



Policies from the Past in a Modern Era
The Unintended Consequences of the AbilityOne
Program & Section 14(c)



National Council on Disability
October 14, 2020

National Council on Disability (NCD)
1331 F Street NW, Suite 850
Washington, DC 20004

Policies from the Past in a Modern Era: The Unintended Consequences of the AbilityOne Program & Section 14(c)

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National Council on Disability

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

Letter of Transmittal

October 14, 2020

President Donald J. Trump
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear Mr. President,

The National Council on Disability (NCD) is pleased to provide this comprehensive analysis of the AbilityOne Program along with the use of Section 14(c) subminimum wage certificates under the Fair Labor Standards Act by AbilityOne nonprofit agencies.

The AbilityOne Program, composed of a government-appointed Commission and staff, three central nonprofit agencies (CNAs) that operate much of the program, and over 500 participating nonprofit agencies, seeks, through federal procurement, to create employment opportunities for people who are blind or have a significant disability.

Created in 1938 and now operating under the 1971 Javits-Wagner-O'Day Act, Federal Government agencies currently purchase around \$3.6 billion worth of goods and services from nonprofits participating in the program. Section 14(c), also established in 1938, allows businesses to pay people with disabilities less than the federal minimum wage.

This report is informed by thorough research of relevant information and interviews of AbilityOne Commission members and staff, the program's Inspector General, the three CNAs, and other stakeholders. NCD visited nine AbilityOne nonprofit agencies in three states and interviewed 14 other such agencies by phone. The work of this assessment was informed by an Advisory Committee composed of experts in disability employment issues, of which half of whom identified as a person with a disability.

NCD concludes that the AbilityOne Program is based on an outdated model that results in the segregation of people with disabilities and is hampered by a lack of transparency and confusion over compliance roles. Of even greater concern, despite increase in the amount of government sales from the program, the employment of people who are blind has stagnated under the program, and the employment of people with significant disabilities has declined. In this report, NCD offers a series of recommendations that NCD believes will ultimately promote the employment of people with significant disabilities and who are blind that aligns with modern national disability policy of full equity and inclusion.

NCD provides this assessment during a grim moment in world history. The United States and the entire world are reeling from the effects of COVID-19 virus as it threatens the health and safety of

millions of people, while dealing a devastating blow to our economy. In 2019, at the start of the research for this report, unemployment in the United States was approximately 3.5 percent. The COVID-19 pandemic, however, has swiftly leveled the U.S. economy with the unemployment rate rising to 20 percent in late spring of 2020. NCD recognizes the potential audacity of suggesting a new version to an 82-year-old system that today provides employment to 45,000 people with significant disabilities and people who are blind. As the United States works to return to normalcy after the reverberations caused by COVID-19 begin to fade, NCD offers this report and recommendations as a way to build an employment system that is based upon the God given belief in the value of every human being and the American belief of equity and inclusion for all Americans.

Respectfully,

A handwritten signature in black ink that reads "Neil Romano". The signature is fluid and cursive, with "Neil" on the top line and "Romano" on the bottom line.

Neil Romano
Chairman

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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Acknowledgments

The National Council on Disability wishes to thank the National Disability Rights Network, particularly David Hutt, Ph.D., Amanda Lowe, Jacqueline Hubbard, and Amy Scherer, and their partner the Institute for Community Inclusion at the University of Massachusetts Boston, particularly John Butterworth, Ph.D., and Jean Winsor, Ph.D.

The National Council on Disability also thanks the AbilityOne Commission and staff for their cooperation in meeting with NCD for interviews and providing data for the report.

NCD extends a special thanks to the National Federation of the Blind for its contribution to this report of several photographs showing blind employees.

Executive Summary

With roots back to the New Deal of the 1930s, the Javits-Wagner-O'Day (JWOD) Act, which operates today as the AbilityOne Program, is a complex use of federal procurement power to seek to increase the employment of people who are blind or have significant disabilities. Led by a 15-person Commission and 32 staff members, the AbilityOne Program relies on a network of around 500 nonprofit agencies (NPAs) to make products and provide services that Federal Government agencies are mandated to purchase. To increase employment opportunities, these NPAs are required to employ people who are blind or have a significant disability in 75 percent of

the direct labor hours of the work performed by the entire NPA. Two central nonprofit agencies (CNAs), National Industries for the Blind (NIB) and SourceAmerica, play a key role within the program by distributing federal contracts to the NPAs through conducting monitoring visits and by working with the NPAs to add new products and services to the mandatory procurement list in an effort to further increase employment. The Commission recently designated the American Foundation for the Blind (AFB) as the third CNA,

but AFB has yet to begin operations. In this report, the National Council on Disability (NCD) looks at the AbilityOne Program in detail as follow-up to a 2019 white paper.¹ This report further addresses the use of Section 14(c) subminimum wage certificates by AbilityOne Program NPAs as follow-up to a 2018 NCD report on subminimum wages and sheltered workshops.²

NCD found that during the most recent eight-year period for which figures are publicly available

that employment of people with disabilities through the AbilityOne Program at best remained static for one subset while the other declined. AbilityOne Program sales to

the Federal Government and revenue earned by CNAs through a program fee increased. Between FY 2011 and FY 2018, the Federal Government purchased on average \$3.1 billion worth of goods and services annually through the AbilityOne Program. NCD found that between FY 2011 and FY 2018, the number of employees working in the program declined from around 50,500 to 44,000, and the number of hours worked declined from 49.2 million in FY 2011 to 47.8 million hours in FY 2018.

[A] greater amount of federal purchases through the program increased CNA revenue without resulting in increased employment of the target population.

Furthermore, despite an increase in total sales to the government, the percentage of AbilityOne Program revenue going to pay wages for people who are blind or have a significant disability declined from 20.09 percent to 18.19 percent between those years. In short, a greater amount of federal purchases through the program increased CNA revenue without resulting in increased employment of the target population.

Through interviews of interested parties and statistical and other research, NCD found systemic issues around AbilityOne Program transparency, oversight and compliance, structural integrity, and the philosophical underpinnings and assumptions of the program when compared to other federal disability policies. The program has also struggled with key issues involving the CNA program fee—a percentage paid of around 3.7 to 3.9 per year from the government contract, and the key CNA revenue source; financial audits; and a lack of clarity on the selection of NPAs for individual government contracts and individual eligibility for the program. Confusion around the oversight role of the CNAs appears to exist. The Government Accountability Office (GAO) and a panel established to study the program have

further been critical of the use of the program fee on lobbying and payment of executive salaries.

In addition to transparency and oversight issues, advances in technology, such as the use of federal procurement cards and an e-commerce

pilot; lack of knowledge about the AbilityOne mandatory preference by federal procurement officers; and veterans' small business preferences represent structural problems with the AbilityOne model. Most critically,

however, is the ongoing conflict between the 75 percent direct labor hour ratio and current federal disability law and policy. The ratio inherently creates pressures on the AbilityOne NPAs to place workers with disabilities into more

segregated settings, whether as work crews or on the production floor, while the entire program perpetuates a separate system for people who are blind or have significant disabilities at the same time federal laws seek to achieve greater integration.

NCD also considered the use of 14(c) wage

certificates by AbilityOne NPAs. While all but one NPA affiliated with NIB have foregone their 14(c) certificate, 233 NPAs affiliated with SourceAmerica still possess a certificate. SourceAmerica recently adopted a policy

The program has also struggled with key issues involving the CNA program fee . . . ; financial audits; and a lack of clarity on the selection of NPAs for individual government contracts and individual eligibility for the program.

The [75 percent] ratio inherently creates pressures on the AbilityOne NPAs to place workers with disabilities into more segregated settings . . . while the entire program perpetuates a separate system for people who are blind or have significant disabilities at the same time federal laws seek to achieve greater integration.

to encourage NPAs to eliminate the use of subminimum wages. NCD found that NPAs typically use the 14(c) certificates under the AbilityOne Program to pay less than the prevailing wage for the job but at least the applicable minimum wage. NPAs also use the certificates to pay subminimum wages to employees with disabilities who do not work on AbilityOne contracts.

Given the numerous systemic problems that beleaguer the AbilityOne Program, coupled with the necessity for America to advance to the fullest extent the integration of people with all disabilities into the economic mainstream of society, NCD calls on Congress to phase out the AbilityOne Program over an eight-year period and replace the program by requiring that federal contractors hire a percentage of people who are blind or have a significant disability. Specifically, NCD recommends that after the

phaseout, Congress require all federal contractors and subcontractors with at least \$200,000 in contracts and 50 or more employees to hire a certain percentage of people who are blind or have significant disabilities. The program phaseout must ensure the 45,000 jobs currently within the AbilityOne Program are captured under the new federal hiring requirements. An extensive

study would determine what percentage of people who are blind or have a significant disability would need to be hired by federal contractors. NCD further recommends, as part of

the phaseout, that the CNAs play an important role to support the NPAs in transitioning from the current program of having a mandatory preference to either competing directly for federal contracts or fulfilling other functions, and to assist all other federal contractors in preparing for hiring and supporting people who are blind or have significant disabilities.

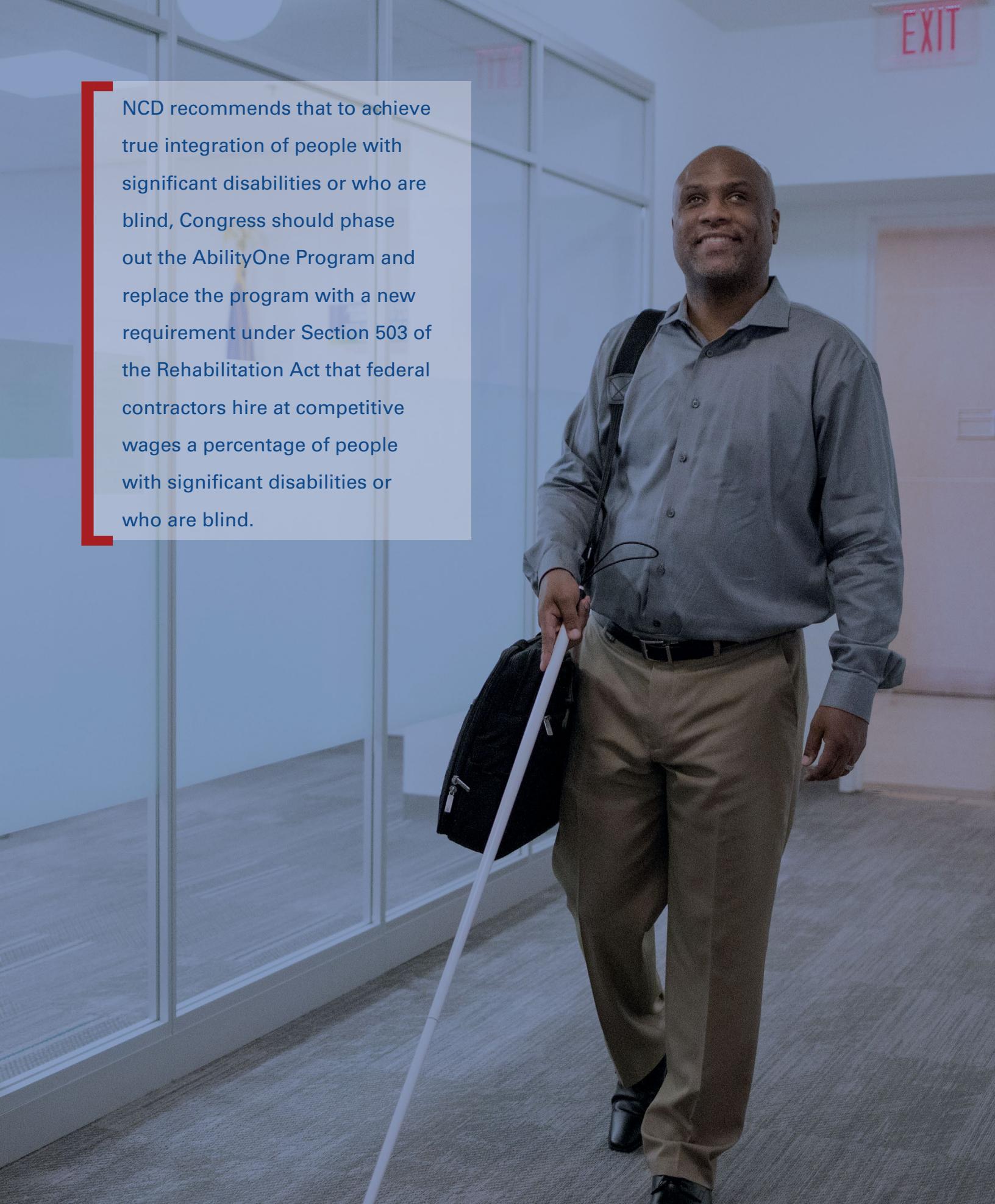
While all but one NPA affiliated with NIB have foregone their 14(c) certificate, 233 NPAs affiliated with SourceAmerica still possess a certificate.

Acronym Glossary

AAP	affirmative action program
ADA	Americans with Disabilities Act of 1990
AFB	American Foundation for the Blind
CIE	competitive integrated employment
CNA	central nonprofit agency
CSAVR	Council of State Administrators of Vocational Rehabilitation
DOJ	Department of Justice
ETS	essentially the same
FLSA	Fair Labor Standards Act
FTE	full-time equivalent
GAO	Government Accountability Office
HELP	Health, Education, Labor and Pensions Committee
IDEA	Individuals with Disabilities Education Act
IEE	Individualized Employment Evaluation
JAN	Job Accommodation Network
JWOD	Javits-Wagner-O'Day
KPI	key performance indicator
MOU	memorandum of understanding
MRE	Meals Ready to Eat
NCI	National Core Indicator
NCD	National Council on Disability
NDA	nondisclosure agreement
NDAA	National Defense Authorization Act
NIB	National Industries for the Blind
NIRA	National Industrial Recovery Act
NISH	National Industries for the Severely Handicapped
NPA	nonprofit agency
ODEP	Office of Disability and Employment Policy
OFCCP	Office of Federal Contract Compliance Programs
OIG	Office of Inspector General
QASP	Quality Assurance Surveillance Plan
RSA	Rehabilitation Services Administration

RFP	Request for Proposal
SELN	State Employment Leadership Network
SSDI	Social Security Disability Insurance
SSI	Supplemental Security Income
TA	technical assistance
VR	Vocational Rehabilitation
WIOA	Workforce Innovation and Opportunity Act

NCD recommends that to achieve true integration of people with significant disabilities or who are blind, Congress should phase out the AbilityOne Program and replace the program with a new requirement under Section 503 of the Rehabilitation Act that federal contractors hire at competitive wages a percentage of people with significant disabilities or who are blind.



Introduction

For more than 80 years, the U.S. government has sought to increase the employment of people who are blind, and for almost 50 years, people who have a significant disability, through what is today known as the AbilityOne Program. Composed of a government-appointed Commission and staff, three central nonprofit agencies (CNAs) that operate much of the program, and over 500 participating nonprofit agencies (NPAs), the AbilityOne Program currently employs around 45,000 people who are blind or classified as having a significant disability

Snapshot of AbilityOne

- Government-appointed Commission and staff
- Three central nonprofit agencies (CNAs) operating much of the program;
- 500+ nonprofit agencies (NPAs)
- Currently employing approximately 45,000 people who are blind or have a significant disability
- Provides approximately \$3.6 billion in products and services to the Federal Government through mandatory preference

and provides around \$3.6 billion in products and services to the Federal Government.³ In this report, the National Council on Disability (NCD) conducts a comprehensive analysis of the AbilityOne Program along with the use of Section 14(c) subminimum wage certificates under the Fair Labor Standards Act (FLSA) by AbilityOne NPAs as follow-up to two recent NCD reports on these topics.⁴

Methodology

In producing this report, NCD completed a number of interviews focused on different perspectives of interested program stakeholders. NCD researchers conducted in-person interviews with three AbilityOne Commission members and staff, the AbilityOne Program Inspector General, and the directors and staff of two CNAs (the National Industries for the Blind [NIB] and the American Foundation for the Blind [AFB]). NCD received written responses to questions from a third CNA, SourceAmerica, which declined NCD's invitation for an in-person interview.

To better understand and gather feedback from the NPAs who hold AbilityOne contracts with the Federal Government, NCD visited nine AbilityOne NPAs in California, Illinois, and New York. NCD chose the locations based on NPAs that currently hold or formally held an FLSA Section 14(c) certificate, to achieve

geographic diversity and an appropriate balance between NPAs affiliated with SourceAmerica and NIB. One NPA affiliated with SourceAmerica refused NCD's request for an on-site visit and interview. NCD also visited two nonprofit organizations that assist people with significant disabilities but no longer participate in the AbilityOne Program. The nine programs visited were generous with their time and willingness to share information and their perspectives about the program. All NPAs visited seemed committed to the mission of supporting the

employment of people who are blind or have significant disabilities.

Additionally, NCD randomly selected 24 NPAs across the country (see Appendix for the methodology) to conduct phone interviews, of which 14 were completed. Seven NPAs did not respond after repeated attempts to schedule a phone interview, and three refused to participate. In an effort to represent the perspectives of various communities, NCD also held open comment sessions in California, Illinois, and New York for which interested people could

NCD Research Methodology

Interview Subjects:

- Three AbilityOne Commission members and staff
- AbilityOne Inspector General
- Directors and staff of two CNAs (National Industries for the Blind [NIB] and American Foundation for the Blind [AFB])
- Written responses to questions from third CNA, SourceAmerica, which declined an in-person interview
- Congressional staff of Senate Health, Education, Labor and Pensions Committee and House Education and Labor Committee
- Staff of Council of State Administrators of Vocational Rehabilitation
- Staff of State Employment Leadership Network

NCD Site Visits:

- Nine AbilityOne NPAs in California, Illinois, and New York
- One SourceAmerica NPA declined NCD request for interview and site-visit
- Two nonprofits that assist people with significant disabilities but no longer participate in the AbilityOne program

Phone Interviews:

- 24 attempted phone interviews with NPAs
 - 14 completed
 - 7 did not respond after numerous attempts
 - 3 refused to participate

Open Comment:

- At each site visit, NCD held open comment sessions to receive diverse perspectives by phone or in-person

participate either in person or by phone. Many comments received during these sessions reflected the ongoing debate about the need for full integration of people with disabilities and the concern about the potential loss of employment and opportunity for people who are blind or have significant disabilities.

To gain congressional perspective about the AbilityOne Program, NCD interviewed congressional staff members from the U.S. House of Representatives' Education and Labor Committee, and from the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP). NCD also interviewed staff from the Council of State Administrators of Vocational Rehabilitation (CSAVR) and the State Employment Leadership Network (SELN) to learn more about the transition of people with disabilities to competitive, integrated employment. Throughout this project, NCD was assisted by an Advisory

Committee composed of experts from around the country on the employment and rights of people with disabilities under federal law, some of whom had participated in the AbilityOne Program as employees or NPA program staff. At least half of the committee self-identified as being a person with a disability.

Problems with the AbilityOne Program

The AbilityOne Program today is stymied by conflicting goals and an outdated legislative approach that runs counter to modern federal disability policy. The program struggles with

a lack of transparency and overlapping and sometimes unclear responsibilities among the various program entities.⁵ The Commission complains it lacks adequate resources to effectively oversee the program, while use of a program fee paid to the CNAs as a percentage of each government contract to support the participating NPAs has been subject to significant scrutiny. Meanwhile, AbilityOne Program sales to the government continue to increase, but the employment of people with significant disabilities under the program has declined, and the employment of those who are blind has remained static.

Congress has taken recent steps to address some of these issues through the establishment of a review panel under Section 898 of the 2017 National Defense Authorization Act (NDAA), known as the 898 Panel, and by

requiring a more formal oversight structure through the creation of an Office of Inspector General (OIG) and mandated written agreements. These congressional actions, while rightfully focused on the importance of improved oversight and transparency, nevertheless are patching up a program with underlying structural issues, many of which stem from assumptions about persons with disabilities for a program originally designed before the Second World War, and last modified before the digital revolution.

The 1971 Javits-Wagner-O'Day (JWOD) Act, which established the current AbilityOne Program, mandates that (1) 75 percent of all

direct labor hours on federal and nonfederal contracts performed by NPAs to produce goods and services be by people who are blind or have a significant disability,⁶ and (2) that Federal Government agencies must purchase goods and services at a fair price from a procurement list established by the AbilityOne Commission. The very structure of the program perpetuates the segregation of people with disabilities and further does not provide incentives for the advancement of people with disabilities to supervisory or managerial positions and does not recognize the importance of supporting functions other than direct labor. The Commission is required to ensure compliance with the JWOD Act and has gone further than statutorily required by setting the goal to expand the employment of people who are blind or have a significant

disability under a structure that conflicts with modern federal disability law and policy.⁷

This report addresses the various goals of the AbilityOne Program in the broader context of national policies that promote disability employment opportunities integrated in the community at competitive and fair market wages for people with any type of disability. NCD provides historical context to the program in Chapter 1, and in Chapter 2 discusses how the program operates today and the perspectives of a number of stakeholders. Chapter 3 considers sales to the Federal Government under the

AbilityOne Program, the employment of people who are blind or have significant disabilities, and issues related to subminimum wages and the use of segregated settings. Chapter 4 discusses the recommendations that were garnered from the findings in the report.

NCD recommends that to achieve true integration of people with significant disabilities or who are blind, Congress should phase out the AbilityOne Program and replace the program with a new requirement under Section 503 of the Rehabilitation Act that federal contractors

hire at competitive wages a percentage of people with significant disabilities or who are blind. The phaseout must be conducted in such a way to ensure that all employees working under the program are prepared to transition to the new requirement to avoid job loss, unemployment

or underemployment, or lower wages. NCD understands a recommendation of this magnitude will take time to implement and recommend an eight-year time frame for the phaseout. The recommendations embodied in this report align with current federal disability policies' goal of providing employment opportunities for people with significant disabilities and who are blind based on equity and inclusion. In the interim, NCD also provides recommendations to patch current problems, while Congress considers the more far-reaching recommendations.

These congressional actions . . . are patching up a program with underlying structural issues, many of which stem from assumptions about persons with disabilities for a program originally designed before the Second World War, and last modified before the digital revolution.

Chapter 1: History of the AbilityOne Program and Section 14(c)

To fully understand the implications of both the AbilityOne Program and the payment of subminimum wages to people with disabilities under Section 14(c) of the Fair Labor Standards Act (FLSA), it is necessary to consider society's evolving perception and understanding of disability, the clear evolution of federal disability policy, and the historical contexts that existed when Congress created and modified these programs.

The Medical and Charity Models of Disability

For much of the twentieth century, up until the 1970s, the medical and charity models of disability shaped society's perception of people with disabilities. The medical model promoted the idea that disability was something to be "cured," with medical professionals seen as the ultimate authority. Throughout much of the last century, derogatory words such as "abnormal" and "handicapped" were used to describe people with disabilities. The primary focus of this model was on the negative impact of a person's disability rather than on the person's unique skills, talents, and abilities.⁸ The charity model was closely linked to the medical model and promoted the idea that people with disabilities were "tragic" and should be "pitied."⁹ It was within this context that the Wagner-O'Day Act,

the forerunner to the AbilityOne Program, and the FLSA were passed.

The New Deal and the Employment of People with Disabilities

In 1933, when President Franklin D. Roosevelt took office, the United States was in the throes of the Great Depression. The United States had a 25 percent unemployment rate and was just around the corner from the start of the Great Dust Bowl, which saw a migration of up to 2.5 million people out of the American Midwest.¹⁰ President Roosevelt quickly set about to enact the "New Deal" designed to provide relief, reform, and recovery from the Great Depression. The laws and policies enacted during the New Deal resulted in a massive increase in Federal Government regulation that touched on many facets of life, including banking, public works and finance, farming, housing, social security, and labor and employment. On June 25, 1938, as part of New Deal reforms, both the Wagner-O'Day Act and provisions of the FLSA were signed into law, which addressed the employment of people with disabilities.¹¹ The passage of these laws signaled a commitment from the Federal Government that the employment of people with disabilities required certain considerations as the nation recovered from the economic upheavals.

The passage of the FLSA, which banned child labor and set a minimum wage and an hourly workweek, was a watershed moment in the evolution of employment law.¹² The law is still considered to be a landmark in our nation's social and economic development.¹³ Section 14(c) of the FLSA specifically affects the wages paid to some people with disabilities by allowing employers who hold a special or subminimum wage certificate to pay less than the federal minimum wage set by the FLSA.¹⁴

Section 14(c)'s legislative origins can be traced to the National Industrial Recovery Act (NIRA), which passed in 1933, and allowed the President to regulate industry for fair wages and prices to stimulate the economy. Although the U.S. Supreme Court declared the NIRA unconstitutional in 1935, the NIRA included a productivity-based subminimum wage specific to people with disabilities.¹⁵ The idea of paying people with disabilities less than the minimum wage, based on productivity, resurfaced three years later in the FLSA.¹⁶ Section 14(c), as passed in 1938, stated that, "[t]he Administrator [of the Wage and Hour Division], to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or by orders provide for . . . (2) the employment of individuals whose earning capacity is impaired by physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage."¹⁷ Since then, Section 14(c) has allowed employees with disabilities to be paid less than the minimum wage under special certificates.

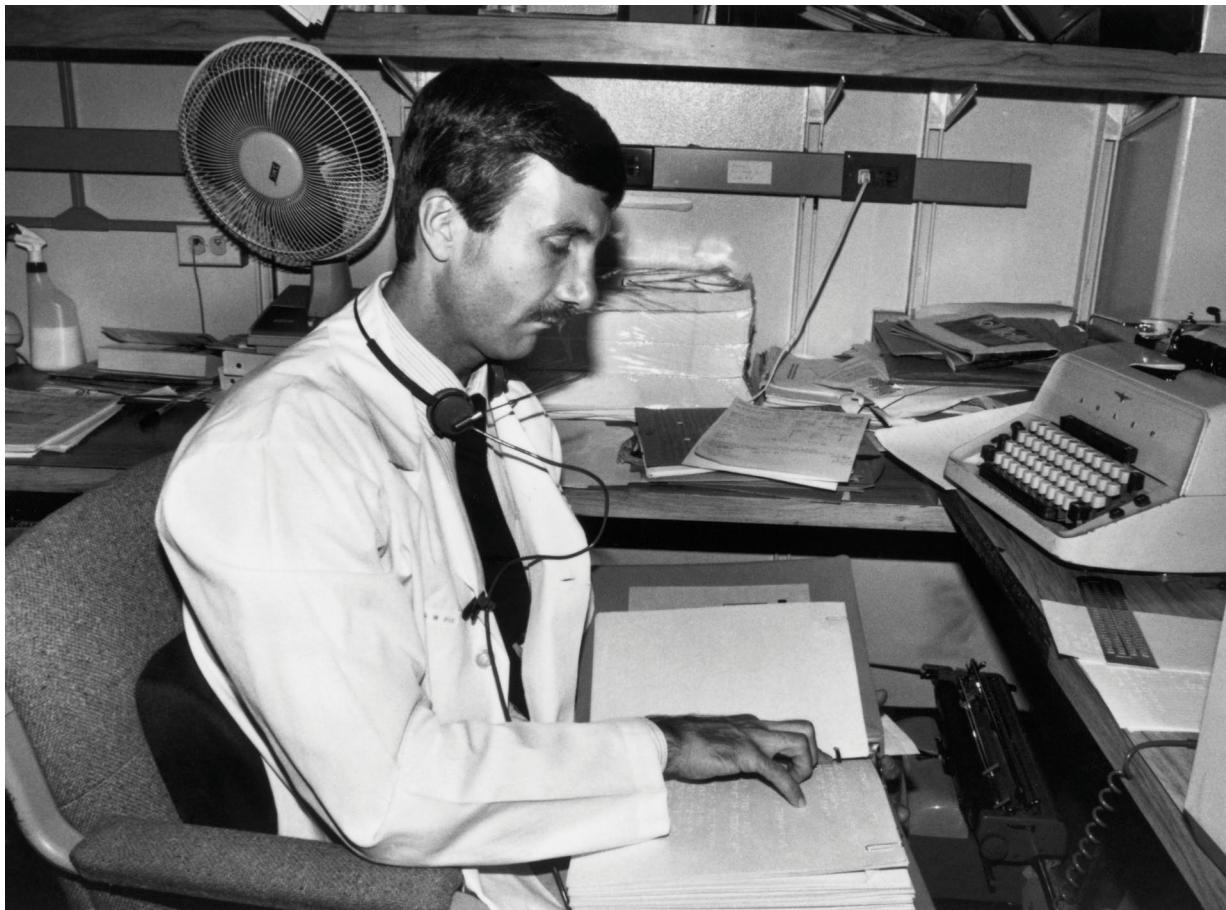
The Wagner-O'Day Act sought to encourage Federal Government purchases as a means to increase the employment of people who are blind. Three individuals, two of whom were blind,

Peter J. Salmon, Robert B. Irwin, and Moses C. Migel, spearheaded the Act. These men shared a common desire to increase the market, and thus opportunities, for certain products made by people who were blind. Salmon wrote in 1937, "I don't think that AFB [American Foundation for the Blind] could possibly do anything that would result in more jobs [for people who are blind] in a shorter period of time than getting federal and state governments to purchase the brooms and mops they make."¹⁸

The Wagner-O'Day Act specifically sought to aid in the employment of people who were blind by allowing nonprofit agencies (NPAs), which employed people who were blind, to sell manufactured goods, such as mops and brooms, to the Federal Government for a fair market price.¹⁹ The products were placed on the federal procurement list²⁰ and approved by the "Committee for Purchase of Blind-made Products" created under the Wagner-O'Day Act. The Committee also set the fair market price of the goods, revised prices as necessary, and created rules and regulations for the NPAs.²¹ The Wagner-O'Day Act was the basis for the current AbilityOne Program.

Changes to Section 14(c) and Passage of the Javits-Wagner-O'Day Act

Congress has amended the FLSA many times since 1938 to reflect the changes in the construct of employment and the Federal Government's role in the process.²² Section 14(c), on the other hand, has gone through comparatively fewer changes. In 1965, Senator Wayne Morris proposed two changes to Section 14(c). The first proposed change included a three-year transition period after which workers with disabilities would be paid no less than the federal minimum



wage. The second proposed change was a minimum wage floor by which workers with significant disabilities would not be paid less than 50 percent of the prevailing minimum wage. The wage floor proposal was adopted, but the three-year transition phasing out subminimum wage was not.²³

The only amendments to the 1938 Wagner-O'Day Act occurred in 1971, when Congress significantly expanded the statute through the Javits-Wagner-O'Day (JWOD) Act. This expansion added goods and services provided by organizations that employ people with significant disabilities to the federal procurement list. During the debate over the passage of the JWOD Act, congressional records suggest

a sharp division between the organizations representing individuals who are blind and those representing people with significant disabilities. John F. Nagle, Chief of the National Federation of the Blind at the time, stated, "enactment of [the JWOD Act] into Federal law would result in depriving blind employed persons wanting to work."²⁴ In 1971, Henry Viscardi, Jr., President of Human Resource Center, stated in support of the expansion that "here is an opportunity for increasing numbers of severely handicapped people to support themselves and not to be supported, to meet the challenges of life and not seek out the guaranteed existence, to seek their fulfillment as citizens in a great democracy."²⁵ Despite the controversy, Senator Jacob Javits of

New York led the expansion of the Wagner-O'Day Act to include people with significant disabilities. More specifically, the JWOD Act expanded the program to include the purchase of both goods and services from people who are blind and added the purchase of goods and services from people with significant disabilities. In an apparent attempt to address the controversy of including people with significant disabilities in the procurement program, the JWOD Act includes a preference for goods and services provided by people who are blind.²⁶

The most recent amendment to Section 14(c) occurred in 1986.²⁷ The 1986 amendment requires that subminimum wages paid to a

worker with a disability under a certificate be based on the individual's productivity commensurate with wages paid to workers without disabilities employed in the vicinity for essentially the same type, quality, and quantity of work. This so-called commensurate wage

paid to workers with disabilities employed under Section 14(c) certificates has no wage floor, which Congress eliminated by the amendment. Elimination of the wage floor has resulted in some employees with disabilities earning as little as cents per hour.²⁸ The 1986 amendment also included the ability of an employee to dispute the payment of a subminimum wage through an administrative appeal to the U.S. Department of Labor—a process that is rarely used.

Despite the amendments to both the Wagner-O'Day Act and Section 14(c), the theoretical

underpinnings of both laws remain much the same. Specifically, both signal a separate path in society for people with disabilities through a federally sanctioned segregated jobs system for people who are blind, deaf-blind, or have significant disabilities and lower wages paid to some with disabilities.

Based on the medical and charity models, people with disabilities were not seen as possessing the capacity to work in the regular economy. Special exemptions and programs were deemed necessary—and perhaps the only option for people with disabilities—to participate in a primarily industrial and agricultural economic system. Congress would not consider enshrining

any civil rights for people with disabilities for decades. Even the more recent JWOD Act was created just two years before one of the first milestones in the disability rights movement, passage of Title V of the Rehabilitation Act of 1973. These challenges

are also hampered by the Commission's lack of a rulemaking agenda that has been stalled and lacks progress in modernization.

Expansion of the Committee for Purchase and Creation of the Central Nonprofit Agencies

Congress, through the JWOD Act, created the Committee for Purchase from People Who Are Blind or Severely Disabled as the replacement to the Wagner-O'Day Act's Committee on Purchases of Blind-Made Products. The JWOD Act uses the

term “severely disabled”²⁹; however, today the more appropriate term is “significant disability,” which will be used for this report. The Committee for Purchase is tasked with adding products and services to the procurement list for mandatory purchase by the Federal Government. The products and services under the JWOD Act must be made or provided by NPAs that employ people who are blind or have a significant disability in at least 75 percent of the direct labor hours for all work performed by the NPA.³⁰

When Congress passed the JWOD Act, it instructed the Committee for Purchase, renamed the U.S. AbilityOne Commission in 2011,³¹ to designate “a central nonprofit agency or agencies (CNA or CNAs) to facilitate the distribution” of government orders of various products and services to other nonprofit agencies employing people who are blind or have significant disabilities. Through the years, the U.S. AbilityOne Commission has designated three CNAs: the National Industries for the Blind (NIB); SourceAmerica, formerly known as National Industries for the Severely Handicapped (NISH); and more recently, AFB. The designation of AFB was not done through notice and comment and is subject to legal challenge under the Administrative Procedures Act and currently before the U.S. Court of Appeals for the Fourth Circuit. These national nonprofit organizations, discussed in greater detail in Chapter 2, have emerged to play a critical role in the operation of the program through the development of the procurement list, as well as the coordination and distribution of the government orders among the participating agencies. As AFB remains in the research phase, the National Council on Disability (NCD) cannot yet assess the impact of this third CNA on the program.

NIB has been involved in the AbilityOne Program almost since its inception under the Wagner-O’Day Act. In the late nineteenth and early twentieth centuries, 16 nonprofit organizations emerged to employ people who were blind. These organizations focused on creating hand-crafted goods like baskets and mops. In the late 1930s, a group of advocates sought to regulate and pass legislation that would formalize the sale of such products to the Federal Government in an effort to ensure steady employment opportunities. Through these initial efforts, NIB was incorporated in 1938.³² NIB has served in the coordinating role of the blind nonprofit agencies since that time. One of NIB’s goals is to ensure that people who are blind have available a wide variety of career options.

A coalition of agencies including Goodwill Industries International, National Easter Seal Society (now known as and herein after referred to as Easterseals), American Congress of Community Support & Employment Services (ACCSES), The Arc, United Cerebral Palsy Association, and International Association of Jewish Vocational Services spearheaded efforts to successfully include people with significant disabilities into the Wagner-O’Day program during the debate over the JWOD Act in the early 1970s.³³ These organizations eventually incorporated NISH in 1974, which was eventually designated as a CNA for people with significant disabilities. NISH changed its operating name to SourceAmerica in 2013.³⁴

AFB was founded in 1921, and its mission is to maximize the potential and opportunities for people who are blind. AFB became a CNA in 2018, but it is not a full participating CNA and as of the date of this report is in a

“research” phase.³⁵ The primary focus of AFB will be “increasing job placement and career advancement opportunities in knowledge-based positions.”³⁶

Changes in Federal Disability Law and Policy

From the inception of the AbilityOne Program and Section 14(c) to the current day, the United States has undergone innumerable social, political, and cultural changes. Perhaps the time period of most dynamic change to the disability community began in the latter part of the twentieth century. Building on the momentum of the civil rights movement of the 1960s, in the 1970s members of the disability community sparked a groundswell of action to create a disability rights movement prompting a significant shift from the previously accepted medical and charity models of disability

to a new social model of disability. The social model of disability moved away from the view that disability is something to be fixed, cured, or pitied, and promoted the idea that the obstacles affecting persons with disabilities are caused by the lack of integration and universal accessibility within society. The social model embraces the idea that disabilities, no matter how significant they are, should not keep people from fully participating in the world. As such, the social model advances the position that society has a responsibility to eliminate barriers that limit people with disabilities, to work toward the

inclusion of people with disabilities in all aspects of society rather than excluding or segregating them.³⁷ Following a similar philosophy, changes in federal policies related to people with disabilities, beginning with passage of the Rehabilitation Act in 1973, have sounded a clear and consistent drumbeat toward integration and equity.³⁸

Congress modeled Title V in the Rehabilitation Act of 1973 after Title VI of the Civil Rights Act of 1964. The Rehabilitation Act, among other provisions, prohibits discrimination on the basis of disability by recipients of federal funds.³⁹ The Supreme Court later held that the Rehabilitation Act prohibits both intentional and unintentional discrimination based on disability,⁴⁰ requiring entities covered by the Act to take positive steps to avoid discrimination.

Just two years after Congress passed the Rehabilitation Act, in 1975 it enacted Public Law 94-142, the Education for All Handicapped Children

Act (P.L. 94-142), which was reauthorized and renamed the Individuals with Disabilities Education Act (IDEA). Prior to the passage of P.L. 94-142, students with disabilities had only a one in four chance of obtaining an education in a public school, an outcome that necessarily affected the poor employment rates of people with disabilities.⁴¹ A foundational tenant of P.L. 94-142 was the inclusion of what has become known as the “least restrictive environment,” a clear signal of congressional intent that the nation must focus on greater integration of students with disabilities into the educational system.

[T]he social model advances the position that society has a responsibility to eliminate barriers that limit people with disabilities, to work toward the inclusion of people with disabilities in all aspects of society rather than excluding or segregating them.

In 1990, Congress took further steps to eliminate discrimination against and promote the equity and integration of people with disabilities through the bi-partisan passage of the Americans with Disabilities Act (ADA).⁴² The ADA is an “equal opportunity law” for people with disabilities and the first comprehensive civil rights law for people with disabilities. The ADA brought about sweeping changes in all facets of life for people with disabilities, and this law prohibits discrimination on the basis of disability in the areas of employment, public

accommodation, public services, transportation, and telecommunications. Congress stated the unambiguous goal for the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁴³ Congress further emphasized this intent through amendments to the ADA in 2008 to reverse restrictive interpretations of the law by federal courts.⁴⁴

The theme of integration continued in 1999, when the U.S. Supreme Court ruled in *Olmstead v. L.C.* that under Title II of the

ADA, services for people with disabilities must be made available in the most integrated setting possible.⁴⁵ The *Olmstead* decision was yet another signal that the country was moving away from policies that resulted in segregation and toward policies that promote integration.

The most recent legislative change in disability policy is the Workforce Innovation and

Opportunity Act (WIOA), which passed with broad bi-partisan support in 2014. Through the passage of WIOA, Congress unequivocally stated that work is an important and valued activity for people and society. WIOA established the employment of people with disabilities as a national priority. One of the notable achievements of WIOA is the codification of the definition of

competitive integrated employment (CIE).

WIOA defines CIE as a job that (1) pays people with disabilities at least the minimum wage and not less than the wage paid to people without

disabilities for the same or similar work, (2) is performed in a location where the employee interacts with people without disabilities, and (3) provides workers with disabilities the same opportunities for career advancement as their coworkers without disabilities.⁴⁶

The philosophies embraced by WIOA are in stark contrast to the concept of “sheltered workshops” for people with disabilities that arose in the 1930s.⁴⁷ Current disability policy recognizes the inherent problems with sheltered workshops

and encourages community job placements for all people with disabilities. To help accomplish this goal, Section 511 of WIOA made notable changes by placing significant limits on the use of subminimum wage sheltered workshops, particularly for transition age and out-of-school youth. Section 511 requires that any person with a disability under the age of 24 years

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Some of the notable achievements of WIOA are the codification of the definition of competitive integrated employment (CIE).

explore and try CIE before they can be placed in a subminimum wage setting. It also prohibits schools from contracting with subminimum wage providers and requires at least annual reviews of anyone employed in a subminimum wage setting to discuss CIE alternatives.⁴⁸ WIOA requires state agencies—including Medicaid, intellectual and developmental disabilities

agencies, Vocational Rehabilitation (VR) agencies, and education programs—to enter into cooperative agreements

that prioritize CIE as the employment goal. The law also requires that at least 15 percent of VR funding be used for pre-employment transition services.⁴⁹

The evolution of disability policy, from the passage of the Rehabilitation Act in 1973 to the passage of WIOA in 2014, has followed the arc of the disability rights movement and the

changing perceptions of people with disabilities. No longer is disability viewed as something to be fixed, cured, or pitied. Rather, disability is more commonly viewed as a limitation or obstacle imposed by society and an environment which needs to be removed or altered to allow for full integration.

Since the passage of the Rehabilitation Act, disability-related statutes and policies have all sought to remedy inaccessibility,

inequity, and segregation. On the contrary, Section 14(c) and JWOD now stand out as significant exceptions to the norms of modern disability policy. Consideration of how the AbilityOne Program operates and recent trends and outcomes further highlight concerns around issues of transparency, compliance, and structural program integrity seen throughout the program.

Chapter 2: How the AbilityOne Program Operates Today

The AbilityOne Program today is a complex public-private relationship involving the AbilityOne Commission and its staff as the governmental oversight authority; the central nonprofit agencies (CNAs) working with the participating nonprofit agencies (NPAs) and government agencies, the NPAs which provide goods and services; and the federal agency customer. The ultimate goal of the program is to employ people who are blind or have a significant disability who, based on assumptions made almost 50 years ago, would be unable to find employment in the regular private or public sector economy. In addition, the Commission and its partners view the addition of new products and services to the mandatory federal procurement list, the satisfaction of the Federal Government end-user, and the satisfaction of employees as important elements of the program.

The National Council on Disability (NCD) discovered through a review of public documents and interviews, confusion over roles and responsibilities, and a lack of transparency

in other areas of the AbilityOne process. NCD also found misunderstandings about aspects of the program, issues with the evaluation process used to determine eligibility for employment under the program for people with significant disabilities, and long-standing concerns over the 75 percent direct labor hour ratio.⁵⁰ In a May 2013 report, the Government Accountability Office (GAO) identified the need to enhance program oversight and transparency

as a challenge for the Commission. In 2019, a provision increasing contracting goals and setting the stage for expanded Program growth was abandoned at the National Defense Authorization Act (NDAA) Conference. The reason

discussed by lawmakers for not increasing the contracting goal provision was that "both the [AbilityOne] Inspector General and the [Department of Defense] Panel generated findings and recommendations for needed reforms and expectations that the AbilityOne Commission take appropriate steps in the future to increase transparency and effectiveness of the program."⁵¹

The AbilityOne Commission

The AbilityOne Commission consists of 15 members appointed by the President. Eleven Commission members must be from the Federal Government, including a member each from the Departments of Defense (DoD), Army, Navy, and Air Force.⁵² The other required federal agencies include the Departments of Agriculture, Education, Commerce, Veterans Affairs, Justice, and Labor, and the General Services Administration.⁵³ The four non-Federal Government members must include one each representing people who are blind and people with significant disabilities, and one each representing employees from NPAs providing services or goods under the program from workers who are blind and workers with significant disabilities.⁵⁴ The Commission has three vital roles under the program. First, the Commission decides on the addition or removal of products or services from the AbilityOne procurement list.⁵⁵ Second, the Commission sets, with significant support from the CNAs, the fair market price the Federal Government will pay the NPAs for the goods or services.⁵⁶ Finally, the Commission has oversight over the three CNAs, two of whom currently operate significant aspects of the program, as well as ultimate oversight of the NPAs.⁵⁷

The AbilityOne Office of Inspector General (OIG) identified in December 2019 a lack of transparency and lack of communication by the Commission as among the top management challenges for the program.

The AbilityOne Office of Inspector General (OIG) identified in December 2019 a lack of transparency and lack of communication by the Commission as among the top management challenges for the program.⁵⁸ The first identified challenge—a higher level of transparency and communication needed to enhance program confidence—noted that more than half of the Commission membership is vacant.⁵⁹ This challenge was also noted by an AbilityOne Commission member interviewed by NCD. The OIG further

mentioned that while the Commission holds open meetings four times a year, the meetings would be enhanced by more subcommittee work completed in advance, larger agendas, and more written materials.⁶⁰ More importantly, the frequent use of executive sessions and nondisclosure agreements (NDAs), as noted by the OIG, adds to the perceived opacity of the

Commission's work by stakeholders.⁶¹

During interviews with NCD, one AbilityOne Commission member stated a disagreement with the OIG that the Commission often uses executive sessions, while

[T]he frequent use of executive sessions and nondisclosure agreements (NDAs) as noted by the OIG, adds to the perceived opacity of the Commission's work by stakeholders.

another Commission member stated that they felt following the advice of AbilityOne general counsel regarding how meetings should proceed was appropriate. A federal district judge recently noted that while the selection of the American Foundation for the Blind (AFB) as a third CNA

was not done unlawfully, the “Commission’s process was not a model of exemplary agency decision making.”⁶² The case is under appeal.

The AbilityOne Procurement and Contracting Process

The CNAs selected by the Commission are assigned the responsibility to help administer the program through direct connection with the NPAs.⁶³ As of the date of this report, the National Industries for the Blind (NIB) remains the primary CNA working toward the employment of people who are blind. AFB was designated as a new CNA in 2018 and is in a research phase focusing on how to achieve greater employment of people who are blind in knowledge-based industries in competitive, integrated employment. SourceAmerica, on the other hand, remains the sole CNA that works toward the employment of people with significant disabilities through the program.

A primary role of the CNAs is to help the NPAs understand and navigate the intricacies of the procurement list process. The CNAs, in most cases working with an NPA, must first make a recommendation to the Commission suggesting a new item or service for the mandatory procurement list and a suggested fair market price. After receiving the recommendation and supporting documentation, the Commission must determine the suitability of the recommendation for the goods or services.⁶⁴ A suitability determination of an NPA must include the potential to generate employment opportunities for people who are blind or have a significant

disability, and the NPA proposing the good or service must satisfy both the Commission’s qualification standards and the government’s quality standards.⁶⁵

The process to add items to the federal procurement list normally begins after a federal agency identifies a need for a product or service. The government customer and the NPA may discuss and refine the requirement and contracting activity. Then, the NPA and government customer negotiate a recommended price, with the CNA providing technical assistance during the process. Based on NCD interviews, many ideas for new products and services for the procurement list are initiated

by NPAs working with government agencies. NIB also reported that it scans the national market for potential new opportunities for its NPAs. One NPA interviewed stated it has been difficult in

their experience to get new items added to the procurement list, stating it has not received an assignment or allocation for a new product since 2009.

Whenever an appropriate product or service is identified, the CNA, working with the NPA, will compile an information package for review by the Commission staff. The package will include the price negotiated with the government entity and supporting documentation from the NPA, the CNA, and the customer. If the package is approved by the Commission staff, a summary of the proposed addition to the procurement list is published in the *Federal Register* for a 30-day notice and comment period. Based

on comments received during this comment period, the Commission staff will recommend project approval or disapproval, and provide the Commission members with a decision package. The Commission will vote to approve or disapprove the suitability of the product or service. A final *Federal Register* notice is published with a second 30-day comment period before the addition to the procurement list becomes effective.

According to one Commission member, the Commission is provided a Decision Document that demonstrates how the suitability criteria are met by the proposed addition, prepared by AbilityOne Commission staff, along with the decision package of supporting information. The Decision Document describes details such as the federal agency that would purchase the service or good, the jobs that would be created for people with significant disabilities or people who are blind, an analysis

showing that the purchase of the product or service would not have a severe adverse impact on previous contractors, a description of the tasks, relevant transportation information, how quality would be ensured by the NPA, and any safety issues of relevance for employees. According to one Commission member interviewed, decisions by vote may be registered through an online portal system or via direct email correspondence. The Commission member noted that if there is concern about a package, Commission members can call for a discussion about the recommended product or service.

Prior to the placement of a product or service on the procurement list, the assignment

process begins when a CNA posts a Request for Proposal (RFP) (a business document used in the bidding process to provide details about the project) for the approved goods or services. According to Commission staff, each CNA has their own specific process for posting bids. The CNA that recommended the selected good or service will solicit bids from among its affiliated NPAs.⁶⁶ According to the CNAs, after an NPA is recommended for a product or service, and it is included on the procurement list, the Federal Government awards the contract to an NPA. Once the NPA is awarded the contract, the Federal Government must purchase the good or service subject to some exceptions.

Based on interviews with NPAs, the process to assign AbilityOne contracts lacks full transparency. NCD heard varying responses from the NPAs about the bid posting process, including NPAs who reported they receive information regarding

RFPs through weekly blasts and through listings on a customer portal. One NPA reported the process was hit or miss and that the onus was on the NPA to find contract opportunities. NCD also heard from numerous NPAs that the CNAs do not make it clear how they actually evaluate the RFPs. One NPA, in particular, noted frustration with the lack of transparency around the selection process. Specifically, the process was described as “random” and “not clear.” The NPA also expressed frustration about the lack of clarity about who reviews the contract bids, if there was a conflict with another NPA, as well as a lack of written feedback on contract bids.

NCD also heard from numerous NPAs that the CNAs do not make it clear how they actually evaluate the RFPs.

The concerns about the transparency of the bid process have been echoed in a number of reports. In 2013, the GAO recommended that the Commission take steps to ensure that the CNA process for assigning contracts was fair and equitable.⁶⁷ Three years later, the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (Workforce Innovation and Opportunity Act [WIOA] Advisory Committee), a committee established

under WIOA to make recommendations to Congress, recommended that a third party (not SourceAmerica or NIB) be in charge of the bid process.⁶⁸ In 2018, the 898 Panel established by Congress under Section 898 of the 2017 NDAA made essentially the same recommendation in its report to Congress, “[i]ncrease transparency in CNA’s nonprofit agency recommendation processes with mandatory criteria and certifications.”⁶⁹ The Commission believes it

has addressed many of the concerns voiced by GAO, and the 898 Panel. As an example, the Commission incorporated additional CNA reporting requirements pertaining to the NPA

recommendation process within the newly formed cooperative agreements. A better assessment of the impact on transparency of the assignment process, however, will need to await completion of an audit by the AbilityOne OIG. The OIG included in its FY 2018–2019 Audit

Plan and current FY 2020–2021 Audit Plan a high priority to complete an audit on the “CNA’s Process for Assigning Projects and Allocations of Orders.”⁷⁰

Once a contract is awarded to an NPA for a product or service, based on NCD interviews and

research, the contract historically remains with the NPA absent significant performance issues, the contract terminates without renewal, or the NPA no longer offers the product or service. NCD heard of

instances of NPAs ceasing operations or stopping production. In several cases, this happened because the NPA went out of business, thus requiring transfer of the contract to another NPA. And yet, a number of NPAs reported having the same AbilityOne contract with a Federal Government agency for products or services for years or, in most cases, a decade or more. The goods and services offered by the program are addressed in Chapter 3.

[A] number of NPAs reported having the same AbilityOne contract with a Federal Government agency for products or services for years or, in most cases, a decade or more.

In 2018, in an effort to improve contractor performance while saving the Federal Government money, the 898 Panel recommended that the Commission pilot a competitive contract

process within the AbilityOne Program. The result of this recommendation was the first AbilityOne competition, led by the Commission with support from SourceAmerica. Through the pilot test, NPAs competed for the Facility Support Operations Services contract in Fort Bliss,



Texas.⁷¹ The pilot resulted in the competitive award of a \$300 million (total contract value) Fort Bliss facility support operations services contract to a nonprofit agency on the AbilityOne Procurement List.⁷² A Commission after-action report on the pilot has not been made public to date despite representation that a report would be provided. The 898 Panel stated in its 2020 report that the next steps will be to conduct debriefs with all NPAs involved; to conduct a review with Commission staff, the Army, and SourceAmerica; and to evaluate the possibility of future competitions.⁷³

NCD visited a nonprofit organization that no longer participates in the AbilityOne Program but which as recently as a few years ago had a contract to build wooden index filing boxes for the Navy. The work was performed in a

sheltered setting and required skilled wood-crafting abilities. The NPA left the AbilityOne Program after the director determined that future funding trends were moving away from segregated settings, and employees no longer had the interest or the skills to continue the production. The director reported the agency had moved away from sheltered work and toward locating community employment at competitive wages. A particular highlight during the transition to community employment included a former workshop employee who now takes the bus independently and volunteers with the Rotary Club despite persistent beliefs and fears by family members, now overcome, that he could not safely navigate within the community.

Another NPA reported losing a Department of Veterans Affairs (VA) contract due to the

“rule of two,”⁷⁴ which requires the VA to first consider veteran-owned small businesses before contracting with another entity. Further implications regarding the rule of two and program integrity are discussed later in this report. Additionally, some NPAs interviewed stated that the CNAs should focus more on getting NPAs contracts in new areas rather than being limited to products. A few even believe that being limited to existing products for which demand is in decline does not allow for growth of the AbilityOne Program.

Changes to the Javits-Wagner-O’Day Act and the Role of Cooperative Agreements

Although Congress has never amended the JWOD Act, there have been some changes, through interagency and congressional actions, to enhance the transparency and oversight of the Commission.⁷⁵ For

example, in 2006, according to Commission staff, the program changed its name to “AbilityOne” to help unify the program. Prior to 2006, the JWOD program was often defined by specific products (e.g., SKILCRAFT) that did not accurately represent all of the products produced or the services offered under the program. By changing the name, the Committee believes it simplified the description of the program and focused the attention on the abilities of the workers who produce the products and services.

Additionally, in 2016, Congress mandated changes to the oversight of the AbilityOne

Commission and reporting requirements through the Consolidated Appropriations Act.⁷⁶ These changes included the creation of an OIG for the AbilityOne Program as well as requirements that the Commission enter into written agreements with the CNAs and submit quarterly reports to Congress.⁷⁷ The requirement of written agreements represented the first time the Commission had written agreements with the CNAs. While these congressionally imposed obligations were meant to increase the overall accountability and transparency of the AbilityOne Program, there are additional steps that must be taken for these measures to be more effective. The OIG included program transparency as one of the Commission’s most pressing challenges

in a recent Semi-Annual Report to Congress and Top Management and Performance Challenges Report. The OIG concluded, following a comprehensive 2020 audit, that the Cooperative Agreements enhanced program

accountability and transparency. The performance audit report provided seven recommendations to assist the Commission to further strengthen oversight effectiveness and transparency of the Program and five areas to improve Commission oversight.⁷⁸

The primary purpose of the cooperative agreements between the Commission and the CNAs is to formalize the roles and responsibilities of the CNAs and define the measures of accountability used to evaluate the CNAs. More specifically, as directed by Congress, the cooperative agreements address the roles and

responsibilities on the part of the Commission and the CNAs.⁷⁹ These roles and responsibilities include project assignment procedures (including decision making processes); expenditures of funds (including policy governing reserve levels); performance goals and targets; governance standard and other internal controls to prevent fraud, waste, and abuse (including conflict of interest disclosures and reports of alleged misconduct); access to data and records; consequences for not meeting expectations; periodic evaluations and audits on affiliates; periodic review and updates on pricing information; and provisions for updating the agreement.⁸⁰

The CNAs are required under the cooperative agreements to provide quarterly reports to the Commission. With that information, the Commission then evaluates CNAs' performance in accordance with internal metrics outlined in a Quality Assurance Surveillance Plan (QASP).⁸¹ The QASP outlines the performance standards, the frequency of surveillance, and the minimum acceptable performance levels.⁸² Although there are minimum requirements, NCD believes that the QASP is not fully effective since it lacks significant penalties for CNAs who fail to meet their minimum requirements. The Commission also sends these quarterly reports to Congress.⁸³ It is worth noting that AFB also has a cooperative agreement; however, it is distinct from the NIB and SourceAmerica agreements, and its only focus is on research, CNA development, and transition to full

CNA functionality. The OIG also noted some deficiencies with the QASP in a 2020 report on the cooperative agreements. Specifically, the OIG expressed some concerns with regard to key performance indicators (KPI), which were established to evaluate CNA performance under the agreements. Specifically, the OIG stated that some KPIs are out of the CNAs' control and in fact do not enhance intended performance in the program. The auditors also noted the following concerns: (1) there was no formal process in place outlining how the KPI measurements were and are developed, (2) there was a lack of adequate procedures for CNAs to resolve KPI criteria disagreements with the Commission, and (3) there were no indications that the Commission staff conducts data analysis to assess and validate the Fee and Expenditure Reports submitted by the CNAs before they are sent to Congress.⁸⁴

Additionally, congressional staff indicated that it was difficult to track down the quarterly reports required, and even if they were located, it was difficult to understand what exactly is in the reports. In addition, the OIG reported in the audit of the cooperative agreement problems with the quarterly reporting and with the analysis and review by the Commission. Congressional staff further asserted that not requiring the reports to be public hinders the overall transparency of the program, while also making it difficult to track the expenses and the use of the program fees by the CNAs.

According to one CNA, the cooperative agreement has been helpful in detailing

requirements of the CNA and the metrics the Commission will use to evaluate CNA performance. Additionally, the CNA noted the agreements have also increased the overall transparency and accountability of the process while enhancing the collaboration between the Commission and the CNAs. These improvements have resulted in more effective communication and alignment between the interested parties.

On the other hand, according to one CNA, the excessive administrative requirements of the agreements have led to unnecessary overhead costs. One CNA indicated that modifications to the cooperative agreements have lacked meaningful negotiation between the Commission and the CNA. One CNA believed the cooperative agreements failed to clarify roles and responsibilities and stated that evaluations

required as a result of the agreements were done in an inconsistent manner. In their 2020 audit report on cooperative agreements, the OIG concluded that, although the cooperative agreements were effective and designed to enhance accountability, operational effectiveness, integrity, and transparency of the Program, there are opportunities for improvements with the Commission's oversight of CNAs in five areas: (1) the criteria used to develop KPIs, (2) program and agreements compliance, (3) program performance objectives and deliverables, (4) performance of data analysis on CNAs' reports, and (5) modernization and alignment

of policies with cooperative agreements requirements.

The cooperative agreements are seen as important because they outline KPIs for the CNAs, which include employment growth; program administration, oversight, and integrity; NPA support, assistance, and development; and training and strategic communications. There appears to be, however, some confusion about the exact role and scope of the CNA's oversight role even with the cooperative agreements. The Commission seeks to achieve compliance when issues arise with an NPA through the use of corrective action plans. Commission staff stated they rely primarily on the CNAs to identify problematic NPAs for the Commission compliance team to investigate. Despite the clear intention that the enactment of the cooperative agreements would increase transparency, clarify

roles, and put in place performance measures, in their current state, there does not appear to be a clear consensus on the efficacy of the cooperative agreements.

In its 2018 report to Congress, the 898 Panel noted that while the cooperative agreements signed between AbilityOne and the CNAs was a positive step, no such mechanism exists with the NPAs.⁸⁵ Although the idea of contracts between the NPAs and the CNAs was not a welcome one to all the NPAs interviewed, one NPA did vociferously state that not only would this be helpful but also that they considered it vital to their operation and the operation of the other NPAs.

Congressional staff further asserted that not requiring the reports to be public hinders the overall transparency of the program, while also making it difficult to track the expenses and the use of the program fees by the CNAs.

The Role of the Central Nonprofit Agency Program Fee

The Javits-Wagner-O'Day (JWOD) Act states that a CNA "may charge fees to nonprofit agencies, thereby allowing participation in the AbilityOne Program. Fees are calculated based on nonprofit agency sales to the U.S. Government under the AbilityOne Program. Fees shall not exceed the ceiling approved by the Committee."⁸⁸ These fees are charged by the CNAs to their respective NPAs and applied to each AbilityOne contract. The Commission votes at least annually to set a separate program fee for each CNA.

Prior to the establishment of the cooperative agreements with the CNAs in 2016, the

Commission based the fee on the CNA's annual business plans and projected revenues, and evaluated the CNA's revenue needs based on their duties.⁸⁷ Since the creation of the cooperative agreements, the Commission bases

the fee, now called the "program fee," on each CNA's performance according to the QASP metric, as well as on other considerations such as the CNA's financial health metrics. The Commission previously set the program fee ceiling at 3.9 percent for NIB and 3.85 percent for SourceAmerica, later reducing the fee to 3.73 percent for NIB and 3.75 percent for SourceAmerica starting on April 15, 2019, through March 2020.⁸⁸ Commission staff stated that they have always sought to keep the CNA program fee at a ceiling to provide sufficient funds to allow the CNAs to perform required functions while avoiding an excess. Based on data provided by

SourceAmerica and NIB, the total program fee revenue was around \$121.3 million in FY 2018. Details of the program fee are discussed in Chapter 3.

The transparency of the utilization of the program fee has been an ongoing issue and the focus of a number of reports. The GAO identified two areas of concern regarding the program fee in its 2013 report.⁸⁹ The first concern was CNA executive salaries. The GAO noted that CNA salaries are not limited by federal law because the salaries are paid through program fees. The GAO reported that in 2012, 11 CNA executives received a salary that exceeded the federal senior executive service salary.⁹⁰ Another GAO concern

involved use of the program fees for CNA lobbying activities. As with executive salaries, the money spent by the CNAs on lobbying is exempt from restrictions on the use of federal funds for lobbying activities. The exemption exists because the

program fee is not a direct appropriation but, instead, based on government purchases. The GAO further reported that in 2012, NIB reported spending \$175,729, and NISH (now SourceAmerica) reported spending \$700,000 on lobbying.⁹¹

The 898 Panel reports to Congress in 2018, and again in 2020, also addressed program fees. The panel recommended a prohibition on the use of the program fee to cover lobbying expenses and suggested that Congress enact legislation to close this loophole. Additionally, the panel report released in early 2020 noted

The GAO reported that in 2012, 11 CNA executives received a salary that exceeded the federal senior executive service salary. Another GAO concern involved use of the program fees for CNA lobbying activities.

that Congress may seek a formal opinion from the GAO as to whether the program fees can be used for lobbying under current federal law.⁹² Additionally, the OIG completed a performance audit of the AbilityOne Program fee and reported the following findings: adequate guidance on the program fee ceiling needs improvement, current and complete program fee calculation guidance is not available, along with a lack of indicators and evidence that the Commission performs data analysis on CNAs' reports.⁹³

To gain further insight into the program fees, NCD asked the NPAs interviewed if they knew how their CNAs utilized the program fees. No NPA interviewed reported receiving details about the use of the program fee or knowing how the fee was spent. Some NPAs were aware of trainings made available by their CNAs, and several noted the receipt of technical assistance and the availability of interest-free capital requirement loans. NIB informed NCD that, while they are bound by the fee ceiling set by the Commission, they return a significant portion of the program fee back to the NPAs through grants and incentive programs.

NIB reported further that the recent fee ceiling was 3.9 percent and after returning money to the NPAs, the portion NIB kept was closer to 3.4 percent. As required by Congress, CNAs send the Commission data on the use of the program fee, which the Commission then reports to Congress on a quarterly basis. As noted earlier,

these congressional reports are not available to the public.

The NPAs also expressed varying opinions about the program fees and did not have unified perspectives. One NPA articulated confusion as to why the program fee remained the same each year throughout the life of the contract. Rather,

this NPA felt that the fee should reflect the heightened need for CNA involvement at the beginning of a contract bid and negotiation process, and then decrease when there is

limited need for CNA involvement. Additionally, some NPAs felt that the program fees contributed to support, grants, and no-interest loans to the NPA. NIB reported an incentive mechanism for NPAs which is funded out of the program fee. Other NPAs felt that the program fees were simply a CNA profit-driven mechanism.

NPAs varied in their understanding of how the program fee was paid and who paid it. Some NPAs believed that they paid the program fee

(a deficit to their own revenue), while others thought the government agency paid the program fee such that there was no reduction to NPAs' revenue. Additionally,

for some contracts, a CNA will act as the prime contractor with the Federal Government and then invoice the NPA directly for program fees. A handful of NPAs interviewed did not know anything about the program fee and did not even realize they were paying a program fee. Confusion about which pocket the program fee

The GAO further reported that in 2012, NIB reported spending \$175,729, and NISH (now SourceAmerica) reported spending \$700,000 on lobbying.

No NPA interviewed reported receiving details about the use of the program fee or knowing how the fee was spent.

came from, and whether or not the NPA lost revenue because of the fee increased frustrations among NPAs and further highlights the lack of transparency.

Nonprofit Agencies and the Seventy-Five Percent Direct Labor Hour Ratio

According to the implementing regulations for AbilityOne, the CNAs must evaluate each individual NPA and provide the Commission with data about the NPA's status, their goods/services capabilities, and other relevant information.⁹⁴ Once evaluations have been

completed and an NPA has been approved, the CNAs monitor and assist the NPAs in meeting the participation requirements of the program.⁹⁵ According to the Commission, it is the responsibility of the CNAs to provide the support and assistance necessary to ensure that NPAs are compliant. SourceAmerica annually conducts compliance visits among a percentage of its member NPAs, whereas NIB conducts compliance visits with all of its associated NPAs. NPAs must be either privately incorporated or state owned or operated to participate in the program.

As part of the compliance visits, the CNAs check to ensure that the NPAs meet the required direct labor hour ratio. Direct labor for production work is defined as "all work required

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for preparation, processing, and packing of a commodity or work directly related to the performance of a service, but not supervision, administration, inspection or shipping."⁹⁶ Direct labor for services is the "performance of those tasks directly required (or specified) in the contract statement of work, such as janitors and

groundskeepers."⁹⁷ The JWOD Act requires that 75 percent of the direct labor hours (75 percent ratio) be completed by people who are blind or have a severe disability in production or service work performed by the NPA as a whole, and not limited specifically to AbilityOne contracts.

The 75 percent ratio is a hotly debated topic. When first authorized, the rationale behind the mandate was to ensure the employment of people with significant disabilities and people who are blind. As previously discussed in Chapter 1, however, the country has moved toward the social model of disability, and

modern disability laws and policies consistently emphasize greater integration and equity. Specifically, the 75 percent ratio conflicts with the previously mentioned goals of

WIOA—competitive integrated employment (CIE) for people with disabilities. CIE has three main components: a job that pays at least the federal minimum wage, occurs in a setting where employees with disabilities interact with those

without disabilities to the same extent as others in comparable positions, and includes full- or part-time work.⁹⁸ For a job placement to be considered a successful employment outcome under the federally funded and state-operated Vocational Rehabilitation (VR) program, the employment must meet the CIE definition.⁹⁹

The VR program no longer supports employment outcomes that do not meet the CIE criteria. The AbilityOne Commission has been told that the CIE integration mandate found in the WIOA regulations and related guidance make it difficult for some NPAs to recruit VR clients to participate in their program.¹⁰⁰ The Commission also reports that since the majority of AbilityOne employees are engaged under service contracts, many of which occur at military installations and in federal buildings, the Commission believes such jobs are

integrated employment placements.¹⁰¹ A further discussion of the debate around what is an integrated setting is contained in Chapter 3.

The 75 percent ratio works against NPAs who seek to embrace the CIE trend. All NPA contracts, public or private, are effectively subject to this segregating ratio if they wish to remain

in compliance with the program. Therefore, organizations with an integration mission are required to spin off other entities not subject to the ratio, thereby increasing management and administrative costs. Many NPAs interviewed expressed concerns with the interaction of VR and WIOA, specifically that

VR determinations were not consistent and that they were both geographically and case worker dependent. While all of the NPAs interviewed reported they experienced little to no trouble in maintaining the overall 75 percent ratio, some NPAs believed that the 75 percent ratio limited their overall mission and stated it should be lowered to 50 percent. One NPA was open to considering a 30 percent ratio. It is important to note that the Council of State Administrators of Vocational Rehabilitation (CSAVR) indicated that VR hopes to work more collaboratively with the Commission in the future.

As with many other aspects of the AbilityOne Program, the 75 percent ratio has been a focus of numerous reports. The WIOA Advisory Committee noted in its 2016 congressional final report that the ratio “essentially segregates workers from the mainstream workforce”

Competitive Integrated Employment

- A job that pays at least the federal minimum wage
- Occurs in a setting where employees with disabilities interact with those without disabilities to the same extent as others in comparable positions
- Includes full- or part-time work

and might be inhibiting the goal of CIE. In order to address these concerns, the report recommended considering the feasibility and difficulty of measuring the 75 percent ratio (or any ratio), changing the ratio to avoid segregation, and the introduction of pilots, including pilots that reduce contract hours.¹⁰² The 898 Panel has also considered the 75 percent ratio and recommended that JWOD's required ratio be amended to "provide for a range of direct labor

hour percentages to promote the employment of individuals in integrated work environments."¹⁰³ Additionally, AbilityOne and SourceAmerica are conducting an AbilityOne Project Ratio Pilot to examine the effects of a lower direct labor hour ratio.¹⁰⁴

These reports are reflective not only of expert opinions, but also the sharp divide within the disability community about the 75 percent ratio and the importance of integration. Some advocates see the ratio as a necessary mechanism to protect jobs for a segment of the community whose unemployment and poverty rates are

disproportionally high. Others, however, see the ratio as a throwback to a time where segregation of people with disabilities was the norm as well as a block to integration that is in direct conflict with the goal of CIE.

The JWOD Act's exclusion of including people with disabilities in supervisory positions,

management, or administrative positions (e.g., indirect labor) toward the 75 percent ratio is further detrimental to the advancement of people with disabilities and in conflict with modern disability policy. Some NPAs informed NCD that employees with disabilities could apply for supervisory, management, or administrative

positions, and some NPAs reported a few occasions when this occurred. Employees with any disability, however, always have

the right to apply for a position and are protected from discriminatory treatment under the Americans with Disabilities Act (ADA) if they are qualified and can perform the position with or without reasonable accommodations.

The mere fact that a person who is blind or has a significant disability may occasionally apply and receive a supervisor or management position does not address the detrimental

impact of the 75 percent ratio on employment. Since NPAs must maintain the necessary ratio to remain in compliance, and a few reported a struggle to maintain the ratio, NPAs have no tangible

reason to encourage advancement of people who are blind or have significant disabilities outside of the direct labor positions. One CNA and a number of NPAs shared with NCD the suggestion that all employment positions (direct and indirect) should count toward the 75 percent ratio.

The 75 percent ratio works against NPAs who seek to embrace the CIE trend.

The WIOA Advisory Committee noted in its 2016 congressional final report that the ratio "essentially segregates workers from the mainstream workforce" and might be inhibiting the goal of CIE.

Compliance and Roles and Responsibilities Within the AbilityOne Program

Compliance by the NPAs with the statutory requirements of JWOD is at the heart of ensuring fidelity of the

program. Significant confusion abounds regarding compliance of the NPAs and who has responsibility for ensuring that compliance. Given the direct role the NPAs play in the current employment of 45,000 people with significant disabilities and who are

blind, the lack of clarity is concerning. For two years in a row, the OIG has identified the compliance program as a significant management challenge for the Commission.

The Commission established a Director of Compliance in 1973, and through the 1990s issued compliance-related guidance documents. In 2005, the Commission staff published a compliance manual to improve the NPA's understanding of the reviews

and the Commission's assessments. Based on this manual, the reviews should consist of assessing an NPA's compliance with the direct labor hour ratios, the medical documentation requirements, and the "not competitively employable" assessments. The manual was last updated in 2007, but Commission staff stated they are in the process

of completing an update to the manual and have removed the manual from the website to avoid inconsistencies. The current expectation is that a new compliance manual will be available in the second quarter of FY 2020.¹⁰⁵

According to SourceAmerica, the Commission has the sole authority to determine AbilityOne NPA compliance. SourceAmerica believes they are to monitor and assist their NPAs to meet the statutory and regulatory requirements needed to fully participate in

the AbilityOne Program. To achieve this goal, SourceAmerica conducts assistance and regulatory visits to their NPAs and provides feedback to the Commission, but they do not consider these to be qualified AbilityOne compliance visits.

The OIG has observed that the Office of Compliance for the AbilityOne Commission "delegates certain governmental compliance duties to the CNAs and

has not performed a compliance visit to an NIB-affiliated NPA since 2011."¹⁰⁶ The Commission staff challenge the accuracy of the OIG's findings. Furthermore, in the cooperative agreements, the Commission directly addresses the CNAs' "qualified NPA oversight protocols" in requiring NPAs to complete corrective action(s) if the

NPA is not meeting program requirements. The Commission recognizes that as the government oversight agency, it may find an NPA is out of compliance with the program but nevertheless places much of the real responsibility on the CNAs to ensure that NPAs stay compliant. SourceAmerica reported that it performs a number of on-site regulatory reviews of member NPAs each year, and NIB stated it annually conducts on-site visits of all its member NPAs.

The Commission staff described a shared oversight responsibility between the Commission and the CNAs and indicated that the CNAs can use their assistance visits to regularly monitor NPA compliance. The Commission noted the large discrepancy between the resources available to the CNAs to work with the NPAs, as compared with the Commission, and seemed to imply that the CNAs are in a better position to provide direct, regulatory assistance to facilitate compliance given greater resources because of the program fee.

NIB conducts a yearly visit that includes a check on compliance with program requirements and to some degree with the Occupational Safety and Health Act to address safety concerns. NIB may also assist with reasonable accommodation issues. NIB will support the NPAs if the Commission requires the NPA have a corrective action plan and will provide an opinion if they believe the NPA has met the requirements within the corrective action plan. According to NIB, the Commission operates independently in terms of determining

compliance and whether a corrective action plan was successful. SourceAmerica appears to agree with some shared responsibility on oversight with the Commission. SourceAmerica stated that it monitors and assists its NPAs with program requirements and, as necessary, provides the Commission the results of site visits. Ultimately for SourceAmerica, the NPAs are the ones expected to understand and perform as required.

At best, the CNAs and the Commission appear to have a muddled understanding of the lines of authority for monitoring compliance, which likely causes confusion for the NPAs about the role of each entity.

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Most NPAs interviewed reported little to no interaction with the Commission, but one NPA did report having a relationship with Commission staff which they utilized to get direct answers to their questions. NPA interaction with the CNAs

varied. Most SourceAmerica NPAs interviewed discussed the increases over the past two years in audits by SourceAmerica, as well as a focus on NPA internal compliance. NIB-affiliated NPAs reported that the CNA conducts both an annual audit and a qualification audit to determine the NPA's suitability for new contract opportunities.

Complexities Surrounding Employee Eligibility Within the AbilityOne Program

The employment of people who are blind or who have a significant disability is the primary goal of the AbilityOne Program. Unfortunately,

eligibility for the Program is not a clear-cut process. Rather, it often pivots on the subjective interpretation of the person conducting the evaluation, referred to as an Individualized Employment Evaluation (IEE). What is classified as “severe,” to use the direct term from the JWOD Act, may differ from one evaluator to another. In order for the integrity of the program to be robust, the eligibility determinations must be completely transparent. Through research, site visits, and interviews, NCD has found this fundamental, integral cornerstone of the program to be opaque at best for people with significant disabilities.

People who are blind must expressly meet the Commission’s definition that “[b]lind means an individual or class of individuals whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied

by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle no greater than 20 degrees.”¹⁰⁷

For people considered to have a significant disability, however, the medical documentation must include “a written report signed by a licensed physician, psychiatrist, or qualified psychologist, reflecting the nature and extent of the disability or disabilities that cause such person to qualify as a person with a severe disability, or a certification of the disability or disabilities by a state or local governmental entity” and “[r]eports which state whether

that individual is capable of engaging in normal competitive employment.”¹⁰⁸ Although the reports must be signed by a person qualified by training and experience to evaluate work potential, the Commission does not list training requirements for the person conducting the assessments.

The 2007 Compliance Manual contains a section entitled “A Discussion of Disabilities Prevalent Among AbilityOne Employees” that provides some insight into which disabilities the Commission considers as significant. The manual lists common functional limitations related to a given disability as a way of analyzing whether an individual’s disability is significant.

The manual lists various categories of disabilities. The list includes learning disabilities, mental illnesses (based on the *Diagnostic and Statistical Manual of Mental Disorders [DSM]* IV Axis I and Axis II), physical disabilities, as well as hypertension, obesity, low vision, alcohol/

drug addiction, and other substance abuse disorders.¹⁰⁹

NCD spoke with a number of people with disabilities during visits of SourceAmerica NPAs job sites who did not present as having a significant disability. NCD, of course, did not have access to the relevant medical or psychological documentation and is aware of limitations of brief interactions. If the goal of the AbilityOne Program is to employ people with severe disabilities who have difficulty finding public or private employment, it was difficult to see how the people NCD spoke with had

such difficulties. Many people NCD observed during site visits were actively participating in meaningful work without any direct supervision, and some with almost no supervision. In fact, some of the employees, who were determined to have a significant disability, were working on a different floor than their supervisor. If they needed any assistance, the person with a significant disability had to call the supervisor for assistance, although NPA supervisors indicated that most often the

workers did not require assistance. NCD noted one instance in which a person considered to have a significant disability drives a truck, requiring a commercial license, with another person considered to

have a significant disability. Their job involved navigating through a major city to deliver paper twice a week. Also, during these visits, a number of workers fully engaged with NCD in conversation. One employee spoke about his upcoming solo trip to Asia to visit family. Another employee oversaw the scheduling of and setting up for meetings for a conference space in a federal building. When asked if he sometimes provided meeting attendees with technical assistance with the technology, he answered affirmatively. NCD observations highlight the subjective nature of the IEE and that the program does not appear on the surface to be employing persons with significant disabilities.

NCD does not purport to have conducted medical evaluations or possess medical expertise of the persons interviewed. However, if an AbilityOne employee can work unsupervised,

travel, and drive independently, the question that should be asked is this: why is the person not working in CIE? Members of an advisory group of disability advocates, former AbilityOne employees, and a former manager of an NPA also discussed how the NPAs only hire employees who marginally fall under the definition of significantly disabled. This practice is not unlike that of public/private employers except for the fact that NPAs are receiving federal set-aside

contracts to ensure the employment of people with significant disabilities. The absence of strong oversight of the evaluation process as discussed later, gives NPAs less incentive to ensure persons with

If the goal of the AbilityOne Program is to employ people with severe disabilities who have difficulty finding public or private employment, it was difficult to see how the people NCD spoke with had such difficulties.

People considered to have 'severe disabilities' NCD observed during NPA site visits

- One person drives a truck, requiring a commercial license, with another person considered to have a significant disability. Their job involved navigating through a major city to deliver paper twice a week.
- One employee spoke about his upcoming solo trip to Asia to visit family.
- One employee oversaw the scheduling of and setting up for meetings for a conference space in a federal building and provides meeting technical assistance with technology.

significant disabilities are being employed under the program.

NCD also heard from congressional staffers and in other independent interviews that a real concern exists about the evaluation of significant disabilities, particularly when the NPA, the contract holder, is the entity responsible for evaluating an employee for the contract. NPAs employing people with significant disabilities have a vested interest in finding the person significantly disabled in order to fulfill program

requirements. This concern is also echoed in a number of reports, including an 898 Panel report that recommends "stricter requirements on NPAs for documentation and disability determinations."¹¹⁰

According to the most recent compliance manual available, the Commission further considers a person with a disability as capable of normal, competitive employment if the person can, with or without reasonable accommodations, work at least 40 hours per week, complete an application and

participate in an interview independently, receive the same pay and benefits as any other worker performing comparable work, maintain a job for an extended period of time, and maintain a job without intervention or supports from

outside sources. This understanding of what is competitive employment is problematic by setting a high bar. The Commission has excluded from competitive employment situations in which most employers will not provide the

accommodation, are not normally provided in typical community employment, "or involve a third party in making the job placement successful."¹¹¹ These provisions conflict with the ADA that requires individual assessments by employers to determine what accommodations may

be needed if a person is otherwise qualified for the job.¹¹² The VR program further allows people with disabilities, including those with the most significant disabilities, to pursue high-quality CIE, when provided with the necessary services and supports.¹¹³

Additionally, the Commission fails to provide NPA evaluators with particular accommodations a "typical" community employer is unlikely to provide. Studies have shown that most accommodations are relatively inexpensive and easy to provide.¹¹⁴

The ADA also advances

Congress' belief that, with the appropriate accommodations, people with disabilities, even those with the most significant disabilities, can and should be working in the most integrated settings. Furthermore, in *Lane v. Kitzhaber*, a

Many people NCD observed during site visits were actively participating in meaningful work without any direct supervision, and some with almost no supervision. In fact, some of the employees, who were determined to have a significant disability, were working on a different floor than their supervisor

[I]f an AbilityOne employee can work unsupervised, travel, and drive independently, the question that should be asked is this: why is the person not working in CIE?

U.S. District Court specifically addressed the application of the ADA and the *Olmstead v. L.C.* decision to a public entity's obligation to prevent unnecessary segregation for people with disabilities in employment services. The court held that the ADA's integration mandate extends to employment services and prohibits the unnecessary segregation, and serious risk of unnecessary segregation, of people with disabilities, including adults and youth with disabilities.¹¹⁵ The case eventually settled.

Following this ruling, there were three landmark ADA settlement agreements entered within the span of three years that were brought by the Department of Justice (DOJ) or by the DOJ along with private plaintiffs. Each of these court-ordered settlement agreements provided a road map for how state and local governments can rebalance their systems to ensure that

their employment services are provided in the most integrated setting appropriate. Definitions that seek to limit the purpose of the ADA restrict the goal of Congress to include people with disabilities fully into the community.¹¹⁶

Technology has become vital for increasing opportunities for people with significant disabilities as well as those who are blind to successfully work in the community. For example, a young man named Andy, who was paralyzed from the neck down and lost the ability to speak following a near-drowning accident as a toddler, worked successfully for 15 years at a local bookstore in Oregon. Andy communicated by using an iPad, and the only body part that he

had voluntary control over was his head. Andy's job responsibilities, with the help of an assistant, involved scanning/tracking books that were delivered to the store. He activated mechanical switches with his head in order to scan the bar codes and to review the lists of books. In one year, Andy scanned over 53,000 books and loved doing his community-based job.¹¹⁷

NCD heard stories about the importance of employment and opportunities under the AbilityOne Program from sites visited for this report. Several employees who acquired a disability later in life mentioned how AbilityOne employment was fundamental to helping them through the transition. Several other employees appreciated the understanding of the NPAs to disability-related concerns that directly affect their employment, and the services the NPA provides. NCD appreciates that these

intangible benefits are important for many employees, but for true integration to occur, all employers covered by the ADA and the Rehabilitation Act must act like these NPAs and address the disability-related concerns of their employees. In addition, any programmatic changes to AbilityOne must ensure that current employment services rendered to people who are blind or have significant disabilities through an NPA or other service system remain intact.

Complexities Regarding Individual Eligibility by the Nonprofit Agencies

At present, the Commission requires the NPAs to make initial and annual IEEs for each

employee who is blind or has a significant disability that will be counted in their direct labor hour ratio. The IEE documents the functional limitations related to the disability(ies) experienced by an individual and identifies the barriers for that individual, as well as the supports and services that individual requires, in order to participate

in competitive employment. Several NPAs reported watching SourceAmerica webinars about how to conduct IEE evaluations, and several stated specifically that the trainings were more about filling out the required paperwork.

The IEE requires NPAs to evaluate people with disabilities who plan to participate in the AbilityOne Program and to make a determination of the severity of their disability. It is unclear, however, whether the NPAs have the capacity, skill, and knowledge to effectively evaluate the employment capabilities of their workers with disabilities.

NPAs reported a significant increase in the number of audits conducted due to the cooperative

agreements implemented by SourceAmerica, especially in regard to the IEEs. NPAs reported that SourceAmerica now conducts annual audits of the IEEs. These are paper-only audits, however, and thus limited to ensure that the medical documentation is available to support the determination. NPAs informed

NCD that SourceAmerica auditors do not speak to the employees or conduct other evaluations to check on the NPA's determination. Further, it is completely up to the discretion of the NPA to determine if a person has a significant disability and cannot be successfully accommodated in CIE.

It is unclear . . . whether the NPAs have the capacity, skill, and knowledge to effectively evaluate the employment capabilities of their workers with disabilities.

The JWOD Act requires that the Commission create specific criteria for the NPAs to follow to determine the severity of a person's disability.¹¹⁸

The Commission has also defined the term "severely disabled" through regulation.¹¹⁹

The Commission created a broad evaluation process that gives NPAs the power to decide if a person has a significant disability. This approach is inherently problematic since the NPAs are making decisions about their own potential employees whom they will want as part of the program. The

NPAs informed NCD that SourceAmerica auditors do not speak to the employees or conduct other evaluations to check on the NPA's determination.

898 Panel recommended to Congress that all IEEs for new employees be conducted by evaluators who are independent from the NPA.¹²⁰ This same recommendation had

also been made by the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities.¹²¹ Program regulations appear to assign oversight of the employment determinations to the Commission, but in practice, the Commission is far removed from the determination process.

NPA conflict of interest

The Commission created a broad evaluation process that gives NPAs the power to decide if a person has a significant disability. This approach is inherently problematic since the NPAs are making decisions about their own potential employees whom they will want as part of the program.

Degeneration of AbilityOne Program Integrity

The AbilityOne OIG and Commission staff have raised what they consider external threats to the continued viability of the program. One threat, which the Commission described as program “leakage,” is the failure of federal agencies to purchase from the AbilityOne

Program as required by JWOD. NIB also discussed this problem to NCD and noted the need to market the program to ensure federal purchasing officers follow JWOD requirements. High turnover among federal procurement officers, lack of effective training to procurement officials about the program, and the use of purchase cards that allow for the purchase of goods from commercial vendors were mentioned as reasons for the leakage. The OIG reported as a management challenge the “Erosion of Statutory Authority,” a “[l]ack of enforcement capabilities for the [program] to assert its mandated source-priority when

federal agencies fail to purchase AbilityOne products and services.”¹²²

The Commission created a short-term pilot project between AbilityOne and Amazon designed to use the Amazon e-commerce portal for federal agency purchase. NCD was informed about significant concerns with the pilot and the lack of information about the outcome. Specifically, the pilot program did not lead to an increase in AbilityOne sales due to the fact that Amazon did not block its “essentially the same” (ETS) offerings. Despite the requirement that the federal agencies purchase an AbilityOne product, by using ETS, Amazon would list similar non-AbilityOne goods to the government purchaser at a cheaper price. In an interview with NCD, NIB expressed dissatisfaction and frustration

with the pilot program citing lack of blocking ETS on Amazon as well as pricing procedures by Amazon that raised the price of the AbilityOne goods. The Commission reported

to NCD that it believes the pilot provided information about the advantages and challenges of using an e-commerce platform, knowledge that was provided to the Government Services Administration. Nevertheless, the Commission has yet to provide a report or publicly give the results of the Amazon program, and during a Commission meeting no written materials or web materials were provided.

Another threat to the program is the so-called rule of two analysis used by the Department of Veteran Affairs (VA) to give veteran-owned small businesses procurement priority when there is a “reasonable expectation” that two or more

of those businesses will bid for the contract.¹²³ Congress created the rule of two analysis in 2006 under the Veterans Benefits, Health Care, and Information Technology Act (Veterans Benefits Act), which has been upheld by the U.S. Court of Appeals for the Federal Circuit as taking precedence over JWOD since the Veterans Benefits Act is a more recent and specific statute.¹²⁴ This decision effectively creates an exemption from the AbilityOne Program's procurement list priority for the VA. In their latest Top Management and Performance Challenges Report, the OIG provided the Commission with a detailed explanation on how the rule of two was applied in a recent court challenge where the decision by the court, in favor of a veteran-owned small business, potentially had negative impacts on the Program and the mandatory procurement sources in Part 8 of the Federal Acquisition Regulation. Moreover, according to the OIG, the "court challenges further demonstrate the confusion as to how AbilityOne Program rules should be interpreted and implemented." In August 2020, Congress tried to reconcile these conflicting laws and passed the Department of Veterans Affairs Contracting Preference Consistency Act of 2020 (PL 116-155), which creates an exception to the VA's contracting requirements under the Rule of Two for certain AbilityOne products or services whose VA contract was in effect prior to December 22, 2006 and in effect prior to the enactment of the law on August 8, 2020.

Despite the statutory erosion, discussed in detail in Chapter 3, AbilityOne Program sales have increased in most years since FY 2011.

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This trend might suggest that while erosion might affect specific NPAs and specific opportunities, leakage and erosion may not be impacting overall government sales under the program.

AbilityOne Commission's Resources

The AbilityOne Commission has suggested that in comparison with the CNAs, the Commission lacks the resources for oversight. The Commission's appropriations have increased slightly over the past several years, with much of the increase required to fund the new OIG. The Commission is currently funded at \$10 million, of which \$1.65 million funds the OIG.¹²⁵ From FY 2011 though FY 2015, the Commission budget ranged between \$5.09 million and \$5.39 million, with steady increases starting in FY 2016 at

\$6.19 million to the current amount as the OIG began operations.¹²⁶ The Commission currently employs 32 full-time equivalent (FTE) staff, a slight increase

from around 25 FTEs reported in FY 2016. The OIG has a separate staff that employs four FTEs.

Commission staff and the three Commission members interviewed stated that lack of resources is the most significant challenge facing the work of the Commission. The Commission further noted that NIB and SourceAmerica's combined revenue and staff is 12 to 16 times larger than that of the Commission.¹²⁷ The OIG also included lack of adequate resources, which impacts program effectiveness as a top management and performance challenge.¹²⁸ This challenge was also reflected in the 898 Panel 2020 Report to Congress.¹²⁹ The Financial Statement Audit

for FY 2019 of the Commission, however, reported financial management weaknesses and significant deviations from generally accepted accounting principles and federal reporting requirements. The auditors found the departures from the guidelines included material and pervasive misstatements and omissions in the Commission's financial statements and footnotes. The financial statement auditors identified three findings of a potential violation of the Antideficiency Act by the Commission and issued an adverse opinion.¹³⁰

While NCD is concerned, as detailed in Chapter 3, that CNA revenue from the program continues to rise without greater employment, NCD believes that the larger fundamental problems with the program cannot be

resolved through greater appropriations to the Commission.

As discussed earlier, the AbilityOne Program is complex, composed of many interwoven and often overlapping segments. Through interviews, site visits, and a review of governmental and nongovernmental reports, NCD finds

that the program is riddled by confusion of responsibilities, inconsistency, and a lack of transparency, and is fundamentally based on the outdated ideas about people with

all types and severities of disabilities. Despite recent congressional attempts to remedy these problems, as detailed in Chapter 3, overall, the program has not improved or increased employment opportunities of people who are blind or have significant disabilities.

NCD believes that the larger fundamental problems with the program cannot be resolved through greater appropriations to the Commission.

Chapter 3: AbilityOne Sales, Revenue, and the Employment of People with Disabilities

Since the employment of people who have significant disabilities or who are blind is the primary goal of the Javits-Wagner-O'Day (JWOD) Act, it is necessary to consider the employment outcomes of the AbilityOne Program. The JWOD Act does not require employment growth as an explicit goal of the program,¹³¹ but such growth is a key strategic goal set by the Commission.¹³² Sales to the Federal Government is also an important factor to consider, as increased sales should positively impact employment. Considering these factors, the NCD discovered that while overall AbilityOne Program sales have increased since FY 2011, the employment of people who are blind or have a significant disability, measured both by the number of employees and total direct labor hours worked, has decreased. Central nonprofit agency (CNA) revenue through the AbilityOne Program fee has also increased during this same period.

[W]hile overall AbilityOne Program sales have increased since FY 2011, the employment of people who are blind or have a significant disability, measured both by the number of employees and total direct labor hours worked, has decreased. Central nonprofit agency (CNA) revenue through the AbilityOne Program fee has also increased during this same period.

Employment Under the AbilityOne Program

The AbilityOne Program employed, on average, around 46,886 persons who are blind or have a significant disability per year between FY 2011 and FY 2018, the years for which complete data is

available (see Table 1).¹³³

SourceAmerica nonprofit agencies (NPAs) account for the vast majority of employment under the program, both in terms of total employees with significant disabilities and hours worked.

SourceAmerica NPAs employed on average 42,470 people with significant disabilities per year, which represents 90.57 percent of total annual employment

under the program. NPAs affiliated with National Industries for the Blind (NIB) employed on average 4,416 persons who are blind, which represents 9.43 percent of total annual employment under the AbilityOne Program.

Table 1: Employment of People Who Are Blind or Have a Significant Disability and Hours Worked Under the AbilityOne Program FY 2011 to FY 2018*

Fiscal Year	Number of Employees	Direct Labor Hours Worked
2011	50,580	49,288,796
2012	48,816	47,714,261
2013	47,701	45,851,212
2014	46,621	44,855,247
2015	47,268	46,845,904
2016	46,161	47,352,402
2017	43,831	46,935,026
2018	44,006	47,840,847
Yearly Average** (n = 8)	46,886	47,085,462

*Data from AbilityOne Commission Annual Performance Reports during this period or provided by the Commission.

**Average calculations by the National Council on Disability.

In addition to the total number of employees who are blind or have a significant disability, the number of hours worked per year is an important factor to assess the program given the Commission's stated goal of employment growth. Employees worked on average 47.08 million direct labor hours a year between FY 2011 and FY 2018. This equated to, on average, about 19 hours a week per employee. SourceAmerica NPAs accounted for 41.2 million direct labor hours a year on average, or 87.86 percent of the total direct labor hours. NIB participating NPAs accounted for 5.7 million

CNA employment figures

- SourceAmerica NPAs employed on average 42,470 people with significant disabilities per year (90.57 percent of total annual employment under the program);
- National Industries for the Blind (NIB) NPAs employed on average 4,416 persons who are blind per year (9.43 percent of total annual employment under the program).

direct labor hours on average each year, or 12.14 percent. Based on the aggregate data, employees who are blind worked more direct labor hours under the program than those with a significant disability. Overall, the highest annual level of employment for this period occurred in FY 2011 in which 50,580 employees worked 49.2 million direct labor hours through the AbilityOne Program.¹³⁴

The total number of AbilityOne employees in a given year did not necessarily correspond with greater or fewer total direct labor hours worked in a given year. In FY 2018, for example, fewer employees worked more hours (44,006 employees worked 47.8 million hours) than a larger number of employees worked in FYs 2009 (45,936 employees worked 45.7 million hours), 2012 (48,816 employees worked 47.7 million hours), and 2016 (46,161 employees worked 46.9 million hours). As a further example, in FY 2014, the program employed 46,621 persons for 44.8 million direct hours, while in FY 2017, 43,831 employees worked 2.1 million more direct hours for a total of 46.9 million hours.

A number of factors likely explain the lack of congruence between the total number of employees and the total number of hours worked, such as increases in government contract orders or service requests, or new procurement items produced, which did not require the hiring of additional employees. While NCD did not explore the various reasons behind these statistics, the lack of a relationship between a change in the total number of employees and the total hours worked raises questions about how the program should be evaluated. If the Commission's goal is increased employment, is this accomplished best through increasing the numbers employed, the total number of hours worked, or both? Given the direction of federal disability policy toward CIE, are other metrics more important to measure the program, such as advancement in employment, wages, and other opportunities for people who are blind or have significant disabilities? The JWOD Act provides no clear guidance.

Declining disability employment under the AbilityOne Program

Employment under the AbilityOne Program has declined since a peak in FY 2011 as measured by both the total number of employees in the program and by direct labor hours worked. The number of direct hours worked dropped significantly from FY 2011 through FY 2014, and then began to rebound. In FY 2018, the program had 6,574 fewer employees who are blind or have a significant disability than in FY 2011, with 1.4 million fewer hours worked compared with FY 2011.

The employment of people who are blind declined under the program in fiscal years 2012, 2013, and 2014, but in recent years, employment increased from a total of 4,249 employees in FY 2015 to 4,467 employees in FY 2018. These increases resulted in employees who are blind accounting for 10.5 percent of the total employees for the program in FY 2018 compared with about 9.5 percent in FY 2011. The total number of direct labor hours worked by employees who are blind fluctuated from a high of 6.02 million direct labor hours worked in FY 2011 to a low of 5.22 million hours in FY 2014. Direct hours worked by employees who are blind again topped 6 million hours in FY 2018. Based on these numbers, between FY 2011 and FY 2018, the employment of people who are blind under the AbilityOne Program can, at best, be described as static.

The employment of people with significant disabilities through the AbilityOne Program, on the other hand, dropped in every year but one between FY 2011 and FY 2018. Only in FY 2015 did more employees with significant disabilities work under the program than the prior year, and overall, 6,428 fewer employees with significant disabilities worked under the program comparing FY 2011 with FY 2018. The number of direct labor hours worked by people with disabilities also declined by 1.43 million hours comparing FY 2011 and FY 2018. Direct labor hours worked by people with significant disabilities did, however, increase in fiscal years 2015, 2016, and 2018 over the prior years. Nevertheless, the overall trend for the AbilityOne Program since FY 2011 has been fewer employees with significant disabilities generally working fewer hours.

In recent years, the Commission has tracked the movement of employees out of the program into competitive employment. NCD reported in 2019, based on Commission reports, that about 4 percent of employees who are blind or have a significant disability annually exit the program for competitive integrated employment.¹³⁵ The Commission also tracks promotions to higher wage grades, indirect labor positions, or management position within the program.

From FY 2016 to FY 2018, between 1,310 and 1,541 employees were promoted each year, representing about 3 percent of employees achieving a promotion in a given year.

Looking specifically at Commission-provided data on promotions out of direct labor, on average 395 persons exited direct labor positions per year from FY 2011 to FY 2018, or about 0.84 percent of all employees with significant disabilities or who are blind. SourceAmerica NPAs promoted about 0.87 percent of its employees per year out of direct labor, while NIB-affiliated

NPAs promoted about 0.60 percent, with big increases in promotions in FY 2017 and 2018. Since the JWOD Act lacks a clear incentive or encouragement to promote, the number of promotions out of direct labor will likely remain limited. Based on NCD interviews, the NPA's own mission may be a larger driver to encourage promotions than incentives from the AbilityOne Program.

The Commission also annually tracks the number of employees who are blind or have a significant disability

who leave the AbilityOne Program and enter community-based employment. As part of this data, the Commission gathers information about whether the employee is placed into

competitive employment, or employment with supports. Based on figures provided by the Commission, NCD calculated that between FY 2011 and FY 2018 on average 4.3 percent of AbilityOne employees exited into community employment. About 4.71 percent of

Given the direction of federal disability policy toward competitive integrated employment (CIE), are other metrics more important to measure the program, such as advancement in employment, wages, and other opportunities for people who are blind or have significant disabilities? The JWOD Act provides no clear guidance.

[O]verall, 6,428 fewer employees with significant disabilities worked under the program comparing FY 2011 with FY 2018. The number of direct labor hours worked by people with disabilities also declined by 1.43 million hours comparing FY 2011 and FY 2018.

employees with a significant disability left for community employment per year on average, while around 0.67 percent of employees

AbilityOne exits for CIE and upward mobility

- About 4 percent of employees who are blind or have a significant disability annually exit the program for CIE
- About 3 percent of employees achieve a promotion (higher wage grades, indirect labor positions, or management positions) in a given year
 - About 0.84 percent were promoted out of direct labor

who are blind left AbilityOne employment for community employment. Since FY 2012, however, the vast majority of the 20 to 30 employees who are blind who left the program each year entered competitive employment with no supports. The reverse was true for employees with significant disabilities. About two-thirds of the approximately 2,000 employees with significant disabilities who left the AbilityOne Program for community employment per year required employment supports in their new placement from outside entities. The remaining one-third of people with significant disabilities entered competitive employment without the need for outside supports.

Sales, Wages, and Central Nonprofit Agency Revenue Under the AbilityOne Program

Despite the decrease in both employees and work hours since FY 2011, AbilityOne sales to the Federal Government kept growing. The AbilityOne Program generated \$3.6 billion in sales in FY 2018, which is the highest sales level in both actual and constant dollars looking back to FY 2011.¹³⁶ The program generated \$626.1 million more sales in FY 2018 compared to FY 2011 (\$250 million more in constant 2011 dollars) despite having fewer employees who worked fewer hours. Of equal importance, in the aggregate, is that the percentage of AbilityOne

Program sales devoted to wages for people with a significant disability or who are blind has declined in almost every year since FY 2011 (see Table 2).

SourceAmerica NPAs accounted for on average 77.5 percent of AbilityOne sales from FY 2014 and FY 2018, and NIB-affiliated NPAs accounted for on average 22.4 percent of sales.

Sales by NPAs under the NIB umbrella averaged about \$700 million a year, with four of the eight years experiencing declines from the prior year. In comparison, sales from NPAs under SourceAmerica averaged \$2.4 billion and were

more stable with only one of the eight years resulting in a decline in sales from the prior year. Based on both sales and the number of

Despite the decrease in both employees and work hours since FY 2011, AbilityOne sales to the Federal Government kept growing.

[T]he percentage of AbilityOne Program sales devoted to wages for people with a significant disability or who are blind has declined in almost every year since FY 2011.

Table 2: AbilityOne Program Sales, Wages Paid, and Wages as Percentage of Sales

Fiscal Year	AbilityOne Program Contract Sales (in millions)	Wages Paid (to employees who are blind or have a significant disability) (in millions)	Wages as a Percentage (%) of Sales**
2011	\$2,981.60	\$599.1	20.09%
2012	\$2,860.70	\$557.7	19.50%
2013	\$2,833.00	\$554.1	19.56%
2014	\$2,881.50	\$558.00	19.36%
2015	\$3,153.90	\$589.40	18.69%
2016	\$3,333.50	\$616.20	18.49%
2017	\$3,345.30	\$626.20	18.72%
2018	\$3,607.70	\$656.20	18.19%
Yearly Average** (n = 8)	\$3,124.65	\$594.61	19.07%

*Data based on reports in AbilityOne Commission Annual Performance Reports. Contract Sales data broken down by National Industries for the Blind and SourceAmerica was obtained through request from the central nonprofit agencies and SourceAmerica.

**Wages as percent of sales and seven-year average calculation by the National Council on Disability.

employees, SourceAmerica is certainly the larger player in the AbilityOne Program.

In FY 2018, 18.19 percent of sales revenue paid for wages for people who are blind or have a significant disability compared with 20.09 percent in FY 2011, a decline of 1.9 percent. A wide variation will exist in the amount of revenue each individual NPA devotes to wages, especially if one were to compare manufacturing NPAs, which require equipment and materials supplies, with service-based NPAs, which have fewer material and supply requirements. In addition, several NPAs stated that income from the AbilityOne Program assists the NPA in providing other services.

Nevertheless, looking at the total amount paid in wages by AbilityOne is necessary for a proper assessment of the extent the federal

procurement process directly impacts the economic situation of people with disabilities. Comparing the sales and wages paid since FY 2011, NCD calculated that fewer federal dollars, as a percentage of total sales, were being used to pay wages for people who are blind or have a significant disability (see Table 2). A comparison of total wages and total sales between FY 2011 and FY 2018 further shows that total wages paid to employees who are blind or have a significant disability increased by \$57.10 million between these years, while sales increased by \$626.10 million. NCD compared the same time frame, FY 2011 to FY 2018, to account for inflation, and found that total wages paid decreased by \$11.28 million using constant dollars (\$599.1 million in FY 2011 compared with \$587.82 million in FY 2018), while sales

increased by \$250.14 million in constant dollars (\$2,981.60 billion in FY 2011 compared with \$3,231.74 billion in FY 2018).¹³⁷

The Commission reported that federal contracts under the program have shifted from manufacturing with higher labor requirements to those that require more cost associated with materials, especially specialized materials. Increased raw material costs and more complex services requiring less labor may also account for greater sales without

a corresponding increase in employment or wages. The Commission further noted that federal procurement has trended toward consolidating services, such as Total Facilities Maintenance at military bases. NPAs under consolidated services may need to subcontract for certain specialty services, which would not be counted in the direct labor count. These factors could therefore increase the price of the contract while not necessarily increasing the employment of the targeted populations.

Nevertheless, more federal purchases and higher CNA revenue through the mandatory procurement list are not resulting in greater employment opportunities for people with disabilities. Furthermore, many AbilityOne contracts continue for years and sometimes

decades, which means additional revenue for the CNAs for contracts that might not produce greater employment. Critically, therefore, the overall trend in the AbilityOne Program has been greater AbilityOne sales to the Federal Government and higher CNA revenue, but in

the aggregate, fewer people with disabilities employed, generally fewer hours worked, and less program income applied to wages.

As AbilityOne Program sales increased, CNA revenue also

increased. It should be pointed out that CNA program fee revenue is a factor of both the program fee percentage, which may be adjusted by the Commission, and sales under the various government contracts by the NPAs affiliated with the CNA. Increased sales do not necessarily result in an increase in CNA program fee, since the fee is also dependent on whether the percentage is raised or lowered by the Commission. The Commission took steps through the cooperative agreements to base

the program fee on outcomes based on those agreements.

According to Commission figures, in 2000 the annual combined revenue of SourceAmerica and NIB was around \$40 million, and these CNAs combined had just shy of 300 staff.¹³⁸ According to data provided to NCD by SourceAmerica and

NIB, combined CNA revenue rose from just around \$101 million a year in FY 2011 to around \$121.35 million a year (a \$20.33 million increase in actual dollars and \$7.6 million in constant dollars) in 2018. In 2018, the two long-standing CNAs had combined staffing around 600 according to the Commission.¹³⁹

NIB reported program fee revenue averaging \$26.5 million a year from FY 2011 to FY 2018. The NIB program fee increased in real dollars in most years since FY 2011; however, the revenue declined precipitously between FY 2012 and 2013 and then rebounded. Between FY 2015 and 2018, the fee generally exceeded inflation.¹⁴⁰ Comparing the NIB program fee in FY 2011 to FY 2018, revenue increased by \$3.9 million in real dollars and \$843,000 in constant dollars. SourceAmerica reported program fee revenue averaging about \$79.64 million in program

fee revenue per year during the same time period. Similar to NIB, SourceAmerica revenue took a large drop between FY 2011 and 2013, but since that time has increased every year between FY 2014 and FY 2018 in real dollars, and increased every year in constant dollars for four of those five fiscal years.¹⁴¹ Comparing the SourceAmerica program fee in FY 2011 to FY 2018, the CNA's revenue increased by \$16.41 million in real dollars and \$6.844 million in constant dollars.

The AbilityOne Program's purpose, since its inception, is to direct federal purchasing dollars toward the employment of people

with disabilities. As the program is about employment, the increase in federal sales and CNA revenue is concerning when it does not result in increased employment opportunities for persons with significant disabilities or who are blind. Furthermore, despite the Commission's strategic goal of increasing employment, NCD heard comments from NPAs that they felt the Commission and the CNAs view business ventures as more important than the role of providing employment opportunities for people with disabilities. If greater federal purchases from the program do not result in more employment

opportunities, while the CNA revenue increases because of a program fee based in part on the contract price, then the nation needs to consider different models for how to improve the employment outlook for people who are blind or have significant disabilities.

As the program is about employment, the increase in federal sales and CNA revenue is concerning when it does not result in increased employment opportunities for persons with significant disabilities or who are blind.

Nonprofit Agency Production, Services, and Additional Funding

NPAs and their employees who are blind or have significant disabilities work on a variety of activities involving the production and manufacturing of goods and the provision of services for the Federal Government. NCD observed production activities that included packaging small tissue packs used for military Meals Ready to Eat (MREs), packing gloves for Transportation Security Administration workers, filling bottles and other containers with cleaning and other liquid products, producing pens and

other office equipment under the SKILCRAFT and other labels, and making garments of different sorts for the military. Over 3,000 items are listed under the SKILCRAFT label alone.¹⁴² In some operations, people with disabilities are involved in complex production work. On the services side, NCD visited federal courthouses and buildings where custodial services were provided through an AbilityOne contract. NCD also visited or learned about several call centers and switchboard operations run by NPAs under contracts with the U.S. Department of Transportation and Department of Defense.

NPAs utilize a number of sources to fund their employment operations. Most NPAs reported that, in addition to the AbilityOne contract itself, other state contracts, public and private grants funds, fundraising activities, and private commercial contracts and sales, including subcontracts with other AbilityOne NPAs, are used to finance the NPAs' work and services. In some cases, the AbilityOne contracts accounted for a third of an agency's budget, but in other cases the NPAs had only a few contracts that either broke even or provided limited additional revenue for other services.

Wages and the Use of 14(c) Certificates by the AbilityOne Program

The payment of high wages is often mentioned as an important benefit of the AbilityOne Program, and wages paid under the program do, on average, exceed the federal minimum wage of \$7.25 an hour. NCD calculated average

wages for AbilityOne employment between FY 2014 and FY 2018 as \$13.10 an hour.¹⁴³ Average wages also increased over that same time period, rising from \$12.44 in FY 2014 to \$13.72 in 2018. NCD calculated that wages have generally kept pace with inflation.¹⁴⁴ Based on data provided by the CNAs, the annual average wage paid to employees who are blind during these periods was \$11.25 an hour, while employees with significant disabilities earned on average \$13.26 an hour.¹⁴⁵ Information on the range of wages is not easily available, and therefore, NCD cannot comment on whether outlier hourly wages might

impact hourly wage averages. Based on the aggregate wage data, however, both employees who are blind and who have significant disability earn above the federal minimum wage.

The payment of subminimum wages to workers with disabilities has been a controversial issue in recent years. NCD addressed subminimum wages under the Fair Labor Standards Act (FLSA) Section 14(c) in the past, including its use by the AbilityOne Program.¹⁴⁶ Subminimum wages paid to a worker with a disability under Section 14(c), known as commensurate wages, are based on the worker's productivity in comparison to the productivity of experienced workers who do not have a disability performing essentially the same type, quality, and quantity of work.¹⁴⁷

NPAs with Federal Government service contracts are mandated under Executive Order 13658 to pay a minimum wage of \$10.80 an hour as of January 1, 2020,¹⁴⁸ regardless of whether the NPA has a 14(c) certificate. Many federal

contracts contain a prevailing wage requirement to reflect the local labor market, which requires that the contractor pay wages greater than the applicable minimum wage. An NPA can use a 14(c) certificate, however, to pay less than the prevailing wage on a federal contract as long as they are not paying lower than the required minimum wage applicable to the contract.

Under Section 14(c), the “prevailing wage” is the wage paid nondisabled, experienced workers performing essentially the same type of work in the same vicinity.¹⁴⁹

In March 2016, the AbilityOne Commission issued a “Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities,” which asked that all qualified NPAs “commit to, and begin (if not maintain), paying at least the federal minimum wage, or state minimum wage, if higher, to all employees who are blind or have significant

disabilities working on AbilityOne contracts.”¹⁵⁰

NIB made the decision in 2014 to eliminate the use of 14(c) certificates by their affiliated NPAs, and all but one NPA complied. SourceAmerica released a statement indicating they are “fully committed to maximum pay for people with disabilities and supports the elimination of Section 14(c);” and “will invest significant resources toward a transition support program” to accomplish this goal.¹⁵¹ NCD is pleased by the public statements from the AbilityOne Commission and SourceAmerica in regard to the elimination of Section 14(c) subminimum wages, and that NIB has eliminated the use of such certificates by all but one of its NPAs.

NCD cautions, however, that use of the term “maximum pay” is ambiguous, which may lead to further confusion about the use of 14(c) certificates among the general public. An employee with a disability could be paid a subminimum wage or a wage below the prevailing rate and be considered by the employer as receiving “maximum pay” if it determines the maximum productivity of the employee justifies a lower wage compared with other workers.

A number of the NPAs visited as part of this study indicated that their 14(c) certificate is not used to pay employees less than the federal minimum wage under the AbilityOne contract. Most NPAs interviewed tend to use the 14(c) certificates to pay workers with disabilities

who do not work on an AbilityOne contract less than the minimum wage, or to pay employees with disabilities working on an AbilityOne contract at least the required minimum wage but less

than the prevailing wage. Additionally, several NPAs interviewed noted that they needed 14(c) certificates to qualify for their “state use” program. Forty-seven states have state use programs, further demonstrating the likely prevalence of this requirement.

Through interviews with NPAs, NCD heard a number of opinions regarding the use of 14(c) certificates. One NPA stated that although they have and use a 14(c) certificate for AbilityOne contracts, they are phasing out subminimum wage contracts and focusing on contracts where the salary is the prevailing wage. Another NPA noted that they kept their 14(c) certificate until 2012, although they clarified, with pride, that

In March 2016, the AbilityOne Commission issued a “Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities” . . .

they had not actually used the certificate to pay subminimum wages since 2005. Examples therefore exist about how NPAs can transition to eliminate the need to pay subminimum wages.

During the NPA interviews, NCD learned that some of the AbilityOne jobs, especially those located in courthouses, that pay fair competitive wages also include substantial benefits packages, eliminating the dependency of those employees on public benefits. These jobs are understandably attractive to employees and, according to the NPAs, not surprisingly, have very little turnover.

Various Positions on Competitive Integrated Employment and Subminimum Wages

A significant area of discussion about the AbilityOne Program, as well as among people with disabilities, advocates, family members, and service providers, is what constitutes an integrated as opposed to a

segregated setting. SourceAmerica, AbilityOne Commission staff, and a number of the NPAs interviewed believe that work performed in federal buildings, such as custodial work, mail delivery, or kitchen work, is integrated since the employees engage with persons without disabilities, even if coworkers are mainly other people with disabilities. Whether such jobs are considered integrated under the Workforce Innovation and Opportunity Act (WIOA) is also a much-debated point within the disability community. Many proponents of CIE believe that a typical AbilityOne work crew or enclave setting is not fully integrated

since most of the coworker interaction is only with other coworkers with disabilities or a supervisor.

Based on site visits conducted for this study, a number of NPA work environments were segregated. NCD observed several NPA call centers and heard about others where the most direct interaction at the worksite was only between people with disabilities, or supervisors and managers without disabilities. In addition, during a visit to a mailroom run by an AbilityOne NPA, employees with significant disabilities worked in the basement of a hospital, away from other hospital employees and just down the hallway from the morgue. The NPA considered the site integrated because some employees delivered and picked up mail throughout the building. NCD also

visited two work sites in which several custodial providers cleaned federal courthouses. On both visits, the NPA staff commented how much the workers with significant disabilities interacted with the federal judges.

NCD learned that some of the AbilityOne jobs, especially those located in courthouses, that pay fair competitive wages also include substantial benefits packages, eliminating the dependency of those employees on public benefits.

In addition, under WIOA, an employee in CIE must be paid the state or local minimum wage rates and “not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills.”¹⁵² NPAs under the AbilityOne Program who pay the required minimum wage but not the prevailing wage are therefore in conflict with the definition of CIE.

During an NCD comment session, members of the disability community expressed conflicting views on the topic of subminimum wages. Some participants thought the need to pay below the prevailing wage was necessary and should be considered a “fair wage.” Similarly, some people believed that subminimum wages are—and should be—part of a sustainable business model that allows organizations to continue to operate while simultaneously employing people with significant disabilities which might not be possible if the employer paid everyone a minimum wage. On the other hand, other participants of the comment session thought that subminimum wages should be eliminated, and people with disabilities should be paid fair wages at minimum wage or higher for their work.

WIOA extends the definition of CIE to include “supported employment,” which is “competitive integrated employment, including customized employment, or employment in an integrated work setting in which individuals are working on a short-term basis toward competitive integrated employment, that is individualized and customized consistent with the strengths, abilities, interests, and informed choice of the individuals involved, for individuals with the most significant disabilities for whom competitive integrated employment has not historically

occurred or for whom competitive integrated employment has been interrupted or intermittent as a result of a significant disability; and who, because of the nature and severity of their disability, need intensive supported employment services and extended services after the transition . . . in order to perform the work involved.”¹⁵³

The increased prevalence and availability of the customized employment approach allow people

who were previously considered “unemployable” to successfully maintain employment in a competitive, integrated environment. The key to this approach is the use of flexible strategies. Rather than relying on open job postings, a job developer will work to determine the specific skills, assets, and interests of a person with a significant disability and how these skills can

address an unmet need of an employer.¹⁵⁴ For example, Sean, who is autistic, enjoyed organizing books and dusting. He was hired by Barnes & Noble bookstore to clean and organize the shelves prior to the opening

of the store each morning. He loved his job, and the store was equally pleased because their other employees did not have the time to focus on such meticulous tasks.¹⁵⁵ The advent of customized employment negates the need for people with significant disabilities to rely on AbilityOne for employment.

NPAs under the AbilityOne Program who pay the required minimum wage but not the prevailing wage are therefore in conflict with the definition of CIE.

The increased prevalence and availability of the customized employment approach allow people who were previously considered “unemployable” to successfully maintain employment in a competitive, integrated environment.

This study also revealed another critical, overarching issue that must be addressed. Obviously, not all people with disabilities are currently employed. The need for appropriate services for people with disabilities not participating in CIE positions became increasingly evident during NCD's listening sessions. Multiple commenters held the strong belief that some people with disabilities are trapped in noncompetitive placements when they could, instead, be working in a competitive, integrated employment setting, if provided with the needed supports.

The disparity between the employment supports offered under the AbilityOne Program and current disability policy is evident to members of the disability community. Some commenters believed that while competitive integrated placements are not for everyone, we must also ensure that all people with disabilities engage in meaningful activities on a regular basis.

Participation in and the Cost of Segregated Employment

As NCD highlights in Chapter 2 of this report, the JWOD Act mandated 75 percent direct labor hour ratio encourages and, in many cases, results in the segregation of employees with significant disabilities and who are blind. To shed additional light on the overall cost of segregated employment, NCD analyzed data available from states on the amount of state funds spent on "facility-based" work for people with intellectual and developmental disabilities. Through the 2017 National Survey of State

Intellectual and Developmental Disabilities Agencies Employment and Day Services, 30 states reported the total number of people with intellectual and developmental disabilities served in facility-based work and data on the amount of funds spent in facility-based work.¹⁵⁶ Nineteen states could not report on facility-based work for the survey because of the service structure and state reporting capacity, and only one state, Vermont, does not fund facility-based or group-supported employment services.

Based on the 30 states for which data was reported, 90,974 persons with intellectual and developmental disabilities participated in facility-based work with state support. These 30 states further spent \$886.5 million to support

facility-based work, or on average \$9,746 annually per person. A large variation existed across the 30 states, with Kansas spending on average \$38,061 to

support a person with a developmental disability in facility-based work and Virginia spending \$1,148 on average (see Table 3). A majority of states spent between \$6,000 and \$11,000 per person for facility-based employment.

Using the same 2017 data set, NCD was able to estimate the total amount spent to provide services to people with intellectual and developmental disabilities in integrated employment. The majority of state intellectual / developmental disability agency funding provides ongoing supports to individuals once they acquire a job to support job maintenance and advancement. Initial job placement services are typically, but not always, funded

Table 3: State Costs of Facility-Based Work for People with Intellectual and Developmental Disabilities in Thirty States by Average Cost per Person

State	Total Served	Total in Facility-Based Work	Total Spent on Facility-Based Work	Average Cost per Person in Facility-Based Work
Vermont	3,409	0	\$0	\$0
Virginia	15,477	1,054	\$1,209,869	\$1,148
Indiana	14,266	4,552	\$17,778,195	\$3,906
Oklahoma	3,885	2,133	\$9,666,645	\$4,532
South Dakota	2,476	1,476	\$6,900,311	\$4,675
Louisiana	4,951	969	\$4,883,241	\$5,039
Arizona	12,535	1,223	\$6,321,775	\$5,169
Oregon	7,906	1,785	\$10,847,560	\$6,077
Colorado	15,110	702	\$4,295,754	\$6,119
California	90,746	7,838	\$48,783,122	\$6,224
Kentucky	9,506	2,006	\$12,982,799	\$6,472
Ohio	32,976	17,998	\$117,062,171	\$6,504
Wisconsin	16,547	6,733	\$44,051,379	\$6,543
North Carolina	16,637	2,435	\$15,979,861	\$6,563
Georgia	15,842	2,389	\$16,276,907	\$6,813
Iowa	16,015	1,862	\$12,879,814	\$6,917
Washington	9,149	198	\$1,372,392	\$6,931
South Carolina	8,127	2,819	\$25,631,619	\$9,092
Illinois	24,325	172	\$1,601,458	\$9,311
Pennsylvania	30,461	8,163	\$81,169,348	\$9,944
Nevada	2,498	1,226	\$12,695,759	\$10,355
Montana	1,961	489	\$5,101,199	\$10,432
Alabama	5,270	454	\$4,957,488	\$10,920
Michigan	16,046	3,290	\$37,185,858	\$11,303
Nebraska	4,426	881	\$10,267,519	\$11,654
District of Columbia	1,303	186	\$3,017,125	\$16,221
Minnesota	30,396	14,533	\$253,960,955	\$17,475
Connecticut	10,751	190	\$3,550,338	\$18,686
Delaware	2,295	429	\$9,976,735	\$23,256
Kansas	7,477	2,789	\$106,151,990	\$38,061

by state VR agencies. While 45 states provided data on integrated employment, NCD calculated an estimate based only on the 30 states that provided facility-based data. These 30 states supported 115,926 people with intellectual and developmental disabilities in integrated employment for an annual total cost of \$909.6 million. These states thus provided services to support integrated employment to almost 25,000 more persons than in facility-based employment for only around \$23.1 million more. More critically, the 30 states paid \$7,847 per person on average in 2017 to support integrated employment, about \$1,900 less per person on average than for facility-based work. There was also less variation among the 30 states, with Kansas paying \$283 per person on average for integrated employment services, to Connecticut paying \$16,850 on average per person (see Table 4). Every state except Connecticut paid less than \$11,000 on average per person for integrated employment service in 2017, unlike facility-based employment where seven states averaged more than \$11,000.

Cost of segregated vs integrated employment

- Average of \$9,746 spent annually per person on facility-based work with state support
- Average of \$7,847 spent annually per person on integrated employment with state support **and significantly more people served**

In addition to the estimated higher public cost to support people with intellectual and developmental disabilities in facility-based work, wages are also much lower. NCD utilized the 2017–2018 National Core Indicator (NCI) data to estimate the number of people with intellectual disabilities working in individual community jobs, group community jobs, or facility-based jobs.¹⁵⁷ Individual community jobs are those found in the typical labor market where the person with an intellectual disability works alongside peers who do not have a disability. Group community jobs are often referred to as work crews or enclaves, and include custodial, landscaping, mailroom, or similar work settings in which persons with disabilities work as a crew or team of not more than eight other persons with a disability in the community. Facility-based jobs are those segregated settings, commonly called sheltered workshops, where most workers in the location have a disability.

NCD's analysis of the NCI data estimates that 33.8 percent of people with intellectual disabilities are in a job in some capacity, with just under 14 percent involved in an individual job, and just under 15 percent involved in facility-based jobs. Around 5 percent of persons with intellectual disabilities are in group community jobs. More significant, however, is the disparity in estimated wages. The mean wage for individual community work is \$10.03 an hour with an average of almost 29 hours over 2 weeks. In comparison, people in facility-based work earn the estimated mean wage of only \$3.34 an hour and work more hours, at almost 32.5 hours over 2 weeks. The use of 14(c) certificates almost certainly accounts for the wage disparity. Group community work mean wages, at \$8.78 per hour for around 27.5 hours

Table 4: State Costs of Integrated Employment for People with Intellectual and Developmental Disabilities in Thirty States by Average Cost per Person

State	Total in Day and Employment Services	Total in Integrated Employment Services	Total Spent on Integrated Employment Services	Average Annual Cost per Person in Integrated Employment Services
Kansas	7,477	893	\$252,611	\$283
South Dakota	2,476	556	\$747,183	\$1,344
Indiana	14,266	1,529	\$2,213,972	\$1,448
Alabama	5,270	618	\$927,418	\$1,501
Nebraska	4,426	216	\$630,232	\$2,918
Virginia	15,477	3,806	\$11,584,778	\$3,044
Iowa	16,015	4,720	\$19,168,820	\$4,061
Kentucky	9,506	3,253	\$13,336,505	\$4,100
Montana	1,961	508	\$2,216,146	\$4,362
Georgia	15,842	2,153	\$9,553,711	\$4,437
Illinois	24,325	1,747	\$7,976,437	\$4,566
North Carolina	16,637	3,015	\$19,469,121	\$6,457
Michigan	16,046	4,379	\$29,223,562	\$6,674
Colorado	15,110	2,725	\$18,663,581	\$6,849
Washington	9,149	7,886	\$56,675,968	\$7,187
Louisiana	4,951	1,534	\$11,179,547	\$7,288
South Carolina	8,127	1,878	\$13,698,891	\$7,294
Wisconsin	16,547	3,388	\$25,579,423	\$7,550
Pennsylvania	30,461	5,584	\$42,615,933	\$7,632
Minnesota	30,396	3,188	\$24,599,235	\$7,716
Nevada	2,498	429	\$3,413,939	\$7,958
Ohio	32,976	9,222	\$75,231,718	\$8,158
Oklahoma	3,885	2,497	\$20,762,029	\$8,315
Delaware	2,295	731	\$6,164,773	\$8,433
District of Columbia	1,303	384	\$3,286,662	\$8,559
Oregon	7,906	4,542	\$40,054,369	\$8,819
Arizona	12,535	2,345	\$24,550,418	\$10,469
Vermont	3,409	1,256	\$13,178,850	\$10,493
California	90,746	10,903	\$115,625,992	\$10,605
Connecticut	10,751	4,477	\$75,436,620	\$16,850

Wages for segregated vs integrated employment

- Mean wage for individual community work is \$10.03 an hour with an average of almost 29 hours over 2 weeks
- Mean wage of facility-based work is only \$3.34 an hour with an average of 32.5 hours over 2 weeks
- Mean wages for group community work is \$8.78 per hour for around 27.5 hours over 2 weeks

over 2 weeks, are slightly higher than the current federal minimum wage.

A number of NPAs reported during the site visits that a common issue was the potential loss of Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) cash benefits, and any associated health assistance benefits based on SSDI/SSI eligibility, the long-standing problem of the so-called benefits cliff. A benefits cliff is when a public benefit program lessens or stops when a

person's earnings increase. This reduction in or loss of benefits can be disruptive for people with disabilities who do not earn enough to maintain self-sufficiency but are considered to be working too much for public benefit program assistance.

Several NPAs reported workers with disabilities who requested fewer hours or even sought to decline pay raises in order to prevent loss of SSDI/SSI benefits or associated public benefits. In cases of pay raises, NPA reported workers reducing their hours when informed they could not refuse a pay raise.

NPAs who offered supplemental insurance received fewer requests from employees to work less hours to maintain benefits. One NPA reported that none of their AbilityOne employees received public benefits because they were paid above the minimum wage and received employer provided benefits. Another NPA reported that some AbilityOne employees chose not to work a 40-hour workweek for fear of losing their public benefits, unlike the assumption in the 2007 AbilityOne Compliance Manual that assumes not working 40 hours a week is evidence of an inability to work normal competitive employment.

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The reduction or removal of benefits can, and does, create barriers to accessing health care, which could affect the health, housing, and overall participation in society of people with disabilities. This very real and imminent threat discourages people with disabilities from participating in full-time employment.

Comments from the community confirmed NPAs' assertions that the raises in minimum wages, although extremely beneficial, have led to people with disabilities cutting hours in an effort to maintain public benefits like SSDI

and Medicaid. Multiple people in the comment sessions cited the threat of losing benefits as a major problem for people with disabilities and that there needs to be a society-wide focus on assets and benefits of people with disabilities who are looking to partake in CIE. While the benefits cliff is not an AbilityOne Program problem, it highlights an important ancillary problem that limits the full employment of people with significant disabilities or who are blind, and can hinder CIE.

NCD sought to establish estimates for how an increase in CIE impacts the receipt of SSDI or the level

of SSI cash benefits. There is ample evidence to demonstrate that increasing employment for people with disabilities will reduce poverty, improve health outcomes, and ultimately lead to lower public health care costs.¹⁵⁸ Prior research by the University of New Hampshire indicates that the pace at which people exit the receipt of income-tested cash benefits is slow but is a possible long-term outcome of increasing employment for people with disabilities. Many studies overwhelmingly

focus on the financial and psychological benefits of employment for people with disabilities and draw the conclusion that improved financial and psychological benefits lead to better health and therefore lower health care costs.¹⁵⁹ These studies assume that the benefits of employment that have been documented in the general

population through the U.S. Department of Health and Human Services' Social Determinants of Health can also be applied to people with disabilities.¹⁶⁰

Section 503 of the Rehabilitation Act

Besides the AbilityOne Program, the Federal Government has taken other steps to encourage

the employment of persons with disabilities through use of federal funds. Most critical is Section 503 of the Rehabilitation Act. Section 503 "prohibits federal contractors and subcontractors from discrimination

in the hiring and employment of persons with disabilities and requires these employers to take affirmative action to recruit, hire, promote, and retain employees with disabilities."¹⁶¹

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) is charged with the administration

and enforcement of laws applicable to federal contractors and subcontractors that prohibit discrimination and promote equal employment opportunity

of people with disabilities under Section 503.¹⁶² Section 503 also authorizes OFCCP to investigate complaints of disability discrimination.¹⁶³

Any entity with a federal contract or subcontract of more than \$15,000 is subject to the nondiscrimination provisions of Section 503.¹⁶⁴ In an attempt to provide more

While the benefits cliff is not an AbilityOne Program problem, it highlights an important ancillary problem that limits the full employment of people with significant disabilities or who are blind, and can hinder CIE.

Any entity with a federal contract or subcontract of more than \$15,000 is subject to the nondiscrimination provisions of Section 503.

employment opportunities for people with disabilities, an affirmative action program (AAP) is included as a part of Section 503. The AAP applies to entities with 50 or more employees and at least one federal contract or subcontract of \$50,000 or more.¹⁶⁵

Because AAP hiring efforts occurred more in theory than in practice, amendments to the Section 503 regulations were finalized in March 2014.¹⁶⁶ Among other things, the revised regulations sought to increase the impact of the AAP by setting for federal contractors an “aspirational” 7 percent workforce utilization goal for people with disabilities.¹⁶⁷ This new goal is not viewed by OFCCP as a quota or a requirement, but rather as a “management tool . . . designed to promote accountability.”¹⁶⁸

OFCCP must take into account the potential burdens imposed by proposed federal regulations on federal contractors and subcontractors.¹⁶⁹ As NCD found in 2018, these OFCCP concerns led to a diluted attempt to improve the AAP when

the final regulations were implemented. For example, contractors are only required to invite employees to self-disclose their disabilities once every five years.¹⁷⁰ This intermittent approach may do little to ensure that the 7 percent target is reached.

Additionally, issues surrounding OFCCP’s compliance review process became apparent. The number of reviews conducted each year is quite small.¹⁷¹ Moreover, contractors are given 30 days advance notice if their AAP will be reviewed.¹⁷² In short, contractors are unlikely to undergo a review, and if a review occurs, the contractor may have an extended period of time to correct deficiencies in their plan prior to the review. The fact that contractors have very little incentive to meticulously comply with the current regulations is problematic. Nevertheless, Section 503 offers a possible mechanism to increase the employment of people with disabilities, including those who are blind or have a significant disability.

Chapter 4: Recommendations

The National Council on Disability (NCD) recommends that Congress and the President take the following specific steps to phase out the AbilityOne Program:

Congress:

1. NCD recommends that Congress pass legislation to phase out the AbilityOne Program and amend Section 503 of the Rehabilitation Act.
2. NCD recommends the AbilityOne phaseout legislation provide for an 8-year period prior to the sunset of the AbilityOne Program.
3. NCD recommends the legislation for the phaseout plan of the AbilityOne Program include the following:
 - a. The formation of a study, of no more than two years, to determine the percentage required under federal contracts to ensure the integration of persons with significant disabilities and who are blind into new employment so as to avoid the loss of any of the 45,000 jobs currently under the AbilityOne Program.
 - b. The study should identify pathways and resource investments that are needed for current AbilityOne employees to move to a new employment relationship within competitive integrated employment (CIE) with federal contractors or other employers.
 - c. The study should address what funding would be required to offset any potential loss of employment services to people who are blind or have a significant disability.
 - d. A specific sunset provision should be made for the Javits-Wagner-O'Day (JWOD) Act, not to exceed six years after the date of completion of the study.
 - e. The AbilityOne Commission should wind down operations during years 3 through 5 of the phaseout (year 1 following the two-year study).

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- f. The Office of Federal Contract Compliance Programs (OFCCP) should contract with the central nonprofit agencies (CNAs) starting on year 5 of the phaseout to provide training and technical assistance to all nonprofit agencies (NPAs) on competing for federal contracts, utilization of current NPA capital investments in competition, the availability of the Vocational Rehabilitation (VR) Program and other employment options to all NPA employees, and referrals to Social Security benefits planners.
- g. The AbilityOne Commission should cease placing new products or services on the procurement list starting the third year of the phaseout.
- h. Direct the AbilityOne Commission to notify NPAs of the phaseout of the program and assist NPAs through the termination of the program.

4. NCD recommends the formation of an advisory committee to promulgate the study to be composed of the following:

- a. At least 50 percent of members who have a significant disability and who are blind.
- b. An AbilityOne Commissioner.
- c. A representative each from
 - i. National Industries for the Blind.
 - ii. SourceAmerica.
 - iii. American Foundation for the Blind.
- d. An Executive Director from at least six AbilityOne nonprofit agencies, two of which should be from an NPA that employs people who are blind.
- e. At least three covered federal contractors.
- f. A representative from a state developmental disability agency.
- g. A representative of a state VR agency.
- h. A representative of a state Medicaid agency.
- i. A representative from a state education agency.

5. NCD recommends Congress direct the U.S. Department of Education, Rehabilitation Services Administration (RSA) to require that state VR agencies conduct meaningful outreach to all NPA employees about available employment supports and options on either a one-on-one basis or in a group setting. Outreach should include, at a minimum:

- a. A description of the overall purpose of the VR Program.
- b. The eligibility requirements of the VR Program.

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- c. The application procedures of the VR Program.
- d. The scope of services that may be provided by the VR Program.
- e. Other employment networks such as the American Job Centers.

6. NCD recommends Congress direct the AbilityOne Commission and OFCCP to contract with the current CNAs and other appropriate entities at a proper time before the end of the eight-year period, to utilize the expertise of these entities to provide training and technical assistance to all covered federal contractors to facilitate the employment of people who are blind or have significant disabilities. Such training and technical assistance should include how to recruit, support, and retain employees with significant disabilities and who are blind.

7. NCD recommends Congress ensure that federal appropriations currently covering wages and NPA services under the AbilityOne Program continue to support the employment of people who are blind or have significant disabilities after the sunset of the AbilityOne Program.

8. NCD recommends legislation for the amendment of Section 503 include:

- a. That every federal contract valued at \$200,000 or greater, including subcontracts, for which the contractor has at least 50 employees ("covered federal contractor"), hire a percentage of people who are blind or have a significant disability. (The percentage to be determined by the two-year study.)
- b. That OFCCP oversight of the amended Section 503 requirement, and AbilityOne Commission appropriations and part of the current CNA program fee be made available to OFCCP to fund oversight and enforcement once the phaseout is complete.
- c. That OFCCP coordinate with the AbilityOne Commission and the U.S. Department of Labor, Office of Disability Employment Policy (ODEP), during the phaseout, to develop and adopt a nonambiguous definition of significant disability to be used when assessing and calculating the labor ratio percentage for contractors.
- d. A requirement that federal contractors obtain appropriate documentation to verify the employee with a disability meets the criteria adopted by OFCCP of an individual with a significant disability or who is blind. The documentation should be current (within the last 3 years) and be provided by a physician, psychologist, psychiatrist, or other relevant medical professionals.
- e. A requirement that OFCCP review federal contracts and conduct random "audits" to ensure that covered contractors meet the required determined labor ratio percentage.

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- f. That sufficient funds are appropriated to allow for an audit of at least 15 percent of covered contractors for each fiscal year.
- g. That OFCCP design a system that allows complaints to be filed against covered contractors for failure to adhere to required percentages.
- h. NCD recommends upon completion of the study that Congress mandate OFCCP to issue, by regulation, the required percentage of people with significant disabilities or who are blind that covered federal contractors must hire to comply with the amended Section 503.

Existing CNAs and NPAs:

9. NCD recommends that existing CNAs and NPAs be used as an integral tool during the transition. The CNAs should continue to represent and assist their affiliated NPAs and private nonprofit organizations with appropriate resources and training, NPAs can transition to competing for federal contracts, entering into subcontract arrangements, or supporting other federal contractors who would be required to employ people who are blind or have significant disabilities.

RSA and State VR Agencies:

10. NCD recommends that the RSA require state VR agencies to report relevant documentation about outreach activities on an annual basis. RSA will submit an annual report to Congress detailing all state VR agency outreach activities.
11. NCD recommends RSA direct state VR agencies to report the number of VR eligible persons who obtain or advance in employment by a covered federal contract.
12. NCD recommends that RSA facilitate the development of state-based memorandum of understandings between developmental disability services, Medicaid, education, VR, and other supports to ensure success for people with significant disabilities or individuals who are blind.

ODEP:

13. NCD recommends that ODEP facilitate a connection between NPAs and Employment First initiatives in states and a connection between covered federal contractors to the Job Accommodation Network (JAN) to learn about reasonable accommodations.

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Federal Agencies:

14. NCD recommends that federal agencies not renew contracts with NPAs under the AbilityOne Program which expire during the phaseout period. Following the expiration of the contract, federal agencies would either have to compete the contract or justify continuing with the NPA as a sole-source contract under applicable federal law.

AbilityOne Commission:

15. NCD recommends that during the phaseout, the AbilityOne Commission should work with the Department of Defense, the General Services Administration, and other applicable federal agencies in winding down AbilityOne contracts with NPAs prior to the end of the eight-year phaseout in compliance with Title 41 of the United States Code and the Federal Acquisition Regulations.
16. NCD recommends that the AbilityOne Commission cease operation after all NPA contracts under the existing program expire.

Interim Recommendations

The phaseout of the AbilityOne Program will take multiple years to occur. In the meantime, NCD provides the following interim recommendations to improve the efficacy of the AbilityOne Program during the transition. The implementation of these recommendations does not require additional appropriations. These recommendations are in no way intended as a substitute for NCD's recommendation to phase out the AbilityOne Program. Piecemeal changes will not address the structural problems and the incompatibility of the program with federal disability policy. NCD offers these interim recommendations to improve the function of the program toward the primary goal of the JWOD Act, to provide employment opportunities for people who have significant disabilities or who are blind.

AbilityOne Commission:

1. NCD recommends that the AbilityOne Commission make strong efforts to clarify and streamline the Individualized Employment Evaluation (IEE) process. Specific standardized criteria and methodology should be developed to determine if a person has a significant

(continued)

Interim Recommendations: *continued*

disability. Eligibility for the AbilityOne Program (e.g., the documentation of a significant disability or documentation for someone who is blind) should not be determined by an NPA but by an independent party.

- a. NCD recommends that such documentation issued by other federal and/or state agencies that provide official disability determinations be accepted as evidence of eligibility for the AbilityOne Program. The CNAs should provide training to the NPAs about how to conduct the IEEs.
2. NCD recommends that the AbilityOne Commission require and provide specific training about eligibility process requirements to the NPAs.
3. NCD recommends that the AbilityOne Commission should no longer allow NPAs that service people with significant disabilities to serve the dual roles of evaluator for participation in the AbilityOne Program and the employer. The Commission should consider entities, such as the state vocational rehabilitation program or other independent evaluators, to fulfill the evaluator role.
4. NCD recommends that the AbilityOne Commission explicitly clarify, through the cooperative agreements and policies, the CNA's specific role in NPA compliance, especially regarding the IEEs.
5. NCD recommends that the AbilityOne Commission work with the CNAs to ensure the cooperative agreements clearly indicate how failure of the CNAs to comply with the Quality Assurance Surveillance Plan (QASP) will result in a reduction in the program fee or other steps to maintain compliance with the agreement. The QASPs should also place the greatest emphasis on both the employment of people who are blind or have a significant disability, especially encouraging promotions within NPAs, as well as movement of employees to CIE outside of the AbilityOne Program.
6. NCD recommends that the AbilityOne Commission amend the cooperative agreements, as necessary, to ensure that the program fee is set at a rate such that annual CNA revenue should provide only sufficient funds necessary to allow the CNA to offer training and technical assistance to the NPAs, distribute contracts among the NPAs, ensure the quality of NPA products and services to the Federal Government, submit new products and services to the procurement list, and create opportunities to advance the employment of people who are blind or have a significant disability into supervisory and management positions and into CIE.
7. NCD recommends the AbilityOne Commission restrict the use of executive sessions and nondisclosure agreements.

(continued)

Interim Recommendations: *continued*

Congress:

8. NCD recommends that Congress restrict the use of the CNA program fees for lobbying and executive salaries to the same extent as any entity that directly receives federally appropriated funds.
9. NCD recommends that Congress mandate that the CNAs report on the use of the program fee directly to AbilityOne on a quarterly basis and require AbilityOne to post the reports on its website.
10. NCD recommends that Congress amend the JWOD Act to eliminate the direct labor requirement and allow all jobs, both direct and indirect positions, to be counted toward the 75 percent ratio in order to improve the employment and promotion opportunities for people who are blind or have significant disabilities. NCD emphasizes that such an amendment be an interim step to the eventual phaseout of the JWOD Act.

U.S. Department of Labor:

11. NCD recommends that the U.S. Department of Labor restrict the issuance of Fair Labor Standards Act (FLSA) Section 14(c) certificates to NPAs that work on AbilityOne contracts.

Conclusion

Since the early twentieth century, the attitude in the United States toward people with disabilities—even those with the most significant disabilities—has undergone a monumental paradigm shift. The overall perception toward people with disabilities has evolved from one of pity and incapability under the medical and charity models, to one of awareness and inclusion under the social model. Since the mid-1970s, federal laws and policies have shown a clear and steady progression toward integration and equity.

The present day AbilityOne Program is beset by a number of systemic problems around transparency, compliance issues, and program erosion as highlighted in this report. These problems include criticism and opacity surrounding the use of program fees by the central nonprofit agencies (CNAs), and a lack of oversight of individualized employment evaluation procedures, issues around the Commission's use of executive sessions and nondisclosure agreements, and financial audit concerns. The program is also bedeviled by the 75 percent direct labor ratio that inherently encourages various forms of segregation and restricts the ability of nonprofit agencies (NPAs) to encourage promotions out of direct labor positions. Congress has made several attempts to fix these problems, most notably through

the mandate for the Commission to enter into cooperative agreements with the CNAs and establishment of the 898 Panel. These efforts, however, have simply plugged leaks to maintain a system at odds with the spirit, if not the letter of the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Workforce Innovation and Opportunity Act (WIOA), and the other federal disability policies.

Furthermore, and as critical, data indicates that the ultimate purpose of the Javits-Wagner-O'Day (JWOD) Act, to use the Federal Government's purchasing power to enhance employment opportunities for people who are blind or have significant disabilities, is not achieving the desired results. The AbilityOne Commission's stated mission is "to enable all people who are blind or have other significant disabilities to achieve their maximum employment potential."¹⁷³ Promotions out of direct labor from the program appear to be minimal. In addition, despite a continued increase in AbilityOne Program sales, employment of persons who are blind has been generally flat since FY 2011, while employment of persons with significant disabilities has declined. The National Council on Disability (NCD) found that the overall trend since FY 2011 in the AbilityOne Program has been fewer people with disabilities employed for generally fewer hours, while AbilityOne sales to the Federal Government

and CNA revenue have increased. There are certainly some differences between the National Industries for the Blind (NIB) and SourceAmerica in terms of sales, revenue, and employment outcome, but employment trends and numerous problems with the program point to the need for a change.

NCD appreciates the hard work of many NPAs under the AbilityOne Program to train, support, and provide various services to people with significant disabilities or who are blind. NCD learned about the support many of the NPAs provide to persons with disabilities in addition to providing employment. In some cases, NPA services are augmented or supported by revenue generated from AbilityOne Program contracts, while in other cases, AbilityOne contracts were simply part of a mix of employment provided by the NPA, which added little or nothing to the NPAs' operating revenue.

NCD believes that for the nation to advance the full inclusion of people who are blind or have a significant disability that a paradigm shift in the approach to employment of people with disabilities must occur. It is time the nation moves past wholly separate programs or segregated settings for employees with

disabilities, and from evaluating disability policies through the lens of whether the program is merely "good enough" for people with disabilities. The United States needs to have the fortitude and creativity to enact sensible policies to continue the country's march toward equity and inclusion.

Congress already set the tone for encouraging greater employment of people with disabilities when it enacted Section 503 of the Rehabilitation Act. While the Affirmative Action Provision of Section 503 has been weak, even after the 2014 regulatory changes, Section 503 presents a mechanism to increase the employment of people who are blind or have a significant disability throughout the federal contracting world, and thus expand the potential for full integration of all people with disabilities. Examples of how people with the most significant disabilities can be supported in full community integrated jobs have been included in this and other NCD reports, as have examples of how nonprofit agencies moved away from segregated employment. With these examples in mind, NCD offers the following recommendations to Congress and the President.

Appendix

Nonprofit Agency Phone Interview Selection Methodology

In order to further evaluate the nonprofit agencies (NPAs) and their use of the AbilityOne Program, the National Council on Disability (NCD) randomly selected 18 NPAs across the United States to participate in phone interviews. To select these NPAs, NCD divided the country into four sections—Northeast, Midwest, South, and West-Pacific—and pulled four or five agencies from each region. NCD used a formula that randomly assigned each NPA a number; once completed, the Excel program randomly selected four or five numbers. NCD chose the agencies that corresponded to the randomized numbers. To obtain pertinent information, NCD only ensured that at least one NPA from each region represented a blind organization. Otherwise, the process for selecting NPAs to interact with was randomized.

Once NCD began calls, there were some unforeseen challenges. While most NPAs knew who was best to talk with, a handful of NPAs either never responded or were unaware of the proper person to answer NCD's questions. Surprisingly, the majority of these agencies were from the Midwest region. NCD surmised that the Midwest NPAs may have less contact with their AbilityOne-affiliated central nonprofit agency (CNA) because of their location. The only region that has easy access to the CNAs is the Northeast, which is close to the main CNA office in Washington, DC. The NPAs in the Midwest that NCD did hear from were smaller agencies that were often unable to afford the costs of travel and hotel for CNA or AbilityOne trainings. NCD heard from both larger and smaller agencies, and it is apparent that smaller agencies struggle to maintain as much involvement in the AbilityOne Program as larger agencies. This was a point of frustration with some agencies that felt that they were paying a large sum of money, through the program fee, and should be aided like larger NPAs.

Endnotes

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- 11 Fair Labor Standards Act of 1938, Pub. L. No. 718, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 8 [2006]). Wagner-O'Day Act, Pub. L. No. 75-739, 52 Stat. 1196 (1938).
- 12 Johnathan Grossman, "Fair Labor Standards Act: Maximum Struggle for a Minimum Wage," accessed December 8, 2019, <https://www.dol.gov/general/aboutdol/history/flsa1938>.
- 13 Ibid.
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- 15 William Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act* (Washington, DC: Congressional Research Service, 2005), accessed April 6, 2020, http://digitalcommons.ilr.cornell.edu/key_workplace/209.
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National Council on Disability
1331 F Street, NW, Suite 850
Washington, DC 20004