August 14, 2017

Via First Class Mail and Submission through Regulations.gov

Ms. Rachel L. Brand, Esq.
Associate Attorney General
Chair, Regulatory Reform Task Force
United States Department of Justice

Re: Docket No. OLP 164/DOJ FRDOC 0001-0201. Response to Request for Public Comment to Assist the Regulatory Reform Task Force

Dear Ms. Brand:

On behalf of ACCSES, and the more than 1,200 disability service providers serving over three million people with disabilities that we represent, thank you for this opportunity to provide a comment in response to the Department of Justice’s June 28, 2017 notice seeking public input on regulations and related rules that are overly burdensome, outdated, expensive, or that eliminate jobs or inhibit job creation.

We strongly urge the Task Force to recommend and arrange for the elimination of the October 31, 2016 Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. to State and Local Government’s Employment Service Systems for Individuals with Disabilities (DOJ Statement). The DOJ Statement is contributing to the potential loss of upwards of 100,000 jobs held by and intended for people with disabilities: high-quality, high-paying jobs, often with benefits. In other words, jobs that turn individuals into taxpayers. These jobs, which fall under the federal program through Javits-Wagner-O’Day contracts (i.e., the AbilityOne program – a program that for almost 80 years has provided high-quality, high-paying jobs for people with disabilities) and state set-aside agreements, are not being filled because of the actions of the last Administration in its final months. Right now, there are jobs available in 19 states intended for people with disabilities where the state Vocational Rehabilitation Offices (VR Offices) refuse to refer people to these jobs because of the guidance of the Department of Education’s Rehabilitation Services Administration (RSA) and the DOJ Statement.

Leaving these jobs unfilled has a domino effect. When a contract cannot be fulfilled because of staffing shortages, the contract may have to be given up. Once given up, that contract may never again be designated for these important programs. Moreover, if the contracts are lost, the businesses holding the contracts are deeply impacted. We cannot overstate the risk not just to the jobs intended for people with disabilities but the jobs of all the people working for those businesses. This is serious and needs to be fixed immediately. The DOJ Statement was not put
out for public comment. It should be eliminated with a notice to the public that it is no longer in effect.

To fully understand the implications of the DOJ Statement and the timing of its issuance, you must understand the parallel actions of the Department of Education and RSA during the initial implementation of the Workforce Innovation and Opportunity Act (WIOA) regulations. 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:

The criterion does not exclude from competitive integrated employment any innovative or unique business models that otherwise satisfy the definitions 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 DSU [Designated State Unit] to take these factors into account when determining if a position in a particular work location is an integrated setting.

81 FR 161 at 55463 (August 19, 2016) (emphasis added).

There, of course, has never been a federal policy barring state VR Offices from referring people with disabilities to jobs based on this specious criterion.1 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 in respect to the WIOA law that Congress passed. Yet, that is the position the RSA took with respect to state VR Offices in fall 2016.2

1 This is directly contrary to regulations issued 16 years ago specifically calling for a “case-by-case” decision of whether a job was “integrated,” and noting that “many jobs secured under JWOD service contracts would meet these criteria.” See 66 FR 4419 (Jan. 17, 2001) (emphasis added).

2 On January 18, 2017, RSA further memorialized this guidance in the form of FAQs that were posted on the RSA website. This was the parting salvo of the last Administration and it has caused grave difficulties since then. Subsequent to this posting, many more states became
Then came the DOJ Statement on October 31, 2016. We probably should have expected it. The providers of services to people with disabilities have had a firehose turned on them over the past four years. These nonprofit agencies and the people who manage them and who have devoted their professional lives to helping people with disabilities have been treated with a level of disrespect by the federal government that is nothing short of shameful. There is a reason these agencies are called community rehabilitation providers. These are the organizations that were founded by families to move loved ones out of institutions fifty years ago, and to help people with disabilities be productive, learn job skills, and live full, rich lives. These nonprofit agencies have given people with even the most significant disabilities the opportunity to know the dignity of work. They are the reason many people with disabilities have been able to find work in what are deemed competitive jobs. They are the providers of job coaches and soft-skills coaching that help people get and keep employment. They are the safety net that help people with disabilities remain attached to the workforce. Now, the government is pushing them out of what the government describes as the “community” based on a complete misstatement of the law.\(^3\) It must stop. Because it is not just the community rehabilitation providers who are being harmed, it is also the people with disabilities whom they serve.

The DOJ Statement is an extension of the government’s efforts in the last Administration. The DOJ Statement opens with unfounded and unsupported assertions about people with disabilities and where “millions” of them work. This commentary is based neither on law nor reality, but it sets up the strawman argument that the Department of Justice is using to support faulty logic. DOJ Statement at 1. Referring to the Supreme Court’s decision in *Olmstead*, the DOJ Statement then sets forth three factors relevant to a public entity providing “community-based services” to people with disabilities “when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated. . . .” DOJ Statement at 2. The DOJ Statement recognizes an individual with disabilities’ right to decide the setting that is best for them, and then proceeds to ignore it. Instead, it focuses on what it describes as “segregated employment settings” and “integrated employment settings.” RSA, however, had already decided that integration for the purposes of employment settings would not be based only on location but also on the party holding the JWOD or state aside contract. So, a federal contract that employs hundreds of people on military bases doing many different jobs would be deemed, under RSA’s instructions to the state VR Offices, segregated settings simply because the party holding the contract is a community rehabilitation provider. This is nonsensical.

\[^{3}\] The DOJ Statement itself discusses a community so welcoming of people with disabilities that the need “for services and supports may fade over time as individuals become accustomed to their employer and become connected with natural supports, including supports provided by co-workers and peers.” DOJ Statement at 7. We cannot base law this important on a fantasy that co-workers will provide either the personal or professional supports and services a person with significant disabilities might need during their work day. Moreover, such a stance undoubtedly would conflict with certain labor laws.
The DOJ Statement makes it clear that public entities like the state VR Offices “must provide services to individuals with disabilities in the most integrated setting appropriate” and be accountable for it. DOJ Statement at 12-13. When the DOJ Statement issued on October 31, 2016, RSA had already established the narrow criterion for what qualifies as an integrated setting for employment. The DOJ Statement’s references to integrated settings therefore must be read in light of that guidance and in light of what RSA was telling the state VR Offices: not to refer people to good jobs under the AbilityOne and state use programs because of the narrow interpretation of “integrated setting” found in the WIOA preamble, and if certain people with disabilities were to learn of these jobs on their own, not to provide supports and services to which the individual might be entitled.

Between RSA posturing against positions hired under AbilityOne contracts and state set-aside contracts and the DOJ issuing this somewhat threatening Statement, these Departments have caused the VR Offices in 19 states to cease referring people to high-quality, high-paying jobs, often with benefits, on military bases, in government buildings, and in myriad business across these states. Neither Congress nor federal policy have ever presumed that these jobs would not be an employment outcome for people with significant disabilities.

The DOJ Statement that was issued on October 31, 2016 is superfluous and needs to be set aside. Rather than helping, it will soon help place the AbilityOne program and state set-aside programs in a stranglehold and cause tens of thousands of people with and without disabilities to lose their jobs. As we said at the outset, right now there are good jobs available for people with disabilities and people with disabilities who want those jobs, but cannot have them because of this narrow interpretation of “integrated setting.” Eliminate the DOJ Statement, and help us work to eliminate the RSA guidance that misstates the law and federal policy. It is hard for people with disabilities to find work. Let’s not make it harder.

On the same note, the Department of Justice issued guidance in 2011 on the Americans with Disabilities Act and Olmstead, Statement of the Department of Justice of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. We encourage the Department to revisit the 2011 guidance to underscore the right of choice of settings that belong to every person with disabilities who is eligible for services. What page one of the 2016 DOJ Statement references in disparaging and disdainful tones are, in fact, settings where you find community. Community rehabilitation providers are in the community. While the government has decided that community only exists where people with disabilities are in the minority and people without disabilities are in the majority, it could not be more wrong. People with disabilities working in center-based employment have full and robust lives. The community rehabilitation providers offering center-based employment opportunities are in cities and towns across America. They are woven into the community, and in many cases, are the biggest employers in their locations. Many are set in the heart of the city. There is no segregation in center-based employment. In fact, if the standard were reversed and segregation were assessed based on how many people without disabilities work in each business, it is fair to say vast numbers of business would be considered segregated. But they are not. The government must stop treating people with disabilities differently in terms of their job choices, and instead work on strong policies that encourage businesses to increase hiring people with disabilities. We
recommend the Department of Justice eliminate the 2011 guidance and reissue it with an express recognition of the importance of giving each person with a disability the right to choose the setting that best meets his or her individual needs.

Thank you for the opportunity to share our concerns.

Sincerely yours,

Terry R. Farmer
President & Chief Executive Officer

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