

Before the Health, Education, Labor and Pensions Committee

U.S. Senate

Full Committee Hearing: Lessons Learned from COVID-19: Highlighting Innovations, Maximizing Inclusive Practices and Overcoming Barriers to Employment for People with Disabilities

February 8, 2022

On behalf of the three programs funded under the Developmental Disabilities Assistance and Bill of Rights Act (DD Act)¹, the Association of University Centers on Disabilities (AUCD), National Disability Rights Network (NDRN) and National Association of Councils on Developmental Disabilities (NACDD) submit the following Statement for the Record in advance of the hearing. For over 50 years, the central purpose of the DD Act has been to “assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs.”² The DD Act, and other federal statutes, have been the driving force for people with developmental disabilities to have the opportunity to live and work in their communities as equal and full members.

Increasing opportunities for people with disabilities to obtain or maintain competitive integrated employment (CIE) has been a long standing and central priority for all of the DD Act partners. On behalf of the DD Act partners who are located in every state, territory, the District of Columbia, Puerto Rico, and U.S. territories (American Samoa, Guam, U.S. Virgin Islands, and the Northern Mariana Islands), we submit these comments and recommendations.

Legal Framework

Thirty years after passage of the Americans with Disabilities Act (ADA) the promise to remove barriers to employment for people with disabilities still remains to be achieved. People with disabilities continue to experience discrimination and numerous barriers to CIE. In 1990, Congress enacted the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³ Congress stated that the “Nation’s proper goals...are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for people with disabilities.⁴

Congress recognized in the ADA, that society has “historically...tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of deinstitutionalization against individuals with disabilities continue to be a serious and pervasive problem.”⁵ While Title I of the ADA addresses discrimination in employment by private employers, Title II of the ADA protects a “qualified individual with a disability from being “excluded from participation in or being denied the benefits of

¹ 42 USC § 15001 et seq.

² 42 U.S.C. § 15001(b)

³ 42 U.S.C. §12101(b)(1).

⁴ 42 U.S.C. §12101(a)(7)

⁵ 42 U.S.C. §12101(a)(2).

services, programs, or activities of a public entity”⁶ or being “subjected to discrimination by any such entity.”⁷ As directed by Congress, the Attorney General promulgated regulations necessary to implement Title II, including its integration mandate: “A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁸ Title II’s integration mandate reflects the recognition that “[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates people with disabilities to second-class status.”⁹

In 2014, Congress passed the Workforce Innovation and Opportunity Act (WIOA).¹⁰ One of the purposes of WIOA is “to increase, for individuals in the United States, particularly those individuals with barriers to employment, access to and opportunities for the employment, education, training, and support services they need to succeed in the labor market”.¹¹ Title IV of WIOA specifically focuses on making amendments to the programs in the Rehabilitation Act of 1973 regarding the provision of employment services to people with disabilities. WIOA prioritizes CIE, where people with disabilities work in mainstream jobs alongside, and are paid comparable wages to, co-workers without disabilities. Despite the framework included in the ADA, the definition of CIE in WIOA recognizes two critical differences that make employment for people with disabilities different from most people without disabilities. Most people without disabilities go “to work” or “are employed”. The assumption for those people without disabilities is that they will be integrated when they go to work and will be paid a competitive wage. For many people with disabilities, this has not been the reality for them, hence the need to define CIE in WIOA.

Low expectations are among the most significant barriers for people with disabilities obtaining or maintaining CIE. While progress has been made, thirty years after the ADA many people with disabilities are still relegated to segregated employment and/or sub-minimum wage employment. Too many people with disabilities continue to be funneled into segregated and/or sub-minimum wage employment, frequently known as sheltered workshops, where they are isolated from co-workers without disabilities and broader society and are legally paid pennies on the dollar under Section 14(c) of the Fair Labor Standards Act (FLSA).¹²

Impact of the COVID-19 Pandemic on the Employment of People with Disabilities

The COVID-19 pandemic has further exacerbated the already existing barriers to people with disabilities maintaining or retaining CIE. The National Council on Disability (NCD) in the 2021 “Progress Report: The Impact of COVID-19 on People with Disabilities” submitted to Congress and the Administration focused on the impact of the pandemic on people with disabilities and concluded in regards to employment that “prior to the COVID-19 pandemic, nearly two-thirds of working-age Americans with disabilities were left out of the labor market altogether.”¹³ Fewer than one-third of working-age people with disabilities had a job, compared to nearly three quarters of working-age people without disabilities.¹⁴ This employment gap of 40 or more points has remained steady for years.¹⁵ “The onset of the COVID-19 pandemic triggered a massive decline in employment, and the initial hit had a disproportionate impact on people with disabilities. By the end of April 2020, nearly 1 million people with disabilities lost their jobs, representing about 20 percent of working people with disabilities. By comparison, 14 percent of people without disabilities lost their jobs.”¹⁶ Two years into the pandemic, as of January 2022, the employment participation rate of people with disabilities is 37.5 percent compared to 76.4 percent for people without

⁶ 42 U.S.C. §12132

⁷ Id.

⁸ 28 C.F.R. §35.130(d)

⁹ 28 C.F.R. Pt., App. B.

¹⁰ 29 U.S.C. §3101 et. seq.

¹¹ 29 U.S.C. §3101(1)

¹² 29 U.S.C. §214(c)

¹³ National Council on Disability (NCD). (2021). The Impact of COVID-19 on People with Disabilities. https://ncd.gov/sites/default/files/NCD_COVID-19_Progress_Report_508.pdf.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

disabilities.¹⁷ Furthermore, people without disabilities are entering the workforce at a quicker rate than people with disabilities. From January 2021 to January 2022, the labor force participation rate for people with disabilities has only increased by .9 percent compared to 4.7 percent for people without disabilities.¹⁸

Significant Barriers and Recommendations

It is within this research and legal framework that the DD Act partners identify the following five areas as some of the most significant barriers to CIE for people with disabilities and offer some possible policy solutions that we believe the Committee should consider immediately implementing to address these barriers. The DD Act partners are also supportive of the recommendations included in Chapter 5 on COVID and Employment in the 2021 Progress Report: The Impact of COVID-19 on People with Disabilities.¹⁹

Barrier 1: Implementing and Fully Funding the Individuals with Disabilities Education Act

When Congress passed the Education for All Handicapped Children Act, now known as the Individuals with Education Act (IDEA), it promised that the federal government would pay 40 percent of the average cost to educate a student with disabilities. Later, Congress amended the law to promise that the federal government would pay a “maximum” of 40 percent. Congress has never lived up to this promise creating a significant barrier to students with disabilities receiving a “free and appropriate public education” and obtaining a high-school diploma. In 2019, 16.4 percent of young adults with disabilities had not attained a high school diploma, compared to 7.3 percent of their peers without disabilities, reflecting a gap of 9.0 percentage points.²⁰ Not receiving a high-school diploma limits the jobs that students with disabilities are qualified for and creates a significant barrier to obtaining CIE.

Recommendation:

Congress should immediately pass the IDEA Full Funding Act and fully fund the Individuals with Disabilities Education Act ([H.R. 5984](#) / [S. 3213](#))

Barrier 2: Decoupling Public Benefits

Many people with disabilities rely on Supplemental Security Income (SSI) for income and Medicaid to obtain healthcare including long-term services and supports (LTSS). These programs are means-tested. By these programs being means-tested, people with disabilities are forced to live in poverty to get these critical supports to live in the community. These critical benefits are often essential to avoiding unnecessary institutionalization and potentially death. By having federally-imposed restrictions related to income and assets, many people with disabilities do not pursue CIE because they are essentially put in the position of deciding between working or losing these benefits. As long as the maintenance of publicly-funded benefits such as SSI and Medicaid are contingent upon the maintenance of a low-income and assets, it will continue to be incredibly difficult to incentivize people with disabilities to seek better employment with higher wages in CIE.

¹⁷ Kessler Foundation. (2022, February 4). *nTIDE January 2022 Jobs Report: People with disabilities build on job gains to break historic records*. <https://kesslerfoundation.org/press-release/nTIDE-January-2022-Jobs-Report>.

¹⁸ *Id.*

¹⁹ *Supra*, note. 13.

²⁰ Rehabilitation Research and Training Center on Disability Statistics and Demographics. (2020). *2020 Annual Report on People with Disabilities in America* (p. 12). Institute on Disability (IOD) at the University of New Hampshire (UNH). <https://disabilitycompendium.org/>

Recommendations:

Congress should immediately pass the Supplemental Security Income Restoration Act ([H.R. 3763 / S.2065](#))

Congress should pass legislation to decouple eligibility for Medicaid and Medicare from eligibility for cash benefits. The legislation should allow people with disabilities covered by Medicaid and/or Medicare through the SSI and SSDI programs to work and to retain their existing healthcare coverage permanently, without cost to the individual and without any complex paperwork.²¹

Barrier 3: Repeal Section 14(c) of the Fair Labor Standards Act

Section 14(c) of the Fair Labor Standards Act permits employers to pay some people with disabilities less than the minimum wage.²² This program is incompatible with the goals of the ADA and WIOA. By maintaining section 14(c), Congress is endorsing the perpetuation of a life of poverty and dependency for people with disabilities who are paid sub-minimum wages. The continued existence of this program creates a significant barrier to CIE by holding some people with disabilities to the lowest expectations as to their ability to work in CIE. Employers need to be supported to transition their models from segregated sub-minimum wage employment to one that supports CIE.

Recommendation:

Congress should immediately pass the Transformation to Competitive Integrated Employment Act ([H.R. 2373 / S. 3238](#))

Barrier 4: Providing Reasonable Accommodations

Title I of the ADA states that employers of more than 15 employees will not “discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”²³ An employee with a disability is considered qualified if they can perform the essential functions of the job with or without reasonable accommodations.²⁴

While the ADA provides for reasonable accommodations, obtaining accommodations and related enforcement of the ADA continues to be a barrier to CIE. Human resource professionals continue to lack knowledge about how to provide and the costs for providing reasonable accommodations as well as the impact of accommodations on the development of trust and the ability of workers with disabilities to meet expectations of productivity.²⁵ Additionally, we have heard anecdotally that employers believe that that they must hire people with disabilities who would otherwise be unqualified for the job and that people with disabilities cannot be terminated for cause for fear that it could trigger a lawsuit. Clearly this is untrue. This misunderstanding of the ADA almost undoubtedly prejudices employers against hiring people with disabilities. Furthermore, the COVID-19 pandemic has increased the need for reasonable accommodations as many workers have transitioned to telework and/or flexible work schedules. This underscores the need for both more education about the ADA and reasonable accommodations, and improved enforcement of the ADA.

²¹ Supra note 13.

²² 29 U.S.C. §201 et seq.

²³ 42 U.S.C §12112(1).

²⁴ 42 U.S.C §12112(8).

²⁵ Disability Employment TA Center. (2021). Transforming Networks through Systems Change, Innovation, and Collaboration. https://aoddisabilityemploymenttacentr.com/wp-content/uploads/2021/05/AoD_TA_Center_Landscape_Assessment_Final_without_Appendices_4.30.2021_508.pdf

Recommendations:

The government should prioritize enforcement of the ADA and Sections 501 and 503 of the Rehabilitation Act to ensure that workers with disabilities receive reasonable accommodations needed to obtain or maintain CIE.

The federal government should issue guidance on effective telework tools and highlight the benefit of telework for many people with disabilities.

Congress should pass the Disability Employment Incentive Act ([H.R. 3765](#) / [S. 630](#))

Barrier 5: Improving School to Work Transition and Vocational Rehabilitation

School to college or work transition is critical for students to obtain CIE. The Higher Education Opportunity Act's Transition and Postsecondary Programs for Students with Intellectual Disabilities (TPSID) programs provide students with disabilities the opportunity for post-secondary education and the opportunity to gain the skills needed for CIE. Another avenue for students with disabilities to gain the skills need for CIE is through apprenticeships. Furthermore, WIOA requires vocational rehabilitation (VR) to spend 15% of their annual budget on supporting the provision of pre-employment transition services (pre-ETS) for youth and young adults with disabilities.²⁶ However, there is evidence to suggest that VR does not consider pre-ETS a priority or focus and many VR programs continue to unilaterally decline support for students in TPSID programs despite Federal guidance to the contrary.²⁷ Additionally, anecdotal evidence suggests that some educators and transition counselors stress the importance of applying for Social Security as soon as possible rather than focusing on post-secondary education, vocation training or job development.²⁸

Recommendations:

Congress should conduct an oversight investigation to do a study to understand why VR is not focusing efforts on pre-ETS or require the GAO to do a study.

Congress should increase funding for other programs that interact closely with VR such as the Client Assistance Program.

Congress should pass the National Apprenticeship Act ([H.R. 447](#))

Congress should provide additional funding to expand the TPSID program.

²⁶ 29 U.S.C. §730(d)(1)

²⁷ Supra note 25.

²⁸ Id.