May 20, 2015

Workforce Innovation and Opportunity Act (WIOA) Proposed Rule
VR, SE and 511
Q&A

Q: Is it ACCSES's position that all AbilityOne contracts are by definition not "competitive integrated Employment?"

A: First and foremost, we wish to clarify that the analysis document does not reflect any ACCSES position or policy statement. It is solely an outline of the proposed regulations and positions of the Administration and the Department of Education.

Based on the reading of the proposed regulations, it is clear that the intent of the Department of Education (ED) is that some jobs in AbilityOne contracts ***do not*** constitute competitive integrated employment as currently organized. This is evident in the definition of 'Competitive Integrated Employment,' and more specifically, the requirements for a 'work unit' under proposed §361.5(c)(9)(ii)(B).

> §361.5(c)(9)(ii)(B) 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), must be 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***, as applicable.

It is ACCSES' position, 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; including the opportunity to participate in a 14(c) certificate program should the individual wish it. Additionally, it is the position of ACCSES that 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 and effectively eliminating the desired economic self-sufficiency that the regulation purports to strive to achieve.

ED provided examples, such as the interaction with individuals with disabilities in a customer service center and those working under service contracts [alone or in groups], that do not take sufficient context into account.

> ***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 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.

ACCSES will advocate for the broadest interpretation of 'competitive integrated employment' possible and the subsequent definitions of 'work unit' and 'work site' be expanded to allow for an array of employment configurations and options to ensure the broadest choice and opportunities available for individuals with disabilities.

Q: Is it ACCSES's position that CRPs are by definition not "competitive integrated employment"?

A: ACCSES believes these same definition issues will apply to CRPs.

ACCSES will advocate for the broadest interpretation of 'competitive integrated employment' possible and the subsequent definitions of 'work unit' and 'work site' be expanded to allow for an array of employment configurations and options to ensure the broadest choice and opportunities available for individuals with disabilities.

Q: If you are a vendor that provides an array of disability services, shouldn't schools be able to contract with us even though we pay subminimum wage in some programs?

A: ACCSES understands the intent of the ED in prohibiting 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. 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 will advocate for the ability of CRPs to contract with state and local education agencies for an array of provided services, outside of 14(c) certificate programs.

Q: We have DOR in California applying the WIOA to all disability service clients even after age 24 years old regarding competitive integrated employment, is this accurate under law?

A: WIOA is comprehensive in its applicability to disability employment programs and supports; specifically, the most onerous regulations facing ACCSES members focus on state VR service programs, state supported employment programs and limitations on subminimum wage. These regulations are applicable to all participants in these programs, regardless of age. While there are specific regulations applicable specifically to those up through age 24, such as contracting with state and local education agencies and the primary focus on transition services with an emphasis on employment first; the definition of 'competitive integrated employment' and its related terms are applicable to all service recipients. For individuals who are receiving less than minimum wage, regardless of age, the regulations provide for a regular assessment of the individuals' needs for continuing in that employment situation.

Q: Will ACCSESS distribute a list of the specific sections on which you are seeking commentary from provider organizations? Are there plans to assemble a list of talking points in response to the proposed rules using the above as a framework? If yes to any or all of the above, is there a target date for release?

A: Yes, this document is forthcoming and will be distributed broadly to ACCSES membership. Additional documents will be distributed on a rolling basis, as necessary.

Q: Will the format for these comments be suggested (such as examples of current situations that may be negatively impacted by a narrow interpretation of the proposed rules)?

A: First and foremost, we will be seeking specific examples of how these proposed regulations will impact you and the individuals you serve. While we have begun initial internal discussions on negative repercussions these regulations will have, we will be relying on your expertise and on-the-ground knowledge of employment and service scenarios and potential unintended consequences to help shape our comments to the ED. ACCSES will take these comments to shape our formal commentary, which will then be shared with the ACCSES membership to create individual comment letters for submission.

Q: I am also interested in your assessment of the impact of the new definition of competitive integrated employment on AbilityOne contracts and state use programs, and if you are encountering specific plans for advocacy to use a narrow interpretation of that definition to attack these programs. In particular, the Michigan CRO Set Aside Committee, the decision-making entity for our state use program, is structured to include a representative from our state VR agency, Michigan Rehabilitation Services. In your view, would WIOA impact VR status as a stakeholder in this program?

A: As proposed, the definition of competitive integrated employment would be critically detrimental to AbilityOne contracts and state use programs, and potentially commercial contracts if some of those jobs are currently counted as VR closures/outcomes. The opposition is latching onto the proposed definition and the explicit statement by ED that settings established by community rehabilitation programs specifically for the purpose of employing individuals with disabilities do not constitute an integrated setting. We do not see why VR would withdraw from the CRO Set Aside Committee because of these proposed rules; but instead would advocate that some jobs do not qualify as VR outcomes.

Q: May an entity holding a 14 (c) certificate and one which conducts commercial business in their work center, can they create a Limited Liability Corporation (LLC) for VR services and not have to deal with some of these onerous rules?

A: While entity holding a 14(c) certificate program may alleviate some contracting concerns and potential mis-application of contracting and/or assessment bans by divesting itself of the VR services programs into a separate entity, it does not circumvent the 14(c) certificate program or the VR services program from compliance with existing and proposed regulations. The proposed regulations would still apply to each entity as applicable to each covered program or services.

Q: How is the "overriding principle that individuals with disabilities, including those with the most significant disabilities, can achieve competitive integrated employment when provided necessary skills and supports", reconciled with the reality that VR determines most, if not all persons with I/DD in organization based employment having 65% or lower productivity...as being not eligible to begin with?

A: The proposed rules are meant to discourage VR from using its past practices, and adopt a different approach. That is one reason why VR money is via WIOA, now allocated to provide employment first services.

Q: One of my members sent this to me; it appears to be pulled from the NPRM: "Therefore, we continue continue to maintain the long-standing Department of Education policy that settings established by community rehabilitation programs specifically for the purpose of employing individuals with disabilities (e.g., sheltered workshops) do not constitute integrated settings because these settings are not typically found in the competitive labor market." Our concern is that this language, combined with HCBS, would allow all CRPs to automatically be deemed ineligible for funding.

A: CRP's are not categorically ineligible for funding. The types of services and settings within which the services are provided are subject to these WIOA rules and the HCBS rules. This is accurately pulled straight from the proposed rules; combined with other comments made by the ED recently, it seems a clear indication that the intent of these rules is to change the manner in which CRPs operate as they would have to fundamentally change how they function in order to maintain compliance with the proposed rules.