

January 14, 2020

Via E-Mail - nbair@usccr.gov

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U.S. Commission on Civil Rights
Office of Civil Rights Evaluation

Dear Nick:

Thank you for giving ACCSES the opportunity to respond to the Commission's follow-up questions. We are available on an on-going basis if the Commission has additional questions or if another need arises. It has been a pleasure getting to know you and working with the Commission.

In response to the eleven questions you recently asked, ACCSES's answers follow:

Question 1:

You mentioned in your testimony that there are approximately 125,000 people in 14(c) programs and they "don't want to leave their jobs." Could you please explain how many people in 14(c) don't want to leave their jobs, and whether you have any data or other sources for your assessment that they don't want to leave their jobs?

Before getting to the meat of the answer, it is important to lay some groundwork. First, the 125,000 figure came from the Congressional Budget Office (CBO) in its evaluation of the Raise the Wage Act last summer, in which the CBO stated: "Employers certified by the Department of Labor are allowed to pay disabled workers below \$7.25 per hour—though those lower wages must be justified by analyses of prevailing wages and worker productivity. There are about 125,000 such workers."¹

Second, the Fair Labor Standards Act provides that, "The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals . . . whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are—(A) lower than the minimum wage applicable under section 206 of this title, (B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and (C) related to the individual's productivity."² This has been

¹ CBO Report, *The Effects on Employment and Family Income of Increasing the Family Income*, July 2019, at 5.

² Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 214(c).

the law for decades and has given opportunities to tens of thousands of people with disabilities. It is an option that is permitted under the law that provides individuals with the dignity of real work, soft skills learning, training in specific areas, the opportunity to have their unique needs met during the workday, and community.

Individuals working under a 14(c) certificate also receive other services and benefits. No one is required to work under a Section 14(c) certificate. It is an option for individuals who choose it. Competitive jobs for people with the most significant disabilities may be limited to a few shifts per week. If a person has a job that consists of only one or two shifts per week, which happens often, it is important to have access to other opportunities. Section 14(c) provides a work opportunity that many individuals choose as their daily work and others to round out their week. Absent Section 14(c), many individuals would never be attending day programs or be at home.

Many individuals have come to Washington over the past three years to talk about how important their job is to them and how concerned they are that the Section 14(c) option will be eliminated. We live in the real world and the choices by this Commission will affect real people. We are disappointed that no one currently working under a certificate was invited to testify before this Commission during the November 15 hearing. This oversight permitted other people to speak for individuals whose jobs are at stake and who want to be heard. As several individuals have said: "My voice, my job, my choice." During the public comment period following the hearing, ACCSES submitted to the Commission via electronic mail a video of advocates cutting off the voices of individuals, many of whom traveled a long distance to come to DC to talk about their jobs during a Congressional briefing sponsored by ACCSES on July 25, 2018. Advocates stormed the briefing and shut down the very people they claimed to represent.³ This Commission likewise declined to hear the voices of individuals who want to be heard. We hope the Commission will rectify that oversight.

Last spring, the U.S. Department of Labor, Office of Disability Employment Policy (ODEP), sponsored a National Dialogue on Section 14(c). The public comments submitted during that period were strongly in favor of retaining Section 14(c) as an option. To our disappointment, a report prepared by an unbiased third party has yet to be published. Additionally, the comments themselves are no longer available to the public.

You asked about my testimony that people do not want to lose their jobs and for data to support it. Lack of data is a significant issue in respect to what happens to people in states and localities where Section 14(c) has been eliminated. Keep in mind that the existence of Section 14(c) does not take away from any individual's opportunity to work in competitive employment. Rather, it enhances opportunities. Under the Section 511 of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, individuals working for less than minimum wage are required to have counseling twice

³ The video can be found on YouTube at <https://www.youtube.com/watch?v=FluLOj9UzhI&t=8s>. It also is accessible through the ACCSES website at access.org. You will find it at the first link under the YouTube logo on ACCSES's front page.

in their first year of employment and annually thereafter. This counseling is provided by the designated state unit in individual states. In addition, certificate holders must provide information as to the availability of third-party peer mentoring, self-advocacy, and self-determination training opportunities annually to each individual working under a certificate for less than minimum wage.⁴ Many CRPs have long incorporated the same training into their programs.

Every individual working under a Section 14(c) certificate does so by choice and has other options available, including day activities. In some cases, individuals work part-time in competitive employment and round out their weeks working under a Section 14(c) certificate in a different job. In other instances, individuals have tried competitive employment and have not been successful or have missed working in a community setting that they enjoy. You asked how we know that individuals want to keep their jobs. Let us pose this question in return: Is that a question you ask people in your offices, your families, or your friends? We must stop treating people with disabilities as if they were some unique group that allows everyone else to have a vote on how they live their lives. Every person with a disability is an individual. "People with disabilities" are not a monolithic group where everyone thinks the same or believes the same or has the same goals or options. Nor are they a monolith eligible to choose only from a limited menu that other people think is best for them. Please stop buying into the idea that individuals have fewer rights to choose their own course. We know individuals with disabilities want to keep their jobs because they choose to work and because we have heard it from many self-advocates. No one wants to lose their job and threatening 14(c) adds stress to individual lives without any upside. Let us work together to expand options, not take them away.

Respectfully, we would like to end this section with a request. "Subminimum wage" is a term promulgated over the years by advocates opposed to Section 14(c). The correct term and term that the Commission should be using is "special minimum wage."⁵ We ask the Commission to follow this convention in drafting its report as the use of "subminimum wage" is both inaccurate, given the fact that many people who work under a Section 14(c) certificate are paid more than minimum wage, but less than prevailing wage, and that it is inherently biased. In the context of the Commission's Report, "special minimum wage" is the correct term.

⁴ See Workforce Innovation and Opportunity Act, 29 U.S.C. 3101, *et seq.* (2014) (referring to 29 U.S.C. 794g); See also P.L 113-128, July 22, 2014, Subtitle F, Rights and Advocacy.

⁵ See, e.g., Congressional Research Service, *Special Minimum Wages for Workers with Disabilities: Frequently Asked Questions*, Dec. 2016, at 1. See also Department of Labor, Wage and Hour Definitions, Special Minimum Wage (SMW), at <https://www.dol.gov/whd/FOH/ch64/64k00.htm>. ("A wage paid a worker with a disability that is commensurate with that worker's individual productivity as compared to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage is always a special minimum wage, i.e., a wage below that required by section 6(a). Before a SMW rate may be paid, the employer must obtain a certificate under section 14(c).")

Question 2:

Are CRPs exempt from OSHA?

Community Rehabilitation Providers (also referred to as Disability Service Providers) ("CRPs") are not exempt from the Occupational Safety and Health Administration (OSHA) requirements. The federal OSHA law applies and will preempt any lesser state law. Under 29 CFR § 1904.2 (subpart B) vocational training programs are partially exempt from keeping injury and illness records, under certain circumstances along with all "social advocacy organizations" (of which CRPs are a part) and myriad other industries, including full-service restaurants, car dealerships, clothing stores, colleges and universities, medical laboratories, insurance carriers, and oil and gasoline pipelines, among many others. The following list provided by OSHA reflects that the decisive factor for whether an industry is required to maintain recordkeeping is not related to whether any specific business or organization identifies as a workplace:

Non-Mandatory Appendix A to Subpart B of Part 1904 - Partially Exempt Industries

Employers are not required to keep OSHA injury and illness records for any establishment classified in the following North American Industry Classification System (NAICS) codes, unless they are asked in writing to do so by OSHA, the Bureau of Labor Statistics (BLS), or a state agency operating under the authority of OSHA or the BLS. All employers, including those partially exempted by reason of company size or industry classification, must report to OSHA any employee's fatality, in-patient hospitalization, amputation, or loss of an eye (*see* § 1904.39).⁶

| NAICS Code | Industry |
|------------|---|
| 4412 | Other Motor Vehicle Dealers. |
| 4431 | Electronics and Appliance Stores. |
| 4461 | Health and Personal Care Stores. |
| 4471 | Gasoline Stations. |
| 4481 | Clothing Stores. |
| 4482 | Shoe Stores. |
| 4483 | Jewelry, Luggage, and Leather Goods Stores. |

⁶ Legal Information Institute, at https://www.law.cornell.edu/cfr/text/29/appendix-A_to_subpart_B_of_part_1904. *See also* OSHA Laws and Regulations, at <https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904TableofContentsAuthorityfor1904>; OSHA appendix, <https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html>.

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| 4511 | Sporting Goods, Hobby, and Musical Instrument Stores. |
| 4512 | Book, Periodical, and Music Stores. |
| 4531 | Florists. |
| 4532 | Office Supplies, Stationery, and Gift Stores. |
| 4812 | Nonscheduled Air Transportation. |
| 4861 | Pipeline Transportation of Crude Oil. |
| 4862 | Pipeline Transportation of Natural Gas. |
| 4869 | Other Pipeline Transportation. |
| 4879 | Scenic and Sightseeing Transportation, Other. |
| 4885 | Freight Transportation Arrangement. |
| 5111 | Newspaper, Periodical, Book, and Directory Publishers. |
| 5112 | Software Publishers. |
| 5121 | Motion Picture and Video Industries. |
| 5122 | Sound Recording Industries. |
| 5151 | Radio and Television Broadcasting. |
| 5172 | Wireless Telecommunications Carriers (except Satellite). |
| 5173 | Telecommunications Resellers. |
| 5179 | Other Telecommunications. |
| 5181 | Internet Service Providers and Web Search Portals. |
| 5182 | Data Processing, Hosting, and Related Services. |
| 5191 | Other Information Services. |
| 5211 | Monetary Authorities - Central Bank. |
| 5221 | Depository Credit Intermediation. |

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| 5222 | Nondepository Credit Intermediation. |
| 5223 | Activities Related to Credit Intermediation. |
| 5231 | Securities and Commodity Contracts Intermediation and Brokerage. |
| 5232 | Securities and Commodity Exchanges. |
| 5239 | Other Financial Investment Activities. |
| 5241 | Insurance Carriers. |
| 5242 | Agencies, Brokerages, and Other Insurance Related Activities. |
| 5251 | Insurance and Employee Benefit Funds. |
| 5259 | Other Investment Pools and Funds. |
| 5312 | Offices of Real Estate Agents and Brokers. |
| 5331 | Lessors of Nonfinancial Intangible Assets (except Copyrighted Works). |
| 5411 | Legal Services. |
| 5412 | Accounting, Tax Preparation, Bookkeeping, and Payroll Services. |
| 5413 | Architectural, Engineering, and Related Services. |
| 5414 | Specialized Design Services. |
| 5415 | Computer Systems Design and Related Services. |
| 5416 | Management, Scientific, and Technical Consulting Services. |
| 5417 | Scientific Research and Development Services. |
| 5418 | Advertising and Related Services. |
| 5511 | Management of Companies and Enterprises. |
| 5611 | Office Administrative Services. |
| 5614 | Business Support Services. |
| 5615 | Travel Arrangement and Reservation Services. |

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| 5616 | Investigation and Security Services. |
| 6111 | Elementary and Secondary Schools. |
| 6112 | Junior Colleges. |
| 6113 | Colleges, Universities, and Professional Schools. |
| 6114 | Business Schools and Computer and Management Training. |
| 6115 | Technical and Trade Schools. |
| 6116 | Other Schools and Instruction. |
| 6117 | Educational Support Services. |
| 6211 | Offices of Physicians. |
| 6212 | Offices of Dentists. |
| 6213 | Offices of Other Health Practitioners. |
| 6214 | Outpatient Care Centers. |
| 6215 | Medical and Diagnostic Laboratories. |
| 6244 | Child Day Care Services. |
| 7114 | Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures. |
| 7115 | Independent Artists, Writers, and Performers. |
| 7213 | Rooming and Boarding Houses. |
| 7221 | Full-Service Restaurants. |
| 7222 | Limited-Service Eating Places. |
| 7224 | Drinking Places (Alcoholic Beverages). |
| 8112 | Electronic and Precision Equipment Repair and Maintenance. |
| 8114 | Personal and Household Goods Repair and Maintenance. |
| 8121 | Personal Care Services. |

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| 8122 | Death Care Services. |
| 8131 | Religious Organizations. |
| 8132 | Grantmaking and Giving Services. |
| 8133 | Social Advocacy Organizations. |
| 8134 | Civic and Social Organizations. |
| 8139 | Business, Professional, Labor, Political, and Similar Organizations. |

The Commission may have been left with the impression that CRPs are given special treatment. They are not, nor does any applicable partial exemption apply to other aspects of OSHA requirements that permits either state or federal OSHA representatives to conduct inspections or investigations. Please also be aware that CARF-accredited CRPs, which many ACCSES members are, must demonstrate a robust safety program in addition to compliance with OSHA. Furthermore, in surveying some ACCSES members, we learned some participate in a biannual opportunity in their state to invite OSHA in to inspect their premises. This reduces the risk of injury as well as workers compensation claims.

Having visited numerous CRPs from across the country, ACCSES does not recognize the description of CRPs proffered to the Commission by other witnesses. Rather, when we visit a CRP, we see people living their lives, working, choosing between work and day programs (and often combining the two), reveling in friendships, and thriving. In short, we see people working. We also see community.

Question 3:

Are CRPs required to maintain workers compensation insurance?

Yes. Like any other business, CRPs are required to maintain workers compensation insurance in accordance with the relevant laws.

Question 4:

Do CRPs provide housing and/or group homes for their participants?

Some CRPs provide residential services. For example, NBI in California, is a certified HUD Management Agent and manages housing for individuals with developmental disabilities. The residences offer independent living, with some community supports such as Individual Living Skills (ILS) workers or In-Home Services and Support (IHSS) coordinators. Some CRPs offer residential services unrelated to work programs. In other cases, individuals may work through a CRP, and also avail themselves of residential services offered by the CRP. There is no one response. In fact, many CRPs do not offer residential services at all.

Question 5:

Are there officers of CRPs and/or directors of CRPs and/or corporations, profit and/or non-profit associated with CRPs, and/or officers and/or directors of CRPs and/or corporations that provide housing and/or group homes for its participants?

Most CRPs are nonprofit organizations with governing boards of directors. The Commission would have to survey every CRP to determine whether specific officers or directors participate in providing housing or group homes for individuals who receive other services at the CRP. This is beyond ACCSES's area of knowledge and we are not aware of any individual that responds to this question in the affirmative.

Question 6:

What are the implications for 14(c) policy if, as the data seem to show, the population in workshops and the population in CIE have a similar level of disability and employment support needs?

If the Commission has data to share, we can be more specific, however a dearth of data is one of the concerns regarding the pressure to eliminate Section 14(c). One of the key concerns regarding the lack of data, of course, is that no one knows what happened to individuals in states and localities where Section 14(c) has been eliminated. Such a change affects individuals and families in a dramatic fashion. Many of the individuals served under Section 14(c) employment require specific assistance with their personal needs, medication, or other supports provided through the CRP that family members must provide directly when full employment is not available to individuals. Transportation, likewise, is an issue for many individuals who work in non-CRP environments as many CRPs provide transportation to and from work. Losing transportation, particularly in areas where there is not a robust public transportation system, can create permanent barriers to employment.

Individuals with very significant challenges or complex needs may have employment outside of Section 14(c) environment, frequently with a job coach provided through a CRP. We emphasize again that Section 14(c) is about individual choice and there is no "similar level of disability and employment support needs." Every person is unique. Every situation is different. Every individual's skills and goals are different. The implications for Section 14(c) policy is that job opportunities disappear when Section 14(c) is eliminated. Those jobs do not magically reappear through competitive integrated employment. People who were working may be placed in day programs if no other employment opportunities are available, or they may be at home. A family member may have to leave their full-time employment to be at home with the individual or may be forced to hire direct support professionals (DSP) during the day for tasks that previously were performed through the CRP. This is a serious issue and can be very expensive for families. Moreover, we have a DSP crisis in this country, and it is not going to get any better as the baby boomer generation ages. Our focus should be on expanding employment opportunities, not taking opportunities away. Not one person working under a Section 14(c) certificate is prevented from working in a competitive job because of the certificate. It is an individual choice, and that choice should be respected.

Question 7:

Does payment of subminimum wages align with the civil rights aims of statutes like the ADA prohibiting exclusion on the basis of disability?

ACCSES is a major supporter of the Americans with Disabilities Act. The ADA and the *Olmstead* decision do not take the right of choice away from people with disabilities.⁷ In fact, the broad assertion made by many advocates that people with disabilities are only entitled to a menu limited to the environments certain advocates think is appropriate deprives individuals with the freedoms that all of us expect. The goals of the ADA and *Olmstead* are to provide greater opportunities for individuals with disabilities to participate in the community. Make no mistake, CRPs ARE a part of their communities, an important part. Without CRPs and the options provided through the experienced, knowledgeable staff working at CRPs, many individuals would have truly limited options, often leaving them with no employment options at all. Moreover, the messaging that somehow it is a *superior* experience to work with people without disabilities and an *inferior* experience to work with people with disabilities is contrary not just to the goals of the ADA and *Olmstead* but to common sense. In fact, in it is offensive.

Neither the ADA nor *Olmstead* speaks to special minimum wage nor should they. Special minimum wage does not exclude – it allows for inclusion. It provides work opportunities and training to individuals who choose this option. Work under special minimum wage also opens doors to other employment opportunities. Working under a Section 14(c) certificate is an option that individuals may choose; it is not mandated anywhere. Without Section 14(c), the civil rights of individuals with the most significant disabilities would be violated if loss of Section 14(c) took away their opportunity to work or eliminated the "choice" component of the goal of informed choice.

That is a long way of saying that work under a Section 14(c) absolutely aligns with the goals of the ADA and *Olmstead*.

Question 8:

Why should different rules apply to 14(c) providers than to mainstream employers, if both are engaging in commerce in the private sector?

Different rules do not apply. For profit businesses are equally eligible to provide Section 14(c) employment and are subject to the same rules and regulations as CRPs.⁸ Please note that CRPs are in communities and states throughout this country. They have been the heart of disability policy for more than 50 years and they are a part of the future of disability policy. There are few industries more "mainstream" than CRPs, and we ask the Commission to recognize why this phrase is offensive and to

⁷ See *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁸ See Wage and Hour Division, Business Certificate Holders List, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders/businesses>.

do better, as CRPs are vital parts of their communities. So vital, in fact, if they ceased to exist, we would have to reinvent them.

Question 9:

Could some other form of regulation achieve the aims of promoting disability employment without creating a special category of worker exempted from bare minimum wage protections based on their status as a person with a disability?

Section 14(c) provides employment opportunities for individuals who choose it. It is the law under the Fair Labor Standards Act and it is continued to be valued by many individuals who like and want to keep the jobs they have. The goal is to expand employment choice, not take opportunities away. ACCSES and its members, some of which have Section 14(c) certificates, focus on offering and expanding employment opportunities for individuals with disabilities. CRPs provide employment supports and job coaches for individuals who work in competitive employment. There is no reason to change a law that has successfully worked for a long time, nor is it likely that eliminating Section 14(c) and creating new regulations would expand choice. In certain circumstances, changes to the law have limited the use of Section 14(c) for certain jobs without the need to eliminate Section 14(c) for all jobs. For instance, Executive Order 13658 was issued in 2014 and requires all federal contractors to be paid at least \$10.10 per hour.⁹ That has subsequently increased to \$10.80 per hour.¹⁰ Many people working under a Section 14(c) certificate, earn more than minimum wage.

An additional challenge posed by the wage issue, as noted above, involves benefits. Benefits are impacted when earnings are above a certain amount. In some states, for example, an individual who is funded by a state agency through a Medicaid waiver who loses benefits may no longer be eligible for services and supports that enable them to live their best lives in their communities. The federal government and state governments should collaborate to eliminate this concern and allow individuals with disabilities to pursue opportunities that might currently be out of reach. Do not underestimate the psychological barrier that the loss of benefits presents for some individuals.

Question 10:

Wouldn't the rationale from the Rhode Island and Oregon Olmstead cases apply to many other states? Is it your view that many states are or are not complying with the Olmstead

⁹ Federal Register Notice, Establishing a Minimum Wage for Contractors, Feb. 20, 2014, at <https://www.federalregister.gov/documents/2014/02/20/2014-03805/establishing-a-minimum-wage-for-contractors>.

¹⁰ Wage and Hour Notice, Establishing a Minimum Wage for Contractors, Notice of Rate Change in Effect as of January 1, 2020, Sept. 19, 2019, at <https://www.federalregister.gov/documents/2019/09/19/2019-19673/establishing-a-minimum-wage-for-contractors-notice-of-rate-change-in-effect-as-of-january-1-2020>.

integration mandate as they structure their disability employment programs or are Oregon and Rhode Island outliers? Why?

This is a question for individual states to answer, not ACCSES. *Olmstead* provides that individuals are entitled to receive services in the most integrated setting appropriate to their needs and to which that individual does not object. It does not take away the right of individuals to choose where and with whom they wish to work or live. One ACCSES member with an organization in Oregon, affirmed that some people who used to have jobs under Section 14(c) have been unable to access any work at all, causing great hardship for the individuals and for their families. This member provides robust competitive employment services in urban and rural areas and has been acknowledged by both states in which they provide services as a leader because of their ability to help people with the most significant disabilities into employment. Still, there are individuals who are unable to obtain or maintain competitive integrated employment despite the efforts of the state vocational rehabilitation office and the ACCSES member organization. These individuals also deserve the dignity of work, and without Section 14(c) that opportunity is eliminated for many individuals.

Question 11:

Are providers required to provide reasonable accommodations under the ADA during time trials? In your experience, are these accommodations generally provided during work periods when 14(c) participants perform work activities? What compliance assistance might providers need to meet their ADA obligations?

CRPs have a mission to employ people with disabilities and help them become as productive as possible. CRPs make accommodations every day, whether it is during a time study or during regular work. They do it as part of their mission. In addition, the ADA requires reasonable accommodations. Many of the accommodations help the productivity of the individual, increase confidence, and make individuals more successful in their workplace and in their career of choice. This is true during time studies and in the normal course of business.

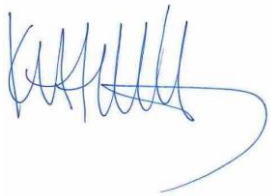
Conclusion

Thank you again for the opportunity to testify before the Commission. Like the Commission, we are fervent believers in civil rights. People who work at CRPs do so out of a desire to help the individuals they serve live robust lives. Supporting an individual's right to a full array of options is very much a civil right. To recommend eliminating Section 14(c) employment is to recommend eliminating real jobs for real people, people who are genuinely concerned about having their opportunity taken away. Please keep that in mind.

During the November 15 hearing, the Commission heard from a lot people whose jobs are not on the line. ACCSES represents the people who would be directly affected if Section 14(c) jobs were eliminated. We welcome the opportunity to introduce the Commission to self-advocates who would like to tell you how much they want to keep their jobs.

If there is anything that the Commission needs from us or that we can do to help in our shared mission of expanding employment options for people with disabilities, please do not hesitate to ask.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Kate McSweeney", with a long, sweeping flourish extending to the right.

Kate McSweeney
Vice President Government Affairs & General Counsel