



January 16, 2025

Director Daniel Navarrette  
Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
**SUBMITTED VIA REGULATIONS.GOV**

Re: Comments in response to the notice of proposed rulemaking, *Employment of Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act* (RIN 1235-AA14)

Dear Director Navarrette,

Indiana Disability Rights (IDR) submits these comments in support of the Department of Labor's (DOL's) proposed rule to phase out the issuance of certificates that permit employers to pay subminimum wages to workers with disabilities, pursuant to section 14(c) of the Fair Labor Standards Act (FLSA).<sup>1</sup> As the state's congressionally mandated protection and advocacy system (P&A),<sup>2</sup> IDR has long-advocated for the rights of Hoosiers with disabilities, including the right to be free from discrimination by employers. Indeed, one of IDR's Priorities and Objectives involves systemic advocacy for Indiana to shift state and federal funding toward supporting Hoosiers with disabilities in competitive integrated employment (CIE) rather than sheltered workshops.<sup>3</sup> Although the proposed rule does not go so far as to mandate the closure of sheltered

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<sup>1</sup> See *Employment of Workers with Disabilities under Section 14(c) of the Fair Labor Standards Act*, 89 Fed. Reg. 96,466 (Dec. 4, 2024); see also 29 U.S.C. § 214(c).

<sup>2</sup> See 42 U.S.C. § 15001 et seq.

<sup>3</sup> See Indiana Disability Rights, *FFY 2025-2027 Priorities & Objectives*, available at: <https://www.in.gov/idr/priorities-and-objectives/#:~:text=Advocate%20with%20individuals%20with%20disabilities,employment%2C%20justice%2C%20and%20voting>. (last accessed: Jan 14, 2025). IDR's Priorities & Objectives are created based upon extensive feedback from Hoosiers with various disabilities. This particular priority of the Hoosier intellectual and developmental disability (IDD) community has been evident for years. During a 2016 sheltered workshop monitoring project, many workers reported having no interest in the tasks they undertook, instead sharing aspirations compatible with CIE, such as working for a veterinary clinic or restaurant. Unfortunately, sheltered work was the only option available to them due to the preferences of the individual's parent(s) or guardian, insufficient employment-related support services, and/or the significant misunderstanding that public benefits and CIE are incompatible.

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## Equity Through Advocacy

The Protection and Advocacy System for the State of Indiana

workshops, curtailing the payment of subminimum wages is a meaningful act that furthers the ability of individuals with disabilities to exercise their employment rights.

IDR is a consistent and vocal participant in policy discussions and advocacy regarding the employment of individuals with disabilities. In addition to its role in administering the Client Assistance Program and Protection and Advocacy for Beneficiaries of Social Security grants,<sup>4</sup> through which IDR – formally and informally – represents Hoosiers with disabilities whose rights have been violated by Vocational Rehabilitation Services, employment networks, and employers, IDR has also been at the forefront of Indiana’s efforts to shift resources from sheltered work to CIE. Since the group’s inception, IDR’s Policy Director has been the P&A representative to the Administration on Community Living’s Disability Employment Technical Assistance Center Grantee Advisory Committee. Further, the Policy Director is a former member of the national Association of Professionals Supporting Employment First (APSE) board of directors, and multiple IDR staff have presented at national and state chapter APSE conferences. IDR’s leadership has also contracted with the Center for Public Representation to leverage its expertise in promoting CIE as Indiana continues to navigate the transformation of IDD services.

As noted, IDR supports the DOL’s proposed rule as currently written. The multitude of evidentiary materials cited in the notice of proposed rulemaking (NPRM) are both credible and overwhelmingly support the conclusion that subminimum wage certificates are now unnecessary to “prevent the curtailment of opportunities for [individuals with disabilities] employment.”<sup>5</sup> Perhaps unsurprisingly, the materials referenced by the NPRM echo trends and sentiments in Indiana. While IDR has received some ardent feedback from a handful of parents and sheltered workshop leadership maintaining that the institutions provide a safe and friendly place for individuals with disabilities to spend their day, the vast majority of Hoosiers with disabilities – including former sheltered workers – have publicly expressed an informed choice to participate in CIE rather than sheltered work.<sup>6</sup> The few sheltered workers who want to maintain their current position share that their preference is rooted in fear they will never see their fellow sheltered workers again if they leave the workshop,<sup>7</sup> which suggests a lack of appropriate home and community-based supports rather than a legitimate need for the issuance of subminimum wage certificates.

Data collected from Indiana providers further evidences that CIE is possible for sheltered workers, again rebutting outlier parents and guardians. Consider, for example a 2024 Indiana University report showing that 5% of sheltered workers in Indiana are simultaneously engaged in competitive employment in a secondary environment.<sup>8</sup> Although the report does not detail whether these particular workers are paid subminimum wage by their sheltered workshop, it is not unreasonable to assume so when the average sheltered worker’s pay rate in Indiana is a mere \$3.49 per hour (compared to \$11.94 per hour for Hoosiers

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<sup>4</sup> 29 U.S.C. § 732 and 42 U.S.C. § 1320b-21.

<sup>5</sup> 29 U.S.C. § 214(c)(1).

<sup>6</sup> See IDR’s sheltered workshop monitoring survey data (2016); see also Derek Nord and Teresa Grossi, *Comprehensive State Plan on Community-Based Services for Persons with Intellectual and Developmental Disabilities: A Report to the Indiana General Assembly* (Oct. 2018), available at: [https://www.in.gov/fssa/ddrs/files/1102\\_Final\\_Report\\_11.1.2018.pdf](https://www.in.gov/fssa/ddrs/files/1102_Final_Report_11.1.2018.pdf).

<sup>7</sup> See IDR’s data *supra*, note 6.

<sup>8</sup> Teresa Grossi et al., *Day and Employment Services Outcomes Systems Report* (2024), 20, available at: <https://www.iidc.indiana.edu/doc/indiana-desos-report-2024.pdf>.

with disabilities in CIE).<sup>9</sup> Clearly, numerous subminimum wage workers are more than capable of succeeding in CIE.

Indeed, the report's statistics suggest that some individuals with disabilities are capable of performing CIE job duties but have reduced productivity in the sheltered work environment. Consider that sheltered workshops have a financial incentive not to accommodate workers with disabilities, and, at least in Indiana, available job tasks are overwhelmingly manufacturing-related.<sup>10</sup> On the other hand, CIE-related employment support services, including those available through vocational rehabilitation services, aim to match participants with disabilities to jobs that match their interests, skills, and abilities.<sup>11</sup> Not only are these CIE jobs often more interesting and meaningful to individual employees with disabilities, but employers are also incentivized to ensure that these employees are reasonably accommodated to ensure their maximum productivity.

Rather than being used as intended when Congress passed the FLSA, sheltered workshops today largely serve as a cheaper alternative to community-based day programming. Sheltered workers have told IDR monitors that their work is not meaningful, but rather whatever the workshop's leadership can get from local manufacturing companies.<sup>12</sup> Some workers asked monitors why they could not just complete the same work on-site, integrated with company workers. Ultimately, the reason may come down to the provider's ability to pay subminimum wages.

Generally, sheltered workshops receive substantial revenue from Medicaid reimbursements, private employers from whom work is obtained, private donations, and additional state subsidies (in some states) and tax benefits (given their general non-profit status). Authorizing these providers to pay subminimum wages further strengthens their financial position. This situation enables the provider to accept lower Medicaid reimbursement rates than other providers, such as those providing more skilled and resource-intensive services like job coaching. In Indiana, entering a sheltered workshop offers individuals with disabilities the means to stretch a limited Medicaid budget greater than is possible through any alternative service. For that reason, many parents and guardians insist that individuals participate in sheltered work, even if the individual could thrive in a CIE setting.

Similarly, there is significant misinformation about an individual's ability to earn a living wage and maintain critical public benefits, including Medicaid eligibility. Although nearly 90% of states have a Medicaid buy-in program,<sup>13</sup> few individuals are well-informed about their existence, not to mention their advantages. IDR's monitoring project illustrated that this phenomenon is caused by several factors. First, in Indiana, benefits counseling is generally obtained through vocational rehabilitation services.<sup>14</sup> Second, many benefits

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<sup>9</sup> Id. at 15.

<sup>10</sup> 92% of sheltered work positions primarily involve assembly and manufacturing, according to providers participating in the Indiana University report. Id. at 20.

<sup>11</sup> Specifically, vocational rehabilitation services are aimed at employing participants with disabilities in a manner "consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, informed choice, and economic self-sufficiency." 29 U.S.C. § 720(a)(2)(B).

<sup>12</sup> See IDR's data *supra*, note 6.

<sup>13</sup> Emily Munson, *Medicaid Millionaire: The Disabled Person's Guide to Earn and Keep Wealth while Receiving Public Benefits* (Oct. 2024).

<sup>14</sup> Although Indiana has two regional Work Incentives Planning and Assistance providers, they do not widely advertise their services to the general disability community. Thus, many Hoosiers with IDD and their families and guardians do not know how benefits planning can be used.

counselors are employed by providers that also offer sheltered work. Providers are disincentivized to recommend that their best workers receive benefits counseling, lest these workers transition to CIE and cease serving as an income source.

The third factor is more nuanced. Some adults with IDD continue to live in their family home. A family member often serves as the individual's representative payee and deducts rent and other expenses from the individual's Social Security benefits. Because these expenses would often otherwise be paid by the family, the family benefits from the individual's public benefits. Some family members, then, are disincentivized from changing the status quo because, from their perspective, it benefits everyone (even though CIE could potentially allow the individual with a disability to contribute even more to household expenses). Other, less scrupulous representative payees, may view CIE as an opportunity for the individual with a disability to obtain more autonomy over their life, potentially cutting out the representative payee entirely.

Thus far in these comments, IDR has focused on describing how sheltered work affects a subset of Hoosiers with IDD, those receiving home and community-based services through Medicaid waivers. Another group of Hoosiers with IDD – those who reside in group homes – also often attend sheltered work for the majority of their day. IDR has learned that these individuals rarely have any input into their placement. Instead, to conserve resources, the group home is unstaffed during the day and all residents are transported to (and from) a sheltered workshop (which is not infrequently owned by the same provider as the group home). Multiple IDR clients have been told by these providers that they cannot reside in the group home and pursue CIE or any alternative other than sheltered work. Again, while this concern pertains more to *Olmstead's* integration mandate, requiring these providers to pay sheltered workers subminimum wage may force these providers to consider options other than mandatory sheltered work.

IDR's sole concern about the DOL's proposal to curtail the issuance of section 14(c) certificates is the potential for current sheltered workers to be funneled into facility-based day programming rather than CIE. IDR recognizes that states will be responsible for monitoring the transition from subminimum wage to an alternative and ensuring that sufficient supports and services are available to individuals with disabilities that desire at least minimum-wage employment. However, this transition will take time. For that reason, IDR supports the DOL's proposed three-year phase-out period.<sup>15</sup> Relatedly, IDR believes that timeframe is ample for existing sheltered workshops to shift their business model to: (1) pay workers at least the minimum wage; (2) provide CIE supports and services to their sheltered workforce and others; or (3) altogether cease providing employment-related services to individuals with disabilities.

Given the DOL's well-researched, nearly unequivocal, and compelling justifications for eliminating the issuance of section 14(c) certificates three years from the final rule's effective date, IDR suggests that any extension beyond the three-year phase-out period is inappropriate. As the NPRM notes, "the [DOL] must consider whether the payment of subminimum wages is necessary to prevent the curtailment of 'a suitable combination of conditions,' for employment opportunities, advancement, or progress broadly, not whether all workers attain a particular employment outcome, or a specific worker attains a particular job in a particular setting."<sup>16</sup> This language indicates that difficulties a particular sheltered workshop or worker may experience as a result of the rule's implementation cannot merit the opportunity to continue subminimum

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<sup>15</sup> See *Employment of Workers supra*, note 1 at 96,494.

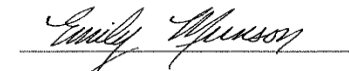
<sup>16</sup> *Id.* at 96,468.

wage payment. This conclusion is further supported by the DOL's recognition of "the fundamental principle that FLSA rights cannot be waived by workers or employers . . . even if workers would agree to work for subminimum wages."<sup>17</sup> Hence, even if an individual sheltered worker would benefit from the continued receipt of subminimum wages after the proposed phase-out period's conclusion, regulations implementing the FLSA cannot be bent or circumvented for that individual. Therefore, the DOL should not contemplate extensions that would accomplish such and similar results.

In conclusion, IDR concurs with the DOL's hypothesis that the continued issuance of section 14(c) certificates is likely "self-reinforcing" and "even contravene[s] the [FLSA]'s intent of promoting opportunities for gainful employment."<sup>18</sup> As voluntarily offered by Indiana providers, there are individuals with disabilities who participate in part-time CIE while using their Medicaid waiver to engage in sheltered work during the remainder of the week. This occurrence is not indicative of workers' gradual transition from the sheltered workshop to CIE, but rather reflects a compromise. The worker can engage in CIE only as far as his waiver budget will allow, and the surest way to conserve one's budget while still receiving services is to do sheltered work. This plain fact is also the reason many other Hoosiers with disabilities continue to perform sheltered work year after year, decade after decade; parents and guardians can (arguably) keep their ward safe while conserving their waiver budget and other public benefits. In short, sheltered workshops have become an obstacle that prevents some individuals with disabilities from CIE. Not only is this situation discriminatory and unnecessary, but it also deprives those individuals with the ability to find a vocation and participate in meaningful work each day.

For the foregoing reasons, IDR strongly supports the DOL's proposed rule as it is currently written. Should you need any further information regarding these comments, please contact me at [emunson1@indianadisabilityrights.org](mailto:emunson1@indianadisabilityrights.org). Thank you for your efforts in promulgating a rule and for the opportunity to provide this feedback.

Sincerely,



Emily Munson  
Policy Director

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<sup>17</sup> Id. at 96,493.

<sup>18</sup> Id. at 96,491.