



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

March 28, 2016

Ms. Naomi Barry-Perez
Director, Civil Rights Center
US Department of Labor
200 Constitution Ave NW
Room N-4123
Washington, DC 20210

Re: RIN 1291-AA36, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act

On behalf of the Consortium for Citizens with Disabilities Employment and Training and Rights Task Forces, we submit the following comments concerning implementation of Section 188 of the Workforce Innovation and Opportunity Act (WIOA) as outlined in the proposed rule issued January 26, 2016. CCD is a coalition of national rights, consumer, advocacy and provider organizations representing the nation's 57 million people with disabilities.

This NPRM is intended to address all physical and programmatic aspects of America's Job Centers operations and apply to all recipients of WIOA Title I financial aid. The aim is to increase recipients' understanding of their nondiscrimination obligations and to safeguard access to the workforce system for people with disabilities [among the other protected classes]. This NPRM proposes to incorporate the rules of construction set out in the ADAAA that specify that the definition of "disability" is to be interpreted broadly, that the primary inquiry should be whether covered entities have complied with their statutory obligations and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. This NPRM also proposes revisions to the definition of "disability" and its component parts, including "qualified individual," "reasonable accommodation," "major life activity," "regarded as having a disability," and "physical or mental impairment" based on specific provisions in the ADAAA, as well as the EEOC's final and the DOJ's proposed implementing regulations.

Maximizing opportunities for competitive integrated employment among individuals with disabilities was one of the central purposes of WIOA, but the goal of competitive integrated employment is not mentioned in the non-discrimination regulations. It is

critical that the non-discrimination mandates in this proposed rule require that covered entities provide people with disabilities equal opportunity to access competitive integrated employment. Accordingly, we urge the Department to include in its final rule a specific requirement to this effect.

We also urge the Department to include examples of how some of the non-discrimination provisions apply in the context of WIOA Title I-funded entities. For example, providing reasonable accommodations to individuals with disabilities means that American Job Centers must, among other things, use simpler language where necessary to ensure that a person with an intellectual disability can fully participate in and benefit from Job Center services, programs and activities, and must use effective engagement strategies when needed to ensure full participation and benefit for a person with cognitive or psychiatric disabilities. We make this recommendation in recognition that some components of the workforce development system have not historically dealt as frequently with people with disabilities as other programs in that system. WIOA intended for all employment services and programs to be available to all Americans and we want to ensure this includes people with disabilities. We do understand that examples may be more appropriately placed in program guidance and defer to the Department's protocols to effect this.

Subpart A – General Provisions

Definitions – 38.4

We appreciate the effort of the Department to update a number of existing definitions to make them consistent with applicable law. In particular:

- Inclusion of new technology alternatives that have become available since the current regulations were drafted in 1999 under Auxiliary Aids and Services – **38.4(h)**
- Updating the definition of disability to reflect the current status of the law as outlined in section Disability – **38.4(q)**
- Updating the definition of Individual with a Disability under **38.4(ff)** to be consistent with the Americans with Disabilities Act Amendments (ADAAA) and regulations issued by the Equal Employment Opportunity Commission (EEOC) and proposed by the Department of Justice (DOJ)
- Adding a definition for Other Power Driven Mobility Device in **38.4(nn)** to mirror that contained in DOJ ADA Title II regulations.
- Adding a definition for Programmatic Accessibility in **38.4(tt)** to emphasize the fact that WIOA repeatedly directs Title I recipients to comply with Section 188 and applicable provisions of the ADA. We understand that the Department's definition as stated below is intended to offer needed direction to Title I recipients as well as to program beneficiaries and participants. Read broadly, this definition of programmatic accessibility places Title I recipients under a proactive obligation actually to put policies, practices and procedures into place that will give effective and meaningful opportunities to people with disabilities and those opportunities

should not be just “helpful” but designed to put program beneficiaries and participants with disabilities in the position they would be in if they did not have disabilities. We do suggest a modest change to emphasize this approach, and to achieve consistency with non-discrimination requirements in the ADA, Section 504, and other non-discrimination laws, through the addition of the words “equally” and “fully” as follows:

“Programmatic accessibility means policies, practices, and procedures providing **equally** effective and meaningful opportunity for persons with disabilities to participate **fully** in or benefit from aid, benefits, services, and training.”

- In Reasonable Accommodation – **38.4(yy)**, revising the definition to add a new paragraph (4) outlining the circumstances when such accommodations are called for to make it consistent with ADA, EEOC and DOJ.
- Adding a separate definition for Wheelchair under **38.4(uuu)** in order to distinguish it from other power driven mobility devices.

Accessibility Requirements – 38.13

We support the stipulations for physical accessibility in existing facilities, as well as new construction or alterations under Title II in Accessibility Requirements – **38.13(a)**. However, we believe it would be useful for the department to include non-exhaustive examples in its guidance as to steps recipients should take to ensure this accessibility. We also commend the Department for the additional references in this section to obligations of those recipients covered by Section 504 of the Rehabilitation Act and accessibility requirements under other statutory authority, including Title III of the ADA.

We also agree generally with the definition of programmatic accessibility as contained in **38.13(b)** – “All WIOA Title I-financially assisted programs and activities must be programmatically accessible, which includes providing reasonable accommodations for individuals with disabilities, making reasonable modifications to policies, practices, and procedures, administering programs in the most integrated setting appropriate, communicating with persons with disabilities as effectively as with others, and providing appropriate auxiliary aids or services, including assistive technology devices and services, where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, the program or activity.”

However, we believe there are additional critical elements that must be referenced within the proposed regulation in order to ensure the successful implementation of programmatic accessibility. These elements include:

- Effective notice to individuals with disabilities of their right to programmatic accessibility, including verbal offers to provide information concerning the right in an alternative format such as large font text, Braille or electronic disc, or in appropriate language translations needed by LEP individuals;
- Ongoing training of program staff on what programmatic accessibility entails, best practices in promoting integrated and competitive employment, disability

cultural competency, and examples of reasonable accommodations and modifications to policies, practices and procedures;

- Modification of standard equipment, technology or software programs used by the Title I-financially assisted program or activity as assessment, diagnostic, training, or skills-building tools;
- Coordination with other parts of a state's service and benefits delivery system, including assistance with navigating and maintaining ongoing benefit eligibility requirements.

Reasonable Accommodations and Reasonable Modifications for Individuals with Disabilities – 38.14

We strongly urge you to include the additions and modifications in bold in the following section concerning reasonable accommodations and reasonable modifications:

*Reasonable accommodations and reasonable modifications for individuals with disabilities. (a) With regard to aid, benefit, service, training, and employment, a recipient must provide reasonable accommodations to qualified individuals with disabilities who are applicants, registrants, eligible applicants/registrants, participants, employees, or applicants for employment, unless providing the accommodation would cause undue hardship. See the definitions of “reasonable accommodation” and “undue hardship” in § 38.4(rrr)(1). (1) In those circumstances where a recipient believes that the proposed accommodation would cause undue hardship, the recipient has the burden of proving that the accommodation would result in such hardship. (2) The recipient must make the decision that the accommodation would cause such hardship only after considering all factors listed in the definition of “undue hardship” in § 38.4(rrr)(1). The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. **The written statement must meet readability standards that reflect the program participant's literacy level and plainly communicate the actual reasoning behind a conclusion that an accommodation would comprise an undue hardship.** The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the accommodation. (3) If a requested accommodation would result in undue hardship, the recipient must, **in consultation with said individual(s)**, take ~~any~~ other actions that would not result in such hardship, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefit, service, training, or employment provided by the recipient. (b) With regard to aid, benefit, service, training, and employment, a recipient must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity. See the definition of “fundamental alteration” in § 38.4(z). (1) In those circumstances where a recipient believes that the proposed modification would fundamentally alter the program, activity, or service, the recipient has the burden of proving that the modification would result in such an alteration. (2) The recipient must make the decision that the modification would*

*result in such an alteration only after considering all factors listed in the definition of “fundamental alteration” in § 38.4(z). The decision must be accompanied by a written statement of the recipient’s reasons for reaching that conclusion. **The written statement must meet readability standards that reflect the program participant’s literacy level and plainly communicate the actual reasoning behind a conclusion that an accommodation would comprise a fundamental alteration.** The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the modification. (3) If a modification would result in a fundamental alteration, the recipient must, **in consultation with said individual(s)**, take ~~any~~ other actions that would not result in such an alteration, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefits, services, training, or employment provided by the recipient.*

Communications with Individuals with Disabilities – 38.15

We support the addition of new subparagraph **(a)(5)** within this section addressing the obligation of recipients to ensure that communications “with individuals with disabilities are as effective as communications with others.”

Service Animals – 38.16

We support the addition of this section providing direction to recipients regarding their obligation to modify policies, practices and procedures to permit use of a service animal.

Mobility Aids and Devices – 38.17

We support the addition of new section 38.17 to provide direction to recipients concerning use of wheelchairs and manually powered mobility aids by program participants and employees.

Subpart B – Recordkeeping and Other Affirmative Obligations

Recipients Obligations to Public EO Notice – 38.36

We support the proposed change in **38.36(b)** to direct provision of this notice in the appropriate formats to registrants, applicants, and eligible applicants, applicants for employment and employees and participants with visual impairments.

Collection and Maintenance of EO Data and Other Information – 38.41

We support the language in **38.41(b)(3)** outlining a recipients responsibility to keep medical and disability related information on separate forms and in separate files.

Subpart C – Governors Responsibilities to Implement Nondiscrimination and Equal Opportunity Requirements of WIOA

While not imposing any new responsibilities on Governors, the new title and restatement of obligations on the part of states’ chief executives for ensuring

nondiscrimination in WIOA programs emphasize to states the importance of proper implementation of Section 188.

Governor's Oversight and Monitoring Responsibilities for State Programs – 38.51

We agree with the change in **38.51(b)** calling for the Governor to monitor “on an annual basis” the compliance of state programs with Section 188 and agree that the previous language calling for periodic monitoring was too ambiguous. We also support the specific steps the Governor is called to take, at a minimum, as outlined in this section.

(b) Annually monitoring the compliance of recipients with WIOA section 188 and this part, including a determination as to whether each recipient is conducting its WIOA Title I-financially assisted program or activity in a nondiscriminatory way. At a minimum, each annual monitoring review required by this paragraph must include: (1) A statistical or other quantifiable analysis of records and data kept by the recipient under § 38.41, including analyses by race/ethnicity, sex, limited English proficiency, preferred language, age, and disability status; (2) An investigation of any significant differences identified in paragraph (b)(i) of this section in participation in the programs, activities, or employment provided by the recipient, to determine whether these differences appear to be caused by discrimination. This investigation must be conducted through review of the recipient's records and any other appropriate means; and (3) An assessment to determine whether the recipient has fulfilled its administrative obligations under Section 188 of WIOA or this part (for example, recordkeeping, notice and communication) and any duties assigned to it under the Nondiscrimination Plan.

Subpart D – Compliance Procedures

Authority to Monitor the Activities of a Governor – 38.65

We applaud the inclusion of a new paragraph **38.65(c)** that specifies the ways in which the Civil Rights Center may enforce the nondiscrimination and equal opportunity provisions of WIOA.

However, 38.65(a) as it is presently written is not sufficiently strong and would not ensure the adequacy of states' non-discrimination plans. That section reads, “The Director **may** periodically review the adequacy of the Nondiscrimination Plan established by a Governor, as well as the adequacy of the Governor's performance under the Nondiscrimination Plan, to determine compliance with the requirements of §§ 38.50 through 38.55. The Director may review the Nondiscrimination Plan during a compliance review under § 38.62 and 38.63, or at another time.” We recommend that the Director be required to review the adequacy of state nondiscrimination plans and thus propose changing “may” to “shall”.

Once again, we commend the Department for producing a very good set of nondiscrimination provisions for the Workforce Innovation and Opportunity Act and thank you for your attention to our comments.

For the Employment and Training Task Force

Kelly Buckland, Co-chair
National Council on Independent Living

Alicia Epstein, Co-chair
SourceAmerica

Susan Goodman, Co-chair
National Down Syndrome Congress

Susan Prokop, Co-chair
Paralyzed Veterans of America

Tony Stephens, Co-chair
American Council for the Blind

For the Rights Task Force

Dara Baldwin, Co-chair
National Disability Rights Network (NDRN)

Samantha Crane, Co-chair
Autistic Self Advocacy Network

Sandy Finucane, Co-chair
Epilepsy Foundation

Jennifer Mathis, Co-chair
Bazelon Center for Mental Health Law

Mark Richert, Co-chair
American Foundation for the Blind
(AFB)