages under section 14(c) of the Fair Labor Standards Act. A provision under the regulations allows for such a hearing in which the employer must prove payment of the subminimum wage was correct. This complaint is the first hearing under this regulatory provision in years, if not decades. In a precedent-setting opinion issued February 2, 2016 by an administrative law judge from the U.S. Department of Labor (USDOL), three clients in Ohio have been awarded minimum wage going forward and back pay from Seneca Re-Ad, a sheltered workshop run by the Seneca County Board of Developmental Disabilities. The judge found that the workshop failed to show the employees were “impaired for the work performed”, the ALJ noted the lack of any medical, psychological, or other evidence for why the employees did not meet production standards in effect at the time. The determination that the employees were not impaired for the work performed is sufficient to hold an employer in violation of a 14(c) certificate. The decision holds that their wages have not been calculated correctly. Therefore, Seneca must pay at least the minimum wage. Similarly, the Disability Law Center of Massachusetts (the Massachusetts Protection and Advocacy Agency) has been very active with both filing complaints with U.S. Wage and Hour Division and working with state level subminimum wage issues.

“We are shaking the building and bricks are starting to fall off, but the structure still stands,” Curt Decker, executive director of NDRN.

### **Legal Action**

Disability Rights Oregon and the Center for Public Representation brought legal action in Oregon to challenge the failure of the state to move people with disabilities into the mainstream. The lawsuit alleged that the State's employment service system over-relied on segregated sheltered workshops to the exclusion of integrated alternatives, such as supported employment services. The plaintiffs argued this over-reliance placed individuals, including

youth, at risk of entering sheltered workshops. Assisted by private counsel and eventually intervention from the Department of Justice Office of Civil Rights (DOJ/OCR), the case ultimately settled with a long term plan to provide employment services and close the front door of segregated workplaces. Most importantly, the case held that the Olmstead principle requiring states to eliminate unnecessary segregation of persons with disabilities and to ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs covered employment. On September 8, 2015, the United States entered into a settlement agreement with the State of Oregon to assert the civil rights of individuals with intellectual and developmental disabilities (I/DD) who are unnecessarily segregated in sheltered workshops, or at risk of such unnecessary segregation. Over the next seven years, 1,115 working-age individuals with I/DD who are currently being served in segregated sheltered workshops will have opportunities to work in real jobs at competitive wages. The settlement agreement was approved by U.S. Magistrate Judge Janice Stewart of the District of Oregon on December 29, 2015.

### **U.S. Department of Justice**

The Department of Justice took action against Rhode Island Birch School (Birch) for utilizing 14c to pay students with disabilities who were “employed” in segregated settings by the school during their transitional years. It was determined that the pervasive violations at Birch put students with I/DD at serious risk of unnecessary placement in segregated adult day activity service programs. On June 13, 2013, the United States entered a court-enforceable settlement agreement with the State of Rhode Island and the City of Providence for unnecessarily segregating individuals with I/DD in a sheltered workshops and segregated day activity service programs, placing public school students with I/DD at risk of unnecessary segregation in that same program. The settlement gives Training Thru Placement, Inc. (TTP), and the Harold A. Birch Vocational Program service recipients the opportunity to receive integrated supported employment and integrated daytime services that will enable them to interact with the broader community to the fullest extent possible.

Later, a settlement agreement with the State of Rhode Island on April 8, 2014 resolved an ADA Olmstead investigation into the State’s day activity service system which over-relies on segregated settings, including sheltered workshops and facility-based day programs, to the exclusion of integrated alternatives, such as supported employment and integrated day services. DOJ stated that the civil rights of students with disabilities who can and want to access services to help them successfully transition into integrated adult lives are violated when publicly funded service systems impede their ability to do so and forced placements in segregated settings result. Approximately 3,250 individuals with I/DD are affected. Rhode Island’s governor issued an executive order closing down sheltered workshops. Similar executive orders have been issued in other states.

### **Governor Executive Orders**

In New York, the governor issued an executive order requiring the state Office for People with

Developmental Disabilities to eliminate funding for any new workshop admissions, essentially closing the front door of the workshops. The Office for People with Developmental Disabilities is working aggressively to help people identify "fully integrated community opportunities" and realize their goals for employment or other meaningful activities consistent with national trends and recent DOJ activity.

In Massachusetts, a mutual, proactive plan has been created by key representatives of the Association of Developmental Disabilities (ADDP), The Arc Massachusetts, and the Massachusetts Department of Developmental Services (DDS) to increase integrated employment opportunities for people with I/DD. The foundation of the plan emphasizes the deeply held values about the importance of having a job in society and the multiple benefits gained by individuals and businesses when adults with I/DD contribute to their communities via work. The Blueprint for Success takes the initiative to close sheltered workshops and provide supported employment in integrated settings.

### **Congressional Action**

Congress updated our employment system for the first time since the 1990s with the passage of the Workforce Innovation and Opportunity Act (WIOA). This statute included the reauthorization of the Rehabilitation Act as well as sweeping changes to 26 other programs encompassed in the law. Despite the clear transition language in both the Individuals with Disabilities Education Act (IDEA) and the Rehabilitation Act, the concept was ineffectively implemented. In an attempt to rectify this, the controversial Section 511 was added to the rights section. This key section requires VR and other providers to reach out to individuals in segregated settings to offer guidance, career counseling, and other information and supports regarding community employment opportunities. Hopefully, this will help to close the front door of many sheltered workshops and decrease the number of people placed in such settings. The Client Assistance Programs (CAPs) and NDRN will work together to aggressively monitor the implementation of Section 511.

### **Centers for Medicare and Medicaid Services (CMS)**

CMS recently published rules that limit the payment of Medicaid to support sheltered segregated facilities. The January 17, 2014 CMS rule governing certain home and community-based settings (HCBS) and services makes a statement that federally-funded employment services should be provided in integrated settings. The rule clarifies and expands on earlier guidance, where states have long been on notice that employment services provided pursuant to an HCBS waiver cannot include long-term vocational services provided in a sheltered workshop. Nor can states use federal waiver funding to segregate individuals with disabilities in other facility-based employment programs. The 57 agencies that comprise the Protection and Advocacy network are on the front lines ensuring that this rule and other CMS guidance is being implemented in segregated facilities.

### **Presidential Executive Order**

The President's Executive Order 13058 for federal contractors' treated people with disabilities to the same \$10.10 minimum wage required of all other workers. Coupled with new regulations for Sections 503 of the Rehab Act, federal contractors are required to develop outreach plans to hire, retain, and promote qualified workers with disabilities. There is now a targeted hiring goal of 7 percent for people with disabilities employed under federal contracts.

### **Advisory Committee to Increase the Competitive Integrated Employment of People with Disabilities**

Formed under the recently authorized WIOA, the Advisory Committee to Increase the Competitive Integrated Employment of People with Disabilities (the Committee) has been meeting regularly to review and revise cross administration policies and practices which negatively impact the employment of people with disabilities. Although their final report is not due to Congress until September 2016, their preliminary report includes far reaching recommendations to end segregated practices.

### **US Department of Labor Wage and Hour Division (WHD)**

In December 2015, NDRN signed a Memorandum of Understanding with the U.S. Wage and Hour Division (WHD) of the Department of Labor (DOL) to increase the cooperation and information sharing on 14(c) enforcement and other issues of interest to NDRN, the P&As, and the WHD. Specifically, NDRN and the WHD will establish a methodology for exchanging investigative leads, complaints, and referrals of possible violations. NDRN and the WHD will consult on issues of mutual interest, including training for WHD's Regional Enforcement Coordinators on the P&A and CAP system, and issues around the employment of individuals with disabilities, as well as how the payment of back wages can affect the government benefits (e.g. Supplemental Security Income). WHD will accept complaints filed by P&As regarding alleged violations of statutes WHD enforces either when an individual has designated a P&A as the individual's representative, or when the P&A files a complaint as a third party, and will treat the P&A as complainants for all relevant purposes. WHD further agreed to update the publically available list of approved and pending 14(c) certificate applications, which includes renewal applications, every six months.

### **The Media**

The largest program in the U.S. for the employment of people with disabilities, Javits-Wagner-O'Day Act (JWOD), has not escaped scrutiny and investigation. JWOD is a U.S. federal law requiring that all federal agencies purchase specified goods and services from nonprofit agencies employing persons who are blind or have other significant disabilities. It was last updated in 1971. The federal agency charged with administering the program is currently known as the Committee for Purchase from People Who Are Blind or Severely Disabled. The program operates as Ability One under the two central non-profit agencies Source America and National Industries for the Blind.

In July 2015, CNN aired a news report that as many as half of the companies contracting with Source America may not be hiring enough severely disabled employees in violation of the law. A follow up report was aired in January 2016. The core criteria for these lucrative contracts is that 75 percent of total direct labor hours must be performed by people who are blind or have other significant disabilities. Specific companies and Source America are being investigated by the DOJ, the Office of Inspector General from the General Services Administration, Department of Defense, the Veterans Administration and the State Department, as well as State Inspector Generals. Allegations include illegal operations, financial fraud, mismanagement, operating in violation of the law, steering of contracts, and possibly obstruction of justice. There is little more than paper and pencil oversight and the disability community is enraged. Language was added to the appropriations bill requiring an office of Inspector General to provide oversight to the program.

### **Advocacy Partners**

A coalition of disability groups including NDRN has started to meet regularly to reform JWOD and the Ability One program. In September, the coalition issued Reform Principles which they hope will be developed into legislative reform that will increase employment of people with significant disabilities.

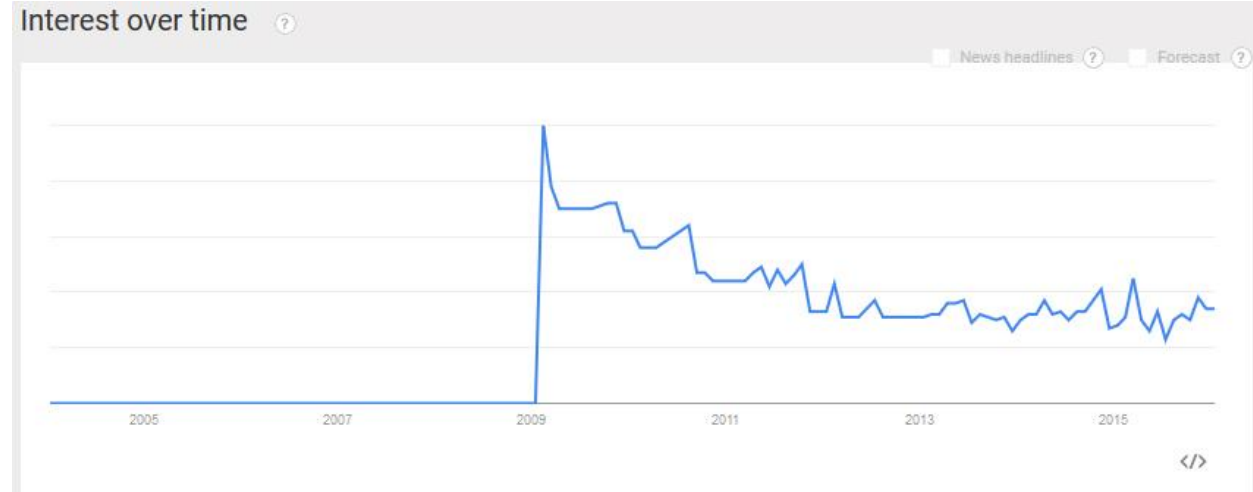
A meeting of DisBeat and the National Disability Leadership Alliance employment group (including NDRN) met with Maria Towne at the White House on January 25, to discuss concerns with AbilityOne/Source America as well as larger employment policy issues. Topics included minimum wage; the poverty level of people with disabilities which is larger than any other group; Bureau of Labor Statistics (BLS) figures on employment; long term supports; and CRPs; an update on activity around AbilityOne/Source America; WIOA Advisory Committee - AbilityOne Workgroup, RSA, CMS and the interconnections to solve the problem; Department of Education, Appropriations language regarding AbilityOne and required development of an Inspector General for the program; how the president's executive order for \$10.10 minimum wage affects only federal contractors providing products but not services; Section 511 and concerns regarding proper implementation by VR agencies; a request for assistance in getting a federal contractor list since Office of Federal Contract Compliance Program (OFCCP) claims not to have one; and a request for meeting with OMB, OFCCP, and WHD to help with section 503 and implementation of those regulations. The point of all these conversations is to call attention to the abuses of many programs and to suggest changes that will transform support programs consistent with modern policies and practices.

### **Prevalence of Sheltered Workshop Media Coverage**

Since the Des Moines Register's expose on the abuse of workers with intellectual and developmental disabilities at Henry's Turkey Service, more media attention has been paid to the issues of sheltered workshop and subminimum wage, in addition to disability employment issues in general.

The graph below represents Google search interest using the keywords “sheltered workshops.” The term did not register before 2009. In 2009 there was a significant increase in the number of people searching for the term sheltered workshop. This is probably due to the Des Moines Register investigation. Since 2011, the term has maintained a constant rate.

Google Trends: Sheltered Workshops



#### **Sample of media stories about disability employment:**

[Feds investigating premier work program for disabled after CNN reports](#)

CNN

[Activists say Goodwill exploits workers with penny wages](#)

NBC News

[Loophole allows companies to pay disabled below minimum wage](#)

Al Jazeera America

[Days are numbered for 'sheltered workshops'](#)

WIVB, CBS Affiliate

[Federal judge approves settlement with disabled Oregon workers](#)

KTVZ

[Subminimum Wages For The Disabled: Godsend Or Exploitation?](#)

NPR

[Dead-End Jobs, Low Pay](#)

Minneapolis Star Tribune

#### **NDRN’s Role in Advancing Media Coverage of Disability Employment Issues**

NDRN has issued a number of public statements on disability employment issues. They include:

- [National Disability Rights Network, Department of Labor Enter Agreement that Assists Workers with Disabilities](#)
- [The National Disability Rights Network launches Wage and Hour Complaint Initiative](#)
- [Statement by Executive Director Curt Decker Supporting Section 511 of the Rehabilitation Act](#)



- [Workers with Disabilities See Major Advancements](#)
- [Court Agrees that Americans with Disabilities Act Applies to Employment](#)
- [Report Finds Government Dollars Used to Segregate and Exploit Workers with Disabilities](#)
- [Report Finds People with Disabilities Segregated and Exploited at Work](#)

Additionally, NDRN has worked with members of the press on stories related to disability employment and placed a variety of letters to the editor, op-eds and blog posts in media outlets. A sample of stories are included here:

- [Employers still grappling with disability law after 25 years](#)
- [Discrimination Against Disabled Applicants Sadly 'Not Surprising](#)
- [When Should Disabled People Be Paid Less Than Minimum Wage](#)
- [Higher pay for disabled workers a double-edged sword](#)
- [The Boys in the Bunkhouse](#)
- [Watchdog report: Workers with disabilities earn pennies per hour](#)
- [Contractor sues government; says disabled can't get clearance](#)
- [Disability rights advocate defends new Labor Dept. law about j](#)
- [Workshops still get most federal funds for disabled](#)
- [Disabled workers paid cents per hour at state-run homes](#)
- [People with Disabilities Deserve a Minimum Wage](#)

### **Best Practices**

Research over the years has shown us that full employment of people with disabilities is not only possible but probable if high expectations are set and individuals are provided the supports and services they need. But one must assume the employability of people with even the most significant disabilities.

IDEA and the Rehab Act have comparable language regarding the development of transition plans that lead to meaningful outcomes for students with disabilities. Supported employment of the 1980's demonstrated a new model of placement and training that has served individuals well. And customized employment is a service delivery model that has long been effective in job placement to identify individualized jobs matching the needs and interests of individuals with disabilities with employer needs. Yet segregation continues.

States would do well to firmly establish Employment First Policies that focus on integrated, Community based employment earning at or above the minimum wage as the first option for individuals with intellectual and other developmental disabilities. In order to be effective these policies require cross-agency commitment to abide by a set of guiding principles, policies and practices disseminated through state statute, regulation or operational procedures that identify employment in integrated, community-based businesses as the priority for state funding.