

Ms. Hilary Malawer
Assistant General Counsel, Office of the General Counsel
U.S. Department of Education
400 Maryland Ave SW., Room 6E231
Washington, DC 20202
Re: Docket ID: ED-2017-OS-0074

Dear Ms. Malawer:

After being brought to our attention in a staff meeting with the Director of Strategy and Innovation and A Senior Social Worker/Case Manager, at InspiriTec, Inc., I am requesting input and recommending changes to the current Regulation ID: ED-2015-OSERS-001-1167, Date Posted: Aug 19, 2016 RIN:1820-AB70 CFR:34 CFR Parts 361, 363, and 397 Federal Register Number: 2016-15980.

As a current Customer Service Representative for The Child Welfare Information Project for the Department of Human Services under the Commonwealth of Pennsylvania, I am employed here at Inspiritec, Inc., for over one year and 8 months serving the citizens across the . My job at InspiriTec, as an affirmative employer of people with disabilities, including veterans, offers full competitive wages, benefits and promotional opportunities. Many of the co-workers are also persons with various disabilities (i.e. physical, mental, psychological, and/or a combination thereof); however, after working here for over a year, I see that the co-workers and I operate just as any other business “typically found in the community,” such as Wal-Mart Inc, Target Stores Inc, and other companies who employees with disabilities, with an identical focus on job performance and exceeding customers’ expectations. Yet, under the current Rehabilitation Services Administration (RSA) regulations and guidance, the employer may not meet the revised definition of a Competitive Integrated Employment setting, which means that all people with various disabilities, in the future, may not have an opportunity to work at InspiriTec and earn competitive wages and career opportunities enjoyed by all of us here. It is ironic, per RSA guidance, that future persons with disabilities may not be supported if they choose to work at InspiriTec simply because many already do work here. Many of the coworkers with disabilities have expressed their sense of freedom and empowerment to reach their full potential in an environment where the focus is not on one’s disability, but rather performing one’s job. Why deny others this potential opportunity of employment?

RSA guidance does not seem to recognize each person has individual needs and that a one standard metric will fail to truly measure quality of life as presupposed by the definition used to describe “integrated” workplaces. Any employer expects certain things from current and prospective employees and/or independent contractors. Here is an excerpt from ADA Laws and Regulations.

II. ADA DEFINITION OF DISABILITY:

{3} Title I of the ADA protects qualified individuals with disabilities from employment discrimination. Under other employment legislation, such as Title VII or the Age Discrimination

in Employment Act, whether an individual is in a protected class is a relatively simple matter. Race, color, sex, national origin and age are, in most cases, easily determined. However, whether an individual is in a protected class under the ADA is more complicated. *Disabilities in the Workplace*, Â§1053 (Andrew W. Boden et al. eds., 1996)

{4} The ADA has a three-prong definition of disability, where satisfaction of any of the three prongs constitutes a disability. The ADA's definition of disability is based on the definition of "handicap" found in the Rehabilitation Act. A judgment under either is precedent for the other. Henry H. Perritt, Jr., *Americans With Disabilities Handbook*, Â§ 3.3 (2d ed. 1991).

{5} The first definition of disability defines an individual with a disability as an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." 42 U.S.C.A. Â§ 12102(2).

A. A Physical or Mental Impairment that Substantially Limits One or More Major Life Activities

{6} In cases where there is an issue of whether an individual has a disability, the first definition of disability is most often litigated. This definition has three subparts that must be shown by plaintiff.

i. Physical or Mental Impairment

{7} A physical impairment is defined by the ADA to include: "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito urinary, hemic and lymphatic, skin, and endocrine." 29 CFR Â§ 1630.2(h)(1).

{8} A mental impairment is defined by the ADA to include: "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 CFR Â§ 1630.2(h)(2).

{9} The ADA and EEOC regulations do not list all of the "specific conditions that constitute impairments both because of the difficulty of ensuring comprehensiveness and because new disorders might develop in the future." Henry H. Perritt, Jr., *Americans with Disabilities Act Handbook* Â§ 3.2 (2d ed. 1991). However, examples of covered physical and mental impairments were included in the legislative history of the ADA: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction and alcoholism and HIV infection. *Id.* (citing House Labor Report at 51; House Judiciary Report at 28). Serious impairments such as cancer and multiple sclerosis, however, have been held not to be disabilities.

{10} An impairment under the ADA must be a physiological or mental disorder. Tough calls like stress and depression are "conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder" or whether they result from job or personal life pressures. Equal Employment Opportunity Commission, Technical Assistance Manual for the Americans With Disabilities Act, at II-3.

ii. Substantially Limits

{11} The second subpart of the definition is that the impairment must substantially limit one or more major life activities. *42 U.S.C.A. Â§ 12102(2)(A)*. The EEOC regulations use the term "substantially limits" to characterize "the extent to which a physical or mental impairment interferes with an individual's ability to perform one or more of the major life activities." *Henry H. Perritt Jr., Americans With Disabilities Act Handbook, Â§ 3.2 (2d ed. 1991)*. The regulations define "substantially limits" as:

{12} "i) Unable to perform a major life activity that the average person in the general population can perform; or

{13} ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." *29 CFR Â§ 1630.2(j)(1)(i) & (ii)*.

{14} The impairment is to be made in comparison to normal people. An example would be a person who can walk ten miles continuously, but experiences pain on the eleventh mile. Because this discomfort is typical of the population, it is not a limitation and, thus, not an impairment. *Id.*

{15} The EEOC regulations also include three factors influencing a determination of substantial limitation: nature and severity of the impairment, how long the impairment is expected to last, and whether the impairment is characterized as permanent or long-term. *29 CFR Â§ 1630.2(j)(2)(i)-(iii)*.

{16} These factors must be considered because "it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the effect of an impairment or condition on the life of a particular person." Equal Employment Opportunity Commission, Technical Assistance Manual for the Americans with Disabilities Act, at II-4. AIDS, deafness and blindness are by their nature substantially limiting, but "many other impairments may be disabling for some individuals but not for others, depending on the impact on their activities." *Id.* An example would be where an individual has mild cerebral palsy. Although cerebral palsy may limit the major life activities of one individual, an individual with mild cerebral palsy only slightly interfering with the ability to speak and has no significant limitation on other major life activities is not an individual with a disability under the ADA. *Id.* at II-5.

Quality of life assumptions such as community integration need to be assessed by the individual's needs and desires and not a one-size-fits-all in an identity group mentality. Therefore, it is impossible to assign a statistical measure of "integration" using numbers such as ratios of co-workers with disabilities; however, current ADA legislation requires any employer is prospectively hiring a person with a disability, to abide by these terms.

As an affirmative employer of people with disabilities participating in the AbilityOne/JWOD Program and state-use programs, InspiriTec has created thousands of jobs in the IT Help Desk and Contact Center arena since launching in 2001. When referrals and placements from state vocational rehabilitation counselors cease, employment opportunities at the company will go unfilled. Deserving individuals with significant disabilities, including veterans, will be denied these opportunities and the ability to be a vital part of our community, unless the Department immediately rescinds the FAQ guidance (posted on the Department's website, <https://www2.ed.gov/about/offices/list/osers/ras/wioa/competitive-integrated-employment-faq.html>) related to the definition of integrated settings and issues clarifying guidance that employers participating in the AbilityOne/JWOD Program and state-use programs may be considered competitive integrated employment settings.

Thank you for the opportunity to recommend changes on existing regulations that eliminate jobs, or inhibit job creation.

Sincerely,

David W. Powers