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Via Submission through Regulations.Gov

The Honorable Miguel Cardona  
Secretary  
United States Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

**RE: U.S. Department of Education, Office of Special Education and Rehabilitative Services Proposed Guidance, “Frequently Asked Questions: Criterion for an Integrated Employment Location in the Definition of ‘Competitive Integrated Employment’ and Participant Choice” (Docket ID ED-2021-OSERS-04)**

Dear Secretary Cardona:

Thank you for the opportunity to provide a public comment on the proposed guidance cited above (“proposed guidance”). ACCSES submits this comment on behalf of itself and disability service providers from across the country whose efforts to expand employment opportunities for individuals with disabilities have been limited by the existing guidance that was posted on January 18, 2017 (“current guidance”).

ACCSES is a D.C.-based policy and advocacy organization that provides a voice for disability service providers on issues that significantly affect the lives of individuals with disabilities. The more than 1,200 disability service providers that make up the ACCSES network serve over three million individuals with disabilities. Their efforts expand opportunities for people with disabilities to live, work, and thrive where and with whom they want – just like people without disabilities. Unfortunately, the current guidance treats people with disabilities, including federal, state, and local contractors, differently from other individuals seeking vocational assistance. It is time for the Department of Education, the Office of Special Education and Rehabilitative Services (OSERS), and the Rehabilitation Services Administration (RSA) to fix this disparity (collectively, "the Department").

The proposed guidance takes some steps in the right direction although it does not go far enough to correct an imbalance that is preventing individuals with disabilities in many states from being referred to well-paid jobs due to a too-narrow view of what constitutes an integrated location. With an unemployment rate for individuals with disabilities that is double that of people without disabilities, and a labor force participation that hovers around 20 percent, it is time to leave counterproductive restrictions and purity goals behind and focus on the real-life needs that can be met and the opportunities that can be provided by taking a broader and more welcoming

approach to employment locations and the jobs that they involve. We also want to encourage the Department to cease basing success on working with people without disabilities. There is nothing inherently better or superior about working alongside a person without disabilities, but so much of the messaging in the current guidance, the proposed guidance, and the law itself suggests otherwise. This is both offensive and categorically untrue, and we believe holds people back from reaching their goals.

That being said, we would like to express our appreciation for some of the positions the Department has taken in the proposed guidance that are a step in the right direction. We also want to remind the Department that many of the jobs that working-age adults with disabilities have held onto during this pandemic are jobs deemed essential by federal, state, and local governments. These jobs are important and highly valued, and as you are reviewing the public comments and finalizing the guidance, we hope you will keep this in mind.

### **Training and Referrals**

While it may seem odd to begin our comment with the end of the proposed guidance, we want to thank the Department for its recognition of the importance of referrals from state Vocational Rehabilitation agencies (VR) for soft skills training with the intention of leading to competitive integrated employment (often called work adjustment) in any setting that meets an individual's needs. This has been a point of confusion leading to some individuals being required to receive soft skills training in a setting where they may not be ready or successful. As **Question 21** notes, "Nothing in the Rehabilitation Act or its implementing regulations prohibits an individual from receiving VR services, including job training or work experience, in a non-integrated setting." Thank you for this clarification.

### **Informed Choice**

The expanded focus in the proposed guidance on informed choice is very positive. The current guidance also expresses support for informed choice, but we remind the Department that this did not lead to individuals in some states being informed about high-paying jobs (some with benefits) made possible through government contracts. The proposed guidance should reinforce that informed choice means being informed of all opportunities. **Question 19** should be clarified to state that informed choice means being informed of all types of available jobs, including those arising under state, federal, or local contracts, whether or not those contracts include a requirement for a certain percentage of hours to be worked by individuals with disabilities. This is something on which the state Vocational Rehabilitation (VR) agencies should be required to report.

We also are appreciative of the Department clarifying that "individuals may find it helpful when exercising informed choice to know that it is permissible under the VR program to participate in both integrated and non-integrated training and work experiences." This can lead to expanded competitive integrated employment by allowing individuals the opportunity to try new things without the risk of losing the job they already enjoy. We applaud the Department for recognizing the value of flexibility.

### **Case-by-Case Reviews**

The multiple references requiring state VR agencies to conduct case-by-case reviews of job site locations is welcome, and something many providers and advocates have been calling for since the current guidance was posted. It should be reinforced in the proposed guidance that such reviews must be conducted with an open mind and without any presumptions based on the ultimate employer or contractor. This is a crucial issue and one that currently can either open the door to tremendous opportunities or keep it firmly shut, depending upon the subjective view of the state VR agency. We encourage the Department to include in the final guidance that the emphasis should be on finding the criteria for an integrated location met, not on subjectively determining that the criteria is not met for reasons not found in the law.

### **Community Rehabilitation Programs**

Community rehabilitation programs (CRPs) are the foundation of the disability service system and are the primary movers behind helping individuals succeed in competitive integrated employment. We are pleased to see that the proposed guidance recognizes CRPs as key partners in the effort to expand employment options, and we would like to see this partnership further emphasized. This is where we have some additional thoughts on things that we would like to see amended in the proposed guidance.

In keeping with the concept of CRPs being closely aligned partners, the answer to **Question 9** should be entirely rewritten to clarify that jobs through a CRP or at a CRP-owned business are not presumptively non-integrated settings. An increasing number of jobs within or through a CRP are open to individuals with or without disabilities. The citation to 81 FR 55643 should be eliminated as the language contained in that citation would only serve to discourage opportunities for individuals or lead to confusion as to when a job is considered an integrated setting when the owner of the business is a CRP.

**Question 10** conflicts with **Question 9** and should be expanded to recognize that all jobs under ratio-based contracts are open to individuals with or without disabilities. The very existence of a ratio underscores that point. The answer to **Question 10** should be rewritten to recognize that as CRPs broaden their hiring practices to create more integrated settings, individual jobs may qualify as competitive integrated employment. Blanket suppositions that only certain jobs within a CRP qualify as competitive integrated employment limits opportunities today and in the future.

### **Typically Found in the Community**

The entire analysis of “typically found in the community” in the proposed guidance is overly prescriptive and serves to limit opportunities, not expand them. Moreover, it is not science-based or data-based; rather, it is founded on opinion and an arbitrary assignment of “community” that is counter-factual at best. The fact that it has been “longstanding policy,” as referenced in the answer to **Question 8**, is not a reason to continue maintaining a narrow perspective. **Question 8** and its definition of “typically found in the community” leaves no room for evolution. We would argue that a policy dating back to the 1990s needs to be updated to recognize that the competitive labor market has evolved. The way people work is in a constant

state of change, and we undoubtedly will see even greater changes as more businesses reopen post-pandemic. Policies should be flexible enough to reflect the expectations of the people affected, rather than the people affected being expected to change to meet antiquated policies. We encourage the Department to open new doors to opportunities that meet people's needs and job goals.

The answer to **Question 8** contains language that a business “formed for the purpose of employing people with disabilities” is not “typically found in the community.” Yet, across the country for-profit businesses are lauded for opening a wide variety of job opportunities intended for people with disabilities. This language appears to be specifically targeted toward CRPs and is dated. The intent of the proposed guidance facially includes CRPs as partners, but it is in the specifics and how that plays out in real time that matters. CRPs provide employment opportunities both within the CRP and through placements in competitive integrated employment for individuals with disabilities and should be treated with respect and given the supports necessary to expand those options, not denigrated and belittled as not being part of the community. CRPs are very much an integral and important part of communities across the country.

In April 2020, the Department issued a report titled, **The State Vocational Services Program before and After Enactment of the Workforce Innovation and Opportunity Act in 2014**. Table 2 on Page 11 of the report, replicated below, shows a significantly greater number of people exiting the vocational rehabilitation system *without* an employment outcome in 2018 and 2019 than exited with an employment outcome. While there may have been other factors influencing these numbers, there can be no denying that available jobs went unfilled by qualified would-be applicants because of an overly narrow interpretation of what qualifies as an integrated location for the purposes of determining competitive integrated employment. Broadening the current overly restrictive view of what constitutes an integrated location will help not just the individuals looking for employment, but the VR system as a whole.

<b>FY</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
<b>Individuals Exiting with Employment Outcome</b>	164,674	171,490	173,975	176,788	176,065	178,110	179,476	175,458	153,293	142,523
<b>Individuals Exiting without Employment Outcome</b>	152,587	146,277	138,116	152,956	134,345	135,798	136,207	179,003	171,205	170,521
<b>Employment Rate</b>	51.9%	54.0%	55.7%	53.6%	56.7%	56.7%	56.9%	49.5%	47.23%	45.5%

### **Ability-One, State Use, and Other Jobs Falling Under Local, State, and Federal Contracts**

We applaud the Department for eliminating the specific references to jobs falling under the Javits-Wagner-O'Day Act, a law intended to expand employment options for people with disabilities. The citations, however, in the answers to **Question 8** and **Question 9** to 81 FR at 55642-55643 refer to an opinion as to the status of jobs under these contracts. The entire discussion of ratio-based jobs is counter-productive, unrealistic, and not based on fact. This citation must be removed, and the entire discussion of "typically found in the community" should recognize that jobs made available through ratio-based programs are not intended exclusively for people with disabilities. The very existence of a ratio proves that each job is available to people with or without disabilities. Moreover, these jobs are primarily in locations that absolutely are typically found in the community.

This type of parsing of language to avoid offering good jobs to individuals with disabilities is one of the primary reasons why the unemployment figures and employment participation figures barely budge even in a good economy. It is time to set aside these notions and related restrictions and recognize that individuals thrive in jobs they want. These jobs also are among the highest-paid and often include benefits and considerable opportunities for promotion. Think about: there are numerous categories in which certain groups are accorded preferences, including within the federal government. In fact, the federal government itself has a percentage goal of increasing the employment of people who identify as having disabilities. Are those jobs created for persons with disabilities, or are they open to anyone, but with a preference for individuals with disabilities? Where is the line drawn? Preferences in and of themselves are not uncommon and considered in a negative light. The federal government has long had a preference in place for veterans. Preferences also exist for minority-owned businesses, women-owned businesses, and other select categories. That jobs for individuals with disabilities are being singled out as somehow harmful by the very agency and the very law intended to increase opportunities is counter-intuitive and should be rectified.

The Department itself states in **Question 16** that it has no means of determining an appropriate ratio of persons with disabilities versus persons without disabilities. This aligns with the fact that state VR agencies have no means of knowing who has or does not have a disability in any work setting, where an individual does not self-identify. **Question 16** therefore conflicts with **Question 9**, creating a scenario where the Department admits it has no way to judge an appropriate ratio and then establishes a system to do that very judging. The Department's admission that it has no means of determining an appropriate ratio should lay to rest any discussion of jobs being presumptively not "typically found in the community" simply because they fall under a contract that has a goal of a certain number of work hours being performed by individuals with disabilities. No jobs are created for individuals with disabilities under those programs. Those are jobs that must be done and are available to anyone, with or without a disability. That there may be a preference does not change the underlying fact that the job itself was not created for the purpose of hiring people with disabilities. The entire presumption that jobs falling under contracts encouraging hiring persons with disabilities are not "typically found in the community" should be eliminated entirely. Let us get rid of these artificial barriers to employment.

## The Work-Unit Rule

The citation in the answer to **Question 7** to 62 FR 6337-6338 underscores the concern that this guidance and the current guidance arbitrarily limit what can be considered an integrated setting. In 1997, an integrated setting was cited as a setting in which “applicants or eligible individuals interact with non-disabled individuals, other than non-disabled individuals who are providing services to those applicants or eligible individuals, to the same extent that non-disabled individuals in comparable positions interact with other persons.” The restrictive analysis that the proposed guidance requires in the discussion of the “work unit” rule, which ignores entirely the culture of work settings and the ways in which people create a community in work settings, by only considering interactions with colleagues related to work, is not supported by the 1997 62 FR 6337-6338 citation. This needs to be addressed going forward and the proposed guidance changed to match the less restrictive 1997 guidance.

The answer to **Question 11** is overly prescriptive and treats individuals with disabilities differently from any workers in the country. The work unit rule should be rethought as it implies that two or more individuals with disabilities have nothing to offer each other. We strongly disagree with such an interpretation and recommend that if the work unit rule is going to continue to exist, a single interpretation be adopted that applies to the entire work setting and recognizes interactions beyond those between workers related exclusively to work. The Department also should discontinue the idea of “parity” among all workers as that is virtually impossible to ascertain for many jobs. The citation in the answer to **Question 11** to 81 FR55642- 55645 and its unfounded swipe at contracts falling under the Javits-Wagner-O’Day Act and other contracts should be removed from the proposed guidance.

Like **Question 11**, the answer to **Question 12** is overly prescriptive and sets an even more impossible standard of achieving parity across the entire work setting. It is inconceivable how any VR agency could make such an assessment for many jobs. Individual jobs may have many unique duties that do not conform to such restrictive standards.

**Question 13** likewise looks for a measure of parity that ignores the importance of social interactions and focuses solely on communications within the work unit and work setting related to work. This, too, becomes overly restrictive and difficult to ascertain by an outside entity. The focus of the guidance should be on encouraging VR agencies to *lean into* finding a job eligible for an employment outcome, not finding reasons to reject it.

We are curious as to why the answer to **Question 14** singles out CRPs as having work sites when every business has work sites. To the extent, that it recognizes CRPs as having work sites that are solidly within the rule, being singled out may be a plus, however, that it distinguishes CRPs from any other employer is problematic. In any event, the inclusion of the work unit rule, which is not a part of the WIOA statute, and the work site references in the guidance do not conform to the way jobs are treated generally for people without disabilities. The purpose of the guidance should be to encourage employment outcomes by referring individuals to jobs where they will succeed. This begs the question whether the same level of scrutiny in a case-by-case review is undertaken for all jobs, including those offered by major retailers or manufacturers, or if roadblocks to employment only are being placed when the employer is a CRP.

The answer to **Question 15** should make clear that there is no presumption against a janitorial or landscaping job being in an integrated setting simply because the job arises under a state or federal contract intended to increase employment for individuals with disabilities. These jobs are advertised broadly and are available to people with and without disabilities. We also want to remind the Department that for these jobs, interaction with the public is equivalent to interaction with customers.

In closing, we want to emphasize that state VR agencies should be required to provide detailed accountings of case-by-case reviews and any basis for accepting or rejecting a particular location as integrated. The review should be objective, not subjective or based on internal presumptions that are standing in the way of good job opportunities for individuals. All efforts should be focused on expanding options for individuals with disabilities who want to work, not on overly prescriptive and restrictive guidance.

Thank you for the opportunity to submit this comment, and for time given us over the years to communicate our concerns directly with RSA Commissioner LaBreck, Assistant Secretary Collett, and Acting Assistant Secretary and RSA Commissioner Schultz. We also want to thank Acting RSA Commissioner Carol Dobak and the entire RSA staff for their efforts to further clarify the guidance. This guidance is a step in the right direction. We are all on the same team, and all want to expand opportunities for individuals with disabilities. We hope this public comment will be taken in that spirit and with an eye toward increasing job choices.

Sincerely yours,



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President & Chief Executive Officer



Kate McSweeney  
Vice President of Government Affairs & General Counsel