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Workforce Innovation and Opportunity Act (WIOA) Proposed Rule *Issues for Comment*

ACCSES, as part of our effort to draft comments to the Secretary of the Department of Education on the proposed rules regarding State Vocational Rehabilitation Programs, State Supported Employment Programs and Limitations on Use of Subminimum Wage, have determined seven major areas of concern.

Herein are ACCSES' comments to the Secretary, the issue highlights below, and a template to use for you to send in comments by June 15. Further, ACCSES is seeking your ongoing assistance, knowledge and expertise in helping elucidate any shortcomings, insufficiencies in clarity, and/or unintended consequences that might occur if these proposed regulations go into effect as written. Your direct experiential knowledge will enable ACCSES to provide specific examples to support proposed changes in the rule, and to bolster our advocacy after the formal comment period closes on June 15.

Also, ACCSES encourages that stories and testimonials from individuals with disabilities and their families be submitted for the July meeting of the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (ACICIEID) and to that end, ACCSES will be providing themes and talking points that can be used to create that content, while still maintaining the authenticity of the individual's personal experience.

Competitive Integrated Employment

“Competitive Integrated Employment” is defined as a work location that must be in “a setting typically found in the community,” involves the employee with a disability’s interaction with other employees and others, as appropriate (e.g. customers and vendors), who are not persons with disabilities (other than supervisors and service providers), and must to the same extent that employees without disabilities in similar positions interact with these same persons. Specifically, the interaction must occur as part of the individual’s performance of work duties and must occur both in the particular work unit and the entire work site.

Area of Concern

ACCSES supports the priority that competitive integrated employment should be the first option for consideration for individuals with disabilities. However, this priority should not be to the exclusion of an array of options to best suit the individuals and their goals.

ACCSES believes the specification of ‘work unit’ as a modifier to ‘work site’ is not only overly burdensome, but has the unintended consequence of eliminating work opportunities paying more than the minimum wage, with benefits, and effectively eliminating the desired economic self-sufficiency that the regulation purports to strive to achieve.

ACCSES Proposed Comment

ACCSES opposes the proposed definition of “competitive integrated employment” as being overly restrictive in its scope, and limiting in outcomes for group employment commonly used in AbilityOne, state use and commercial contracts. The proposed definition goes beyond Congressional intent. Had Congress intended to eliminate group work opportunities as part of WIOA, it would have done so directly in law. ACCSES urges the Secretary to remove the conditional sub-definition of ‘work unit’ from the broader definition of ‘competitive integrated employment.’ Further, ACCSES recommends that the statutory definition of ‘competitive integrated employment’ be used instead of the definition proposed in rule.

Supporting Content/Examples

Examples provided below serve to demonstrate that the Secretary of Education has not taken sufficient context into account regarding non-traditional work and solo work units that will have the unintended consequence of eliminating work opportunities paying more than the minimum wage, with benefits, and effectively eliminate the desired economic self-sufficiency that the regulation purports to strive to achieve.

Example:

A two-person service contract team responsible for the entirety of janitorial services at a local courthouse, and making more than \$12 per hour, but having regular interaction with the public and all employees within the courthouse during the performance of their duties would no longer be allowed under the ‘work unit’ definition. Under the new proposed regulations, one half of this team would need to be removed from this well-paying position and replaced by an individual without a disability to be considered ‘competitive integrated employment.’ While the intent of the regulation is well-meaning, it effectively will eliminate an above-minimum wage job for an individual with a disability in favor of an individual without a disability even though the original construction of the two-person team met the intent and letter of the law via its interaction with fellow employees within the courthouse and with the public, in a setting typically found within the community. Furthermore, should this two-person team of individuals with disabilities have been hired directly by the courthouse, and not employed by a CRP, its integration into the employee workforce and the community would be considered to be fully integrated, competitive employment with above minimum wage compensation.

Example:

The vagueness of the definition of ‘work unit’ insufficiently accounts for solo shift work in which an individual is part of a broader team of individuals with disabilities and those without disabilities, but who do not have regular interaction with the rest of their ‘work unit’ on a regular basis in the course of their duties, but do have interaction with the public to the same extent that their non-disabled co-workers have while performing in the same work. This lack of interaction with non-disabled individuals within the ‘work unit’ effectively eliminates this type of work from meeting the definition.

Contracting Prohibition

Prohibits a local or state educational agency from entering into a contract or other arrangement with an entity which holds a special wage certificate under Section 14(c) of the FLSA for the purpose of operating a program for a youth under which work is compensated at a subminimum wage.

Area of Concern

ACCSES understands the intent of the Secretary of Education in prohibiting a local or state educational agency from entering into a contract or other arrangement with an entity holding a special wage certificate for the purpose of subminimum wage employment, however, ACCSES does not believe that there should be a blanket ban on all contracting with CRPs for the other array of services being provided that do not result in 14(c) employment. Nor do we believe that Congress intended such a broad prohibition on utilization of disability service providers just because they hold a certificate for some who need that option.

ACCSES Comment

ACCSES recommends further clarification in the final rule to ensure that local and state education agencies are clear that prohibitions on contracting with entities holding a special wage certificate apply solely to contracts resulting in employment in subminimum wage for youth with disabilities and students with disabilities and not to other education services offered by CRPs. While ACCSES believes the underlying intent of the proposed rule is restricted to contracts for employment outcomes, initial interpretation from some states incorrectly interprets the proposed rule as applying to all services provided by a CRP holding a special wage certificate.

Eligibility Assessment for Vocational Rehabilitation Needs

Requires vocational rehabilitation (VR) agencies, to the maximum extent possible, rely on information from an individual’s experiences obtained in an integrated employment setting in the community or in other integrated community settings when conducting a comprehensive assessment for determining eligibility and the need for VR services for individuals with disabilities.

Area of Concern

ACCSES believes that the proposed rule, as written, may be misinterpreted as meaning CRPs who appropriately conduct some or all aspects of the eligibility assessments in a CRP setting may be precluded, incorrectly, from performing assessments at all.

ACCSES Comment

ACCSES requests that the Secretary of Education provide further guidance and examples to clarify the intent of this language and to minimize misinterpretation and misapplication.

Supported Employment

Revises the current definition of supported employment to among other things, reference competitive integrated employment and customized employment, and requires that an individual who is employed in an integrated setting, but not in competitive integrated employment, must be working towards such an outcome on a short-term basis for such work to qualify as supported employment. For this purpose, to be considered working on a short-term basis means that an individual reasonably expects to achieve an employment outcome within six months.

Area of Concern

ACCSES is concerned that a defined timeframe of ‘short-term basis’ to mean within six months may not be a reasonable timeframe for all individuals working in an integrated setting or in customized employment to achieve competitive integrated employment that provides individuals with disabilities an opportunity to obtain competitive integrated employment consistent with their unique strengths, priorities, concerns, abilities, capabilities, interests and informed choice as mandated by Congress under WIOA.

ACCSES Comment

ACCSES recommends that the timeframe for reasonably achieving competitive integrated employment be adjusted from the proposed six months, to ‘*for a reasonable period of time (as defined in section §397.20) which must be consistent with the disability-related and vocational needs of the individual, as well as the anticipated length of time required to complete the services identified in the individualized plan for employment, not to exceed 18 months.*’ While a reasonable expectation of achieving competitive integrated employment may be appropriate for a significant number of individuals with disabilities, it may take longer to achieve for some individuals with the most significant disabilities.

Assessment for Determining Eligibility and Priority for Services

Clarifies that an individual with a disability, whose physical or mental impairment constitutes a substantial impediment to employment, may be determined eligible for VR services if he or she requires services to advance in employment. The extent to which DSUs should assist eligible individuals to advance in their careers through the provision of VR services depends upon whether the individual has achieved employment that is consistent with this standard.

Area of Concern

ACCSES believes clarification is needed in this section, as we have heard reports that some state VR agencies are interpreting the proposed rules as prohibiting assessments by CRP’s that hold a 14(c) certificate.

ACCSES Comment

ACCSES requests that the Secretary of Education issue guidance clarifying that entities holding 14(c) certificates are not prohibited from providing VR assessments and other services solely on the basis of holding a certificate.

Coordinated Documentation Process

Requires the designated state unit (DSU), in consultation with the state educational agency, to develop a process that ensures individuals with disabilities, including youth with disabilities, receive documentation demonstrating completion of the various activities required by the Rehabilitation Act. Establishes the documentation (§397.40) that the DSUs must provide to individuals with disabilities of any age who are employed at a subminimum wage upon the completion of certain information and career counseling-related services under §511(c).

Area of Concern

ACCSES is concerned specifically by the provisions in §397.40 that state that the services described in §511(c)(1) of the Rehabilitation Act must be provided by an entity that does not have a financial interest in the individual's employment outcomes [*See below statute*]. ACCSES is concerned that this language might be misinterpreted as prohibiting entities who hold a 14(c) certificate, but who do not have a financial interest in the outcome of the individual with a disability, from offering the self-advocacy, self-determination and peer mentoring training required under §511(c)(1).

29 USC 794g: Limitations on use of subminimum wage

§794g(c)(1) In general

An entity may not continue to employ an individual, regardless of age, at a subminimum wage unless,

(A) after the individual begins work at that wage, at the intervals described, the individual is provided (by the DSU) with career counseling, information and referrals delivered in a manner that facilitates independent decision-making and informed choice, as the individual makes decisions regarding employment and career advancement; and

(B) is informed by the employer of self-advocacy, self-determination, and peer mentoring training opportunities available in the individual's geographic area, provided by an entity that does not have any financial interest in the individual's employment outcome, under applicable federal and state programs or services.

ACCSES Comment

ACCSES recommends the Secretary of Education provide further clarification that an entity who holds a 14(c) certificate, but does not have a financial interest in the outcome of the individual, may provide the services required under §511(c)(1).

Employment Outcome

Requires all employment outcomes achieved through VR programs be in competitive integrated employment, thereby eliminating uncompensated outcomes. For VR agencies providing services to individuals with disabilities achieving an outcome of homemakers and unpaid family workers, a transition period of six months following the effective date of the final regulations will be implemented for transition.

Area of Concern

ACCSES concurs that uncompensated outcomes are insufficient to meet the definition of “competitive integrated employment.” Should uncompensated outcomes no longer be allowed to ‘close a case,’ is the transition time of six months sufficient to address the transition for those individuals?

ACCSES Comment

ACCSES requests the Secretary of Education to allow for exceptions on a case-by-case basis, up to 12 months, for individuals who may need more transition time.