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**U.S. Commission on Civil Rights
Briefing on Payment of Subminimum Wages to People with Disabilities**

**Panel 4: Transitioning from 14(c) Programs
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Good afternoon, and thank you for the invitation to share these comments as part of today's discussion regarding the current and future use of 14(c) certificates and the payment of subminimum wages to people with disabilities.

I am the Director of Policy and Advocacy at the Association of People Supporting Employment First, or APSE. APSE is the only national, non-profit membership organization dedicated to Employment First – a vision that all people with disabilities have a right to competitive employment in an inclusive workforce. To that end, we work to ensure that employment in the general workforce is the first and preferred outcome in the provision of publicly funded services for all working age citizens with disabilities, regardless of the impact of that disability. Our members include:

- Large and small employers who are committed to inclusive hiring practices
- Support professionals assisting people with disabilities to transition to inclusive employment settings
- People with disabilities and their family members
- Educators and researchers
- Policymakers at every level of government

In 2009, APSE became one of the first advocacy organizations to call for the phase out of subminimum wage for people with disabilities, under Section 14(c) of the Fair Labor Standards Act.¹ Since then the issue has gained significant momentum, and APSE has garnered support from other advocacy organizations, federal officials, agencies, members of Congress, and several states that have either ended sub-minimum wage altogether or they are currently considering doing so. APSE is proud to serve as a pioneer on this issue along with so many other voices in this fight.

¹ *Association of People Supporting Employment First (APSE) Call to Phase Out 14(c) and Subminimum Wage.* (March 26, 2019). Retrieved from <https://apse.org/wp-content/uploads/2019/04/APSE-14c-Documents-4-17-19-Full-Version.pdf>

The questions asked of this panel aim to understand the benefits and implications of transitioning employment programs from paying subminimum wage under 14(c) and from offering services in segregated or sheltered work settings. We are grateful to the Commission for applying a civil rights lens to this complicated issue and our comments today intend to address these questions from this same perspective.

To begin, I would like to make a distinction between the two separate but related concepts in question here today. There are two avenues through which individuals with disabilities can be paid below the Federal minimum wage. The first is the use of 14(c) certificates, which allow for the payment of subminimum wages to people with disabilities based on a productivity measure of performance. This work is historically housed in segregated work centers designed for people with disabilities. The other avenue is through Medicaid, specifically pre-vocational and group supported employment services. These are often delivered in facility-based or sheltered workshop settings. While often discussed interchangeably, my comments today reflect the subtle differences between the two, especially as it relates to existing laws and regulatory practices that shape the disability services field and impact the civil rights of people with disabilities.

There is a relationship between the Fair Labor Standards Act under Section 14(c) and Medicaid Home and Community Based Services (HCBS). It is important to understand the interface of the two because any change to one will impact the other. Regardless of which side of the 14(c) debate each of today's panelists may represent, I believe we all agree that it is vital to adopt a "do no harm" approach to the policy discussion. It is important to ensure that no individual with a disability is left without necessary supports and services as a result of any policy change.

Considerations for Transitioning from Facility-Based to Competitive, Integrated Employment

Others have testified today about the history of segregation of people with disabilities, including in employment. To quickly reiterate a few points raised by my colleagues, the case is well established that segregation in any form is a violation of civil rights. Furthermore, the federal courts and the Department of Justice have consistently interpreted the Supreme Court's *Olmstead v. L.C.* ruling² to apply across all settings, including where people with disabilities work.³ As such, I will keep my comments on this issue brief. Instead, I will focus on lessons learned from the thoughtful, well-planned, and successful transition from facility-based to competitive, integrated employment.

As an organization, APSE came into existence simultaneous to a significant federal investment in promoting and implementing supported employment services during the late 1980s and early 1990s. The field has grown tremendously over the past few decades. Supported employment

² 527 U.S. 581 (1999).

³ *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.* (June 22, 2011) ("DOJ Olmstead Statement"), retrieved from https://www.ada.gov/olmstead/q&a_olmstead.pdf.

remains the most widely accepted, evidence-based and cost-effective practice for improving competitive, integrated employment outcomes of people with disabilities.^{4,5}

Over the past 20+ years, APSE member organizations, who previously operated facility-based sheltered workshop programs utilizing Medicaid funds, have transformed to a service delivery model that supports individuals with a full range of disabilities in competitive, integrated employment. Supported employment is a critical component of this transition. There is clear evidence that sheltered workshops and similar programs can be changed, and that services can be successfully provided in a way that is in sync with our national disability policy of full integration and inclusion of people with disabilities.⁶

Regardless, pre-vocational services are currently allowable through the Medicaid waiver. By definition, pre-vocational services are provided to develop skills necessary to participate in the general workforce. It is understood that individuals receiving pre-vocational services are not yet prepared to enter the competitive workforce and require additional skill building opportunities.

Under Medicaid rule, an individual is eligible for compensation up to 50% of the minimum wage while receiving pre-vocational services. The wage may be determined by the individual's demonstrated or assessed earning capacity. CMS guidance is clear that "pre-vocational services are not an end point, but a time limited service for the purpose of helping someone obtain competitive employment."⁷ Thus, it is expected that once an individual is assessed as having an earning capacity of 50% or more, they should transition to other employment services.⁸ Remember, Medicaid HCBS services are intended to lead to integrated community employment - or competitive, integrated employment as defined in the Workforce Innovation and Opportunity Act (WIOA). However, in direct violation of the rights of people with disabilities, this transition often does not happen. It is not uncommon to find individuals in these prevocational programs who have been receiving services in that setting for decades.

Yet simply transitioning on to another HCBS employment service does not necessarily equate to having solved the issue of subminimum wage for people with disabilities. When a state is approved to offer Group Supported Employment under their Medicaid HCBS waiver, the regulations are silent on wages. This creates a loophole through which employers or providers can continue to pay a productivity wage to individuals who are not otherwise eligible for pre-vocational services under Medicaid.

⁴ Citera, R. (2011). Does being in sheltered workshops improve the employment outcomes of supported employees with intellectual disabilities? *Journal of Vocational Rehabilitation* 35, 21–27.

⁵ Citera, R. (2008). The cost-trends of supported employment versus sheltered employment. *Journal of Vocational Rehabilitation* 28, 15–20.

⁶ National Council on Disability. (October 11, 2018). *From the New Deal to the Real Deal: Joining the Industries of the Future*. Retrieved from https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf

⁷ CMSC Informational Bulletin. (September 16, 2011). Retrieved from <https://downloads.cms.gov/cmsgov/archived-downloads/CMCSBulletins/downloads/CIB-9-16-11.pdf>, p. 2.

⁸ 42 CFR 440.180(c) (2).

This overlap and comingling between Medicaid regulations and 14(c) subminimum wage law complicates the assessment of whether the rights of people with disabilities are being violated. Regardless, when Medicaid funding is involved, the law is clear – services must be integrated and the ability to earn a full wage must be the goal. To prevent people from disabilities who are being served through Medicaid from achieving competitive, integrated employment is a clear violation of their civil rights. However, the continued utilization of 14(c) is a different matter.

Considerations for Transitioning Away from Section 14(c) of the Fair Labor Standards Act

14(c) employment is not, by definition, pre-vocational. It is, instead, a currently legal designation for work completed by individuals with disabilities who are not working at 100% productivity based on the standards of the workplace. It is important to note that 14(c), under the Fair Labor Standards Act of 1938, was hugely progressive at the time. The goal was to help injured veterans assimilate back into the workforce during a period of time when our society largely institutionalized people with disabilities. Additionally, the U.S. economy was largely driven by manufacturing, where productivity was a reasonable way to assess progress towards being ready to reenter the workforce. In 2019, 14(c) is largely used to pay people with intellectual and developmental disabilities a subminimum wage despite the fact that the law was not conceptualized for this population. Furthermore, manufacturing currently makes up just 12% of the U.S. economy and 8.5% of the U.S. workforce.⁹ As the economy and workforce has changed, our models for preparing individuals with disabilities to be competitively employed have remained largely constant. Arguably, the continued use of 14(c) now perpetuates the stigma surrounding what people with disabilities can be reasonably expected to contribute.

I am often asked whether it is “fair to make an employer” pay the full minimum wage when an employee is not working at 100% productivity. I have several answers to this question. Given what we now know and have available to us in 2019, I fundamentally question the notion that someone simply cannot work competitively. If someone is truly not performing at 100%, my assumption is that something is missing or out of place:

- Perhaps the individual needs better or different training.
- Maybe the correct supports have not yet been put in place to ensure the individual’s success.
- Is it possible that there is a reasonable accommodation, perhaps the use of assistive or other technology, that is missing?
- At the end of the day – maybe it’s just not a good job match for that individual

Consider this – my very first job as a 15-year-old was at a fast food restaurant. When I started, I was not very “productive.” Fortunately, I had a pretty good manager who recognized that this was a first job and I needed to learn some skills. I was not initially expected to perform at 100% all the time. I was provided additional training. I was cross-trained for other tasks that my manager thought I might be better suited for. Eventually, all available options were exhausted, I

⁹ Amado, K. (October 22, 2019). U.S. manufacturing statistics and outlook. *The Balance*. Retrieved from <https://www.thebalance.com/u-s-manufacturing-what-it-is-statistics-and-outlook-3305575>

was still not performing up to expectations despite the tools provided to me, and I was let go. Or, as I like to think about it, I was provided the opportunity to pursue other opportunities for employment. Throughout this entire process, I was paid minimum wage.

The minimum wage is exactly that – a minimum wage. It is a price floor. It is the lowest amount an employer is legally allowed to pay an employee. That is, unless you have a disability. In fact, people with disabilities are the only protected class of U.S. citizen under federal employment discrimination laws for which there is an exemption from the minimum wage.¹⁰ This fact, in and of itself, is a civil rights issue. The actual scope of the issue, however, is hard to define.

You've heard conflicting reports today regarding the number of individuals with disabilities who are currently earning a subminimum wage under 14(c). This is a prevailing question in policy discussions regarding 14(c). For the purposes of my statement today, I am focusing on 14(c) certificates held by community rehabilitation providers (CRPs). According to the most recent report from the Department of Labor (DOL), Wage and Hour Division (7/1/19), there are 1,316 certificates currently held by CRPs. This accounts for 93% of all active 14(c) certificates. 105,006 individuals with disabilities are reported as earning below the Federal minimum wage.¹¹ However, this is not an accurate number.

In fact, there are no publicly available data that tells us the true number of individuals with disabilities served under 14(c). This is because DOL does not require CRPs to report the number of individuals served in work centers whose certificates are in pending or renewal status. At any given time, approximately 20% of existing certificates are in pending status. The most recent report from DOL identifies 230 pending certificates. We can estimate the total number of 14(c) employees by applying an average of the number of individuals served against the total number of certificates. For the July 2019 reporting period, this would bring us to approximately 123,000 U.S. citizens with disabilities who were paid below the Federal minimum wage.

Critical to this discussion is the recognition that we simply do not have adequate data to assist us in understanding the scope of the 14(c) problem, which is a critical step to ensuring we “do no harm” as we seek to identify policy answers to rectify the financial discrimination of people with disabilities currently allowed under 14(c). In addition to the number of individuals impacted, here is a list of just a few of the questions we cannot answer using publicly available data:

- Demographics of individuals working under 14(c) – Are most people nearing retirement? Or are the majority still of working age? There are clear implications to how we approach a transition away from 14(c) based on the answer to these questions.
- Wage information – Is the average wage closer to \$7.25 an hour, or \$0.30 an hour? What is the annual wage that people are earning? Assuming wages earned reflect the productivity or capacity of workers with disabilities, the answer to this question is critical

¹⁰ U.S. Equal Employment Opportunity Commission. (n.d.). Who is protected from employment discrimination? Retrieved from https://www.eeoc.gov/employers/smallbusiness/faq/who_is_protected.cfm

¹¹ U.S. Department of Labor, Wage and Hour Division. (July 1, 2019). *Community Rehabilitation Programs (CRPs) List*. Retrieved from <https://www.dol.gov/whd/specialemloyment/CRPlist.htm>

to plan for the retraining necessary to assist in the transition to competitive work in community settings.

- It should be noted that this is data that DOL has available and can be obtained via a FOIA request. Maryland was able to obtain, analyze and utilize this data, which was critical in planning for the state's own initiative to phase out the use of subminimum wage.
- Length of employment – How long have 14(c) employees been at their jobs? Also, to what extent have their wages counted towards social security retirement benefits? This is critical to understanding the impact of using Social Security retirement benefits as part of a phase out solution to 14(c).

This is just a partial list of factors to consider in terms of the impact on the individual. There are certainly other factors to consider in terms of the impact on CRPs. Federal contracts largely drive the 14(c) economy, and these contracts are awarded and funded based on an assumption of low labor costs. Were 14(c) to be eliminated without a simultaneous increased investment on the part of the Federal government for the products and services currently received under 14(c), there is a real possibility of doing harm. If the contracts cannot support the payment of the Federal minimum wage, people will likely lose their jobs and the system will collapse.

Finally, you have asked us to comment on trends in 14(c) and state-level initiatives to phase out the use of 14(c) and subminimum wages. There has been a steady decline in the number of active certificates and the number of individuals served. In 2016, there were 2,275 active certificates employing 241,265 individuals earning subminimum. In July 2019, these numbers have dropped to 1,316 certificates employing 105,006 individuals. This is a 56% decrease in certificates and 42% decrease in individuals served.

Some of this decrease is accounted for by state-level initiatives. There are four states that have phased out subminimum wage via legislative action including New Hampshire (2015), Maryland (2016), Alaska (2018) and Oregon (2019). Vermont and Maine have ended the use of subminimum wage, although without legislative action. Additionally, as of July 2019, Wyoming does not have any active or pending 14(c) certificates.

Given how relatively recent these changes in policy were enacted, it is not possible to accurately assess the impact on the lives of people with disabilities. Nevertheless, analyzing trends is a useful exercise given the increased attention to this issue from a state and federal policy perspective. During the 2019 legislative session, 12 states had proposed legislation calling for some level of phase out of 14(c) and subminimum wage. At the Federal policy level, the Raise the Wage (HR582 / S150) and Transition to Competitive Employment Acts (HR873 / S260) both seek to phase out the use of 14(c) certificates over a 6-year period of time.

Despite the obvious limitations of available data, positive trends can be observed when comparing employment rates from the year a state enacted legislation to discontinue the use of 14(c) and subminimum wage to the most current data available (Table 1).

Table 1

*Comparisons of employment rates from the year legislation was enacted to the most currently available data*¹²

	Year Enacted	Most Recent Reported Rate
New Hampshire	<u>2015</u>	<u>2017</u>
All disabilities	42.4%	45.0%
Cognitive disabilities	34.6%	34.9%
Maryland	<u>2016</u>	<u>2017</u>
All disabilities	42.2%	42.6%
Cognitive disabilities	31.7%	33.7%
Vermont	<u>2016</u>	<u>2017</u>
All disabilities	41.4%	45.9%
Cognitive disabilities	24.4%	41.3%

Note. Employment rates are the percentage of non-institutionalized, male or female, with a disability, ages 21-64, all races, regardless of ethnicity, with all educational levels in the U.S. who were employed)

However, the rate of employment is impacted by several factors. Of critical concern in the discussion of phasing out 14(c) is ensuring there is adequate funding and capacity within the service delivery system to support the successful transition of individuals into competitive, integrated employment. A cursory analysis of state-level investments in integrated employment funding, simultaneous to the phase out of 14(c), suggests the relationship between the two may have an impact on outcomes. For example, the Maryland employment rates have remained relative constant between 2015 and 2017. However, the state investment in integrated employment funding for people with intellectual and developmental disabilities from approximately \$75 million to \$59 million over the same time period.¹³

On the other hand, Vermont increased their investment in integrated employment funding by approximately \$2 million between 2016 and 2017 and achieved a moderate increase in the employment rate for people with disabilities within the same year.¹⁴

¹² American Community Survey (ACS). *Employment Rate Estimates*. Retrieved from: <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=2>

¹³ Statedata.info. (2019). *State IDD Agencies. Maryland, U.S. Total: Integrated employment funding*. Retrieved from <http://www.statedata.info/data/showchart/934295>

¹⁴ Statedata.info. (2019). *State IDD Agencies. U.S. Total, Vermont: Integrated employment funding*. Retrieved from <http://www.statedata.info/data/showchart/565751>

Again, these findings are to be viewed with caution as there are significant limitations in the data that is publicly available. To echo the testimony of Dr. Butterworth earlier today, more and better data are needed.

In Summary

I'd like to address a common critique in the debate over 14(c) and subminimum wage for people with disabilities. It is the opinion of some that there are people who, due to the severity of their disability, simply cannot work. I do not accept this claim. In fact, it is my opinion that to accept this as truth is to summarily discriminate against people with disabilities by applying an inherently unfair standard of low expectations about their potential contributions to our society.

Bill Stumpf, a parent advocate from Iowa, whose son has successfully transitioned from 14(c) into competitive, integrated employment, summarizes it best. "When I'm asked this question, I respond by acknowledging that I used to be one of the people who believed that. But I've now seen what is possible. I'm not saying it is easy to accomplish, but it is possible. And to accept anything less is to deny the rights of people with disabilities."

At the end of the day, it cannot be ignored that the only protected class of employee for which there is an exemption from the basic right of earning a Federal minimum wage is people with disabilities. When Federally funded programs and services contribute to this systematic discrimination, the U.S. government is complicit in devaluing their existence. There is much work to be done to untangle the current systems that economically disadvantage people with disabilities. However, it is good work and is it the right work.

In fact, it is the work that APSE has engaged in for decades. Through policy, advocacy, and the sharing the best practices, tools and connections, we continue to strive to move the needle forward toward inclusive, fair employment for all. We thank the Commission for examining this critical barrier to Employment First, and we stand ready to assist in any way we can.