

**APPENDIX B: AGENCY'S RESPONSE TO THE REPORT**


U.S. Department of Labor

Employment and Training Administration  
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Washington, D.C. 20210



March 5, 2021

MEMORANDUM FOR: CAROLYN R. HANTZ  
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FROM: SUZAN G. LEVINE   
Principal Deputy Assistant Secretary

SUBJECT: Response to Office of Inspector General Draft Audit Report  
Number 05-21-001-03-370, *Job Corps Should Improve its Pre-Admission Evaluation Process*

Thank you for the opportunity to respond to the Office of Inspector General's (OIG) draft audit report, *Job Corps Should Improve its Pre-Admission Evaluation Process*. The Employment and Training Administration (ETA) is committed to continuous improvement of the Job Corps program and will explore opportunities to improve its pre-admission assessment process in a manner consistent with applicable federal nondiscrimination and equal opportunity statutes and regulations.

As discussed in the executive summary section (see *Briefly...*) of the draft audit report, the OIG conducted its audit with the objective of determining "Did Job Corps sufficiently evaluate the suitability of incoming students?" The OIG concludes that "Job Corps did not sufficiently evaluate the suitability of incoming students," because "Job Corps' admissions screening process does not allow Admissions Counselors to sufficiently inquire about applicants' history to help them determine if applicants are ready for the Job Corps program." The OIG elaborates further on page 5 of the draft audit report, saying more specifically that the process does not provide Admissions Counselors with "sufficient understanding of applicants' mental health and substance abuse issues, which could lead to related behavioral issues." The OIG's conclusion relies on Center Directors' observations noting an increase in the number of student separations due to mental health and substance abuse issues and the number of violent incidents that Center Directors associated with mental health issues.

ETA has communicated to the OIG that there are significant legal concerns with linking a Job Corps applicant's "suitability" for enrollment with "mental health issues." Job Corps is generally prohibited from denying eligible applicants enrollment into the program based on any real<sup>1</sup> or perceived mental disabilities and is prohibited from requiring applicants to disclose such disabilities as part of the admissions process. While ETA appreciates the OIG's recommendations to the extent that they can lead to improvements in Job Corps' pre-admission assessment process, it will only do so within the parameters of applicable law.

<sup>1</sup> Except in narrow, tightly prescribed circumstances. See 29 C.F.R. §§ 38.4(p), 38.4(ww), 38.4(yy), 38.14.

In preparing this response, ETA shared the OIG’s January 28, 2021 draft audit report with the Civil Rights Center (CRC), the U.S. Department of Labor (DOL) agency responsible for enforcing the nondiscrimination laws that apply to Job Corps. CRC also reviewed an earlier version of this draft audit report, which the OIG issued to ETA for response on September 10, 2020, and communicated to the OIG the significant legal concerns mentioned in the preceding paragraph at that time as well. CRC agrees with ETA’s concern that the current January 28, 2021 version of the draft audit report continues to base its conclusions on the assumptions that applicants with “mental health issues”—or what could be considered “psychiatric disabilities” within the meaning of applicable nondiscrimination law—will have behavioral problems and, conversely, that applicants and students with behavioral problems must necessarily have “mental health issues”/psychiatric disabilities. CRC emphasizes that these assumptions are directly contrary to the provisions of the disability nondiscrimination laws that DOL itself enforces. Although it is entirely lawful—indeed, it is required by the regulations governing the Job Corps program—for Job Corps to inquire into whether a potential student is likely to engage in disruptive behavior, such inquiries cannot lawfully be associated with pre-enrollment inquiries about issues related to “mental health”/psychiatric disabilities. CRC also emphasizes that applicable law prohibits Job Corps from asking any questions about disability before an applicant is extended a conditional offer of enrollment. CRC strongly believes that this OIG draft audit report will lead to confusion and misinformation in the Job Corps program, because it directly contravenes nondiscrimination laws applicable to the Job Corps program.

ETA also notes that on January 20, 2021, President Biden signed an Executive Order (EO) on *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*. The EO states that “the Federal Government should pursue a comprehensive approach to advancing equity for all, including people... who have been historically underserved [including individuals with disabilities]... and agencies must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.” Job Corps continues to be committed to equitable treatment of individuals with disabilities and ensuring that its policies and practices are consistent with applicable law and the EO.

The remainder of this memorandum summarizes the actions that the Office of Job Corps (Job Corps) plans to take to implement the recommended actions, as applicable.

**ETA Responses to the OIG’s Recommendations**

**Recommendation 1: Make a final determination on the legality and permissibility of pre-enrollment behavioral assessment tools, such as drug screens, trial periods, or personality or aptitude tests that would be appropriate for use within Job Corps.**

**ETA Response:** ETA will explore permissible pre-enrollment assessment tools to improve the Job Corps admissions process. As explained below, ETA has made a final legal determination on several of the tools the OIG suggested and will continue to explore the legality and permissibility of others. Where appropriate, ETA will make program and policy changes to implement tools and methods to enhance the assessment process.

*Academic Aptitude Assessments* – As Job Corps explained in previous communications with the OIG, Job Corps may conduct pre-enrollment academic readiness assessments, as long as the results are considered in light of all of the eligibility criteria. Basic skills deficiency is an eligibility criterion for Job Corps. 29 U.S.C. § 3194(a)(3)(A). The term “basic skills deficient” is generally defined as an individual with English reading, writing, or computing skills at or below the eighth-grade level on a generally accepted standardized test or as an individual who is unable to compute or solve problems or read, write, or speak English at a level necessary to function on the job, in the individual’s family, or in society. 29 U.S.C. §3102(5). The Workforce Innovation and Opportunity Act (WIOA) requires Job Corps to establish procedures, as part of the admissions process, to determine whether an applicant’s “educational and career and technical education and training needs . . . can best be met through the Job Corps program or an alternative program in the community in which the applicant resides.” 29 U.S.C. § 3195(a)(2)(C)(i).

Currently, as part of its program design, Job Corps centers typically enter into contracts or memoranda of understanding with high school diploma or equivalency programs to help students who are basic-skills deficient improve their math and/or reading levels while enrolled in the Job Corps program. Job Corps is also assessing, subject to funding availability, implementing a pre-enrollment academic assessment for reading and math, such as the Standardized Test for the Assessment of Reading (STAR) assessment, to identify levels of proficiency in each of these areas. STAR is a reliable assessment that is used by many school systems throughout the country. Proficiency levels can be assessed and compared with skill levels needed to participate successfully in Job Corps training to determine if an applicant has academic remediation needs that may be better met through other programs or partner resources prior to enrollment in Job Corps.

*Trial Periods* – Job Corps is exploring the legality and permissibility of establishing an on-site center pre-enrollment trial period to determine whether the program is a good fit for the applicant. The appropriate center staff may be able to objectively evaluate the applicant’s behavior as a supplemental assessment of the applicant’s ability to meet criteria 7 and 8 of Job Corps’ Policy and Requirements Handbook (PRH) and 20 CFR 686.410 (b) and (c) (i.e., *whether the applicant can participate successfully in group situations and activities and whether the applicant can comply with the rules*). In addition to determining legality and permissibility, Job Corps must also determine how to balance a pre-enrollment trial period with other pre-enrollment processes and staff resources. Additionally, considerations must be made to ensure objective behavioral assessments are conducted and that discriminatory actions are not taken against applicants, particularly against individuals in a protected class (e.g., students with disabilities).

As explained in prior communications to the OIG, Job Corps is prohibited from denying otherwise eligible applicants admission based on their real or perceived disabilities under Section 188 of WIOA and its implementing regulations. Such disabilities include, for example, “any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 CFR § 38.4(q); *see* 29 CFR § 38.12(a)(1). Furthermore, Job Corps may not “impose or apply eligibility criteria that screen out or tend to screen out individuals with disabilities or any class of individuals with disabilities from fully and equally enjoying any aid, benefit, service, training, program, or activity, unless

such criteria can be shown to be necessary for the provision of any aid, benefit, service, training, program, or activity being offered.” 29 CFR § 38.12(i). Under the regulations implementing Section 504 of the Rehabilitation Act of 1973, Job Corps also may not require applicants to disclose their disabilities. See 29 CFR § 32.15. Ultimately, Job Corps must have objective evidence that the applicant does not meet eligibility criteria or would create a “significant risk of substantial harm” to others, even with a reasonable accommodation. 29 CFR § 38.4(p); see 29 CFR §§ 38.4(ww), 38.4(yy), 38.14.

**Personality Tests** – Job Corps has determined that personality assessments create legal risks of violating anti-discrimination laws and potentially introducing unreliable indicators for assessing eligibility. Therefore, Job Corps will not be assessing their use as a pre-enrollment screening tool.

**Pre-Enrollment Drug Screening** – Pre-enrollment drug testing of Job Corps applicants presents significant legal risks by infringing upon applicants’ constitutional rights under the Fourth Amendment’s protection against unreasonable searches. Urinalysis drug testing is a search under the Fourth Amendment. *Skinner v. Railway Labor Execs. Ass’n*, 489 U.S. 602, 617 (1989). Warrantless searches are generally impermissible except under limited circumstances, such as for circumstances in which “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *National Federation of Federal Employees-LAM v. Vilsack*, 681 F.3d 483, 489 (D.C. Cir. 2012) (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)). Where the government invokes the special needs doctrine and expresses special government needs, beyond the normal need for law enforcement, “courts must ‘balance the individual’s privacy expectations against the government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.’” *Vilsack*, 681 F.3d at 489 (quoting *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 (1989)). The Supreme Court has permitted suspicionless drug testing only in limited circumstances—where the government’s need addresses a public safety concern (such as applicants for employment in sensitive positions) or where the government is acting in its role as guardian of public school children engaged in athletics or extracurricular activities. ETA has concluded that pre-enrollment drug testing would likely be unconstitutional because the government (Job Corps) would not be able to articulate a specialized need for pre-enrollment drug testing of applicants to the program.

Job Corps has a compelling need to ensure a safe and productive living and learning environment while also ensuring that the program complies with statutory requirements. To fulfill that government interest and with the exception of the flexibility allowed under the Consolidated Appropriations Act, 2021, due to the coronavirus pandemic, Job Corps conducts drug testing for students participating on-site *after* enrollment and has a zero tolerance policy, as required by statute and set forth in the PRH. Pub. L. 116-260, Title VI, Sec. 601(a); 29 U.S.C. §§ 3195(a)(2)(A), 3203(b)(2). The statutory requirement is to test Job Corps “enrollees” and receive drug test results “within 45 days after the enrollees enroll in the Job Corps.” 29 U.S.C. § 3192(3); 29 C.F.R. § 686.480. New enrollees must be tested within 48 hours of arrival on center. PRH 2.3, R5(e)(1). Enrollees with a positive drug test “must receive intervention services and a follow-up drug test. If the entry test is positive, then the student must be retested between the 37th and 40th day after arrival on center. The results of the follow-up drug test must be received on center

prior to the end of the intervention period. To remain in the program, students who test positive on entry must have a negative drug test result at the end of the intervention period.” PRH, 2.3, R5(e)(3). Students who test positive a second time are immediately dismissed from the program. In addition, under the statutory zero tolerance policy and the Job Corps discipline policy, any use of drugs (as evidenced by a positive drug test conducted on the basis of reasonable suspicion) or possession/distribution of drugs on center or under center responsibility is a level one infraction and results in automatic discharge from the program. PRH, Exhibit 2-1. In light of Job Corps’ drug testing and zero tolerance policies, an applicant’s privacy interest would almost certainly outweigh any remaining interest the government might have in conducting pre-enrollment drug testing. Therefore, ETA will not be exploring this option further.

**Recommendation 2:** Perform cost/benefit analyses to determine which, if any, of these pre-enrollment behavioral suitability assessment tools would be beneficial to Job Corps.

**ETA Response:** ETA agrees with this recommendation to the extent that such assessment tools are legally permissible. Before deciding to adopt any pre-enrollment assessment tools, Job Corps will perform a cost-benefit analysis to assess the tools’ costs, usefulness, and likely impact on the program. Alternative tools and approaches will be explored if Job Corps determines that the return on investment cannot be justified.

**Recommendation 3:** Incorporate the results of recommendations 1 and 2, as appropriate, in revising guidance to improve the assessment process.

**ETA Response:** ETA agrees with this recommendation. Any pre-enrollment assessment tools and procedures that Job Corps chooses to adopt will be incorporated into the PRH, Instruction Notices, and/or Standard Operating Procedures, as appropriate.

**Recommendation 4:** Evaluate the funding needs of Center Mental Health Consultant and Trainee Employee Assistance Program Specialists Center functions to determine if adjustments are needed to adequately support students with mental health or substance abuse issues.

**ETA Response:** ETA agrees with this recommendation. ETA values the importance of increased Center Mental Health Consultant and Trainee Employment Assistance Program Specialists and the key role they play in identifying and providing support to at-risk students. ETA will evaluate the funding needs of these center functions to determine if budgetary adjustments are needed and then work to secure and provide this funding, to the extent possible.