



August 17, 2017

The Honorable Betsy DeVos
Secretary
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Letter from Representative Kristi Noem *et al.* to Secretary DeVos dated July 28, 2017

Dear Secretary DeVos:

The undersigned disability organizations support and endorse the Department of Education's regulations implementing the Workforce Innovation and Opportunity Act of 2014 (WIOA) which took effect on August 19, 2016 and the Rehabilitation Services Administration's (RSA) Frequently Asked Questions (FAQ) with respect to the definition of competitive integrated employment. We believe these items are consistent with congressional intent and should not be amended. Likewise, we submit that state policies disqualifying AbilityOne from state referrals are consistent with the goals of WIOA, other federal disability laws that promote integration, and the United States Supreme Court's decision in *Olmstead*. The following analysis will illustrate that the appropriate solution is not to rescind the WIOA regulations but rather for Congress to amend the current statutes governing the AbilityOne program.

We recently received a copy of a letter from Representative Kristi Noem *et al.* (hereinafter referred to throughout this analysis as "the letter") concerning the Rehabilitation Act, as amended by the Workforce Innovation and Opportunity Act of 2014. First and foremost, we applaud Congress's bipartisan effort to enact this law, as well as all federal agencies that promulgated regulations to achieve better jobs for Americans with disabilities. Specifically, this analysis will address the following statements from the letter:

- The RSA created a definition of "integrated settings" in the context of competitive integrated employment through its promulgating regulations and sub-regulatory guidance related to WIOA.
- The RSA promulgated a number of factors that disqualify an employer from state referral and those factors are found in the RSA's FAQ document on its website.
- The AbilityOne program receives allowances under the Fair Labor Standards Act for compensatory subminimum wages.
- The AbilityOne program complies with a mandated direct labor-hour ratio of persons with disabilities.
- The RSA's disqualifying criteria are nowhere to be found within the WIOA law.
- The RSA's disqualifying criteria have resulted in AbilityOne organizations experiencing difficulty in placing individuals in jobs around the country.

- State vocational rehabilitation agencies have stopped referring individuals with disabilities to AbilityOne employment.
- States have implemented policies disqualifying AbilityOne from state referrals.

Part I of this analysis provides the groundwork of how Congress's goals have systematically shifted away from the segregated employment model in 1938 to the competitive integrated employment model in 2014. In Part II, it describes how the AbilityOne program is inconsistent with Congress's current employment objective to achieve competitive integrated employment. Finally, Part III provides a solution to reconcile the apparent conflict between the AbilityOne program and WIOA.

I. Legislation Regarding Employment of People with Disabilities Has Been Moving Away From Sheltered Employment Towards Competitive Integrated Employment Over the Last Several Decades

A. Legislative intent of Section 14(c) of the Fair Labor Standards Act and the Javits-Wagner-O'Day Act

Congress has contemplated ideas to secure jobs for people with disabilities since the mid-1800s; however legislation did not develop until the 1930s, at a time when most jobs were found in the manufacturing business. At that time, society believed that employees with disabilities could not meet the production standards of nondisabled employees.¹ In 1938, Congress enacted the Fair Labor Standards Act, but created an exception that allowed the Secretary of Labor to grant a Special Wage Certificate to employers that permitted them to pay their disabled employees subminimum wage commensurate with the individual's productivity level.²

That same year, in another attempt to address the employment dilemma, Congress established a committee to determine the fair market value of commodities manufactured by the blind offered for sale to the federal government by any nonprofit agency.³ Today, this committee, known as AbilityOne, is governed by the Javits-Wagner-O'Day Act⁴ to serve both the blind and people with severe disabilities.⁵ AbilityOne publishes a list of commodities and services provided by "qualified nonprofit agencies" for the blind and other individuals with severe disabilities that the committee determines are suitable for procurement by the government.⁶

Reflecting on the social and economic effects of programs like 14(c) and AbilityOne, Congress acknowledged in numerous Congressional documents that the environment it fostered and funded only resulted in segregated employment.⁷ Consequently, Congress recognized that the 14(c) and AbilityOne programs brought only limited success. Despite its efforts in the 1930s, Congress still found that the isolation and segregation of people with disabilities was a pervasive social problem in critical areas such as employment.^{8, 9}

B. "Integrated settings," as used in WIOA's implementing regulations, are consistent with longstanding federal law, policy, and case law

Congress recognized that past legislative efforts led to an unintended consequence, that consequence being that graduates from "sheltered employment" were unable to transition into

mainstream employment.¹⁰ In response, Congress took a new approach and enacted both the Rehabilitation Act of 1973¹¹ and the Americans with Disabilities Act of 1990¹² with intent to prohibit discrimination based on disability.¹³ This was Congress's attempt to counter past legislation and integrate people with disabilities into society.¹⁴ As the United States Supreme Court explained in 1999 in its landmark decision in *Olmstead v. L.C. ex rel. Zimring*, "[u]njustified isolation of the disabled" amounts to discrimination because institutional placement "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."¹⁵ In its decision, the Court found that Title II of the Americans with Disabilities Act prescribed a state's duty to *counter* discrimination.¹⁶ It also upheld Congress's integration mandate stating that state programs, services, and activities must be administered "in the most integrated setting appropriate."¹⁷ In doing so, the Court defined the "most integrated setting" as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."¹⁸

The *Olmstead* decision has been applied to state services like vocational rehabilitation and prohibits states from referring people with disabilities to segregated employment settings.¹⁹ Leading this initiative, the United States Department of Justice's Civil Rights Division (DOJ), has pursued nearly fifty cases to enforce and expand *Olmstead*.²⁰ It has also created guidelines on the enforcement of Congress's integration mandate, defining the "most integrated settings" as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible...[and] settings that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities."²¹ By contrast, segregated settings often have qualities of an institutional nature 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."²²

The DOJ's enforcement litigation applying the "most integrated setting" standard includes two challenges to the overuse of sheltered employment for people with disabilities: *Lane v. Kitzhaber*²³ and *United States v. Rhode Island*.²⁴ In *Lane*, plaintiffs alleged that Oregon failed to provide training and services that would allow individuals with intellectual disabilities work in mainstream, rather than sheltered, employment settings.²⁵ The DOJ intervened and alleged that Oregon administered employment, rehabilitation, vocational, and education service systems "in a manner that unnecessarily causes qualified individuals with disabilities to be denied the benefit of [these systems] in the most integrated setting appropriate to their needs," and that the state failed to modify the systems to avoid such discrimination.²⁶ The DOJ noted that Oregon's Office of Vocational and Rehabilitation Services, tasked with formulating individualized employment plans, was failing people with disabilities by "administer[ing] a system of vocational assessments that [was] largely inappropriate for individuals with" intellectual or developmental disabilities.²⁷ The parties entered into a settlement agreement, in which Oregon agreed to transition 1,115 sheltered workshop employees into competitive, integrated employment over seven years, and to provide at

least 4,900 youth with disabilities supported employment services to prepare them for competitive employment.²⁸

In another employment case, the DOJ alleged that Rhode Island and the city of Providence violated Title II by failing to administer their supported employment and special education programs in accordance with the ADA integration mandate.²⁹ The DOJ alleged that Rhode Island sent students with disabilities from its special education training program to its largest sheltered workshop, Training Thru Placement (TTP), in unnecessarily high numbers, and that TTP participants then remained in the workshop for decades, with few participants ever moving on to integrated employment.³⁰ In an interim settlement agreement, the parties agreed that new placements would no longer be made to TTP³¹ and to gradually increase placements in integrated mainstream employment.³²

The letter incorrectly states that the RSA created a definition of "integrated settings" in the context of competitive integrated employment.³³ In fact, as described above, "integrated settings" can be found used consistently in other federal regulations and policies well predating the WIOA regulations and FAQ.³⁴ Likewise, the United States Supreme Court upheld the ADA's "integration mandate" in 1999 in its *Olmstead* decision, over a dozen years prior to the passage of WIOA and its implementing regulations. Therefore, RSA did not promulgate a new definition of "integrated setting," but rather adopted a longstanding definition as used in other federal regulations, policies, and case law. Applying *Olmstead's* definition in this analysis, as was previously done in the *Lane* and *Rhode Island* cases, allows the conclusion that vocational rehabilitation services must be provided in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.³⁵

The letter states that state vocational rehabilitation agencies have stopped referring individuals with disabilities to AbilityOne employment.³⁶ As will be discussed later in this analysis in more depth, the AbilityOne program is currently not integrated.³⁷ Turning to federal regulations, policies, and case law for guidance leads to the conclusion that state policies terminating referrals to the AbilityOne program are consistent with states' duties to counter discrimination under Title II and that referrals to these program would effectively be acts of *endorsing* discrimination.³⁸

The momentum building towards integration did not stop after the Americans with Disabilities Act and the Rehabilitation Act however. With the foundation for desegregation in place and the Supreme Court in the midst of hearing arguments in the *Olmstead* case at the time, Congress enacted the Workforce Investment Act of 1998 (WIA).³⁹ Under WIA, all programs, projects, and activities receiving assistance under [the Rehabilitation] Act were required to be carried out in a manner consistent with the principles of inclusion, integration, and full participation of the individuals.⁴⁰ The 1998 amendments to the Rehabilitation Act emphasized Congress's goal of "integrated settings" for people with disabilities. This timeline contradicts the letter's allegation that the Rehabilitation Services Administration created a definition of "integrated settings" in its regulations implementing WIOA. As mentioned previously, Congress recognized "integrated settings" as early as the ADA in 1990 and WIA in 1998, along with the United States Supreme Court's 1999 decision in *Olmstead*.

Additionally, in 2001, the Secretary of Education included the phrase “integrated setting” in its definition of “employment outcome” and required that all employment outcomes in the Vocational Rehabilitation program be in integrated settings under § 361.5(b)(16).⁴¹ That year, the Department of Education’s 2001 regulations eliminated sheltered employment as an employment outcome, regulations which have remained in effect for sixteen years.⁴²

C. Congress’s goal today – to achieve “competitive integrated employment”

In 2014, Congress found that people with disabilities continued to be underrepresented in the general workforce.⁴³ Through the passage of the Workforce Innovation and Opportunity Act of 2014 (WIOA), Congress declared its intent to improve employment opportunities for people with disabilities. Unlike past efforts which brought limited results, this time, Congress emphasized the achievement of jobs in the general workforce and defined “competitive integrated employment,”⁴⁴ “employment outcome,”⁴⁵ and “supported employment”⁴⁶ for the purpose of the Rehabilitation Act.

Next, Congress amended sections of the Rehabilitation Act to “empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society...and to maximize opportunities for individuals with disabilities, including individuals with significant disabilities, for competitive integrated employment.”⁴⁷ It established an Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities to study, and prepare findings, conclusions, and recommendations for the Secretary of Labor on ways to increase the employment opportunities for individuals with intellectual or developmental disabilities or other individuals with significant disabilities in competitive integrated employment, the use of the certificate program carried out under [29 U.S.C. §214(c)] for the employment of individuals with intellectual or developmental disabilities, or other individuals with significant disabilities, and ways to improve oversight of the use of such certificates.⁴⁸

Finally, Congress added Section 511 to the Rehabilitation Act entitled, “Limiting the Use of Subminimum Wages” stating “[n]o entity, including a contractor or subcontractor of the entity, which holds a special wage certificate as described in section 14(c) of the Fair Labor Standards Act of 1938 may compensate an individual with a disability who is age [twenty-four] or younger at a wage that is less than the Federal minimum wage unless [certain] conditions [are] met.”⁴⁹ Congress created these mandatory conditions to ensure that youth with disabilities have a meaningful opportunity to prepare for, obtain, maintain, advance in, or regain competitive integrated employment.

Accordingly, the Secretary of Education incorporated Congress’s definitions into its implementing regulations.^{50,51} In adopting Congress’s definition of “employment outcome,” the Department of Education required that all employment outcomes achieved through the Vocational Rehabilitation program be in competitive integrated employment or supported employment, thus disqualifying previously recognized employment goals like homemakers and unpaid family workers from the Vocational Rehabilitation program.⁵²

1. Congress created two exceptions to the “employment outcome” standard

First, in instances when individuals with disabilities receiving supported employment services cannot achieve employment that satisfies all the criteria of “competitive integrated employment” or

“supported employment,” Congress authorized the payment of non-competitive wages as long as the individual is working in an integrated setting on a *temporary* basis.⁵³ Under this exception, Congress did not intend to circumvent its overall goal and still expects the individual achieve competitive integrated employment at some point.⁵⁴ Accordingly, the Department of Education implemented regulations authorizing work in integrated settings for non-competitive wages for up to twelve months.⁵⁵

Under the second exception, Congress authorized the Secretary of Education to exercise its discretion to determine appropriate vocational outcomes consistent with the Act.⁵⁶ Although this exception permits other vocational outcomes within the scope of the definition of “employment outcome,” it does not mandate the Secretary of Education to incorporate new outcomes or to retain previously permitted ones.⁵⁷ Rather Congress authorized these discretionary acts as long as they lead to competitive integrated employment.⁵⁸

II. The AbilityOne program currently does not satisfy Congress’s goal to achieve competitive integrated employment or its exceptions

The letter highlighted a direct conflict between Congress’s intent under the Rehabilitation Act as amended by WIOA and the AbilityOne program. It stated that the Frequently Asked Questions document on the Rehabilitation Services Administration’s website reiterates three criteria that disqualify an employer from state referrals and that these criteria are unique to the AbilityOne program.⁵⁹ Yet, these three disqualifying criteria are consistent with Congress’s goals under WIOA.

Under the AbilityOne program, noncompetitive government contracts are awarded to “qualified nonprofit agencies for the blind or other severely disabled.”⁶⁰ “Qualified nonprofit agenc[ies] for the blind or other severely disabled” are “agenc[ies] operated in the interest of blind or severely disabled individuals that in the production of products and provision of services employs blind or other severely disabled individuals for at least 75 percent of the hours of direct labor.”⁶¹ Congress explicitly excluded “supervision, administration, inspection, or shipping” from the definition of “direct labor.”⁶² In interpreting these statutes, courts have concluded that the AbilityOne program primarily focuses on providing the blind and others with severe disabilities with a “sheltered environment” and discourages advancement into managerial opportunities.⁶³ In other words, AbilityOne mainly serves people with disabilities.

The letter also stated that the AbilityOne program continues to operate under a mandated direct labor-hour ratio of persons with disabilities.⁶⁴ This 75 percent direct labor requirement, as stated in the current statute and in the letter, is inherently incompatible with WIOA because the work settings are disproportionately filled with employees with disabilities. These settings cannot be considered integrated. Rather than incentivize work in the community, the direct labor ratio requires large-scale retention of employees with disabilities in majority-disability workplaces.⁶⁵

The letter stated that the AbilityOne program continues to receive allowances under the Fair Labor Standards Act for compensatory subminimum wages.⁶⁶ Under Congress’s new definition of “supported employment,” people with disabilities cannot be paid subminimum wages unless the employer is integrated. As previously noted, AbilityOne is not integrated.⁶⁷ Therefore, the program

cannot simultaneously pay subminimum wages and receive support under the Rehabilitation Act, including referrals.

Likewise, the AbilityOne program does not satisfy the first exception enacted by Congress because the program is not intended to be temporary. It also does not have a goal to achieve competitive integrated employment which could trigger the Secretary of Education to exercise its discretion and permit employment in the AbilityOne program under the second exception. Just as the Secretary of Education previously exercised its discretion to disqualify employment goals like homemakers and unpaid family workers from the Vocational Rehabilitation program because these goals could not satisfy Congress's definition of employment outcomes, it can exercise this same discretion to disqualify the AbilityOne program. Therefore, although these three disqualifying criteria are not explicitly included in the WIOA law,⁶⁸ they are consistent with the law's definition and limited exceptions to "employment outcome" and further Congress' clear intent for competitive integrated employment.

Additional arguments support the position that the AbilityOne program is not an employment outcome Congress intended. In an independent analysis, the Government Accountability Office (GAO) found "the participants of the [AbilityOne] program perform work activities that require less skill and experience."⁶⁹ Congress also recognized that the AbilityOne program leads to segregated employment.⁷⁰ Finally and most recently, even the AbilityOne Commission declared that its program required improvements to the quality of employment and wages for its workers with disabilities in order to stay viable.⁷¹

III. Congress should amend the AbilityOne program so that it is consistent with the overall goals and purpose of the Rehabilitation Act, as amended by WIOA, to achieve competitive integrated employment

The letter stated that the RSA's three disqualifying criteria have resulted in the AbilityOne organizations experiencing difficulty in placing individuals in jobs around the country.⁷² This improperly implies that the problem stems from WIOA's implementing regulations when the real issue is that the current statutes governing AbilityOne effectively make integration of their workplaces impossible. Even the AbilityOne Commission acknowledged its governing statutes are outdated.⁷³ It further recognized that its program cannot meet Congress's goal to achieve competitive integrated employment under the Rehabilitation Act as amended by WIOA.⁷⁴ The Advisory Committee on Increasing Competitive and Integrated Employment (Advisory Committee) provided additional support. In its final report, the Advisory Committee recommended several actions Congress should take in order to align the AbilityOne program with modern federal disability law and policy goals.⁷⁵ Therefore, the solution to fix this problem does not lie in the hands of the Secretary of Education, but rather the hands of Congress to improve the AbilityOne program so that it can meet Congress's goals of today, that is, to achieve competitive integrated employment. With WIOA, federal disability laws, and AbilityOne all in effect simultaneously, the federal legal framework governing employment of people with disabilities will remain contradictory.⁷⁶

IV. Concluding Remarks

The undersigned disability organizations thank you for the opportunity to share our rationale for objecting to any amendments to the Department of Education's implementing regulations under WIOA with respect to the definition of competitive integrated employment. We believe the current regulations and RSA's FAQ are necessary to facilitate Congress's goal to achieve competitive integrated employment for people with disabilities. Likewise, state policies disqualifying the AbilityOne program from referrals are consistent with the goals of WIOA, other federal disability laws, and the United States Supreme Court's decision in *Olmstead* which require that states have a duty to administer services, programs, and activities in the most integrated settings. Because the AbilityOne program currently is not integrated as mandated by its 75 percent direct labor ratio, it does not satisfy Congress's goal of an employment outcome. We therefore suggest that a more appropriate solution to the concerns raised in the letter to you is for Congress to amend the statutes governing AbilityOne so that it too facilitates the achievement of competitive integrated employment for people with disabilities.

If you have any questions, or would like additional information, please contact Mark Riccobono, President of the National Federation of the Blind, by phone at (410) 659-9314, or by email at officeofthepresident@nfb.org.

Sincerely,

American Association of People with Disabilities
Association of Programs for Rural Independent Living
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Collaboration to Promote Self-Determination
National Association of the Deaf
National Coalition for Mental Health Recovery
National Council on Independent Living
National Down Syndrome Congress
National Federation of the Blind
National Organization of Nurses with Disabilities
Not Dead Yet
TASH
United Spinal Association

cc:

Office of General Counsel – U.S. Department of Education

Representative Kristi Noem

Representative Cathy McMorris Rodgers

Representative Kevin Brady

Representative Luke Messer

Representative Doug LaMalfa

National Federation of the Blind

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Representative Glenn Grothman
Representative Claudia Tenney
Representative Jim Renacci
Representative Mike Bishop
Representative Mike Gallagher
Representative Jason Smith
Representative H. Morgan Griffith
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Representative Mike Simpson
Representative John Katko
Representative Kevin Cramer
Representative Dave Brat
Representative Gus Bilirakis

Representative Diane Black
Representative Steven M. Palazzo
Representative Chuck Fleischmann
Representative Larry Bucshon, M.D.
Representative Rick W. Allen
Representative Ron Estes
Representative Trey Gowdy
Representative Pete Sessions
Representative Markwayne Mullin
Representative Blake Farenthold
Representative Leonard Lance
Representative Jeff Fortenberry
Representative Mike Coffman

¹ Jessica Wichmann, *The Horrors of Atalissa, Nat'l Fed'n Blind* (Mar. 10, 2014, 4:55 PM), <https://nfb.org/blog/vonb-blog/horrors-atalissa>).

² 29 U.S.C. § 214(c); 29 C.F.R. § 525.5 (2014).

³ Act of June 25, 1938, ch. 697, 52 Stat. 1196 ("the Wagner–O'Day Act").

⁴ 41 U.S.C. §§ 8501-8506 (2011).

⁵ *Id.*

⁶ 41 U.S.C. § 8503(a)(1)(A)-(B) (2011).

⁷ See, e.g., H.R. Rep. No. 105-635 (1998); 134 Cong. Rec. E1308 (daily ed. Apr. 22, 1988) (statement of Rep. Tony Coelho) ("[W]hen prejudice dictates that the handicapped can be productively employed only in separate sheltered workshops . . .").

⁸ 42 U.S.C. § 12101(a)(2)-(3) (2008).

⁹ 29 U.S.C. § 701(a)(5) (2014).

¹⁰ Zoë Brennan-Krohn, *Employment for People with Disabilities: A Role for Anti-Subordination*, 51 Harv. C.R.-C.L. L. Rev. 239, 243 (2016).

¹¹ 29 U.S.C. § 701 *et seq.* (The Rehabilitation Act of 1973 is known as the first civil rights act intended to protect and promote persons with disabilities, and prevent discrimination in programs receiving federal funding); Thomas B. Heywood, *State-Funded Discrimination: Section 504 of the Rehabilitation Act and Its Uneven Application to Independent Contractors and Other*

Workers, 60 Cath. U. L. Rev. 1143, 1151 (2011); *See* 29 U.S.C. § 791 (2014) (providing affirmative action and nondiscrimination protection for disabled persons in federal government positions); *Id.* at § 793 (mandating affirmative action in regards to federal contracts in excess of \$10,000); *Id.* at § 794 (precluding discrimination in any program or activity receiving federal funds); *Id.* at § 794a (providing remedies for violations of § 791 and § 794 of this Act comparable to those available under the Civil Rights Act of 1964).

¹² 42 U.S.C. § 12101 *et seq.*

¹³ 42 U.S.C. § 12132 (1990); 29 U.S.C. § 794(a) (2015).

¹⁴ *See* 42 U.S.C. § 12101(b)(1) (2008).

¹⁵ 527 U.S. 581, 596 (1999).

¹⁶ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999) (emphasis added).

¹⁷ *See* 42 U.S.C. § 12182(b)(1)(B) (1990).

¹⁸ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999).

¹⁹ It should be noted that subsequent to the enactment of WIOA, the DOJ published guidelines for state and local governments' employment service systems in 2016 which can be found at https://www.ada.gov/olmstead/olmstead_guidance_employment.pdf (stating that "in the context to state employment services, the 'most integrated setting' requires the provision of services and supports in an integrated setting that enables an individual with a disability to work in a typical job in the community like individuals without disabilities."

²⁰ *See* *Olmstead: Community Integration for Everyone - Home Page*, ADA.gov, <http://www.ada.gov/olmstead/index.htm> (last visited August 10, 2017).

²¹ U.S. Department of Justice Civil Rights Division, *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), available at https://www.ada.gov/olmstead/q&a_olmstead.htm#_ftnref11 (citing 28 C.F.R. pt. 35 app. A (2010)).

²² *Id.*

²³ *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1201 (D. Or. 2012).

²⁴ Complaint for Declaratory and Injunctive Relief, *United States v. State of Rhode Island and City of Providence*, Case No. 1:13-cv-0042-L-PAS (D.R.I. June 13, 2013).

²⁵ *Lane*, 841 F. Supp. 2d at 1201.

²⁶ United States' Complaint in Intervention at 84, *Lane v. Kitzhaber*, Case No. 3:12-cv-00138-ST (D. Or. March 27, 2013).

²⁷ *Id.* at 76.

²⁸ Settlement Agreement, *Lane v. Brown*, Case No. 3:12-cv-00138-ST (Sept. 8, 2015), available at http://www.ada.gov/olmstead/documents/lane_sa.pdf, archived at perma.cc/Y8R7-R7ME.

²⁹ Complaint for Declaratory and Injunctive Relief, *United States v. Rhode Island and City of Providence*, Case No. 1:13-cv-0042-L-PAS at 110-112 (D.R.I. June 13, 2013), <http://www.ada.gov/olmstead/documents/ri-providence-complaint.pdf>, archived at <http://perma.cc/TCN8-BEUK>.

³⁰ *Id.* at 67, 83.

³¹ Interim Settlement Agreement at 5, Department of Justice, City of Providence, State of Rhode Island, Interim Settlement Agreement, available at <http://www.ada.gov/olmstead/documents/ri-providence-interim-settlement.pdf>, archived at <http://perma.cc/QVR8-VL2G>.

³² *Id.* at 9. (The parties later entered into a consent decree reinforcing obligations under the original settlement.)

³³ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) p.1, ¶1, lines 1-3.

³⁴ *See e.g.* Discrimination Prohibited, 45 C.F.R. § 84.4(b)(vi)(2)(2005).

³⁵ *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999).

³⁶ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017), p.2, ¶1, lines 1-2.

³⁷ *Infra* note 63.

³⁸ *But see Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999)(emphasis added).

³⁹ The Workforce Investment Act of 1998, Pub.L. 105-220 § 401, Aug. 7, 1998.

⁴⁰ 29 U.S.C. § 701(2)(c)(3)(1998), *See also* 29 U.S.C. § 720(a)(3)(B) (stating "Individuals with disabilities must be provided the opportunities to obtain gainful employment in integrated settings").

⁴¹ State Vocational Rehabilitation Services Program, 66 FR 7250-01 (stating "[t]his action is necessary to reflect the purpose of Title I of the Rehabilitation Act of 1973, as amended (Act), which is to enable individuals with disabilities who participate in the VR program to achieve an employment outcome in an integrated setting").

⁴² State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage, 81 FR 55630-01.

⁴³ *See e.g.* 29 U.S.C. § 701(a)(1)-(7) (2014).

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- ⁴⁴ 29 U.S.C. § 705(5) (2014).
- ⁴⁵ *Id.* at 705(11)(A)-(C).
- ⁴⁶ *Id.* at 705(38).
- ⁴⁷ See also 29 U.S.C. § 701(b)(1)-(2)(2014).
- ⁴⁸ 29 U.S.C. § 795n(f)(1)-(3) (2014).
- ⁴⁹ 29 U.S.C. § 794g(a)(1)-(2) (2015) (internal citations omitted).
- ⁵⁰ 29 U.S.C. § 794g(a)(1)-(2) (2015) (internal citations omitted).
- ⁵¹ State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage, 81 FR 55630-01 (stating “[t]he foundation of the VR program is the principle that individuals with disabilities, including those with the most significant disabilities, are capable of **achieving** high quality, competitive integrated employment when provided the necessary services and supports”)
- ⁵² *Id.*
- ⁵³ 29 U.S.C. 705(38)(2014) (emphasis added).
- ⁵⁴ *Id.*
- ⁵⁵ 34 C.F.R. § 363.1.
- ⁵⁶ 29 U.S.C. § 705(11)(C) (2014).
- ⁵⁷ See State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage, 81 FR 55630-01.
- ⁵⁸ See 29 U.S.C. § 705(11)(C) (2014).
- ⁵⁹ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) p.1, ¶2, lines 3-5.
- ⁶⁰ 41 U.S.C. § 8503 (2011).
- ⁶¹ *Id.* § 8501(6)-(7) (emphasis added).
- ⁶² *Id.* § 8501(3)(B).
- ⁶³ See *NISH v. Cohen I*, 247 F.3d 197, 201 (4th Cir. 2001) (citing *Barrier Indus. v. Eckard*, 584 F.2d 1074, 1076 (D.C. Cir. 1978)) (“*NISH II*”).
- ⁶⁴ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) p.1, ¶2, lines 7-8.
- ⁶⁵ Zoë Brennan-Krohn, *Employment for People with Disabilities: A Role for Anti-Subordination*, 51 Harv. C.R.-C.L. L. Rev. 239, 248 (2016).
- ⁶⁶ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) p.1, ¶2, lines 6-7.
- ⁶⁷ *Supra* note 63.
- ⁶⁸ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) p.1, ¶2, lines 8-9.
- ⁶⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-3, DEFENSE CONTRACTS: CONTRACTING FOR MILITARY FOOD SERVICES UNDER THE RANDOLPH-SHEPPARD AND JAVITS-WAGNER-O'DAY PROGRAMS (2007), available at <https://www.gao.gov/products/GAO-08-3>, p. 11, ¶ 1, lines 3-4.
- ⁷⁰ *Supra* note 8.
- ⁷¹ See *infra* notes 69-70.
- ⁷² Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) p.1, ¶2, lines 10-11.
- ⁷³ U.S. AbilityOne Commission, *Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities* (March 18, 2016), p.1, ¶5, lines 6-7, available at <http://www.abilityone.gov/commission/documents/US%20AbilityOne%20Commission%20Declaration%202018March2016%20Final.pdf> (stating “the Commission recognizes that Federal policies have changed since the Javits-Wagner-O'Day Act was passed into law in 1971”).
- ⁷⁴ *Id.* at 1, ¶5, lines 5-7.
- ⁷⁵ ADVISORY COMMITTEE ON INCREASING COMPETITIVE AND INTEGRATED EMPLOYMENT FOR PEOPLE WITH DISABILITIES, FINAL REPORT TO THE HONORABLE THOMAS E. PEREZ, UNITED STATES SECRETARY OF LABOR, THE UNITED STATES SENATE, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, THE UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON EDUCATION AND THE WORKFORCE (2016), available at https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf.
- ⁷⁶ See Zoë Brennan-Krohn, *Employment for People with Disabilities: A Role for Anti-Subordination*, 51 Harv. C.R.-C.L. L. Rev. 239, 245 (2016).