



September 20, 2017

[Docket ID: ED-2017-OS-0074]

Evaluation of Existing Regulations

U.S. Department of Education

The following comments are submitted on behalf of National Industries for the Blind (NIB) in response to the U.S. Department of Education's open comment period concerning "Evaluation of Existing Regulations." The views and opinions expressed in these comments are solely those of NIB and no other organization or entity, private or public.

NIB wishes to focus its comments specifically on the following: Workforce Innovation and Opportunity Act (WIOA) State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage; Final Rule – or more commonly referred to as the WIOA VR Rule.

NIB is the designated Central Nonprofit Agency (CNA) working on behalf of 102 associated nonprofit agencies that provide employment and services for people who are blind all across the United States.

Before presenting our concerns related to the WIOA VR Final Rule, we do wish to recognize the positives that resulted from the bipartisan compromise on WIOA by Congress in 2014. The bill and subsequent rules have provided greater alignment of programs and resources, and have reformed and improved the nation's workforce system. It is important to acknowledge these important improvements.

That being said, we also believe there were unintended negative consequences as a result of the regulatory process that followed passage of WIOA in 2014 that the Department did not fully consider prior to release of these rules.

Our comments will focus on those aspects of the WIOA VR Final Rule that we believe are making it more challenging for job seekers who are blind to be connected to employment opportunities within our network that pay well, provide comprehensive benefits, and also include free professional development and opportunities for upward mobility.

The two major areas of concern related to the WIOA VR Final Rule are:

- (1) Language surrounding the matter of competitive integrated employment (CIE), with an emphasis on what is integrated employment, and what state Vocational Rehabilitation (VR) agencies are doing (or not doing) to make proper determinations on a case-by-case basis; and
- (2) Elimination of the uncompensated outcomes category, including what is commonly referred to as the “Homemaker Exemption.”

Competitive Integrated Employment and the AbilityOne Program

Some would argue that the statutory definition for competitive integrated employment and its application when examining individual employment opportunities is not a change from when it existed in prior regulations. While it is true that previously separate definitions for “competitive employment” and “integrated setting” were joined together to create what is now the CIE definition, based on feedback from many of our associated nonprofit agencies, the situation on the ground in many states has changed significantly.

This is more than some Washington, DC academic or regulatory exercise involved in defining, redefining or reworking definitions. We are focused on the practical application of CIE by VR counselors on the ground, and what impact their actions and decisions are having on the lives of people who are blind.

In great measure, we attribute this significant change to several statements in the VR rule which essentially pre-judged organizations providing employment for people who are blind or significantly disabled through AbilityOne or state use programs.

For example, consider the following statement contained in the WIOA VR Final Rule:

“When the criteria are properly applied by DSUs, group and enclave employment settings operated by businesses formed for the purpose of employing individuals with disabilities will not satisfy the definition of ‘competitive integrated employment.’” (p. 55642)

This statement paints with a very broad brush, and presumes to know every possible employment position within organizations that are part of our network and work through AbilityOne or state use programs. It essentially predetermines that no NIB associated nonprofit agencies provide employment settings that can meet the test and be determined to be competitive integrated employment.

This is analogous to a judge telling the police that if they follow the available evidence trail and use the proper investigative techniques, the alleged suspect will be found guilty.

Despite the rule containing instructions for state VR agencies to “*determine on a case-by-case basis in light of the facts presented whether an employment setting meets both criteria for an integrated location...*”, is it any wonder that some states are unwilling to consider positions within AbilityOne Program agencies, and have communicated that they are no longer willing to consider placements or even referrals with such agencies?

State VR agencies simply have to point to one of several categorical statements in the VR rule to justify why they are not considering NIB agency employment opportunities for clients who are blind. This means people who are blind are missing out on jobs within the NIB network that pay well, offer full benefits and training, as well as opportunities for upward mobility.

NIB’s mission is to create, sustain and improve employment for people who are blind. Our associated nonprofit agencies provide terrific careers in manufacturing and services that allow people who are blind to achieve personal and economic independence. We completely support the statement below taken from the WIOA VR Rule, and believe the work we do to provide quality employment that pays at or above the federal minimum wage supports all the goals contained therein.

“Individuals with disabilities represent a vital and integral part of our society, and we are committed to ensuring that individuals with disabilities have opportunities to compete for and enjoy high quality employment in the 21st century global economy. Some individuals with disabilities face particular barriers to employment in integrated settings that pays competitive wages, provides opportunities for advancement, and leads to economic self-sufficiency. Ensuring workers with disabilities have the supports and the opportunities to acquire the skills that they need to pursue in-demand jobs and careers is critical to growing our economy, assuring that everyone who works hard is rewarded, and building a strong middle class.” (p. 55630)

Beyond not considering NIB agency employment opportunities for possible placements, it is also being reported by our associated nonprofit agencies that some states will not even consider making referrals to our nonprofit agencies. Simply put, this violates the regulatory requirements under WIOA and cannot continue.

As mentioned earlier, choosing not to follow the requirement to make referrals to our agencies limits opportunities for people who are blind and seeking employment. Just as important, these decisions by state VR agencies disrespect informed choice. While the Secretary states in the VR rule that the Department honors informed choice, this is clearly not occurring in states where VR agencies are ignoring this requirement.

We urge the Secretary; through the Rehabilitation Services Administration; to issue new guidance to state VR agencies insisting they do the following:

1. Examine each and every AbilityOne employment opportunity on a case-by-case basis in order to make proper determinations;
2. Even if and when such an employment opportunity is not deemed to be competitive integrated employment, honor informed choice and make referrals to AbilityOne agencies when the client makes such a request.

We also urge the Secretary to revise the WIOA VR rule FAQ document to eliminate prejudicial statements concerning employment opportunities offered through NIB agencies and explicitly instruct VR agencies to give fair consideration to the same.

Restoring the Uncompensated Outcomes Category

Included in the WIOA VR Final Rule was a policy decision to eliminate the uncompensated outcomes category, a portion of which is commonly referred to within the blindness community as the Homemaker Exemption.

The Homemaker Exemption has been used by a large number of older individuals that have experienced vision loss later in life, and the category has allowed these individuals to receive training and rehabilitation. They may end up ultimately managing a household or, after regaining personal confidence and new skills through training, they may choose to reenter the workforce.

This category has been disproportionately utilized by individuals that experience vision loss, and there is no similar federal program that provides these same services to help persons who are blind regain personal independence and resume their careers if they so choose.

Within the final rule, the Secretary admits fully *“that the change eliminating uncompensated outcomes was not explicitly required on the basis of an amendment to the statutory definition...”* It goes on to say *“This provision is purely discretionary, and there is no requirement that the Secretary exercise this discretion, either to incorporate new outcomes or to retain previously permitted outcomes. However, if the Secretary chooses to exercise this discretion, the Secretary must do so in a manner that is consistent with the Act.”* (p. 55646)

In the same way the Secretary had the discretion in 2016 to eliminate this category, the current Secretary has that same discretion to restore the uncompensated outcomes category and restore services and hope to persons who experience vision loss later in life. This would be an especially significant and forward-thinking action in light of federal government projections of increased numbers of older age Americans who are expected to experience vision loss in the coming decades.

We urge the Secretary to take the actions necessary to restore the Uncompensated Outcomes category under WIOA.

Summary

Our requests related to state VR agencies and their interaction with our associated agencies under WIOA (issuance of new guidance and revision of the FAQ document), and restoration of the uncompensated outcomes category, are both tied to our mission to create, sustain and improve employment for people who are blind.

Our associated nonprofit agencies exist solely to help people who are blind achieve personal and economic independence by providing quality employment and a range of rehabilitation services. Careers within our network are one option of many that people who are blind can freely choose, and we believe the federal government must do more under WIOA to ensure informed choice is supported in name and deed.

We appreciate your consideration of our comments.