

Letter of Transmittal

February 22, 2019

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 assessment of the AbilityOne Program.

The AbilityOne Program, seeks, through federal procurement, to create employment opportunities for people who are blind or have a severe disability. First authorized in 1938 and now operating under the 1971 Javits Wagner O'Day Act, today government agencies annually purchase \$3.3 billion worth of goods and services through the program. In this first assessment of the AbilityOne Program by NCD, this initial report examines the goals and outcome of the program through the lens of current federal disability law and policy.

Sources that NCD researchers reviewed to complete this paper were Commission Performance and Accountability Reports; Budget Justifications; Commission regulations, cooperative agreements, and compliance materials; Office of Inspector General (OIG) reports; and reports from other federal agencies and panels. NCD reached out to AbilityOne to secure interviews with key staff. In lieu of interviews, AbilityOne provided brief written answers to some of the broad questions considered in this study and responded in detail to several follow-up questions. Additionally, the AbilityOne OIG met briefly with NCD and its researchers.

NCD provides this assessment at a pivotal moment. Federal statutes and policies which affect the employment of persons with disabilities have shifted dramatically since the

inception of the program eighty years ago. Integrated settings and competitive wages for individuals with disabilities are now the expectation, not the exception. However, despite the clear intentions of federal laws and policies, there are still drivers in the employment system which appear out of sync with the forward momentum of disability policy towards integration and equality.

This report is part one of a two-part series on the AbilityOne Program and the work of the AbilityOne Commission. NCD looks forward to working with the AbilityOne Commission, Congress and the Administration to ensure that Americans with disabilities are supported and encouraged to take their rightful place in the 21st Century economy.

Respectfully,

A handwritten signature in cursive script that reads "Neil Romano". The signature is written in black ink and is positioned above the printed name and title.

Neil Romano
Chairman

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Executive Summary

The National Council on Disability (NCD), in its role to advise Congress, the President, and other policymakers on disability practices that enhance equal opportunity for people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society. In this memorandum, NCD provides an initial report of the AbilityOne Program, which operates under the 1971 Javits-Wagner-O'Day Act, to utilize the federal procurement process to promote the employment of people who are blind or have a severe disability. NCD assesses various aspects of the AbilityOne Program in the context of broader federal disability policy.

The AbilityOne Program seeks to create employment opportunities for people who are blind or have a severe disability through the federal government's procurement process for goods and services. The program traces its history to the 1938 Wagner-O'Day Act, passed at a time when the U.S. economy still suffered under the Great Depression and the mid-western Dust Bowl. During the next eighty years as the U.S. advanced the rights of people with disabilities and progressed to a digitally driven economy dominated by technological development and the provision of services, Congress has only once reconsidered the AbilityOne Program through the 1971 Javits-Wagner-O'Day Act.

In recent years, the federal government has purchased \$3.3 billion annually worth of goods and services from the 527 non-profit agencies who participate in the AbilityOne Program. Only 18.6 percent of those federal dollars went to pay workers who are blind or have a severe disability. Since 2008 AbilityOne Program non-profit agencies employed on average 46,670 people a year who are blind or have a severe disability. In recent years around three-fourths of such employees provided services to the federal government while the remaining one-fourth produced goods. Very few persons with disabilities exit the program each year into competitive employment within the community or are promoted to supervisory positions.

In this report NCD assesses the AbilityOne Program and the work of the AbilityOne Commission in the context of federal disability law and policy. As federal disability law and policy progresses away from segregation and subminimum wages and towards community integration and competitive wages, the AbilityOne Program has become a vestige of the past. The program is centered on the requirements that federal agencies must purchase goods and services from the AbilityOne Program if contained on a procurement list approved and updated by the Commission, and that people who are blind or have a severe disability account for at least 75 percent of the direct labor hours used to provide the service or produce the goods. Since 2013 the program has come under scrutiny from the press, the Government Accountability Office, and Congress for a lack of rigorous oversight and transparency.

In this brief study, NCD finds that the current structure and implementation of the AbilityOne Program calls into question whether people who are blind or have a severe disability are best served by the program. NCD recommends that more in-depth independent research into the impact of the program be conducted, and that Congress make necessary changes so that the program better aligns with the Americans with Disabilities Act, the Workforce Innovation and Opportunity Act, and other federal disability laws and policies which seek the full participation of people with disabilities, including employment and advancement opportunities within the community.

Part I: Overview of the AbilityOne Program

For eighty years, the federal government has utilized its purchasing power in an attempt to expand the employment of people who are blind or have a severe disability.¹ Through the officially titled Committee for Purchase for People who are Blind or Severely Disabled, federal agencies purchase goods and services from non-profit agencies which employ people with such disabilities. The Committee is an independent federal agency, with a recently created Office of Inspector General (OIG). In 2006, the Committee re-named the program as “AbilityOne” and began operating as the “AbilityOne Commission.”² NCD, for the first time, addresses the legal, regulatory, oversight, and policies of the AbilityOne Program and considers the compatibility of the program with broader federal disability laws and policies. The program may have fit the needs of an economy recovering from the Great Depression, or even an era just prior to the legislative recognition of equal rights for people with disabilities. The underlying basis for the AbilityOne Program, however, is now out of step with federal policies which seek to provide services, supports, and most importantly employment opportunities for people with disabilities within the community in an equal manner to all Americans.

A. Historical and Legislative Overview

The AbilityOne Commission defines its mission as “providing job opportunities to people who are blind or have significant disabilities in the manufacture and delivery of products and services to the federal government,” and envisions the enablement of “all people who are blind or have significant disabilities to achieve their maximum employment potential.”³ Beginning in 1938 through the New Deal era Wagner-O’Day Act, the federal government sought to increase the employment of people who are blind by purchasing brooms and mops sold by such persons.⁴ Congress expanded this approach through the 1971 Javits-Wagner O’Day (JWOD) Act 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 severe disabilities.⁵

Under the JWOD Act, federal agencies must purchase goods and services available from an AbilityOne participating qualified non-profit agency (NPA) contained on an approved procurement list,⁶ unless the good is produced by the Federal Prison Industries program,⁷ or an exception is granted.⁸ The Department of Veterans Affairs is also required under the Veterans Benefits Act of 2006 to first seek procurement through veteran owned small businesses before purchasing from the AbilityOne Program, when at least two such businesses are reasonably expected to compete.⁹ The objective of the AbilityOne program rests on two legal pillars: 1) the requirement that federal agencies purchase from an AbilityOne qualified NPA, and 2) the so called direct labor ratio, which mandates that people who are blind or have a severe disability perform 75 percent of the “direct labor” necessary to produce the goods or provide the services offered by the NPA.¹⁰

The AbilityOne Commission consists of 15 members appointed by the President. Eleven Commissioners must be from the federal government, including a member each from the Departments of Defense (DoD), Army, Navy, and Air Force.¹¹ The other required federal agencies include the Departments of Agriculture, Education, Commerce, Veterans Affairs, Justice, Labor, and the General Services Administration.¹² The four non-federal government members must include one each representing people who are blind and people with severe disabilities, and one each representing employees from NPAs providing services or goods under the program from workers who are blind and workers with severe disabilities.¹³ 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.¹⁴ Second, the Commission sets the fair market price which the federal government will pay the NPAs for the goods or services.¹⁵ Finally, the Commission has oversight over three Central Non-Profit Agencies (CNAs) which operate significant aspects of the program, and ultimately has oversight of the NPAs.¹⁶ The Commission increased oversight of the CNAs and the NPAs following a 2013 Government Accountability Office (GAO) report and recent Congressional mandates.

B. AbilityOne Budget, Staffing and Program Implementation

The AbilityOne Program annually sells around \$3.3 billion worth of goods and services to the federal government.¹⁷ Products and services sold specifically to the DoD represented \$2.1 billion of the total in Fiscal Year (FY) 2017, or almost two-thirds of AbilityOne sales and services to the federal government in that year.¹⁸ Between FY 2010 and FY 2015, the Commission's budget slightly fluctuated from \$5.09 million to \$5.39 million per year, then increased to \$6.1 million in FY 2016, and \$8 million in FY 2017.¹⁹ The creation of an OIG accounted for part of the budget increase.²⁰ The AbilityOne Commission full-time employees (FTE's) has fluctuated between 25 to 28 FTEs between FY 2016 and 2018.²¹ In November 2018, an independent auditor could not provide an opinion that the AbilityOne financial statements are free from material misstatements because of "insufficient audit evidence" necessary to provide a basis for such an opinion.²²

The JWOD Act assigns the CNAs the responsibility to "facilitate" through the NPAs, "the distribution, by direct allocation, subcontract, or other means" of orders by federal agencies for products or services on the procurement list.²³ The Commission currently works with two long serving CNAs - SourceAmerica and the National Industries for the Blind (NIB),²⁴ and a new CNA selected in 2018, the American Foundation for the Blind (AFB).²⁵ The appointment of the third CNA is the subject of a lawsuit asserting that the Commission failed to follow the Administrative Procedure Act in the selection of AFB.²⁶

As of May 2017, the CNAs facilitated the work of 527 NPAs participating in the AbilityOne Program, with 463 NPAs under the responsibility of SourceAmerica, and the remaining 64 NPAs within the purview of NIB.²⁷ As a recent selection, AFB is not yet in full operation as a CNA.²⁸ A list of all NPAs as of 2017 is available in the Commission's FY 2018 Budget Justification.²⁹ The CNAs receive a "program fee" as a percentage of each federal contract an NPA enters into for which the CNA has oversight.³⁰ The Commission sets a program fee ceiling, which in FY 2016 and 2017 was 3.85 percent for SourceAmerica, and 3.9 percent for NIB.³¹ In FY 2016, SourceAmerica received \$82.4 million in fees and NIB received \$28.7 million.³² The use of the program fee is

discussed later in this paper. NIB and Source America combined held \$100 million in reserves and assets in FY 2017.³³

Part II: The AbilityOne Program and Current Federal Disability Law and Policy

As federal law and policy surrounding the employment of people with disabilities progresses away from segregation and subminimum wages and towards integration and competitive wages, the AbilityOne Program has become a relic inconsistent with current federal law and policy. Changes in federal disability rights since 1973 highlight the conflicts between the AbilityOne Program and the goals of other federal disability laws.

The modern progression of disability rights policy and the movement towards equal rights and integration began when Congress enacted the Rehabilitation Act of 1973.³⁴ Two years after passage of the JWOD Act, Section 504 of the Rehabilitation Act signaled a paradigm shift, even if limited in scope, in federal legislative efforts to ensure the civil rights for people with disabilities based on non-discrimination.³⁵ In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA)³⁶ - the forerunner of the current Individuals with Disabilities Education Act (IDEA)³⁷ - which began the end of separate and unequal treatment of students with disabilities by public schools. EAHCA, and now IDEA, require that public schools provide students with disabilities a free appropriate public education in the least restrictive environment.

In 1990, Congress passed the bi-partisan Americans with Disabilities Act (ADA) “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³⁸ The ADA is still the seminal disability civil rights law in the United States. Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”³⁹ In 1999, the U.S. Supreme Court made clear in the *Olmstead v. L.C.* decision⁴⁰ that under Title II of the ADA, public entities

must avoid unnecessary segregation of people with disabilities and make services available in the most integrated setting possible, which includes employment opportunities.⁴¹ Congress amended the ADA in 2008 with widespread bi-partisan support to clarify the ADA definition of “disability” and reverse strict court interpretations of the definition.⁴² The ADA Amendments Act better ensures a broad scope of coverage for people with disabilities against discrimination under federal law.

The most recent legislative change in disability policy is the Workforce Innovation and Opportunity Act (WIOA) passed in 2014.⁴³ WIOA modernizes and strengthens the workforce system “to better support people with disabilities by focusing on increasing competitive integrated employment . . . , limiting the use of discriminatory subminimum wages, and requiring that 15 percent of vocational rehabilitation funds be used to help people with disabilities transition from high school to higher education or the workforce.”⁴⁴ Of particular note, WIOA imposed new restrictions on the ability to pay workers with disabilities a subminimum wage under section 14(c) of the Fair Labor Standards Act (FLSA).⁴⁵ WIOA added section 511 to the Rehabilitation Act of 1973 to, among other things, require certain steps before an employee with a disability, and especially transition age youth up to age twenty-four, may be paid a subminimum wage. Section 511 mandates that prior to paying a youth with a disability under section 14(c), the youth must have received transition services, been in contact with the state vocational rehabilitation agency, and received career counseling so they can work towards the goal of competitive integrated employment.

Collectively these federal statutes indicate a steady progress since 1973 away from institutionalization, segregation, and unequal treatment of people with disabilities and towards integration, inclusion, and equal treatment in all aspects of society. NCD now considers the AbilityOne Program in light of current federal disability rights laws and policies.

Part III: AbilityOne Program Outcomes

The AbilityOne Commission lists four strategic goals to achieve its mission of providing job opportunities to people who are blind or have severe disabilities: 1) effective stewardship, 2) employee and customer satisfaction, 3) employment growth, and 4) business excellence.⁴⁶ The Commission seeks to “grow a wide variety of job opportunities by expanding existing product lines of business and by developing new markets in which AbilityOne’s target population desires to work and receive training.”⁴⁷ The employment of people with qualified disabilities under the program has fluctuated slightly since 2008, but the ability of people with disabilities to advance beyond the program and into competitive integrated employment is questionable.

A. Production and Employment

AbilityOne NPAs produce a number of items for the federal government. Current AbilityOne products include pens and other writing instruments, office and cleaning supplies, medical and dental supplies, bedding and mattresses, office furniture, and hardware and paints.⁴⁸ A number of these goods, more than 3,500 products, are produced under the AbilityOne SKILCRAFT label.⁴⁹ AbilityOne also manufactures aircraft parts, vehicular and electrical equipment, and supplies for the DoD and other federal agencies.⁵⁰ AbilityOne services offered to federal agencies include administrative; technical and computer support; document management; vehicle fleet management; food processing, packing, and distribution; hospitality and laundry services; document destruction; and a number of other services.⁵¹

NPAs employed on average 46,670 people per year who are blind or have a severe disability, referred to in this report as an “AbilityOne employee,” between FY 2008 and 2017.⁵² Over the past ten fiscal years the number of AbilityOne employees ranged from a low of 43,388 in FY 2008 to a high of 50,580 in FY 2011. The number of AbilityOne employees in FY 2017 was 43,831, similar to FY 2008, which represented around 6,700 fewer employees since the ten-year peak in FY 2011. In FY 2017 the Commission also reported that 2,851 AbilityOne employees were veterans, similar to previous years,⁵³

and that 33,999 AbilityOne employees worked on service contracts compared with 9,832 on production contracts.⁵⁴

B. Direct Labor Ratio and Competitive Employment

The JWOD Act requires that NPAs participating in the AbilityOne Program employ people who are blind or who have a severe disability “for at least 75 percent of the hours of direct labor required for the production or provision of the product or service.”⁵⁵ The 75 percent requirement is often referred to as the disability or the direct labor hour ratio. Under the direct labor hour ratio, the JWOD Act defines “direct labor” as “all work required 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.”⁵⁶ In order to participate in the AbilityOne Program, the Commission mandates that NPAs employ people who meet the definition of blind or severe disability (an AbilityOne employee) in 75 percent of all direct labor hours regardless of whether or not the labor is for an AbilityOne contract.⁵⁷ For each AbilityOne project, however, an NPA can use as few as 60 percent of AbilityOne employees for the direct labor hours, as long as the 75 percent mark is met both in the aggregate for all AbilityOne projects performed by the NPA, and for all work performed by the NPA.⁵⁸

Under the JWOD Act, a person who is blind is defined based on visual acuity and field of vision.⁵⁹ The definition of a person with a severe disability, however, requires both a physical or mental impairment which limits functional capabilities, and a determination by an NPA that the person “is unable to engage in normal competitive employment over an extended period of time.”⁶⁰ NPAs must assess the “normal competitive employment” of a person with a severe disability at the time the NPA first considers the person for qualification for employment in the AbilityOne Program, and then on an annual basis.⁶¹ Persons who are blind may participate in the AbilityOne Program and be counted towards the 75 percent direct labor ratio even if they could work in competitive employment.⁶² The Commission standards for normal competitive employment are contained in the AbilityOne Program’s Nonprofit Agency Review Manual⁶³ and an Individual Eligibility Evaluation (IEE) form and instructions.⁶⁴

While a person who is blind can work as an AbilityOne employee even if they could be competitively employed, the Commission still requires an annual assessment of competitive employability for an employee.⁶⁵ For people who are blind, the Commission states that “[t]he simplest statement of competitive employability would be two questions; ... whether or not the individual [who is blind] is currently capable of competitive employment and ... whether the individual is interested in a competitive job outside of the nonprofit.”⁶⁶ On the other hand, for people with severe disabilities, the IEE form requires a synopsis of the medical reasons for the disability, the functional limitations which result from the disability, and the evaluation of competitive employability.⁶⁷ The NPAs have flexibility in selecting the appropriate evaluator, with some guidance from the Commission such as not to use a project supervisor to conduct the evaluation.⁶⁸

In making the competitive employability determination for a person with a severe disability, the AbilityOne Nonprofit Agency Review Manual states that an individual is considered “capable of normal competitive employment if the person can do all of the following with or without reasonable accommodations:

- a) Is capable of working a full work week (40 hours),
- b) Can complete an application and participate in an interview independently,
- c) Receives the same pay and benefits as any other worker performing comparable work,
- d) Only requires accommodations considered reasonable under the . . . ADA,
- e) Can maintain a job for an extended period of time (months, if not years),
- f) Can maintain a job without intervention or supports from outside sources.”⁶⁹

Overall, the Commission states that “[i]n making the competitive employability determination, the review should consider whether a reasonable observer, albeit one knowledgeable of AbilityOne Program’s criteria, see this person as being severely disabled, to the point that he or she would be unable to find and maintain a normal competitive job without supports” (underline added).⁷⁰ What is a “reasonable observer” and how the AbilityOne Program assesses competitive employability highlights one of the conflicts between the Program and other federal disability policy.

The Commission, likely to increase those eligible for AbilityOne employment, views competitive employment and reasonable accommodations in ways which differ from the ADA and other federal laws. For example, the ADA requires an individualized assessment of requests for reasonable accommodations, recognizing that the need for an accommodation will differ from person to person, and that what is a reasonable accommodation for one employer, such as a large high-tech company, will be different from a small family owned grocery store.⁷¹ The Commission, in contrast, given the different approach to the employment of persons with disabilities inherent in the AbilityOne Program, focuses on accommodations or supports most employers will not provide, or which are “not normally provided in typical community employment.”⁷²

The Commission’s use of the term “reasonable observer” to help evaluate competitive employability also contrasts with an original Congressional finding in the ADA. In 1990 Congress noted that people with disabilities have been subject to “stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”⁷³ A reasonable observer could easily suspect a person with a severe disability cannot work in competitive employment without a comprehensive assessment of both the person with a disability, and most importantly the various opportunities available from employers whom are either legally required, or willing to provide, accommodations. Ultimately, the AbilityOne approach can result in people with severe disabilities being shifted to AbilityOne employment without a full consideration of other employment opportunities within the community. Further in-depth study of the impact of the AbilityOne Commission’s current competitive employability assessment is necessary.

C. Implications of the Direct Labor Ratio and Normal Competitive Employment

There are a number of negative implications of the direct labor ratio and competitive employability on people with disabilities, most significantly the resulting segregation of people with disabilities, and a clear disincentive for NPAs to promote AbilityOne employees out of direct labor.

The JWOD Act direct labor ratio conflicts with the goals of WIOA. A key tenet of WIOA is competitive integrated employment (CIE) for people with disabilities. WIOA defines CIE as a job which 1) pays at least the federal minimum wage (and not less than the customary rate paid to employees without disabilities performing similar work) and includes eligibility for the same benefits as non-disabled employees; 2) is performed in integrated settings where employees with disabilities interact with those without disabilities to the same extent as others in comparable positions; and 3) provides opportunities for advancement similar to people without disabilities in similar positions.⁷⁴ 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.⁷⁵ The AbilityOne Commission suggests the CIE integration mandate found in the WIOA regulations and guidance severs federally funded VR services to support persons for employment by an AbilityOne NPA program.⁷⁶ 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, it believes such jobs are integrated employment placements.⁷⁷

In an October 2018 report NCD noted a contrast between the CIE advancement opportunity mandate in the WIOA, and the limited advancement out of direct labor or into the community which occurs under the AbilityOne Program.⁷⁸ The AbilityOne Commission states that its mission includes “whenever possible, preparing [AbilityOne employees] to engage in competitive employment.”⁷⁹ Commission reports indicate that since FY 2009 between 2,000 to 2,100 AbilityOne employees moved into competitive employment each year.⁸⁰ This represents about 4 percent of employees who are blind or have a severe disability annually exiting AbilityOne for competitive integrated employment. The Commission also tracks promotions of AbilityOne employees to a higher wage grade, indirect labor positions, or supervisory or management positions within the program. The Commission reported 1,477 promotions of AbilityOne employees within the program in FY 2016, with 400 moving into supervisory positions.⁸¹ Based on the Commission’s definition of promotion, 3.2 percent of employees were

promoted in some manner in FY 2016, with only 0.87 percent achieving a supervisory position and the remaining 1,077 employees receiving a higher wage grade or working in an indirect labor position.⁸² The number of promotions in FY 2017 slightly improved with 1,541 promotions (3.52 percent of AbilityOne employees) of which 438 (1 percent of AbilityOne employees) were into supervisory positions.⁸³ The Commission does not collect data related to promotions outside of the program.⁸⁴

In 2016 an Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (Advisory Committee), established under WIOA, published a final report which examined, among other issues, the AbilityOne Program in the context of WIOA with a particular focus on CIE.⁸⁵ The Advisory Committee noted vulnerabilities in the AbilityOne Program, including potential conflicts of interest since the determination of who is eligible to participate as an AbilityOne employee is often made by NPAs which function both as the employer and a provider of employment support services.⁸⁶ The Advisory Committee further found that the direct labor ratio potentially conflicts with the definition of CIE, that the direct labor ratio leads to the segregation of workers, and that the JWOD Act does not require or even expect that AbilityOne employment will lead to CIE.⁸⁷ The Advisory Committee made a number of recommendations to address these vulnerabilities, including amending JWOD to align better with the ADA, the *Olmstead* decision and WIOA, and that no new FLSA section 14(c) certificates be issued to NPAs.⁸⁸ NCD echoes these recommendations, stating in a recent report that the JWOD Act should be amended to better support CIE as defined by WIOA.⁸⁹

Despite the strong bi-partisan passage of WIOA and the statutory basis of the regulations, the U.S. Secretary of Education (ED) stated an intent, as recently as the fall of 2018, to open the WIOA regulations regarding the definition of CIE with a particular focus on the integration mandate.⁹⁰ NCD has, and continues to oppose re-opening the WIOA regulations on CIE.⁹¹ The potential ED regulatory action is most likely spurred by the AbilityOne Commission's interpretation that a Frequently Asked Questions (FAQ) about CIE published by the Rehabilitative Services Administration (RSA) of the

Department of Education disqualifies, without exception, the use of VR funds to support the employment of people with disabilities by AbilityOne NPAs.⁹² The FAQ, however, calls for VR counselors to consider employment settings on a case-by-case basis, and does not categorically prohibit referral to AbilityOne employment.⁹³ This year the minority staff of the U.S. Senate Health Education Labor and Pensions (HELP) also recommended that the WIOA regulations not be opened and that instead technical assistance be offered by RSA to support state implementation of WIOA and existing regulations.⁹⁴ Minority HELP staff recently surveyed state VR agencies, and after a 100 percent response rate, concluded that VR agencies do conduct case-by-case analyses of employers to assess if the setting meets the CIE definition, and do refer clients to AbilityOne NPAs who met the CIE definition.⁹⁵ State VR agencies also responded that they respect the informed choice of people with disabilities regardless of the setting of the employment chosen by the client.⁹⁶ NCD has recommended that ED not open the WIOA regulations, specifically the definition of CIE.⁹⁷

D. AbilityOne Employee Wages

AbilityOne employees were paid total wages of \$616 million working on AbilityOne contracts in FY 2016.⁹⁸ Based on these aggregate wages, 18.6 percent of the \$3.3 billion in annual federal government purchases through the AbilityOne Program went to wages paid to employees who are blind or have a severe disability, or in other words, 81.4 percent of federal government purchases from the AbilityOne Program support expenditures other than the wages of people who are blind or have a severe disability.

The Commission reported average AbilityOne employee wages paid by the NPAs of \$12.44 an hour in FY 2014, \$13.01 an hour in FY 2016,⁹⁹ and \$13.32 an hour in FY 2017.¹⁰⁰ Under Executive Order (E.O.) 13658, NPAs which provide services under contract to covered federal agencies must currently pay \$10.60 an hour to all employees, regardless of whether an employee with a disability could be paid a subminimum wage under section 14(c) of the FLSA.¹⁰¹ NPA AbilityOne production work, however, is not subject to E.O. 13658 and NPAs with FLSA section 14(c) certificates may pay wages to employees with disabilities below the federal minimum wage of \$7.25

an hour. The Commission reported to NCD researchers that average wages in FY 2017 were \$9.12 an hour for production contracts and \$14.30 an hour for service contracts.¹⁰² The Commission collects aggregate wage data, but does not collect data on wages paid by the NPAs to individual AbilityOne employees.¹⁰³ A calculation is thus not possible of the range of hourly wage rates paid to such employees in order to directly assess the impact of section 14(c) subminimum wages paid by the NPAs.

For this report, NCD researchers compared the name and location of the FY 2017 NPAs against entities which held a section 14(c) certificate as reported by the U.S. Department of Labor's Wage and Hour Division in October 2017. NCD found that between 40 to 44 percent, or as many as 234 of the 527 NPAs, were allowed to pay subminimum wages.¹⁰⁴ Four of the NPAs holding a 14(c) certificate in 2017 were under the responsibility of NIB, with the remaining under the responsibility of SourceAmerica. Using slightly older data, NCD recently reported that as many as 48 percent of NPAs hold a 14(c) certificate.¹⁰⁵ NCD also reported that more than half of the 50 largest 14(c) certificate holders based on the reported number of employees paid a subminimum wage participate as AbilityOne Program NPAs.¹⁰⁶

The Commission uses various data to determine "which lines of business support the most reliable, highest skilled, highest paying positions for AbilityOne employees, and should . . . be the focal points for fostering and growing AbilityOne job opportunities."¹⁰⁷ A Commission vision further includes that "every AbilityOne employee earns not only the federal minimum wage (or higher applicable state or local minimum wage) but also a living wage and benefits package appropriate to his or her geographic locality."¹⁰⁸ Despite these aspirational goals, there is limited public information to determine if the program results in a livable wage, reducing the need for certain public benefits for AbilityOne employees.¹⁰⁹

Part III: Responsibilities and Oversight of the AbilityOne Program

In the past five years, a number of steps have been taken, both directly and indirectly, to increase the oversight of the AbilityOne Program by Congress and the Commission.

A. Public Reports of Problems

The GAO noted several deficits in the AbilityOne Program in 2013, highlighting the extreme lack of oversight of the CNAs, and a general lack of transparency in the AbilityOne Program.¹¹⁰ The GAO recommended the establishment of an OIG for the program, and that the AbilityOne Commission enter into written agreements with the CNAs and improve overall transparency.¹¹¹

In 2015 CNN aired a report examining the AbilityOne Program and reported that the program was being investigated “for illegal operations, financial fraud, mismanagement, operating in violation of the law, steering of contracts, and possibly obstruction of justice.”¹¹² According to CNN, investigative agencies included the Departments of Defense, Justice, State, Veterans Affairs, and the Government Services Administration. The CNN report detailed allegations of conflicts of interest and preferential treatment in NPA selection by SourceAmerica, which SourceAmerica denied. CNN stated that “there is no real verification process in AbilityOne or SourceAmerica to determine whether severely disabled workers are being hired in the proper ratio and the contracts are operating legally.”¹¹³

B. Congressional Action

In 2015 and 2016, Congress took steps to increase the oversight of the AbilityOne Program. Congress passed the Consolidated Appropriations Act, 2016 (CAA) in December 2015 which appointed an Inspector General for the program and mandated that the Commission enter into written agreements with the CNAs.¹¹⁴ Starting in FY 2016, Congress also required that the Commission file quarterly reports on the CNA program fees; salaries and benefits; and on travel, lobbying and related expenses.¹¹⁵ The requirement was extended in FY 2017 and 2018.¹¹⁶ These quarterly reports are not publicly available as the Commission considers the information proprietary and confidential.¹¹⁷ Congress provided for additional oversight in the National Defense Authorization Act for Fiscal Year 2017 (NDAA), creating under Section 898 a panel to review the program in light of a 2016 DoD Inspector General report and to make appropriate recommendations.¹¹⁸

C. Role of the Commission and CNAs

While overall oversight of the program remains with the AbilityOne Commission, the CNAs play an important role. The Commission had never entered into written agreements with the CNAs concerning CNA performance in the history of the program until imposed by Congress under the CAA.¹¹⁹ The first cooperative agreements commenced in 2016 with six modifications through July 2018.¹²⁰

The CNA agreements are performance based, with key performance indicators of employment growth; program administration, oversight and integrity; NPA support, assistance and development; and training and strategic communications.¹²¹ The agreements place a “high value” on “sustaining and increasing employment growth” and developing new business.¹²² The CNAs must develop an annual employment growth plan indicating expected new business lines and levels of employment growth.¹²³ The growth plan needs to address a number of elements based on market research and analysis, including the placement of employees into “indirect labor, supervision, management or competitive employment.”¹²⁴ Plans for “integrated placement,” however, do not impact the requirement that NPAs meet the 75 percent direct labor hour ratio.¹²⁵

The CNA agreements emphasize certain regulatory responsibilities divided between the Commission and the CNAs.¹²⁶ The CNAs must evaluate NPA qualifications; assist the NPAs achieve successful federal contract performance; provide technical assistance to the NPAs, and recommend to the Commission new products and services for the procurement list, including a recommended fair market price.¹²⁷ Of significance, using Commission guidelines the CNAs “facilitate distribution of orders from [government agencies] among the NPAs with an emphasis on employment growth.”¹²⁸ This provision grants the CNAs with certain financial leverage over the NPAs, while further highlighting the Commission’s emphasis on employment growth.

The Commission maintains oversight of, and involvement with, the CNAs internal and external relations. Under strategic communications, the CNAs need to consult with the

Commission on messaging, and provide technical support and assistance with the AbilityOne website and social media.¹²⁹ The CNAs must provide 10 days prior notice to the Commission, unless not practicable, of a “significant meeting,” and work to resolve any Commission concerns.¹³⁰ A significant meeting includes meetings or events by the CNA with members of the disability community, Congress, the White House and the Executive Office of the President, or key stakeholders. While the involvement of certain senior managers or executives likely makes a meeting significant, a meeting can be significant without such individuals.¹³¹ For example, a meeting is significant if the disability community, which includes consumers, advocates, or activists, are participants.¹³² NCD researchers sought to interview SourceAmerica staff but SourceAmerica declined with a reference to the CNA cooperative agreement stating that SourceAmerica’s participation would require direction from the AbilityOne Commission. While the CNA agreement may not have prohibited an interview, SourceAmerica appears to take a strict interpretation of the agreement. Given the concerns raised by the GAO and others about transparency, the perceived or real restrictions placed on the CNAs to meet with the disability community about the program hinders the improvement of the transparency of the program.

The Commission is responsible for NPA compliance with the direct labor ratio, and a three-person compliance team is assigned to the inspection and training of the NPAs.¹³³ Since FY 2014, the Commission annually reports between 21 and 25 NPAs being out of compliance with the direct labor ratio, or about 4 percent of all NPAs.¹³⁴

D. CNA Program Fees

Many terms in the CNA cooperative agreement involve the program fee the CNAs charge the NPAs as a percentage of each government contract. The JWOD Act does not mention a program fee, nor any payment mechanism for the CNAs. The program fee ceiling set annually by the Commission is now based on quality outcomes and performance measures.¹³⁵ The CNAs must enter into agreements with the NPAs regarding payment of the program fee, but the CNAs may charge the NPAs other “customary fees” for conferences and trainings, sponsorships, and advertising.¹³⁶ The

CNAs may use program fees for costs which are necessary and reasonable to perform the cooperative agreement, and “[b]e consistent with policies and procedures that apply uniformly to both Program and other activities of the CNA.”¹³⁷ The fee may not be used for such items as personal expenses for CNA board members or staff, to cover bad debts, for taxes, to purchase alcoholic beverages, and other similar restrictions.¹³⁸

CNAs may use the program fee to lobby. Even though the program fees are derived from federal procurement contracts, the fee is not a direct appropriation subject to lobby restrictions on appropriated funds.¹³⁹ According to the GAO, between 2008 and 2012 NIB spent \$976,729 and SourceAmerica (then known as NISH) spent \$3.5 million on lobbying.¹⁴⁰ Similar to lobbying, CNAs are also not bound by federal restrictions on salaries since the CNAs do not receive direct federal appropriations.¹⁴¹ According to the GAO, a Commission attempt in 2004 to create reasonable standards on CNA executive and employee compensation was withdrawn because of the number and nature of issues raised by commenters to the proposed regulations.¹⁴² As mentioned, Congress now requires quarterly reports on CNA expenditures on salaries and lobbying.¹⁴³

E. Office of Inspector General

The new AbilityOne OIG has issued three semiannual reports. The OIG consists of an Inspector General, presently Thomas Lehigh, a general and investigative counsel, two assistant inspectors general, and an administrative officer.¹⁴⁴ The OIG developed an FY 2018 – 2019 CNA audit job plan which focuses on seven areas concerning the NPAs and NPA interactions with the CNAs.¹⁴⁵ Much of the audit is not directly related to the employment of people with disabilities, but focuses on the relationship of the CNAs with the NPAs and the Commission, such as order allocation and project assignment of federal contracts to the NPAs, the program fee, market growth, and the quality of the products delivered to the government. The plan does include a review of the CNA agreement “to determine the effectiveness of employment growth and program accountability as a result of [the agreement’s] oversight requirements in the areas of direct labor hours, program fees, and reportable expenditures.”¹⁴⁶ Absent from the OIG audit plan is consideration of how the CNAs assist the NPAs in the assessment process

to determine if a person with a severe disability can engage in normal competitive employment. Since the OIG did not respond to NCD researcher's attempts to schedule an interview, it is not known what specific factors the OIG considered to develop the audit plan.

During the last reporting period, the OIG supported investigations into allegations of fraud and violations of federal law in the program, with the amount of government funds under investigation estimated to be over \$300 million.¹⁴⁷ The OIG also identified six management challenges for the AbilityOne Program, 1) erosion of statutory program authority; 2) higher level of transparency needed to enhance program confidence; 3) implementation of cooperative agreements given CNA growth; 4) lack of adequate resources impacts program effectiveness; 5) lack of enterprise-wide risk management framework; and 6) enhancement of program compliance.¹⁴⁸

F. Commercialization of AbilityOne Products and Employment Growth

Of significant interest for the future of the program, the OIG noted that in August 2017 the Commission and Amazon agreed to allow federal agencies to purchase AbilityOne products through the Amazon website.¹⁴⁹ The OIG found this agreement consistent with Congressional and other federal efforts to conduct government commercial purchases through e-commerce.¹⁵⁰ In addition, any private business or individual may purchase AbilityOne products directly through Amazon. A simple search of Amazon.com results in over two thousand AbilityOne products available to the general public. Further, CNAs are specifically authorized to use the program fee "for commercial efforts to the extent that the commercial efforts are intended to have a direct benefit to the Program."¹⁵¹

The commercialization of AbilityOne products and services to private entities has significant ramifications for federal disability policy, especially in the rapidly expanding era of e-commerce. While sales of AbilityOne products and services to the private sector have likely occurred for decades, the impact of such sales on the advancement of competitive integrated employment has received apparently little study or attention. For example, to what extent are the CNAs and NPAs able to continue a segregated

workshop model into private production because of the support received through mandatory federal procurement? To what extent are reduced wages paid to employees with disabilities at the NPAs, either below the federal minimum wage or below the prevailing wage, enabling the NPAs to compete more strongly in the private market to the detriment of the workers with disabilities paid such lower wages?

A central theme throughout AbilityOne Commission reports, manuals, and agreements is employment growth and business development. While employment growth is a logical aim for the program, it is not a statutory requirement. The JWOD Act allows the Commission “on its own or in cooperation with other public or nonprofit private agencies [to] -- study 1) problems related to the employment of the blind and other severely disabled individuals; and 2) the development and adaptation of production methods that would enable a greater utilization of the blind and other severely disabled individuals.”¹⁵² The use of the language “development and adoption of production methods” in the JWOD Act, however, pre-dates by 20 years the ADA which now requires that employers provide reasonable accommodations to people with disabilities. The Commission’s emphasis on employment growth is neither a requirement under the JWOD Act, nor is fully consistent with federal law which now seeks employment growth for people with disabilities within the community, and legally requires private employers to find ways to adopt methods for people with disabilities as a reasonable accommodation.

G. NDAA Section 898 Panel on AbilityOne

The DoD and AbilityOne Contracting, Oversight Accountability and Integrity Panel (Panel) established under NDAA section 898 is the most recent Congressionally established entity to consider the Ability One Program.¹⁵³ The overall goal of the Panel is to address “the effectiveness and internal controls of the AbilityOne Program related to DoD contracts.”¹⁵⁴ The Panel established seven subcommittees and released its first report in July 2018. Findings and recommendations directly relevant to this assessment from the subcommittees on Fraud, Waste and Abuse; Employment Initiatives; and Laws and Regulations are reviewed below.

The Eliminate Waste, Fraud and Abuse Subcommittee focused on recommendations to DoD and the AbilityOne Commission. The subcommittees worked on five identified vulnerabilities in the program and developed corresponding recommendations. The first vulnerability focused on the need for more oversight of both the CNAs and the NPAs, and the subcommittee recommended increased oversight and strengthened audit coverage. The second vulnerability concerned the complexity of verifying the direct labor ratio and the methodology used by NPAs to determine severe disability. The subcommittee recommended stricter requirements for NPA disability determinations, a concern the CNN report highlighted in 2015. A third vulnerability addressed the use of program fee revenues by the CNAs to lobby and the subcommittee recommended elimination of the practice. Finally, the Panel recommended that the process by which the CNAs assign projects to NPAs be structured to eliminate bias through increased transparency complete with mandatory criteria and certifications.¹⁵⁵

The Employment Initiatives subcommittee focused on ways DoD and the Commission can further employment opportunities within AbilityOne for service connected veterans, as well as people who are blind and people who have significant disabilities. The subcommittee explored employment options, support services for employees, individualized career planning and training opportunities. The subcommittee also focused on how employees can progress from direct labor into competitive employment and noted that currently there is a lack of data to evaluate the extent to which case management and/or guidance on career goals are provided. The subcommittee recommended that the AbilityOne Commission develop more robust means by which to measure AbilityOne employees who transition from direct labor into competitive employment.¹⁵⁶ The subcommittee further recommended that the Commission establish an “eligibility and employment ‘cell’ of qualified personnel, to include occupational therapists, Vocational Rehabilitation Counselors (VRCs), Licensed Clinical Social Workers, and other similar qualifications,”¹⁵⁷ to better define, measure and track AbilityOne Program employment outcomes.

The subcommittee on Laws and Regulations examined the underlying laws and regulations which govern the AbilityOne Program. Specifically, the subcommittee noted that “[b]y its nature, the 75% requirement reduces the chance for the NPAs to build an integrated workforce.”¹⁵⁸ The subcommittee recommended amending the JWOD Act to reduce the direct labor ratio and to change the definition of direct labor to include indirect labor. The subcommittee believes both changes would encourage and enable integration of employees with disabilities.¹⁵⁹

Findings and Recommendations

In this brief assessment of the AbilityOne Program, NCD believes that Congress, the Departments of Labor and Education, and the AbilityOne Commission need to take a deeper look into the alignment of the program with broader federal disability policies. No major Congressional changes to the AbilityOne Program have occurred in 47 years despite tremendous changes in disability rights and the U.S. economy since that time. Furthermore, with the AbilityOne non-profit agencies branching out into e-commerce, and with only 18.6 percent of AbilityOne government purchases going to the wages of people with disabilities, the federal government needs a much clearer picture of whether employees who are blind or have a severe disability benefit from the current system. NCD believes that the emphasis placed on employment growth in the AbilityOne Program – a program with a built-in mechanism for segregation and for low wages for production work – is inconsistent with the ADA, WIOA, and other laws and policies that seek to ensure the full participation of people with disabilities.

NCD therefore makes the following recommendations to Congress.

- Congress should direct the U.S. Departments of Defense, Education, and Labor to convene a transformational advisory committee to include advocates from the disability community, experts on the employment of people with disabilities, representatives from federal procurement offices, and other stakeholders to explore a new system to employ people who are blind or have severe disabilities

through the federal procurement process that fully aligns with the tenets of CIE, and is designed foremost to advance the employment opportunities of people with disabilities. The Department of Labor should complete a comprehensive study on job prospects for people who are blind or have severe disabilities as part of this process.

- Congress should develop appropriate legislation based upon the report of the transformational advisory committee.

In the period necessary to develop and implement a new system, additional information, increased oversight, and initial reforms of the current system are necessary. NCD makes the following recommendations.

- Congress should direct the Government Accountability Office, or other appropriate independent entities, to report on the involvement of the CNAs and the AbilityOne NPAs in selling goods and services to the general public including through e-commerce. The report should specially assess the extent that federal government purchases through the AbilityOne Program provide an advantage to the CNAs and NPAs in the sale of goods and services to the general public.
- Congress should amend the JWOD Act to require that the advancement of people who are blind or have severe disabilities into supervisory and management positions be a measurable goal of the AbilityOne Program.
- Congress should amend the JWOD Act to require that the ability of people who are blind or have severe disabilities to transition into competitive integrated employment be a primary outcome of the AbilityOne Program.
- NCD echoes The Panel's Eliminate Waste, Fraud and Abuse Subcommittee recommendation to eliminate the use of program fee revenues by the CNAs to lobby. And at the very least Congress should restrict the use of the CNA program

fees for lobbying and executive salaries to the same extent as any entity which directly receives federal appropriated funds.

- Based on recommendations on how to best achieve integrated employment from the transformational advisory committee on the JWOD Act, or alternatively from advocates from the disability community, experts on competitive integrated employment, and the DoD and AbilityOne Contracting Panel, Congress should amend the JWOD Act to include indirect labor in the disability labor hour ratio and to promote more integrated AbilityOne settings.
- Congress should make available to the public quarterly reports on CNA expenditures on salaries and lobbying.

AbilityOne Commission and other Agencies:

- The AbilityOne Commission should collect and publish data on the range of wages paid to AbilityOne employees.
- The AbilityOne Nonprofit Agency Review Manual and the Individual Eligibility Evaluation form and instructions should be updated to align with the competitive integrated employment and reasonable accommodations requirements found in WIOA, the ADA, and other federal laws.
- The AbilityOne Office of Inspector General should examine how the determination of normal competitive employment is assessed by the NPAs.
- The Departments of Labor and Education should assess the extent to which the performance of AbilityOne service contracts occur in integrated settings.

- The Department of Education should not reopen the WIOA regulations and instead offer technical assistance to support state level implementation of WIOA and existing regulations.

¹ To remain consistent with statutory language, this report uses the term “severe disability.” The U.S. AbilityOne Commission often uses the term “significant disability” instead of the term “severe disability.”

² U.S. AbilityOne Commission, “History,” accessed December 21, 2018, https://www.abilityone.gov/abilityone_program/history.html.

³ U.S. AbilityOne Commission, *Fiscal Year 2017: Performance and Accountability Report*, 5, <https://www.abilityone.gov/commission/documents/U.S.%20AbilityOne%20Commission%20FY%202017%20PAR-Final.pdf>.

⁴ Wagner O’Day Act, Pub. L. No. 75-739, 52 Stat. 1196 (1938). U.S. Government Accountability Office, *Employing People with Blindness or Severe Disabilities: Enhanced Oversight of the AbilityOne Program Needed* (Washington, DC: U.S. Government Accountability Office, 2013), 4, <https://www.gao.gov/products/GAO-13-457>.

⁵ Javits-Wagner D’Day Act, Pub. L. No. 92-28, 85 Stat. 77 (1971), 41 U.S.C. §§ 8501-8506. U.S. Government Accountability Office, *Enhanced Oversight of the AbilityOne Program Needed*, 4.

⁶ 41 U.S.C. § 8504(a). 41 C.F.R. §§ 51-4.2, 51-4.3.

⁷ 41 U.S.C. § 8504(b).

⁸ 41 C.F.R. § 51-5.4.

⁹ Office of Inspector General, U.S. AbilityOne Commission, *Semiannual Report to Congress: April 1, 2018 - September 30, 2018*, 5-6,

[https://www.abilityone.gov/commission/documents/CPPBSD-OIG%20SAR%20\(April%201%202018-%20September%2030%202018\).pdf](https://www.abilityone.gov/commission/documents/CPPBSD-OIG%20SAR%20(April%201%202018-%20September%2030%202018).pdf). *Kingdomware Technologies, Inc. v. United States*, ___ U.S. ___, 136 S.Ct. 1969 (2016). *PDS Consultants, Inc. v. United States*, 907 F.3d 1345 (Fed. Cir. 2018).

¹⁰ 41 U.S.C. §§ 8501(7), 8504.

¹¹ 41 U.S.C. § 8502(b)(1).

¹² *Ibid.*

¹³ 41 U.S.C. § 8502(b)(2), (3).

¹⁴ 41 U.S.C. § 8503(a).

¹⁵ 41 U.S.C. § 8503(b).

¹⁶ 41 C.F.R. § 51-2.2.

¹⁷ Committee for Purchase from People Who are Blind or Severely Disabled, “Fiscal Year 2019 Budget Justification,” 3, <https://www.abilityone.gov/commission/documents/CPPBSD%20FY2019%20Budget%20Justification%2020180212%20Final.pdf>.

¹⁸ In FY 2017, the DoD spent \$320 billion on federal contracts, with 51 percent on goods, 41 percent on services, and 8 percent on research and development. Moshe Schwartz, John Sargent, and Christopher Mann, “Defense Acquisitions: How and Where DOD Spends Its Contracting Dollars,” (Washington, D.C.: Congressional Research Service, July 2, 2018), 1-6, <https://fas.org/sqp/crs/natsec/R44010.pdf>. DoD spent \$291.2 billion on contract goods and services in FY 2017 (92 percent of \$320 billion), and with \$2.1 billion purchases from AbilityOne, the program provided 0.72 percent of all DoD contract goods and services for that fiscal year.

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- ¹⁹ Based on a review of U.S. AbilityOne Commission Budget Justifications. U.S. AbilityOne Commission, “Congressional Budget Justification,” accessed November 29, 2018, <https://www.abilityone.gov/commission/budget.html>.
- ²⁰ Committee for Purchase, “FY 2019 Budget Justification,” 3.
- ²¹ U.S. AbilityOne Commission, *FY 2017 Performance and Accountability Report*, 3. Committee for Purchase from People Who are Blind or Severely Disabled, “Fiscal Year 2018 Budget Justification,” 1, <https://www.abilityone.gov/commission/documents/FY18%20US%20AbilityOne%20Commission%20CPPBSD%20Budget%20Justification%20Final.pdf>.
- ²² Brown & Company, Independent Auditor’s Report (Nov. 15, 2018), [https://www.oversight.gov/sites/default/files/oig-reports/Financial Statement Report Final Report.pdf](https://www.oversight.gov/sites/default/files/oig-reports/Financial%20Statement%20Report%20Final%20Report.pdf).
- ²³ 41 U.S.C. § 8503(c).
- ²⁴ *Ibid.*, 6.
- ²⁵ U.S. AbilityOne Commission, “U.S. AbilityOne Commission Designates American Foundation for the Blind as a New AbilityOne Authorized Central Nonprofit Agency” (July 26, 2018), https://www.abilityone.gov/media_room/documents/U.S.%20AbilityOne%20Commission%20News%20Release%20-%20New%20AbilityOne%20CNA%2020180726.pdf
- ²⁶ National Federation of the Blind v. U.S. AbilityOne Commission, No.18-cv-02965 (D. MD filed Sept. 26, 2018). National Federation of the Blind, “National Federation of the Blind Sues US AbilityOne Commission” (September 26, 2018), <https://nfb.org/national-federation-blind-sues-us-abilityone-commission>.
- ²⁷ Committee for Purchase from People Who are Blind or Severely Disabled, “Fiscal Year 2018 Budget Justification,” Appendix III, <https://www.abilityone.gov/commission/documents/FY18%20US%20AbilityOne%20Commission%20CPPBSD%20Budget%20Justification%20Final.pdf>.
- ²⁸ Office of Inspector General, U.S. AbilityOne Commission, *Semiannual Report to Congress: April 1, 2018 - September 30, 2018*.
- ²⁹ *Ibid.*
- ³⁰ 41 C.F.R. § 51-3.5.
- ³¹ 41 C.F.R. § 51-2.2(f). U.S. AbilityOne Commission, *Fiscal Year 2016 Performance and Accountability Report*, 18, <https://www.abilityone.gov/commission/documents/FY%202016%20CPPBSD%20AbilityOne%20Commission%20PAR%20Final.pdf>. U.S. AbilityOne Commission, *FY 2017 Performance and Accountability Report*, 22.
- ³² Committee for Purchase, “FY 2018 Budget Justification,” Appendix III.
- ³³ U.S. AbilityOne Commission, *FY 2017 Performance and Accountability Report*, 22.
- ³⁴ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).
- ³⁵ 29 U.S.C. § 794.
- ³⁶ Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).
- ³⁷ Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004).
- ³⁸ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327 (1990). The original Act is available at <https://www.eeoc.gov/eeoc/history/35th/thelaw/ada.html>.

³⁹ Ibid.

⁴⁰ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁴¹ U.S. Senator Patty Murray, Ranking Member, Health Education Labor and Pensions Committee, *Disability Employment: Outdated Laws Leave People with Disabilities Behind in Today's Economy: Minority Staff Report* (October 2018), <https://www.murray.senate.gov/public/cache/files/84084732-e011-470a-b246-1cdab87755c3/staff-report-on-employment-for-people-with-disabilities-10-29-2018-pm.pdf>.

⁴² ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); 154 Cong. Rec. H8,286–8,398 (2008), Cong. Rec., S8,342–8,356 (2008).

⁴³ Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014).

⁴⁴ Senator Patty Murray, *Disability Employment: Minority Staff Report*, 2.

⁴⁵ Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, § 458, 128 Stat. 1425, 1676 (2014), 29 U.S.C. § 794g. For more information on the payment of subminimum wages to people with disabilities under section 14(c) of the Fair Labor Standards Act, 29 U.S.C. § 214, see National Council on Disability, *From the New Deal to the Real Deal: Joining Industries of the Future* (Washington, D.C: National Council on Disability, 2018), https://ncd.gov/sites/default/files/New%20Deal%20to%20Real%20Deal%20FINAL_508.PDF

⁴⁶ U.S. AbilityOne Commission, *FY 2017 Performance and Accountability Report*, 3.

⁴⁷ Ibid., 13.

⁴⁸ U.S. AbilityOne Commission, “Procurement List Products,” accessed November 29, 2018, https://www.abilityone.gov/procurement_list/product_list.html. U.S. AbilityOne Commission, “AbilityOne Catalog: Introduction,” accessed November 29, 2018, https://www.abilityone.com/OA_HTML/xxnib_ibeCCtpSctDspRte.jsp?section=11702&site=10040:22372:US.

⁴⁹ Ibid.

⁵⁰ U.S. AbilityOne Commission, “Aircraft, Vehicular and Electrical Equipment and Supplies,” accessed December 17, 2018, https://www.abilityone.gov/procurement_list/product_aircraft.html.

⁵¹ U.S. AbilityOne Commission, “Procurement List Services,” accessed December 17, 2018, https://www.abilityone.gov/procurement_list/services_list.html.

⁵² Based on figures contained in U.S. AbilityOne Commission annual *Performance and Accountability Reports* for fiscal years 2010 to 2017, with the exception of the fiscal year 2014 report for which only the financial statement is available. The average is based nine reported years (fiscal years 2008 – 2012 and 2014 – 2017). U.S. AbilityOne Commission, “Performance and Accountable Report,” accessed November 29, 2018, <https://www.abilityone.gov/commission/performance.html>.

⁵³ U.S. AbilityOne Commission staff written responses to NCD research questions. U.S. AbilityOne Commission, *FY 2017 Performance and Accountability Report*, 3.

⁵⁴ U.S. AbilityOne Commission staff written responses to NCD research questions.

⁵⁵ 41 U.S.C. § 8501(6)(C).

⁵⁶ 41 U.S.C. § 8501(3). 41 C.F.R. § 51-1.3.

⁵⁷ Committee for Purchase from People who are Blind or Severely Disabled, “Committee Staff Nonprofit Agency Review Manual” (June 29, 2007), §§ 2.1.4, 2.5.1, https://www.abilityone.gov/laws_regulations_and_policy/documents/ComplianceManual.pdf.

⁵⁸ Ibid., § 2.6.1.

⁵⁹ 41 U.S.C. § 8501(1).

⁶⁰ 41 U.S.C. § 8501(5), (8).

⁶¹ Committee for Purchase, “Agency Review Manual,” § 3.4.1.

⁶² Ibid., § 3.4.1.

⁶³ Ibid., §§ 3.2-3.7.

⁶⁴ AbilityOne Program, “Instructions for Individual Eligibility Evaluation Form,” accessed December 6, 2018, https://www.abilityone.gov/laws_regulations_and_policy/individual_eligibility_evaluation.html.

⁶⁵ Committee for Purchase, “Agency Review Manual,” § 3.6.1.

⁶⁶ Ibid., § 3.6.2.

⁶⁷ AbilityOne Program, “Instructions for Individual Eligibility Evaluation Form.”

⁶⁸ Committee for Purchase, “Agency Review Manual,” § 3.13.4.

⁶⁹ Ibid., § 3.9.2.

⁷⁰ Ibid., § 3.13.6.

⁷¹ The ADA requires an assessment of four factors, including the size and financial resources of the employer, to determine if an accommodation would cause an undue hardship. 42 U.S.C. § 12111(10)(B). The U.S. Equal Employment Opportunity Commission (E.E.O.C.) further states that while “[a]n employer does not have to provide a reasonable accommodation that would cause an ‘undue hardship’ to the employer, [g]eneralized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.” U.S. Equal Employment Opportunity Commission. “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act” (October 17, 2002), <https://www.eeoc.gov/policy/docs/accommodation.html>.

⁷² Committee for Purchase, “Agency Review Manual,” § 3.9.3. AbilityOne Program, “Instructions for Individual Eligibility Evaluation Form,” Section III “For people who are severely disabled.”

⁷³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327 (1990).

⁷⁴ National Council on Disability, *From the New Deal to the Real Deal*, 125.

⁷⁵ Rehabilitation Services Administration, Regulations Implementing The Rehabilitation Act of 1973, as Amended by the Workforce Innovation and Opportunity Act, Regional Training Series slides, 11, accessed January 3, 2019, <https://www2.ed.gov/about/offices/list/osers/rso/wioa/employment-outcomes-competitive-integrated-employment.pdf>

⁷⁶ Committee for Purchase, “Fiscal Year 2019 Budget Justification,” 5.

⁷⁷ U.S. AbilityOne Commission staff written responses to NCD research questions.

⁷⁸ National Council on Disability, *From the New Deal to the Real Deal*, 125.

⁷⁹ 41 C.F.R. § 51-2.2.

⁸⁰ Committee for Purchase from People who are Blind or Severely Disabled, *Fiscal Year 2010 Performance and Accountability Report*, 10.

<https://www.abilityone.gov/commission/documents/CFPBD%20FY10%20PAR%20final.pdf>. Committee for Purchase, “FY 2017 Budget Justification,” 26. Committee for Purchase, “FY 2018 Budget Justification,” 20. Committee for Purchase, “FY 2019 Budget Justification,” 25.

⁸¹ Committee for Purchase, “Fiscal Year 2019 Budget Justification,” 25.

⁸² The Commission reported 46,161 AbilityOne employees in FY 2016. U.S. AbilityOne Commission, *FY 2017 Performance and Accountability Report*, 19.

⁸³ U.S. AbilityOne Commission staff written responses to NCD research questions.

⁸⁴ *Ibid.*

⁸⁵ Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *Final Report* (Sept. 15, 2016),

https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, 57.

⁸⁸ *Ibid.*

⁸⁹ National Council on Disability, *From the New Deal to the Real Deal*, 124.

⁹⁰ U.S. Department of Education, “Office of Special Education and Rehabilitative Services - Rehabilitation Act of 1973,” accessed December 21, 2018,

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1820-AB79>.

The post states that “The Secretary plans to issue a notice of proposed rulemaking to amend regulatory definitions in 34 CFR part 361 implementing programs under the Rehabilitation Act of 1973, as amended, made by the Workforce Innovation and Opportunity Act.” Committee for Purchase, “FY 2019 Budget Justification,” 5.

⁹¹ National Council on Disability, *From the New Deal to the Real Deal*, 126.

⁹² Office of Special Education and Rehabilitative Services, “RSA: Integrated Location Criteria of the Definition of ‘Competitive Integrated Employment’ FAQs,” January 18, 2017, <https://www2.ed.gov/about/offices/list/osers/rsa/wioa/competitive-integrated-employment-faq.html>.

⁹³ *Ibid.*

⁹⁴ Senator Patty Murray, *Disability Employment: Minority Staff Report*, 21.

⁹⁵ *Ibid.*, 18.

⁹⁶ *Ibid.*

⁹⁷ National Council on Disability, *From the New Deal to the Real Deal*, 126.

⁹⁸ Committee for Purchase, “FY 2019 Budget Justification,” 25.

⁹⁹ Committee for Purchase, “FY 2017 Budget Justification,” 26. Committee for Purchase, “FY 2018 Budget Justification,” 20.

¹⁰⁰ U.S. AbilityOne Commission staff written responses to NCD research questions.

¹⁰¹ U.S. Department of Labor, Wage and Hour Division, “Fact Sheet: Raising the Minimum Wage for Workers with Disabilities under Executive Order 13658” (December 2014), <https://www.dol.gov/whd/flsa/eo13658/EO-factsheet.pdf>. For more information on the payment of subminimum wages, see the National Council on Disability, *From the New Deal to the Real Deal*, 20-65.

¹⁰² U.S. AbilityOne Commission staff written responses to NCD research questions.

¹⁰³ Ibid.

¹⁰⁴ Committee for Purchase, “FY 2018 Budget Justification,” Appendix III. U.S. Department of Labor, Wage and Hour Division, Section 14(c) certificate lists for October 2017 in the possession of NCD researchers.

¹⁰⁵ National Council on Disability, *From the New Deal to the Real Deal*, 54.

¹⁰⁶ Ibid., 54-54.

¹⁰⁷ Committee for Purchase, “FY 2019 Budget Justification,” 27.

¹⁰⁸ Ibid., 9.

¹⁰⁹ The U.S. AbilityOne Inspector General notes that a livable wage could result in reduced public benefits to AbilityOne employees. Office of Inspector General, U.S. AbilityOne Commission, *Semiannual Report to Congress April 1, 2018 to September 30, 2018*, 15.

¹¹⁰ U.S. Government Accountability Office, *Enhanced Oversight of the AbilityOne Program Needed*, 33.

¹¹¹ Ibid.

¹¹² Anderson Cooper, “Disabled Work Program Investigated for Fraud,” CNN video 360. Aired on July 28, 2015, on CNN, <https://www.cnn.com/videos/us/2015/07/27/disabled-work-program-corruption-griffin-dnt-ac.cnn>.

¹¹³ Ibid.

¹¹⁴ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title IV, §§ 401-402, 129 Stat. 2242, 2639 (2015).

¹¹⁵ Ibid., § 402, 129 Stat. 2242, 2639. Section 402 references section 4 of the CAA, 129 Stat 2242, 2244, which in turn references the Chairman of the Committee on Appropriations of the House December 17 statement. The portion of the statement relevant to the Committee for Purchase which specifies the reports to be submitted may be found at 161 Cong. Rec. H10161-01, H10292 (December 17, 2015).

¹¹⁶ H.R. Rep. No. 115-244, at 135.

¹¹⁷ U.S. AbilityOne Commission staff written responses to NCD research questions.

¹¹⁸ National Defense Authorization Act for FY 2017, Pub. L. No. 114-328, § 898, 130 Stat. 2000 (2016), <https://www.congress.gov/114/plaws/publ328/PLAW-114publ328.pdf>.

¹¹⁹ U.S. Ability One Commission, *Fiscal Year 2016 Performance and Accountability Report*, 2, <https://www.abilityone.gov/commission/documents/FY%202016%20CPPBSD%20AbilityOne%20Commission%20PAR%20Final.pdf>.

¹²⁰ U.S. AbilityOne Commission, “U.S. AbilityOne Commission Signs Cooperative Agreement with SourceAmerica” (June 15, 2016), https://www.abilityone.gov/media_room/documents/AbilityOne_Cmsn_SourceAmerica_CA_Signed_FINAL_20160615.pdf. Cooperative Agreement Between the Committee for Purchase from People who are Blind or Severely Disabled and SourceAmerica, Modification 06, January 18, 2018, https://www.abilityone.gov/laws_regulations_and_policy/documents/A01_SA_CA_Incorporating_Mod06_Final_1.18.18.pdf. Cooperative Agreement Between the Committee for Purchase from People who are Blind or Severely Disabled and the National Industries for the Blind, Modification 06, July 18, 2018, https://www.abilityone.gov/laws_regulations_and_policy/documents/A02%20NIB%20CA%20Incorporating%20Mod06%2020180617%20Final.pdf. The AbilityOne Commission

reached an agreement with the American Foundation for the Blind in July 2018, but a comprehensive analysis of that agreement was not conducted since AFB has not yet begun general operations as a CNA.

¹²¹ Cooperative Agreement Between the Committee for Purchase and SourceAmerica, January 18, 2018, 6 and 11. The cooperative agreement with NIB contains the same relevant provisions discussed in this report.

¹²² Ibid.

¹²³ Ibid., 14-15.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid., 12-13.

¹²⁷ Ibid., 13.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid., 30.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Committee for Purchase, "FY 2019 Budget Justification," 22-23.

¹³⁴ Ibid. Committee for Purchase, "FY 2018 Budget Justification," 18. Committee for Purchase from People Who are Blind or Severely Disabled, "Fiscal Year 2016 Budget Justification," 8, <https://www.abilityone.gov/commission/documents/FY-16%20CPPBSD%20Congressional%20Budget%20Justification%20Final%20Feb%202015.pdf>. Committee for Purchase from People Who are Blind or Severely Disabled, "Fiscal Year 2015 Budget Justification," 10, <https://www.abilityone.gov/commission/documents/FY-15%20CPPBSD%20Budget%20Justification%20Narrative-a.pdf>.

¹³⁵ Cooperative Agreement between the Committee for Purchase and SourceAmerica, January 18, 2018, 36-41.

¹³⁶ Ibid., 8.

¹³⁷ Ibid., 36-37.

¹³⁸ Ibid., 37.

¹³⁹ U.S. General Accountability Office, *Enhanced Oversight of the AbilityOne Program Needed*, 10-11.

¹⁴⁰ Ibid.

¹⁴¹ Ibid., 8-9.

¹⁴² Ibid.

¹⁴³ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113.

¹⁴⁴ Office of Inspector General, U.S. AbilityOne Commission, *Semiannual Report to Congress: October 1, 2017 – March 31, 2018*, 3, [https://www.abilityone.gov/commission/documents/CPPBSD%20OIG_SAR%20\(October%201%202017-%20March%2031%202018\)_FINAL_.pdf](https://www.abilityone.gov/commission/documents/CPPBSD%20OIG_SAR%20(October%201%202017-%20March%2031%202018)_FINAL_.pdf).

¹⁴⁵ Office of Inspector General, U.S. AbilityOne Commission, *Semiannual Report to Congress April 1, 2018 – September 30, 2018*, 7.

¹⁴⁶ Ibid., 8.

¹⁴⁷ Ibid., 13.

¹⁴⁸ Office of Inspector General, U.S. AbilityOne Commission, “Top Management and Performance Challenges Report” (November 15, 2018).

¹⁴⁹ Office of Inspector General, U.S. AbilityOne Commission, *Semiannual Report to Congress April 1, 2018 – September 30, 2018*, 21.

¹⁵⁰ *Ibid.*

¹⁵¹ Cooperative Agreement between the Committee for Purchase and SourceAmerica, January 18, 2018, 10.

¹⁵² 41 U.S.C. § 8501.

¹⁵³ Members on the Panel are representatives from the Office of Defense, the AbilityOne Commission, and of Office of the Ability One OIG, Department of Justice, Department of Veterans Affairs, and the Defense Acquisition University. Other representatives were as needed. National Defense Authorization Act for FY 2017, Pub. L. No. 114-328, § 898.

¹⁵⁴ Panel on Department of Defense and AbilityOne Contracting, Oversight, Accountability, and Integrity, *2018 First Annual Report to Congress* (Washington, D.C.: Office of the Under Secretary of Defense for Acquisition and Sustainment, July 18, 2018),

[https://www.acq.osd.mil/dpap/cpic/cp/docs/First Annual RTC on the Panel on DoD and AbilityOne Signed 18 July 18.pdf](https://www.acq.osd.mil/dpap/cpic/cp/docs/First_Anual_RTC_on_the_Panel_on_DoD_and_AbilityOne_Signed_18_July_18.pdf).

¹⁵⁵ *Ibid.*, 16-17.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, 19.

¹⁵⁸ *Ibid.*, 19.

¹⁵⁹ *Ibid.*, 20.