1501 M Street, NW – 7th Floor | Washington, DC 20005
202.349.4259 (PHONE) | 202.785.1756 (FAX)

September 20, 2017

Via Submission through Regulations.Gov

The Honorable Betsy DeVos
Secretary
Department of Education
400 Maryland Avenue, S.W.
Washington DC 20202

Re: Docket ID: ED-2017-OS-0074-0001. Response to Request for Public Comment Pursuant to Executive Order 13777

Dear Secretary DeVos:

Thank you for the opportunity to submit a comment in response to the Department of Education's June 22, 2017 invitation to provide input on regulations that may be appropriate for repeal, replacement, or modification.

ACCSES submits this comment on behalf of itself and the more than 1,200 providers of services to people with disabilities that ACCSES represents. ACCSES member agencies serve over three million people with disabilities. Their efforts serve to expand opportunities for people with disabilities to live, work, and thrive where and with whom they want – just like people without disabilities.

We wish to raise three concerns with you through this letter, each of which is related to the Workforce Innovation and Opportunity Act:

1. The definition of competitive integrated employment created during the regulatory process, and the inclusion of a new "work unit" rule is so narrow that it is costing people with disabilities jobs;

2. The Rehabilitation Services Administration's (RSA) guidance to State Vocational Rehabilitation offices (State VR offices) regarding high quality, high paying jobs not qualifying as competitive integrated employment is limiting job referrals and is a carry-over from the Obama administration that should be eliminated immediately; and

3. Guidance is needed advising State VR offices to recognize that adults under the age of 25 who have graduated from high school and want to work should be permitted to work at the job of their choice.

The Definition of Competitive Integrated Employment Limits Choice

Somewhere between Capitol Hill and Maryland Avenue, the definition of competitive integrated employment changed so that a law intended to expand opportunities wound up limiting choice instead. This revised definition of "competitive integrated employment"[1] that was written into the law during the regulatory process has led to the elimination of jobs, the loss of services, and the loss of job choice for the very people WIOA was intended to help. In short, the Department of Education changed Congress's definition of competitive integrated employment in a way that *narrows* opportunities. This must change.

A portion of the definition of competitive integrated employment follows. The underlined portions of the text are additions made during the regulatory process. The bracketed portion are words that were deleted from the statutory definition.

> (ii) "at a location – (A) <u>Typically found in the community</u>; and (B) Where the employee with a disability interacts <u>for the purpose of performing the duties of the position with other employees within the particular work unit and the entire work site, and, as appropriate to the work performed, other persons (e.g., customers and vendors)</u>, [with other persons] who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons. . . .[2]

What Congress intended – interaction generally "<u>with other persons</u>" – has become a strained definition that can only lead to fewer job opportunities. Perhaps most difficult to understand is why the definition ignores the ways in which community happens in the workplace in favor of a faux concept that community only arises in interactions directly related to the work being performed. If we were all subject to such constraint, we would find much less community in our work lives than we generally experience. But people without disabilities are not subject to having the validity of their employment judged based on their interactions with colleagues. This definition unconscionably treats people with disabilities differently from other people.

---

[1] 34 CFR§361.5(c)(9)(ii) (81 FR 55629 (Aug.19, 2016)).

[2] *Id.*

Just look at the confusing and unnecessary sub-definition of "work unit" to describe the level at which a State VR office must measure whether a person with disabilities has appropriate contacts with people without disabilities.[3] On its face, this narrow sub-definition can only serve to limit opportunities: if a two-person team involves two people with disabilities, remaining in compliance means replacing one of the two people with disabilities with a person without disabilities.

Limiting jobs for people who already have significant challenges in their lives as well as in finding and retaining employment makes no sense.[4] Moreover, and perhaps more importantly, the work unit sub-definition cannot be enforced. The State VR office has no means of knowing the disability status of workers generally, nor does the employer necessarily have such knowledge or the right to share it. The work unit sub-definition does nothing more than make it harder for people with disabilities to find work. It does nothing to benefit their lives. The Department should strike the definition of competitive integrated employment found in the regulations and return to the definition Congress voted on in the statute. At the very least, the Department should strike the "work unit" sub-definition, which has no basis in the law at all.

The RSA's January 18, 2017 Guidance Is a Job Killer

Compounding the concern with the regulatory definition of competitive integrated employment is the way it is being interpreted by the Department and RSA. The WIOA regulations were published in the Federal Register in August 2016. The preamble to Part IV (*State Vocational Rehabilitation Services Program*, et. al) of the regulations – not the regulations themselves – contains language in a discussion of competitive integrated employment that *unilaterally disqualifies jobs intended for people with disabilities* from the definition:

---

[3] The presumption that working with people without disabilities is somehow better is an inherent part of this definition, but that does not square with reality. Each employment situation is different, involving different people, different goals, different dreams. The regulations should be drafted to embrace more opportunity, not less, and not make blanket assumptions about where satisfaction and happiness are found.

[4] The August 2017 employment statistics reveal that 80% of people with disabilities are not attached to the workforce or looking for a job. In the much smaller universe of people with disabilities who are either working or job hunting, the unemployment rate is 8.4%, almost double that of people without disabilities. *See* Bureau of Labor Statistics, Economic News Release, Sept. 1, 2017, *available at* https://www.bls.gov/news.release/empsit.t06.htm. If the goal is to transition people with disabilities from consumers of services to taxpayers, limiting job choice is exactly the wrong way to go about it.

> The criterion does not exclude from competitive integrated employment any innovative or unique business models that otherwise satisfy the definition's criteria. Instead, *the Secretary interprets the criterion to be more narrowly focused on the purpose for which the business is formed*. . . . [B]usinesses established by community rehabilitation programs or any other entity for the primary purpose of employing individuals with disabilities do not satisfy this criterion, and, therefore, are not considered integrated settings, because these settings are not within the competitive labor market. . . . **The factors that generally would result in a business being considered "not typically found in the community" include** (1) the funding of positions through Javits-Wagner-O'Day Act (JWOD) contracts; (2) allowances under the FLSA for compensatory subminimum wages; and (3) compliance with a mandated direct labor-hour ratio of persons with disabilities. It is the responsibility of the [state agency] to take these factors into account when determining if a position in a particular work location is an integrated setting.[5]

The position taken in the preamble is directly contrary to federal policy and to regulations issued 16 years ago specifically calling for a "case-by-case" decision of whether a job is "integrated," and noting that "*many jobs secured under JWOD service contracts would meet these criteria*."[6] Simply put, there never has been a federal policy barring State VR offices from referring people with disabilities to jobs based on this entirely false construction of the law. Secretary DeVos, you did not promote this specious criterion, and you should not stick by it. It needs to go.

Indeed, including such a narrow interpretation of a law intended to *expand employment opportunities for people with disabilities* is not just counter-intuitive, it is wrong as a matter of policy and wrong under the WIOA law that Congress passed. Still, despite it being job limiting, it is the position the RSA took with respect to State VR offices in fall 2016. On January 18, 2017, RSA memorialized this guidance in the form of FAQs that were posted on the RSA website.[7] This was the parting salvo of the last Administration and it has caused grave difficulties since then. Currently, 19 states – **19 states** – are declining to refer people with disabilities to high-quality, high-paying jobs – often with benefits – because of this guidance.

We urge the Department of Education and the RSA to immediately eliminate the FAQs addressing the definition of competitive integrated employment that posted on January 18, 2017 and to advise the State VR offices to disregard the FAQs or any other guidance discouraging the

---

[5] 81 FR 161 at 55463 (August 19, 2016) (emphasis added). These jobs frequently fall under the federally mandated AbilityOne program (under JWOD) and state set aside programs.

[6] *See* 66 FR 4419 (Jan. 17, 2001) (emphasis added).

[7] *See Integrated Location Criteria of the Definition of "Competitive Integrated Employment" FAQs* at https://rsa.ed.gov/faqs.cfm#p3.

placement of people with disabilities in jobs they want and for which they are qualified. Henceforth, the focus instead should be on expanding employment opportunities.

The Department needs to return the prior administration's negative presumption to a YES and give people every opportunity to work. We strongly urge the Department to acknowledge a forward-looking presumption that a business established by community rehabilitation programs or similar programs, including with positions hired (a) through JWOD contracts (i.e., AbilityOne); or (b) any similar ratio-based hiring program for people with disabilities such as state set-aside programs, are a part of the competitive labor market and are valid employment outcomes.

Young Adults with Disabilities Deserve Every Opportunity

Before we end this letter, we want to touch briefly on an increasing concern that some young adults with disabilities who are unable to work in competitive employment will not be permitted to work in a job that will provide skills training, the dignity of work, and a paycheck. Section 511 of the Rehabilitation Act of 1973, as amended by WIOA, should not be interpreted to limit job opportunities for young adults who have graduated from high school but not yet turned 25. It would be detrimental to let people slip through the cracks. A person with a disability deserves to be given every opportunity to work. We ask the Department to encourage State VR offices to be open to <u>all</u> employment opportunities that are of interest to young adults who are just starting out.

It would be unimaginable for any of us to tell a peer, colleague, or friend that they should quit their job and go to a day program or volunteer or become an unpaid intern, particularly when that peer, colleague, or friend loves their job. But in the past few years, our laws and regulations have placed people with disabilities in the position of being told their jobs are not "real" and they would be better off in such programs, and that they must abide by someone else's idea of what is best for them. That is disrespectful to people with disabilities and just plain wrong. This is about choice. Many of the people ACCSES serves thrive in their jobs and live full and robust lives. They want the same freedom to choose as anyone else. In the end, that is what we are asking the Department to do: keep a full array of options available for people with disabilities. Give people every opportunity to work and excel in jobs that best fit their goals and needs. Give people with disabilities the same right to choose that we expect for ourselves.

Thank you for the opportunity to share our concerns.

Sincerely yours,

Terry R. Farmer
President & Chief Executive Officer

Kate McSweeny
Vice President of Government Affairs & General Counsel