State Vocational Rehabilitation Services program; State Supported Employment Services program; Limitations on Use of Subminimum Wage

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4000-01-U

DEPARTMENT OF EDUCATION

34 CFR Parts 361, 363, and 397

RIN 1820-AB70

[ED-2015-OSERS-0001]

State Vocational Rehabilitation Services program; State Supported Employment Services program; Limitations on Use of Subminimum Wage

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the State Vocational Rehabilitation Services program and the State Supported Employment Services program to implement changes to the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act (WIOA) signed into law on July 22, 2014. The Secretary also updates, clarifies, and improves the prior regulations.

Finally, the Secretary issues new regulations regarding limitations on the use of subminimum wages that are added by WIOA and under the purview of the Department.

DATES: These regulations are effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Executive Summary:

Purpose of This Regulatory Action: Individuals with disabilities represent a vital and integral part of our society, and we are committed to ensuring that individuals with disabilities have opportunities to compete for and enjoy high quality employment in the 21st century global economy. Some individuals with disabilities face particular barriers to employment in integrated settings that pays competitive wages, provides opportunities for advancement, and leads to economic self-sufficiency. Ensuring workers with disabilities have the supports and the opportunities to acquire the skills that they need to

pursue in-demand jobs and careers is critical to growing our economy, assuring that everyone who works hard is rewarded, and building a strong middle class. To help achieve this priority for individuals with disabilities, the Rehabilitation Act of 1973 (Act), as amended by the Workforce Innovation and Opportunity Act (WIOA) (P.L. 113-128), signed into law on July 22, 2014, seeks to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion in and integration into society.

To implement the changes to the Act made by WIOA, the Secretary amends the regulations governing the State Vocational Rehabilitation Services program (VR program) (34 CFR part 361) and State Supported Employment Services program (Supported Employment program) (34 CFR part 363), administered by the Rehabilitation Services Administration (RSA), within the Office of Special Education and Rehabilitative Services. In addition, the Secretary updates and clarifies prior regulations to improve the operation of the program. Finally, the Secretary promulgates regulations in new 34 CFR part 397 that implement the limitations on the payment of subminimum

wages to individuals with disabilities in section 511 of the Act that fall under the purview of the Secretary.

Summary of the Major Provisions of This Regulatory Action: We summarize here those regulatory changes needed to implement the amendments to the Act made by WIOA for each part in the order it appears in the Code of Federal Regulations (CFR).

State Vocational Rehabilitation Services Program

WIOA makes significant changes to title I of the Act that affect the VR program. First, WIOA strengthens the alignment of the VR program with other core components of the workforce development system by imposing requirements governing unified strategic planning, common performance accountability measures, and the one-stop delivery system. This alignment brings together entities responsible for administering separate workforce and employment, educational, and other human resource programs to collaborate in the creation of a seamless customer-focused service delivery network that integrates service delivery across programs, enhances access to the programs' services, and improves long-term employment outcomes for individuals receiving assistance. In so doing, WIOA places heightened emphasis on coordination and collaboration at the Federal,

State, and local levels to ensure a streamlined and coordinated service delivery system for job-seekers, including those with disabilities, and employers. Therefore, the Departments of Education and Labor are issuing joint final regulations to implement jointly administered activities under title I of WIOA (e.g., those related to Unified or Combined State Plans, performance accountability, and the one-stop delivery system), applicable to the workforce development system's core programs (Adult, Dislocated Worker, and Youth programs; Adult Education and Family Literacy Act programs; Wagner-Peyser Employment Services program; and the VR program). The joint final regulations, along with the Analysis of Comments and Changes to those regulations, are set forth in a separate regulatory action published elsewhere in this issue of the Federal Register.

To implement WIOA's corresponding major changes to title I of the Act, we:

- Amend §361.10 to require that all assurances and descriptive information previously submitted through the stand-alone VR State Plan and supported employment supplement be submitted through the VR services portion of

the Unified or Combined State Plan under section 102 or section 103, respectively, of WIOA.

- Clarify in §361.29 that States report to the Secretary updates to the statewide needs assessment and goals and priorities, estimates of the numbers of individuals with disabilities served through the VR program and the costs of serving them, and reports of progress on goals and priorities at such time and in such manner determined by the Secretary to align the reporting of this information with the submission of the Unified or Combined State Plans and their modifications.

- Clarify in §361.20 when designated State agencies must conduct public hearings to obtain comment on substantive changes to policies and procedures governing the VR program.

- Remove §361.80 through §361.89 and replace with §361.40 to cross-reference the joint regulations for the common performance accountability measures for the core programs of the workforce development system.

- Provide a cross-reference in §361.23, regarding the roles and responsibilities of the VR program in the one-stop delivery system to the joint regulations implementing requirements for the one-stop delivery system.

Second, the Act, as amended by WIOA, emphasizes the achievement of competitive integrated employment. The foundation of the VR program is the principle that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality, competitive integrated employment when provided the necessary services and supports. To increase the employment of individuals with disabilities in the competitive integrated labor market, the workforce system must provide individuals with disabilities opportunities to participate in job-driven training and to pursue high quality employment outcomes. The amendments to the Act--from the stated purpose of the Act, to the expansion of services designed to maximize the potential of individuals with disabilities, including those with the most significant disabilities, to achieve competitive integrated employment, and, finally, to the inclusion of limitations on the payment of subminimum wages to individuals with disabilities--reinforce the congressional intent that individuals with disabilities, with appropriate supports and services, are able to achieve the same kinds of competitive integrated employment as non-disabled

individuals. Consequently, we make extensive changes to part 361, including:

- The inclusion of a new definition of “competitive integrated employment” in §361.5(c)(9) that combines, clarifies, and enhances the two separate definitions of “competitive employment” and “integrated setting” for the purpose of employment under the VR program in prior §361.5(b)(11) and (b)(33)(ii).

- The incorporation of the principle that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality competitive integrated employment, when provided the necessary services and support, throughout part 361, from the statement of program purpose in §361.1 to the requirement in §361.46(a) that the individualized plan for employment include a specific employment goal consistent with the general goal of competitive integrated employment.

- The revision of the definition of “employment outcome” in §361.5(c)(15) that specifically identifies customized employment as an employment outcome under the VR program, and requires that all employment outcomes achieved through the VR program be in competitive integrated employment or supported employment, thereby eliminating

uncompensated outcomes, such as homemakers and unpaid family workers, from the scope of the definition for purposes of the VR program.

To assist designated State units (DSUs) to implement the change in the definition of “employment outcome” and to ensure that individuals with disabilities did not experience a disruption in services, the Department proposed in the Notice of Proposed Rulemaking (NPRM) published on April 16, 2015 (80 FR 21059), a transition period of six months following the effective date of the final regulations, during which period DSUs would complete the provision of vocational rehabilitation services to, and close the service records of, individuals pursuing uncompensated outcomes, such as homemakers and unpaid family workers, in accordance with individualized plans for employment that were approved prior to the effective date of these final regulations. In consideration of the comments received, the Secretary has extended the transition period in these final regulations. DSUs may continue to provide services to individuals with uncompensated employment goals on their individualized plans for employment, approved prior to the effective date of these final regulations, until June 30, 2017, unless a

longer period of time is required based on the needs of the individual with the disability as determined by the vocational rehabilitation counselor and the individual with a disability, as documented in the individual's service record.

We also amend numerous other provisions throughout part 361 to address the expansion of available services, requirements related to the development of the individualized plan for employment, and order of selection for services, all of which are intended to maximize the potential for individuals with disabilities to prepare for, obtain, retain, and advance in the same high quality jobs and high-demand careers as persons without disabilities.

Third, WIOA emphasizes the provision of services to students and youth with disabilities to ensure that they have meaningful opportunities to receive the services, including training and other supports, they need to achieve employment outcomes in competitive integrated employment. The Act, as amended by WIOA, expands not only the population of students with disabilities who may receive vocational rehabilitation services but also the breadth of services that the VR agencies may provide to youth and students with disabilities who are transitioning from

school to postsecondary education and employment. We implement the emphasis on serving students and youth with disabilities contained in the amendments to the Act made by WIOA in many regulatory changes to part 361 by:

- Including in §361.5(c)(51) and (c)(58), respectively, new definitions of "student with a disability" and "youth with a disability." After further analysis of the comments received, the Department has determined that the definition of "student with a disability" applies to all students enrolled in educational programs, including postsecondary education programs, so long as they satisfy the age requirements set forth in final §361.5(c)(51). The definition is also inclusive of secondary students who are homeschooled, as well as students in other non-traditional secondary educational programs. We have incorporated this broader interpretation of the definition in final §361.5(c)(51), which we believe will increase the potential for DSUs to maximize the use of funds reserved for the provision of pre-employment transition services by increasing the number of students who may receive these services.

- Implementing in §361.48(a) the requirements of new sections 110(d) and 113 of the Act requiring States to

reserve at least 15 percent of their Federal allotment to provide and arrange for, in coordination with local educational agencies, the provision of pre-employment transition services to students with disabilities. We have maintained our interpretation of "potentially eligible," for purposes of pre-employment transition services, as meaning all students with disabilities, regardless of whether they have applied for or been determined eligible for the VR program. The Department believes this is the broadest legally supportable interpretation and is consistent with the congressional intent.

- Amending §361.29(a) to require that the comprehensive statewide needs assessment include an assessment of the needs of students and youth with disabilities for vocational rehabilitation services, including the needs of students with disabilities for pre-employment transition services.

- Clarifying in §361.49 the technical assistance DSUs may provide to educational agencies and permitting the provision of transition services for the benefit of groups of students and youth with disabilities.

- Clarifying in §361.22(c) that nothing in this part is to be construed as reducing the responsibility of the

local educational agencies or any other agencies under the Individuals with Disabilities Education Act (IDEA) to provide or pay for transition services that are also considered to be special education or related services under the IDEA necessary for the provision of a free appropriate public education to students with disabilities.

In addition to the preceding changes implementing the three major goals of the Act, as amended by WIOA, we have made changes to the regulations governing the comprehensive system of personnel development and the fiscal administration of the VR program. In order for DSUs to recruit qualified personnel to provide services to individuals with disabilities, including students and youth with disabilities, and carry out their responsibilities under the Act, we have made changes by:

- Amending §361.18 governing the comprehensive system of personnel development by establishing minimum educational and experience requirements and eliminating the requirement to retrain staff not meeting the DSU's personnel standard for qualified staff.
- Revising proposed §361.18(c)(2)(ii) in these final regulations to provide a more complete list of the skills and knowledge needed to meet the needs of employers and

individuals with disabilities in the 21st century evolving labor market.

Finally, we make changes to part 361 to improve the fiscal administration of the VR program by:

- Clarifying in §361.5(b) the applicability to the VR program of the definitions contained in 2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements and making numerous other conforming changes to align this part with 2 CFR part 200 to ensure consistency.

- Adding a new paragraph (a)(3) to §361.65 requiring the State to reserve not less than 15 percent of its allotment for the provision of pre-employment transition services.

- Amending §361.65(b)(2) to clarify that reallotment occurs in the fiscal year the funds were appropriated and the funds may be obligated or expended during the period of performance, provided that matching requirements are met.

- Adding a new paragraph (b)(3) to §361.65 establishing the Secretary’s authority to determine the criteria to be used to reallot funds when the amount requested exceeds the amount of funds available for reallotment.

Since publication of the NPRM, as a result of further Departmental review, we clarify in §361.63 the requirements for the use of program income.

State Supported Employment Services Program

Under the State Supported Employment Services program (Supported Employment program) authorized under title VI of the Act (29 U.S.C. 795g et seq.), the Secretary provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide supported employment services for individuals with the most significant disabilities, including youth with the most significant disabilities, to enable them to achieve supported employment outcomes in competitive integrated employment. Grants made under the Supported Employment program supplement grants issued to States under the VR program (34 CFR part 361).

WIOA makes several significant changes to title VI of the Act, which governs the Supported Employment program. All of the amendments to title VI are consistent with those made throughout the Act, namely to maximize the potential of individuals with disabilities, especially those with the most significant disabilities, to achieve competitive integrated employment and to expand services for youth with

the most significant disabilities. We implement the changes made to the Supported Employment program by WIOA in these final regulations by:

- Requiring in §363.1 that supported employment be in competitive integrated employment or, if not, in an integrated setting in which the individual is working toward competitive integrated employment on a short-term basis. As a result of comments received, we revised the proposed short-term basis period to allow for an extension of the six-month period for up to a total of 12 months based on the needs of the individual, and the individual has demonstrated progress toward competitive earnings based on information contained in the service record.

- Extending in §363.50(b)(1) the time from 18 months to 24 months for the provision of supported employment services.

- Requiring in §363.22 a reservation of 50 percent of a State's allotment under this part for the provision of supported employment services, including extended services, to youth with the most significant disabilities.

- Requiring in §363.23 not less than a 10 percent match for the amount of funds reserved to serve youth with the most significant disabilities.

- Reducing in §363.51 the amount of funds that may be spent on administrative costs.

In response to comments received, we revised §§363.53, 363.54, and 363.55 to clarify the requirements for the transition of individuals with the most significant disabilities from supported employment services to extended services, the achievement of a supported employment outcome, and the closure of service records. We have redesignated proposed §363.55 as final §363.56.

Limitations on the Use of Subminimum Wage

Section 511 of the Act, as added by WIOA, imposes requirements on employers who hold special wage certificates under the Fair Labor Standards Act (FLSA) that must be satisfied before the employers may hire youth with disabilities at subminimum wages or continue to employ individuals with disabilities of any age at the subminimum wage level. Section 511 also establishes the roles and responsibilities of the DSUs for the VR program and State and local educational agencies in assisting individuals with disabilities, including youth with disabilities, to maximize opportunities to achieve competitive integrated employment through services provided by VR and local educational agencies.

The addition of section 511 to the Act is consistent with all other amendments to the Act made by WIOA. Throughout the Act, Congress emphasizes that individuals with disabilities, including those with the most significant disabilities, can achieve competitive integrated employment if provided the necessary supports and services. The limitations imposed by section 511 reinforce this belief by requiring individuals with disabilities, including youth with disabilities, to satisfy certain service-related requirements in order to start or maintain, as applicable, subminimum wage employment. To implement the requirements of section 511 that fall under the purview of the Department, we are issuing new regulations in part 397, including:

- Section 397.1, describing the purpose of this part and §397.2 setting forth the Department's jurisdiction.
- Section 397.10, requiring the DSU, in consultation with the State educational agency, to develop a process that ensures students and youth with disabilities receive documentation demonstrating completion of the various activities required by section 511 of the Act, such as, to name a few, the receipt of transition services under the

IDEA and pre-employment transition services under section 113 of the Act, as appropriate.

- Sections 397.20 and 397.30, establishing the activities that must be completed by youth with disabilities prior to obtaining employment at subminimum wage and the documentation that the DSUs and local educational agencies, as appropriate, must provide to demonstrate completion of those activities, required by section 511(a)(2) of the Act. These include completing pre-employment transition services in final §361.48(a) and the determination of eligibility or ineligibility for vocational rehabilitation services in final §§361.42 and 361.43.

- Section 397.40, establishing the documentation that DSUs must provide to individuals with disabilities of any age who are employed at a subminimum wage upon the completion of certain information and career counseling-related services, as required by section 511(c) of the Act.

- Section 397.31, prohibiting a local educational agency or a State educational agency from entering into a contract with an entity that employs individuals at subminimum wages for the purpose of operating a program

under which a youth with a disability is engaged in work compensated at a subminimum wage.

- Section 397.50 authorizing a DSU to review individual documentation, required by this part, for all individuals with disabilities who are employed at the subminimum wage level, that is maintained by employers who hold special wage certificates under the FLSA.

In response to comments received, we made revisions to the final regulations to specify that intervals for providing career counseling and information and referral services to individuals of any age employed by section 14(c) entities will be calculated based upon the date the individual becomes known to the DSU starting July 22, 2016. Additionally, we included a time frame in the final regulations of 45 days but, in the case of extenuating circumstances, no later than 90 days, for the DSU to provide documentation of completed activities to individuals with disabilities. We also added provisions that establish minimal information that must be contained in the documentation required by part 397, as well as other administrative requirements related to the documentation process. Finally, we determined that section 14(c) entities have a potential financial interest in providing

some of the services and activities required in the final regulations. Consequently, we inserted language prohibiting the use of these entities in providing these required services or activities, stating that a contractor may not be an entity holding a special wage certificate under section 14(c) of the FLSA and that a DSU's contractor, for the purpose of conducting the review of documentation authorized under the final regulations, may not be an entity holding a special wage certificate under section 14(c) of the FLSA.

We fully explain the regulations described in this Executive Summary, along with all other significant changes to parts 361, 363, and 397 following the publication of the NPRM, in the Analysis of Comments and Changes section of this preamble.

Costs and Benefits: The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. Further information related to costs and benefits may be found in the Regulatory Impact Analysis section later in this preamble.

Public Comment: In response to our invitation in the NPRM, more than 1,100 parties submitted comments on the proposed regulations amending the VR program (part 361), amending the Supported Employment program (part 363), and adding part 397 implementing the new provisions in section 511 of the Act, as amended by WIOA. We discuss substantive issues within each part, by section or subject. Generally, we do not address technical and other minor changes.

Analysis of Comments and Changes:

Part 361 State Vocational Rehabilitation Services Program

Following a description of the organizational changes to part 361 in these final regulations, we present the Analysis of Comments and Changes in three sections. In section A, we discuss provisions in part 361 that apply generally to the administration of the VR program and to the provision of vocational rehabilitation services to individuals with disabilities. In section B, we discuss provisions related to the transition of students and youth with disabilities from school to postsecondary education and employment. Finally, in section C, we discuss the fiscal administration of the VR program.

Due to extensive changes, we published the entire part 361 in the NPRM, which included conforming and technical

changes. We did not propose substantive changes to all sections of this part. Thus, we did not intend to make all regulations within this part available for public comment. Consequently, we do not address the comments we received on the following sections: §§361.5(c)(18), 361.5(c)(24), 361.5(c)(27), 361.5(c)(28), 361.5(c)(29), 361.5(c)(30), 361.5(c)(34), 361.5(c)(40), 361.5(c)(43), 361.5(c)(57), 361.47, 361.52, 361.56, and 361.57. Finally, we generally do not discuss differences between the NPRM and these final regulations that are technical or conforming in nature.

Organizational Changes

Although the regulations maintain subparts A, B, and C of part 361, we make organizational changes to other subparts within this part. First, we incorporate new subparts D, E, and F, where we place the three subparts discussed in a separate, but related, regulatory action (the joint regulations issued by the Departments of Education and Labor implementing jointly administered requirements governing all six core programs of the workforce development system, including the VR program, contained in title I of WIOA) published elsewhere in this issue of the Federal Register. Please see that regulatory action for more information about how these subparts are

incorporated into part 361. Second, we remove prior §§361.80 through 361.89, since the VR program-specific standards and indicators are no longer applicable. Finally, we eliminate Appendix A to prior part 361 – Questions and Responses. The Department intends to issue guidance on various areas covered in the final regulations, including some that had been covered by prior Appendix A, in the near future.

A. Provisions of General Applicability

Section A includes the Analysis of Comments and Changes to the regulations in subparts A and B of part 361 that pertain to the administration of the VR program generally and to the provision of vocational rehabilitation services to individuals with disabilities of any age. The analysis is presented by topical headings relevant to sections of the regulations in the order they appear in part 361 as listed. We discuss some of these same regulations in section B of the Analysis of Comments and Changes as they relate specifically to the transition of students and youth with disabilities from school to post-school activities, including final §§361.24, 361.46, 361.48(b), and 361.49.

Topical Headings:

Purpose (§361.1)

Authorized Activities (§361.3)

Applicable Regulations (§361.4)

- Training on 2 CFR Part 200 Requirements
- Third-Party In-Kind Contributions

Applicable Definitions (§361.5)

Administrative Cost (§361.5(c)(2))

- Supervisory Personnel
- Travel Costs
- Depreciation
- Infrastructure Costs for the Workforce Development System and Capital Expenditures

Assessment for Determining Eligibility and Vocational Rehabilitation Needs (§361.5(c)(5))

Competitive Integrated Employment (§361.5(c)(9))

- Competitive Integrated Employment
- Subminimum Wage and Sheltered Employment
- Public Benefits
- Full- and Part-Time Employment
- Minimum Wage Rates
- Customary Wages
- Comparable Training, Skills, and Experience
- Self-Employment

Documentation of Competitive Earnings

Subsistence Occupations

Integrated Location--General

Typically Found in the Community

Level of Interaction Among Individuals With and Without Disabilities

Work Unit

Interaction During Performance of Job Duties

Opportunities for Advancement

Construction of a Facility for a Public or Nonprofit Community Rehabilitation Program (§361.5(c)(10))

Customized Employment (§361.5(c)(11))

Employment Outcome (§361.5(c)(15))

Statutory Basis

Informed Choice

Legitimacy of Homemaker Outcomes

Availability of Services

Disproportionate Impact

Resources for Service Provision

Feasibility Studies

Transition Period

Indian; American Indian; Indian American; Indian Tribe (§361.5(c)(25))

Informed Choice
Supported Employment Definitions
Transition-Related Definitions
Submission, Approval, and Disapproval of the State Plan (§361.10)
Content and Submission of the VR Services Portion of the Unified or Combined State Plan
Time Estimated for Submission
Alignment of Program and Fiscal Years
Other Comments
Requirements for a State Rehabilitation Council (§361.17)
Establishment of a State Rehabilitation Council
Additional Members
Terms of Appointment
Coordination with One-Stop Centers
Comprehensive System of Personnel Development (§361.18)
Data Report for Comprehensive System of Personnel Development (§361.18(a))
Applicability of Educational and Experiential Requirements to Vocational Rehabilitation Counselors (§361.18(c)(1))
Applicability of Standards to Other Personnel
De-Professionalization and Diminution of Vocational Rehabilitation Counseling

State Job Classification Minimum Qualifications
Additional or Substitute Qualifications
Interplay Between National or State-Approved Certification or Licensure Standards and Minimal Educational and Experiential Requirements
Succession Planning
Re-Training of Staff Not Meeting Personnel Standards
Standards of Personnel Development – Other Comparable Requirements (§361.18(c)(1))
Meaning of “A 21st Century Understanding of the Evolving Labor Force and the Needs of Individuals with Disabilities”
Staff Development (§361.18(d))
Training Areas for Staff Development
Public Participation Requirements (§361.20)
Public Hearings for Changes in an Order of Selection
Public Meetings of the State Rehabilitation Council
Substantive and Administrative Changes
Public Comment Through Electronic Means
Requirements Related to the Statewide Workforce Development System (§361.23)
Cooperation and Coordination with Other Entities (§361.24)
General

Cooperation and Collaboration with Other Agencies and Entities
Non-Educational Agencies
Federal Agreements
Guidance on the Braiding of Funds
Requirements for Training
Notification of the Client Assistance Program
Requirements for Third-Party Cooperative Arrangements (§361.28)
In-Kind Contributions
Students Who Are Eligible or Potentially Eligible for Services
Statewide Assessment; Annual Estimates; Annual State Goals and Priorities; Strategies; and Reports of Progress (§361.29)
Comprehensive Statewide Needs Assessment
Annual Estimates and Reports of Progress
Provision of Training and Services for Employers (§361.32)
Innovation and Expansion Activities (§361.35)
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Innovative Approaches with Components of the Workforce Development System

Ability to Serve All Eligible Individuals; Order of Selection for Services (§361.36)
Individuals Who Require Specific Services and Equipment to Maintain Employment
Information and Referral
Monitoring by the State Rehabilitation Council
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Prohibited Factors
Pre-Employment Transition Services
Information and Referral Programs (§361.37)
Benefits Planning
Referral Options
Follow-Up
Independent Living Services
Protection, Use, and Release of Personal Information (§361.38)
Reports; Evaluation Standards and Performance Indicators (§361.40)
Pre-Employment Transition Services
Standards and Indicators
Program Year
Performance Accountability Regulations
Cumulative Caseload Report (RSA-113)

States with Two VR Agencies
Reporting Burden
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Assessment for Determining Eligibility and Priority for Services (§361.42)
Advancing in Employment and Other Eligibility Criteria
Substantial Impediment to Employment
Prohibited Factors
Residency
Compliance Threshold
Entities Holding Special Wage Certificates
Extended Evaluation and Trial Work Experiences
Development of the Individualized Plan for Employment (§361.45)
Time Frame for Developing the Individualized Plan for Employment
Options for Developing the Individualized Plan for Employment
Data for Preparing the Individualized Plan for Employment
Content of the Individualized Plan for Employment (§361.46)
Scope of Vocational Rehabilitation Services for Individuals with Disabilities

Services for Individuals Who Have Applied or Been Determined Eligible for Vocational Rehabilitation Services (§361.48(b))

Advanced Training

Other Services

Scope of Vocational Rehabilitation Services for Groups of Individuals with Disabilities (§361.49(a))

Establishment, Development, or Improvement of Community Rehabilitation Programs

Technical Assistance to Businesses

Establishment, Development, or Improvement of Assistive Technology Programs

Advanced Training

Comparable Services and Benefits (§361.53)

Accommodations and Auxiliary Aids and Services

Pre-Employment Transition Services and Personally Prescribed Devices

Interagency Agreements

Semi-Annual and Annual Review of Individuals in Extended Employment and Other Employment Under Special Certificate Provisions of the Fair Labor Standards Act (§361.55)

Effective Date

Who Is Subject to the Requirements?

Documentation

Costs of Conducting the Reviews

Informed Choice

Retroactive Reviews

Cross-Reference with 34 CFR 397.40

Individuals with a Record of Service

Purpose (§361.1)

Comments: A few commenters supported the replacement of the term “gainful employment” with the term “competitive integrated employment” and the inclusion of the term “economic self-sufficiency” in proposed §361.1. In addition, many commenters sought clarification of the term “economic self-sufficiency” as used in this regulation and requested that we define it in §361.5(c). Of these commenters, most suggested that the term “economic self-sufficiency” may deter individuals with disabilities who are receiving public benefits from applying for vocational rehabilitation services. Additionally, some commenters suggested that DSUs may use economic self-sufficiency to determine that individuals with disabilities who wish to maintain their public benefits are ineligible for vocational rehabilitation services. Some commenters indicated that individuals with intellectual or

developmental disabilities may never achieve earnings, through competitive integrated employment, sufficient to cease receiving public benefits. Two commenters viewed "economic self-sufficiency" as a criterion within both the definitions of "employment outcome" and "competitive integrated employment," and requested that we identify criteria that DSUs may use to determine when individuals achieve this level of employment and are rehabilitated enough to no longer need vocational rehabilitation services.

Discussion: We appreciate comments supporting inclusion of the terms "competitive integrated employment" and "economic self-sufficiency" in final §361.1. We agree that inclusion of these terms in the regulation reflects the spirit of the Act in general, and is consistent with specific amendments to section 100(a) of the Act made by WIOA. While we understand commenters' requests for a definition of "economic self-sufficiency," the Act, as amended by WIOA, does not define the term. We believe that the use of the term in final §361.1(b) is consistent with its common understanding and refers to the situation in which an individual can support him- or herself financially with minimal or no reliance on public benefits or assistance

from other persons. Therefore, we do not define the term "economic self-sufficiency." In addition, use of the term "economic self-sufficiency" in section 100(a)(2)(B) of the Act, as amended by WIOA, and in final §361.1(b) does not require the individual to achieve economic self-sufficiency--either as a prerequisite for receipt of services or as an outcome resulting from vocational rehabilitation services provided. Rather, the term as used in the Act, as amended by WIOA, and in these final regulations merely requires that the vocational rehabilitation services provided to an individual be consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, informed choice, and economic self-sufficiency. Vocational rehabilitation services ideally should assist an individual to achieve a competitive integrated employment outcome that will enable the individual to become economically self-sufficient, but there is no requirement in either the Act or these final regulations that an individual achieve economic self-sufficiency or a specific level of financial independence.

Section 102(a) of the Act, as amended by WIOA, does not include economic self-sufficiency among the eligibility

criteria. Inclusion of the term in final §361.1(b) does not alter the eligibility criteria for the program in final §361.42(a)(1). We encourage DSUs to conduct outreach to individuals with disabilities and service providers to clarify any misperception that the use of this term implies that individuals with disabilities may no longer receive vocational rehabilitation services for the purpose of achieving an employment outcome in competitive integrated employment or supported employment if they wish to maintain their public benefits. We also encourage DSUs to provide vocational counseling and guidance and benefits planning services to these individuals to assist them in better understanding the impact of participation in the VR program and employment on their public benefits.

Economic self-sufficiency is not a component of the definitions of “competitive integrated employment” and “employment outcome” in sections 7(5) and 7(11), respectively, of the Act, as amended by WIOA. We disagree that the implementing regulations for the definitions of these terms in final §§361.5(c)(9) and 361.5(c)(15) should be revised to incorporate criteria related to the achievement of economic self-sufficiency as suggested by the commenter. We believe the wages and benefits criteria,

especially as contained in the definition for “competitive integrated employment” in final §361.5(c)(9), are consistent with those set forth in the statutory definition in section 7(5) of the Act.

Changes: None.

Authorized Activities (§361.3)

Comments: None.

Discussion: Upon further review of §361.3, we have determined a change is needed to clarify that the use of VR program funds to pay for the infrastructure costs of the one-stop delivery system established by title I of WIOA is an authorized activity under the VR program. Section 121(h) of title I of WIOA requires one-stop partners, including the VR program, to pay a proportional share of the one-stop system’s infrastructure costs. These costs satisfy the definition of “administrative costs” in final §361.5(c)(2) because such expenditures constitute operating and maintenance costs, which are permissible administrative costs under the VR program. We have revised final §361.3(b) to specify that one-stop infrastructure costs are considered administrative costs under the VR services portion of the Unified or Combined State Plan and, therefore, are authorized activities under the VR program.

In making this change, we ensure consistency with final §361.5(c)(2)(viii), as well as jointly administered requirements governing the one-stop delivery system contained in joint regulations published elsewhere in this issue of the Federal Register.

Changes: We have revised final §361.3(b) to specify that the use of VR program funds to pay for one-stop system infrastructure costs is an authorized activity of the program as an administrative cost.

Applicable Regulations (§361.4)

Training on 2 CFR Part 200 Requirements

Comments: Two commenters requested the Department provide training on 2 CFR part 200 requirements, focusing on definitions and general applicability.

Discussion: The Department has conducted a number of Webinars and developed technical assistance materials to assist grantees in implementing 2 CFR part 200 requirements and will continue to do so as needed. The Department maintains a technical assistance web page for grantees regarding the requirements set forth in 2 CFR part 200, which may be accessed at www.ed.gov. The Department will consider future Webinars, as appropriate.

Changes: None.

Third-Party In-Kind Contributions

Comments: None.

Discussion: As specified under final §361.60(b)(2), third-party in-kind contributions may not be used to meet the non-Federal share for match purposes under the VR program. This prohibition against the use of third-party in-kind contributions under the VR program has been in place since 1997. Upon further Departmental review regarding this long-standing prohibition, we have determined it necessary to revise final §361.4(d). In so doing, the Secretary clarifies that 2 CFR 200.306(b), which allows third party in-kind contributions to be used as part of a non-Federal entity's cost sharing or matching when such contributions meet certain criteria, does not apply to the VR program. The Secretary believes this technical change will eliminate any confusion expressed by commenters in relation to final §361.60(b)(2).

Changes: We have amended the applicable regulations in final §361.4(d) to specify that 2 CFR 200.306(b), as it pertains to the acceptance of third-party in-kind contributions, is not applicable to the VR program.

Applicable Definitions (§361.5)

Administrative Cost (§361.5(c)(2))

Supervisory Personnel

Comments: One commenter recommended that we consider costs for local level supervisors who do not perform counseling duties, but who directly supervise counselors, to be direct service costs rather than administrative costs.

Discussion: We disagree with the recommendation to consider the costs for local level supervisors who do not perform counseling duties, but who directly supervise counselors, to be direct service costs, rather than "administrative costs." Final §361.5(c)(2)(xi) specifies that administrative salaries constitute "administrative costs." Administrative salaries are those personnel costs paid to individuals who are not providing direct services to VR program applicants and consumers, and may include clerical and managerial salaries. Therefore, we consider costs for supervisors who do not provide direct services to be administrative costs in support of vocational rehabilitation services, rather than costs for the actual provision of such services.

Changes: None.

Travel Costs

Comments: Two commenters indicated that the instructions for completing the Annual Vocational Rehabilitation

Program/Cost Report (RSA-2) in Policy Directive (PD) 14-02 requiring DSUs to report staff travel costs as "administrative costs" appear to conflict with proposed §361.5(c)(2)(xii), which specifically excludes travel costs related to the provision of services from "administrative costs."

One commenter recommended we clarify that grantees may consider travel costs incurred in the provision of vocational rehabilitation services as a service-related cost, rather than an administrative cost. Specifically, the commenter requested that the final regulations clarify that travel costs incurred in the provision of pre-employment transition services may be paid from the funds reserved for that purpose. This commenter also suggested that the Department update reporting instructions accordingly.

Discussion: We appreciate the commenters' observation that the definition of "administrative costs" in proposed §361.5(c)(2)(xii) appears to conflict with the instructions for completing the RSA-2 with regard to staff travel costs. The Department will review and update previously issued guidance as necessary to ensure consistency with these final regulations.

We agree that travel costs incurred directly as a result of providing vocational rehabilitation services constitute service-related costs, not “administrative costs” for purposes of the VR program. Therefore, DSUs may pay for travel costs incurred as a direct result of providing pre-employment transition services to students with disabilities, including travel to individualized education program meetings, from the funds reserved for the provision of those services. Travel costs incurred as a result of providing other vocational rehabilitation services to students with disabilities may not be paid from the funds reserved for the provision of pre-employment transition services because such travel would be beyond the scope of section 113 of the Act, as amended by WIOA, and final §361.48(a). While travel costs incurred as a result of providing other vocational rehabilitation services to students with disabilities who have been determined eligible for vocational rehabilitation services may not be paid from the funds reserved for the provision of pre-employment transition services, they still would be service-related, not administrative, costs. Staff travel costs incurred for other purposes, such as attending regional meetings or trainings, satisfy the definition of

“administrative costs” and must be reported as such on the RSA-2. DSUs must have an established system of internal controls sufficient to record and track administrative expenditures associated with authorized activities so they can be distinguished from authorized service-related costs. In this way, DSUs are able to satisfy accounting and reporting requirements set forth in final §361.12 and Uniform Guidance on financial management in 2 CFR 200.302.

Changes: None.

Depreciation

Comments: One commenter requested that we clarify whether DSUs must classify depreciation for administrative facilities as administrative costs.

Discussion: Final §361.5(c)(2) provides several examples of administrative costs; however, the examples provided are not exhaustive. DSUs must treat depreciation in accordance with the Uniform Guidance requirements, as set forth in 2 CFR 200.436, and report it accordingly. Therefore, DSUs must report depreciation for facilities used for the administration of the VR program as administrative costs.

Changes: None.

Infrastructure Costs for the Workforce Development System and Capital Expenditures

Comments: None.

Discussion: After further analysis of proposed §361.5(c)(2), we made a technical change in final §361.5(c)(2)(viii) to specify that costs to support the infrastructure of the one-stop delivery system established under title I of WIOA are “administrative costs” for purposes of the VR program. Section 121(h) of WIOA requires one-stop partners, including the VR program, to pay a proportional share of the one-stop system’s infrastructure costs. We believe these costs satisfy the definition of “administrative costs” in final §361.5(c)(2)(viii) because these expenditures constitute operational and maintenance costs. We have revised final §361.5(c)(2)(viii) to specify operational and maintenance costs, for purposes of the definition of “administrative costs” under the VR program, include one-stop system infrastructure costs. This technical change ensures consistency with final §361.3(b) and the jointly administered requirements governing the one-stop system, as set forth in the joint regulations published elsewhere in this issue of the Federal Register.

Additionally, we made a change to final §361.5(c)(2)(viii) to conform to the Uniform Guidance in 2

CFR part 200. In accordance with 2 CFR 200.439(b)(3), capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost, except with the prior written approval of the Department. Therefore, we have revised final §361.5(c)(2)(viii) to delete a clause that had excluded capital expenditures from the definition of "administrative costs" for purposes of the VR program. Pursuant to this change, DSUs must treat capital expenditures as "administrative costs" for purposes of the VR program. This technical change enables grantees to report these costs more accurately as an administrative cost on the RSA-2 VR Program Cost Report.

Changes: We have revised final §361.5(c)(2)(viii) to specify that the definition of "administrative costs" includes those costs associated with operating and maintaining the infrastructure of the one-stop system.

In addition, we have deleted the reference to "not including capital expenditures as defined in 2 CFR 200.13" from final §361.5(c)(2)(viii).

Assessment for Determining Eligibility and Vocational Rehabilitation Needs (§361.5(c)(5))

Comments: A few commenters supported the definition of "assessment for determining eligibility and vocational rehabilitation needs" in proposed §361.5(c)(5). Some commenters disagreed with the requirement in the definition that, if additional data are needed to determine the employment outcome and the vocational rehabilitation services to be included in the individualized plan for employment, the DSU can conduct a comprehensive assessment that, in part, relies to the maximum extent possible on information obtained from experiences in integrated employment and other settings in the community. Another commenter requested clarification as to whether the use of information obtained from prior experiences within integrated employment settings or other integrated community settings could include internships or other unpaid work experiences.

Discussion: We appreciate the support for proposed §361.5(c)(5), as well as the concerns and requests for clarification. Section 7(2)(B)(v) of the Act, as amended by WIOA, and final §361.5(c)(5)(ii)(E) allow a DSU, when conducting the comprehensive assessment to determine the vocational rehabilitation needs and employment outcome for inclusion in the individualized plan for employment, to

rely, in part, on the applicant's participation in integrated employment settings to the maximum extent possible. However, neither the Act nor the final regulations require that the individual be paid during these experiences. Therefore, section 7(2) of the Act and final §361.5(c)(5)(ii) do not prohibit DSUs from using unpaid internships or work experiences during the assessment process. We received other comments concerning a perceived conflict between this definition and proposed §361.42(c)(2), which prohibits a DSU from considering an individual's work history when determining an applicant's eligibility for vocational rehabilitation services, and contracting with community rehabilitation programs that hold subminimum wage certificates issued by the Department of Labor under section 14(c) of the FLSA when conducting assessments. We address these comments in the Analysis of Comments and Changes of the Assessment for Determining Eligibility and Priority for Services section.

Changes: None

Competitive Integrated Employment (§361.5(c)(9))

Competitive Integrated Employment

The overarching principle of the Act, as amended by WIOA, that individuals with disabilities are capable of

achieving full integration into all aspects of life, including employment, is most evident in the definition of “competitive integrated employment” in section 7(5) of the Act and the interweaving of the term throughout the many provisions of the statute. Because of its central importance to the purpose of the VR program, we received extensive comments on the definition in proposed §361.5(c)(9), expressing both strong support for, and opposition to, the proposed definition. The vast majority of public comment on the definition focused on the criteria that an employment location must satisfy if it is to be considered integrated. Some commenters expressed support for the definition in general, and the criteria for an integrated location specifically, for several reasons, including the definition’s specificity that the commenters believe will ensure individuals with disabilities are working in integrated employment settings, and the impact the definition can have in curtailing the low expectations for individuals with disabilities who are relegated to segregated employment with little opportunity for advancement. However, many commenters opposed the definition, expressing concern that it would restrict or eliminate subminimum wage and sheltered employment for

individuals with disabilities, or limit the ability of these individuals to choose among these options. We appreciate the support for the definition, and discuss the detailed comments in opposition to, and requests for clarification of, the proposed definition under the topical headings that follow.

Subminimum Wage and Sheltered Employment

Comments: Many commenters urged us to protect or not to eliminate the payment of subminimum wages to individuals with disabilities and sheltered employment. One of these commenters stated that not all individuals can be paid minimum wages, and that the employment must be profitable for both parties. Similarly, another commenter stated that if entities holding subminimum wage certificates were forced to pay less productive individuals with disabilities minimum wages, they would lose business to companies overseas. Likewise, some commenters stated that sheltered employment is needed to protect individuals with intellectual disabilities and other significant disabilities from abuse. A few commenters expressed their concern that the integrated location criteria of the definition devalue the employment of individuals with disabilities who cannot work in these settings.

Many commenters opposed the definition because it would limit an individual's choice of subminimum wage and sheltered employment options. Some of these commenters asked that we create an exception from the criteria for individuals who choose to work in a segregated or sheltered setting if all other criteria regarding competitive earnings and opportunities for advancement are satisfied.

Discussion: We acknowledge that many commenters on part 361 in general, and the definition of "competitive integrated employment" specifically, are concerned that these final regulations will eliminate or restrict the ability of individuals with disabilities, particularly those with the most significant disabilities, to be paid subminimum wages by entities holding certificates issued by the Department of Labor under section 14(c) of the FLSA, as well as sheltered employment. Although we recognize the concerns expressed by these commenters, we emphasize that the definition of "competitive integrated employment" and its use throughout final part 361 are intended to ensure that all individuals with disabilities served through the VR program are provided every opportunity to achieve employment with earnings comparable to those paid to individuals without disabilities in a setting that allows

them to interact with individuals who do not have disabilities. Nonetheless, nothing in title I of the Act, as amended by WIOA, or the regulations in final part 361 affects the FLSA in any manner. Later in this Analysis of Comments and Changes, we address limitations on the use of subminimum wage in section 511 of the Act and final 34 CFR part 397. In addition, the definition "competitive integrated employment" in final §361.5(c)(9) does not prohibit or eliminate sheltered employment. As explained in final regulations published on January 21, 2001, we agree that extended employment programs have traditionally served as a safety net for individuals with significant disabilities who cannot perform work in an integrated setting in the community or who choose to work only among their disabled peers (66 FR 7250). The Secretary does not devalue the dignity or the worth of extended employment programs or the individuals who work in those settings. Rather, the definition of "competitive integrated employment" reflects the heightened emphasis throughout the Act, as amended by WIOA, that individuals with disabilities, including those with the most significant disabilities, can achieve employment in the community and economic self-sufficiency if provided appropriate services

and supports. Because DSUs have been unable to assist individuals with disabilities to obtain sheltered employment through the VR program since October 2001, the vast majority of individuals have accessed sheltered employment through other sources or on their own initiative. Therefore, the Secretary believes the definition in final §361.5(c)(9) will not affect the availability of sheltered employment for individuals who choose this form of employment, or for whom it is a legitimate and necessary option.

Furthermore, while the Act, as amended by WIOA, places a premium on the ability of individuals with disabilities to exercise informed choice throughout the vocational rehabilitation process, we do not agree that the final regulations in part 361 generally and the definition specifically are inconsistent with that emphasis. In fact, an individual with a disability may pursue any form of employment he or she chooses. However, if the individual wishes to receive vocational rehabilitation services, he or she must intend to achieve an “employment outcome,” which is defined in final §361.5(c)(15) for purposes of the VR program as employment in competitive integrated employment or supported employment. If the individual chooses to

pursue work that does not satisfy the definition of "employment outcome" for purposes of the VR program, such as sheltered employment, the individual must seek services from another agency or provider. In such circumstances, these final regulations require the DSU to refer that individual to local extended employment providers or other Federal, State, or local programs (e.g., community rehabilitation programs, State Use programs, and centers for independent living) that can meet the individual's needs. The referral requirements in final §361.37 also ensure that individuals receive sufficient information concerning the scope of the VR program and opportunities for individuals with disabilities to pursue competitive integrated employment. This information enables individuals to make a fully informed choice regarding whether to pursue competitive integrated employment through the VR program or subminimum wage and extended employment through other sources.

The Secretary believes these final regulations ensure that the VR program promotes to the maximum extent possible opportunities for individuals with disabilities, particularly those with significant disabilities, to pursue competitive integrated employment options. Moreover, final

§361.52 requires each DSU to preserve individual choice in the manner in which the Act intends for individuals who choose to pursue employment outcomes within the scope of the VR program.

Finally, section 7(5) of the Act, as amended by WIOA, does not permit an exception to the definition's requirements for individuals who choose subminimum wage and or sheltered employment. In fact, such an exception would be inconsistent with the plain meaning of the criteria contained in the statutory definition in section 7(5) of the Act. Therefore, we lack the statutory authority to create such an exception in final §361.5(c)(9).

Changes: None.

Public Benefits

Comments: One commenter requested that we clarify the effect of the definition of "competitive integrated employment" on the eligibility of individuals with disabilities for Social Security benefits. One commenter expressed concern that the criteria would cause individuals to lose needed benefits provided through Medicaid and other sources.

Discussion: We recognize that some individuals are reluctant to pursue employment through the VR program due

to their perceptions of the negative impact employment may have on the public benefits, including Medicaid and other sources, on which they rely for financial and medical support. To enable individuals with disabilities to better understand the effects of employment on Social Security and other benefits and make well-informed decisions about the employment goals that best suit their needs, section 102(b)(2) of the Act, as amended by WIOA, and final §361.45(c)(2) require DSUs to provide benefits planning information, including information about work incentives provided through the Social Security Administration (SSA), to these individuals during the process for developing the individualized plan for employment. For further information, see the Development of the Individualized Plan for Employment section later in this Analysis of Comments and Changes.

Changes: None.

Full- and Part-Time Employment

Comments: A few commenters requested that we define or clarify the terms “full-time” and “part-time” employment as they are used in the definition of “competitive integrated employment.” These commenters asked whether there is a minimum number of hours that an individual must work for

the employment to satisfy the requirements of the definition, as well as the definition of an “employment outcome.” A few commenters expressed concern that on-call or temporary employment is not within the scope of the definition because it is not considered full- or part-time scheduled employment. They stated that many entry-level individuals are employed in on-call positions and that permitting this form of employment could enable individuals with intellectual disabilities to maintain employment.

Discussion: The reference to full- and part-time work in the definitions for the terms “employment outcome” and “competitive integrated employment,” for purposes of the VR program, is not new. The definition for “employment outcome” has remained consistent since the 1992 Amendments to the Act and the 1997 VR program regulations (62 FR 6334 (Feb. 11, 1997)). Although “competitive integrated employment” is a new term in the Act, as amended by WIOA, and these final regulations, the term and its definition are consistent with that for “competitive employment” in prior §361.5(b)(11), which dates back to the 1997 VR program regulations. Because these definitions have existed for approximately 20 years without substantial change, we do not believe it necessary to define “full-

time” or “part-time” in final part 361. “Full-time” and “part-time” have their common meanings and may vary across sectors of the economy. Generally, individuals are considered to be employed full-time if they work 40 hours per week. However, it is not uncommon for full-time employees to work fewer hours, such as 35 hours per week, depending on the terms of employment established by the employer. “Part-time” employment is employment for any number of hours less than that of full-time employment for the particular work performed. Nowhere in the statutory definitions of “competitive integrated employment” or “employment outcome,” or any other provision of the Act, as amended by WIOA, is a minimum number of hours that an individual must work for the employment to be considered full- or part-time specified, and we decline to do so in these final regulations, relying on the terms’ common understanding. Finally, we clarify in this discussion that the definitions of “competitive integrated employment” and “employment outcome,” as set forth in the Act and these final regulations, do not require that the individual’s employment be regularly scheduled, as suggested by the commenter. Thus, DSUs may assist individuals to obtain

temporary or on-call employment so long as all the criteria of the definitions are satisfied.

Changes: None.

Minimum Wage Rates

Comments: Some commenters expressed strong support for the competitive earnings criteria in proposed §361.5(c)(9)(i). We also received comments recommending changes to the criteria or requesting clarification. One commenter stated that the requirement that the individual's wages equal or exceed the higher of the Federal, or applicable State or local minimum wage rates adds unnecessary complexity to the vocational rehabilitation process. This commenter recommended that we apply a single standard of the Federal minimum wage rate to all employment outcomes achieved through the VR program, or that we apply the minimum wage rate in effect in the place of the individual's employment, and not the individual's place of residence.

Discussion: We appreciate the strong support for the competitive earnings criteria and respond here to the requests for clarification. We disagree with the request to avoid complexity by using only the Federal minimum wage as the measure of competitive earnings. Section 7(5)(A)(i)(I)(aa) of the Act, as amended by WIOA, requires

that the individual's earnings equal or exceed the Federal, State, or applicable local minimum wage rate, whichever is higher, for the employment to satisfy the definition of "competitive integrated employment." Final §361.5(c)(9)(i)(A) mirrors the statutory definition in this respect. Given the specific statutory requirement, we lack the statutory authority to restrict this requirement in the final regulation. In addition, the definition focuses on the wages paid by the employer, who is subject to the minimum wage laws applicable to the place of employment. Consequently, we agree with the commenter that the determination of whether the individual's earnings satisfy the definition's criteria should be based on the minimum wage rate applicable to the individual's place of employment, and not his or her place of residence.

Changes: We have revised final §361.5(c)(9)(i)(A) to clarify that the applicable State and local minimum wage laws are those that apply to the place of employment.

Customary Wages

Comments: One commenter recommended that we revise the definition to emphasize that the intent of the law and the regulations is to ensure that wages and benefits paid to individuals with disabilities are comparable to the

prevailing wage and benefits of individuals without disabilities.

Discussion: Section 7(5)(A)(i)(I)(bb) of the Act, as amended by WIOA, and final §361.5(c)(9)(i)(B) require that the individual with the disability be compensated at a rate comparable to the customary rate paid by the employer for the same or similar work performed by individuals without disabilities for the employment to be considered competitive integrated employment. The Secretary emphasizes that this provision in both the Act and the final regulations mirrors the definition of "competitive employment" in prior §361.5(b)(11)(ii) (see 66 FR 4379 (Jan. 17, 2001)), which formed the basis for the definition in the Act. We also note that the commenter's recommendation would not limit the criterion to the wages paid by the employer, as do the statutory and final regulatory definition, but would appear to extend the criterion to the prevailing wages paid to individuals without disabilities in similar positions generally. For these reasons the recommendation is not consistent with the criterion in the statutory definition and, thus, we do not have the authority to expand the regulatory definition in final §361.5(c)(9)(i)(B) as the commenter suggests.

Changes: None.

Comparable Training, Skills, and Experience

Comments: Two commenters requested that we clarify the meaning of “comparable training, skills, and experience” as used in the definition, and how this concept could be quantified.

Discussion: Section 7(5)(A)(i)(I)(bb) of the Act, as amended by WIOA, and final §361.5(c)(9)(i)(B) require the DSU to take into account the training, experience, and level of skills possessed by employees without disabilities in similar positions when determining whether the earnings of the individual with a disability are comparable. We do not believe that it is possible to quantify this comparison. Instead, the determination is based on the vocational rehabilitation counselor’s knowledge of the training, skills, and experience needed to perform the job generally and required by the employer specifically. In this way, the DSU can ensure that the individual with the disability is compensated in a manner comparable to that of employees without disabilities in all critical respects, and is not paid at a lower rate simply on the basis of his or her disability.

Changes: None.

Self-Employment

Comments: One commenter noted the proposed definition recognizes that individuals, with or without disabilities, in self-employment may not receive an income from the business equal to or exceeding applicable minimum wage rates, particularly in the early stages of operation. The commenter requested clarification regarding the reason the definition proscribes an individual with a disability in self-employment from what other successful entrepreneurs have the option to practice. Another commenter asked if individuals who achieve self-employment are included in the calculations of the performance accountability measures assessing employment in the second and fourth quarters after exit from the VR program, since their employment and wages are not captured in Unemployment Insurance wage systems.

Discussion: We want to clarify that section 7(5)(A)(i)(II) of the Act, as amended by WIOA, and final §361.5(c)(9)(i)(C) do not prevent, as the commenter indicates, an individual with a disability who is self-employed from receiving earnings comparable to those achieved by individuals without disabilities in similar occupations. As explained in the preamble to the NPRM, the

statutory and regulatory definitions recognize that individuals with disabilities, as well as individuals without disabilities, may experience difficulty in generating sufficient income from their self-employment ventures, that will enable them to achieve earnings equal to or exceeding the applicable minimum wage rate, especially in the early stages of the business operations. Thus, final §361.5(c)(9)(i)(C) provides that a self-employed individual with a disability in the start-up phase of a business venture who is making less than the applicable minimum wage can meet the definition of "competitive integrated employment."

Furthermore, individuals who receive services through the VR program to assist with the achievement of self-employment outcomes are considered "participants" as that term is defined under the joint final regulations implementing the jointly administered performance accountability system requirements of section 116 of title I of WIOA, published elsewhere in this issue of the Federal Register, and must be taken into account when calculating a DSU's performance on those measures. Since the employment status and earnings of self-employed individuals are not captured through the unemployment insurance wage system, a

DSU may use supplemental wage information to obtain the data necessary for the calculation of its performance. For further information concerning the definition of "participant" for purposes of the performance accountability measures under section 116 of WIOA and the data needed to calculate these measures, particularly data related to supplemental information when quarterly wage records are not available, see the analysis of comments on the joint performance final regulations published elsewhere in this issue of the Federal Register.

Changes: None.

Documentation of Competitive Earnings

Comments: One commenter asked what documentation a DSU is required to use when verifying the criteria for competitive earnings, including that the wages are equal to, or exceed, the applicable wage rate for the locality; that the individual's wages and benefits are comparable to those earned by individuals without disabilities in similar positions and who possess the same level of training, skills, and experience; that the individual has the same opportunities for advancement as do persons without disabilities in similar positions; and the income level of an individual who has achieved self-employment.

Discussion: Final §361.47(a)(9) requires the DSU to maintain a record of services for each individual served through the VR program that includes documentation verifying if the individual has achieved competitive integrated employment, including whether the individual has obtained employment with competitive earnings. Final §361.47(b) does not prescribe the necessary documentation, but directs the DSU, in consultation with the State Rehabilitation Council, to determine the type of documentation needed to meet the requirements of §361.47(a). However, examples of documentation that a DSU may use include, as appropriate for the type of employment, unemployment insurance wage records, tax returns, earnings statements from the employer, and self-reported information.

Changes: None.

Subsistence Occupations

Comments: Some commenters responded to the statement in the NPRM's preamble indicating that we interpret subsistence employment as a form of self-employment common to cultures of many American Indian tribes, or to the definition of "subsistence" under 34 CFR part 371 governing the American Indian Vocational Rehabilitation Services

(AIVRS) program (see NPRM, Workforce Innovation and Opportunity Act, Miscellaneous Program Changes, 80 FR 20988, 20994 – 20998 (April 16, 2015)). Several commenters asked whether the interpretation of the self-employment criteria within the definition of “competitive integrated employment” in proposed §361.5(c)(9) that includes subsistence activities is limited to individuals served through the AIVRS program under 34 CFR part 371 or to American Indians and Alaska Natives. Of these, one commenter noted that subsistence activities are not only culturally relevant for American Indians and Alaska Natives, but that they are also vital to many individuals who live in rural areas with limited competitive employment options. One commenter requested that we clarify the meaning of “culturally appropriate” as used in the definition of “subsistence” and the preamble to the NPRM by providing examples. Another commenter asked what limits would be placed on hobbies as self-employment outcomes if subsistence outcomes were available to all individuals served through the VR program. In addition, several commenters requested that we revise the definition of “employment outcome” for purposes of the VR program to include within its scope subsistence activities.

Discussion: In the NPRM covering amendments made by WIOA to the miscellaneous programs authorized by the Act, the Secretary proposed a definition of “subsistence” in 34 CFR §371.6 for purposes of the AIVRS program (80 FR 20988, 20995). Under that definition, “subsistence” means a form of self-employment in which individuals use culturally relevant or traditional methods to produce goods or services for household consumption or non-commercial barter and trade that constitute an important basis for the individual’s livelihood. To ensure consistency in the interpretation of the definition of “competitive integrated employment” for the purposes of the VR program and the AIVRS program, and in light of the definition of “subsistence” in final 34 CFR §371.6, the Secretary stated in the preamble to the NPRM to the VR regulations that the Department interprets subsistence employment as a form of self-employment common to cultures of many American Indian tribes. The Secretary believes that consistency in interpretation and implementation of the regulations governing the VR and AIVRS programs is essential given the large number of American Indians and Alaska Natives with disabilities who are eligible for services from both

programs, some of whom may be served by the programs sequentially or even simultaneously.

The Secretary does not intend the statement in the NPRM covering the proposed regulations in part 361, or the inclusion of the definition of “subsistence” only in 34 CFR 371.6, to limit the provision of services designed to assist individuals to achieve subsistence occupations to those served through the AIVRS program. DSUs may assist American Indians and Alaska Natives served through the VR program to achieve subsistence occupations as a form of self-employment under the limited circumstances set forth in the definition in 34 CFR 371.6, which the Department applies in the same manner to the VR program.

While the Secretary believes that, as the statement in the NPRM indicates, subsistence occupations are most culturally relevant to American Indian and Alaska Native tribes, the Secretary recognizes that they may also be culturally relevant to other small groups of individuals who may traditionally engage in these occupations, such as those in the outlying areas. Thus, DSUs may find it appropriate to assist individuals from cultures other than American Indian and Alaska Native tribes to achieve self-employment in subsistence occupations that meet the

definition of 34 CFR 371.6. However, because the definition of “subsistence” in 34 CFR 371.6 requires that the subsistence occupation be culturally relevant to the individual, the Secretary declines to extend the applicability of subsistence occupations to other individuals with disabilities served through the VR and AIVRS programs solely on the basis of their location in rural areas.

Examples of subsistence occupations that are culturally relevant to American Indians or Alaska Natives include the exchange of fish caught, or grain raised, by the individual with the disability for other goods produced by other members of the tribe that are needed by the individual to live and maintain his or her home. Given, however, the large number of American Indian tribes, including Alaska Native villages and regional corporations, and their widely varying cultural practices, any list of further examples of culturally relevant practices would also be incomplete and may exclude cultural practices that are unique to some tribes. Since the definition of “subsistence” in final 34 CFR 371.6 requires that the activity constitute an important basis of the individual’s livelihood, DSUs cannot provide vocational rehabilitation

services to individuals to enable them to engage in mere hobbies that do not serve this same purpose.

Finally, the definition of “employment outcome” in final §361.5(c)(15) encompasses all forms of competitive integrated employment, including self-employment. Because we consider subsistence occupations to be a form of self-employment, these occupations are already within the scope of the definition of “employment outcome” and it is not necessary to revise the definition to include a specific reference to subsistence.

Changes: None.

Integrated Location--General

Comments: As stated in the introduction to this section, the majority of commenters who commented on the definition of “competitive integrated employment” focused on the integrated location component of the definition in proposed §361.5(c)(9)(ii), which requires that the individual perform work in a location that meets two distinct criteria. The location must be a setting: (1) typically found in the community; and (2) where the employee with a disability interacts for the purpose of performing the duties of the position with other employees within the particular work unit and the entire work site, and, as

appropriate to the work performed, other persons (e.g., customers and vendors), who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to the employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons.

Of the commenters who strongly supported the criteria, several requested that we make additional changes to this particular component of the definition by: (1) adding language that the criteria should not be used to exclude individuals from the VR program due to concerns about their ability to meet the standard, and emphasizing that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality competitive integrated employment when provided the necessary skills and supports; (2) specifically excluding from the scope of the definition employment in businesses owned by community rehabilitation providers, group or enclave settings, affirmative industries, social enterprises, or any other form of non-traditional work unit; and (3) changing the term “competitive integrated employment” to “competitive

integrated individualized employment” to be clear that employment through the VR program is individualized.

Many of the commenters who opposed the integrated location criteria in proposed §361.5(c)(9)(ii) requested that we replace them with those in the statutory definition because they believe that: (1) some of the proposed criteria are not mandated by WIOA; (2) some of the proposed criteria are too strict and would result in the loss of employment opportunities that pay good wages and benefits; and (3) the statutory language would maintain work options and choice for consumers.

Some commenters inquired about the impact of the definition on the employment, by community rehabilitation programs, of individuals with disabilities, particularly those who are blind and visually impaired, in managerial and other positions. These commenters stated that employment in these positions was in an integrated location under prior guidance issued by the Department, specifically technical assistance circular 06-01 entitled “Factors State Vocational Rehabilitation Agencies Should Consider When Determining Whether a Job Position Within a Community Rehabilitation Program is Deemed to be in an Integrated Setting for Purposes of the Vocational Rehabilitation

Program" and dated November 21, 2005. One commenter requested that we clarify whether the employment of individuals with disabilities in call centers operated by community rehabilitation providers occurs in an integrated location.

Another commenter requested that we clarify the impact of the criteria on employment in the business enterprise (vending) program for individuals who are blind under the Randolph-Sheppard Act, as well as State industries programs for the blind.

Discussion: We appreciate the strong support for §361.5(c)(9)(ii). We also recognize those comments opposing, and requesting clarification of, the criteria. Before addressing the specific comments, the Secretary believes, as stated in the NPRM, that the definition of "competitive integrated employment" in section 7(5) of the Act, as amended by WIOA, for the most part incorporates the definition of "integrated setting" in prior §361.5(b)(33)(ii). Therefore, the substance of the definitions of "competitive integrated employment" in final §361.5(c)(9)(ii) and "integrated setting" in final §361.5(c)(32)(ii), for purposes of the VR program, with respect to the integrated nature of the employment location

is familiar to DSUs and does not diverge from prior regulations, long-standing Department policy, practice, and the heightened emphasis on competitive integrated employment throughout the Act, as amended by WIOA.

The Secretary believes that final §361.5(c)(9)(ii) and the explanation in the following paragraphs provide sufficient guidance to enable DSUs to determine whether a particular work location satisfies the definition of "competitive integrated employment." The Secretary does not believe it necessary to revise the definition by adding language emphasizing that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality competitive integrated employment when provided the necessary services and supports. This principle is clearly expressed in final §361.1 describing the purpose of the VR program, thereby forming the foundation for all provisions of final part 361, including the definition of "competitive integrated employment." Therefore, there is no need to restate the principle in the definition.

We do not believe that it is possible to identify all types of non-integrated employment settings in the definition, as the specific exclusion of one type of non-

integrated employment setting from the definition could result in a misperception that settings not mentioned are within the scope of the definition. Instead, we explain in the following paragraphs the application of the integrated location criteria to these types of work settings. When the criteria are properly applied by DSUs, group and enclave employment settings operated by businesses formed for the purpose of employing individuals with disabilities will not satisfy the definition of "competitive integrated employment." Therefore, the Secretary disagrees with the recommendation to add language to the definition expressly excluding from the scope of the definition employment in businesses owned by community rehabilitation providers, group and enclave settings, affirmative industries, social enterprises, and other forms of non-traditional work settings.

In addition, we disagree with the recommendation to change the term "competitive integrated employment" to "competitive integrated individualized employment." Section 7(5) of the Act, as amended by WIOA, defines "competitive integrated employment," and that definition forms the basis for the definition in final §361.5(c)(9). Moreover, the many provisions of the Act and the final

regulations in final part 361, including those governing the selection of an employment outcome, the vocational rehabilitation services provided, the exercise of informed choice, and the closure of an individual's service record, underscore the individualized nature of the VR program, thereby making it unnecessary to add the word "individualized" to the term "competitive integrated employment" in these final regulations.

Furthermore, the Secretary disagrees with the commenters' recommendation that we replace the regulatory criteria in proposed §361.5(c)(9)(ii) with the statutory criteria, verbatim, in section 7(5)(B) of the Act, as amended by WIOA. As stated in the NPRM, the integrated setting criteria in proposed §361.5(c)(9)(ii), although not verbatim, are nevertheless consistent with the statutory definition in section 7(5)(B) of the Act, as amended by WIOA, with respect to the integrated nature of the employment setting, and, in turn, are consistent with the definition of "integrated setting" in prior §361.5(b)(33)(ii). Also in light of the consistency of section 7(5)(B) of the Act with the prior regulatory definition of "integrated setting," as well as the Department's long-standing interpretation of that

definition, the Secretary does not believe that the criteria in the statutory definition of “competitive integrated employment” would permit within its scope work options that would not have satisfied the criteria in prior §361.5(b)(32)(ii). There is no indication in the Act, as amended by WIOA, or the limited legislative history, that Congress intended to narrow the scope of the integrated setting criterion of the definition of “competitive integrated employment.” Therefore, the Secretary believes the definition of “competitive integrated employment” in final §361.5(c)(9)(ii), while not verbatim, is nonetheless consistent with the Act, prior regulations, and long-standing Department policy. This means employment that would have satisfied the definition of “integrated settings” in prior regulations and Department guidance would satisfy the definition of “competitive integrated employment” in these final regulations.

We emphasize that it is the DSU’s responsibility to apply final §361.5(c)(9)(ii) in a manner consistent with long-standing Departmental policy. The DSU must apply the criteria equally to any position, whether it involves the management or administration of, or the production and delivery of goods and services by, the organization, and

without regard to the type of business operation, such as, but not limited to, a call center within a community rehabilitation program, the manufacture of office supplies by a State industries program for individuals who are blind, or a contract for landscaping services. The criteria contained in final §§361.5(c)(9)(ii) and 361.5(c)(32)(ii) provide important clarifications that are necessary to better enable a DSU to determine, on a case-by-case basis, whether a particular position in an organization's specific work unit is in an integrated location.

The Randolph-Sheppard Act provides opportunities for self-employment and entrepreneurship in the community to individuals who are blind. As a form of self-employment and business ownership, the outcomes of individuals in the vending facilities established under the Randolph-Sheppard Act are deemed to be in integrated settings and specifically within the definition of "employment outcome" in final §361.5(c)(15).

Changes: None.

Typically Found in the Community

Comments: One commenter stated that work opportunities established by community rehabilitation programs

specifically for the purpose of employing individuals with disabilities in the community constitute an integrated setting, and that these jobs enable people to become more self-sufficient and live a more rewarding life.

A few commenters asked whether the criteria would prohibit the employment of individuals with disabilities in work settings operated by community rehabilitation providers that exclusively serve other persons with disabilities (e.g., group homes, inclusive child care centers, adult day programs, or peer support programs), because these locations are not typically found in the community or do not afford the level of interaction among individuals with and without disabilities required by the definition.

One commenter specifically addressed the criterion requiring the work location to be a setting typically found in the community, stating that the criterion does not exist in the statutory definition and it would limit opportunities for individuals with disabilities to participate in new and innovative employment models and businesses that are not yet typical. The commenter recommended that we remove this requirement.

Discussion: The Secretary has incorporated language contained in the prior regulatory definition of “integrated setting” requiring that the work location be in “a setting typically found in the community,” meaning that an integrated setting must be one that is typically found in the competitive labor market. This long-standing Departmental interpretation is consistent with the Act, as amended by WIOA, as well as with express congressional intent as set forth in prior legislative history. Specifically, integrated setting “is intended to mean a work setting in a typical labor market site where people with disabilities engage in typical daily work patterns with co-workers who do not have disabilities; and where workers with disabilities are not congregated...” (Senate Report 105-166, page 10, March 2, 1998). Nothing in the Act suggests that Congress intended a different interpretation of the integrated setting criterion in the amendments made by WIOA. Rather, Congress demonstrated a continuation of this interpretation by incorporating into the statute, almost verbatim, a criterion from prior §361.5(b)(33)(ii) into the definition of “competitive integrated employment” in section 7(5)(B) of the Act. Therefore, the Secretary maintains the long-standing

Departmental policy that settings established by community rehabilitation programs specifically for the purpose of employing individuals with disabilities (e.g., sheltered workshops) do not constitute integrated settings because these settings are not typically found in the competitive labor market--the first of two criteria that must be satisfied if a DSU is to determine that a work setting is an integrated location under final §361.5(c)(9).

As we made clear in the discussion of Integrated Location--General previously and have stated in long-standing Departmental policy, DSUs must apply the integrated location criteria in a consistent manner and on a case-by-case basis to any work setting, including settings operated by community rehabilitation providers that exclusively serve other persons with disabilities (e.g., group homes, inclusive child care centers, adult day programs, or peer support programs). Nonetheless, we note that the settings described in the comments, though formed for the unique purpose of serving individuals with disabilities, have not been established for the purpose of employing them. Thus, the settings in question in the comments would appear to satisfy the first criterion that the setting is typically found in the community. If this

is the case, it would remain for the DSU to determine if the setting is one in which the employee with the disability interacts with employees without disabilities in the work unit and across the work site to the degree that employees without disabilities in similar positions interact with these same persons.

With respect to the comment specifically about proposed §361.5(c)(9)(ii)(A), which requires that the location be a setting typically found in the community, the Secretary disagrees with the commenter’s request to remove the criterion from the definition. The criterion does not exclude from competitive integrated employment any innovative or unique business models that otherwise satisfy the definition’s criteria. Instead, the Secretary interprets the criterion to be more narrowly focused on the purpose for which the business is formed. As explained earlier, businesses established by community rehabilitation programs or any other entity for the primary purpose of employing individuals with disabilities do not satisfy this criterion, and, therefore, are not considered integrated settings, because these settings are not within the competitive labor market. The Department has long considered several factors to typically distinguish

positions in these types of businesses from those that satisfy the criterion. The factors that generally would result in a business being considered "not typically found in the community," include: (1) the funding of positions through Javits-Wagner-O'Day Act (JWOD) contracts; (2) allowances under the FLSA for compensatory subminimum wages; and (3) compliance with a mandated direct labor-hour ratio of persons with disabilities. It is the responsibility of the DSU to take these factors into account when determining if a position in a particular work location is an integrated setting.

Changes: None.

Level of Interaction Among Individuals With and Without Disabilities

Comments: Of those commenters who commented specifically on the level of interaction among individuals with and without disabilities, one commenter asked that we include language to require individuals with disabilities to interact with other employees and individuals without disabilities to the same extent that employees without disabilities paid directly by the employer interact with these persons. The commenter stated that the additional language would help to emphasize that individuals can

exercise informed choice in the selection of service providers under the VR program.

One commenter suggested that we define “integrated location” as a ratio of individuals with disabilities and individuals without disabilities, stating that true integrated employment consists of a mix of workers with and without disabilities.

Another commenter recommended that we adopt the prior Departmental guidance in technical assistance circular 06-01 mentioned in the Integrated Location--General discussion. The commenter believed that the guidance required DSUs to give equal weight to the interaction of individuals with disabilities with other individuals without disabilities, including employees in the work unit and across the work site, and customers as well as vendors.

Discussion: In response to those comments addressing proposed §361.5(c)(9)(ii)(B), the second criterion of integrated location, section 102(d) of the Act and final §361.52 require that individuals be able to exercise informed choice in the selection of service providers. Therefore, it is not necessary to amend the definition to require that individuals with disabilities interact with employees and other persons without disabilities to the

same extent that employees without disabilities paid directly by the employer interact with these persons. We do not believe that including the additional language in final §361.5(c)(9)(ii)(B) would further protect the ability of individuals to choose among service providers.

The Secretary appreciates the commenter's recommendation that we revise this criterion and define an integrated setting as being comprised of a ratio (not specified by the commenter) of employees with disabilities in comparison to individuals without disabilities. Since "integrated setting" was first defined in VR program regulations, we have considered how best to capture the intent of Congress and long-standing Department policy in its criteria. In doing so, we considered whether to establish a numerical ratio and have rejected this as impractical and unworkable. Given the many and varied types of employment settings in today's economy, we cannot determine a single ratio that could be used to satisfactorily determine the level of interaction required to meet the intent underlying the definition. Rather than using a numerical standard, we believe that an "integrated setting" is best viewed in light of the quality of the interaction among employees with disabilities and persons

without disabilities when compared to that of employees without disabilities in similar positions, and have not added a numerical ratio to final §361.5(c)(9).

The Secretary disagrees with the commenter's interpretation of the prior guidance provided in technical assistance circular 06-01 and the assertion that factors such as the level of interaction of employees with disabilities with other employees in the work unit and across the work site, as well as with customers and vendors, should be weighted equally. As stated in the NPRM, the Secretary believes the focus of whether the setting is integrated should be on the interaction between employees with and without disabilities, and not solely on the interaction of employees with disabilities with people outside of the work unit. For example, the interaction of individuals with disabilities employed in a customer service center with other persons over the telephone, regardless of whether these persons have disabilities, would be insufficient by itself to satisfy the definition. Instead, the interaction of primary consideration should be that between the employee with the disability and his or her colleagues without disabilities in similar positions.

Changes: None.

Work Unit

Comments: Commenters supporting and opposing the integrated location criteria commented specifically on the use of “work unit” in final §361.5(c)(9)(ii)(B). Some in support requested that we clarify the meaning of the term with respect to the numbers of individuals with disabilities as compared to those without disabilities to ensure that the standard is consistently applied to work units of different sizes, and the effect of the term on the ability of individuals to choose to work alone. One commenter suggested that we clarify that the employment of individuals with disabilities in non-traditional work units who perform their duties of the position in isolation or separate from other employees in the work unit satisfies the definition of “competitive integrated employment” as long as all other criteria are met.

A few commenters asked whether “work unit” refers to all employees in a certain job category or program, or to groups of employees working together to accomplish tasks. These commenters stated that certain categories of employees (such as temporary office workers and certain kinds of contract workers) regularly interact with others within the work site (including other employees, customers,

or vendors), but do not work side by side or in collaboration with others within the same job category. Similarly, a few commenters requested that we clarify the effect of the criteria on employment in scattered work sites.

Of those in opposition, some requested that we remove "work unit" from the definition because they were concerned that its use prohibits mobile work crews and enclaves unless very restrictive criteria are met, and that if Congress had intended to eliminate group work opportunities, it would have done so in the law. Other commenters requested clarification of the effect of the term on group employment under the JWOD Act commonly used in Ability One and long-term commercial contracts, stating that these settings provide well-paying jobs for persons with the most significant disabilities.

Discussion: In response to those comments that address the use of the term "work unit," the Secretary disagrees with the recommendation to remove the term from the definition because it properly focuses the consideration of the interaction of the individual with the disability with employees without disabilities within the environment in which the work is performed. As used in the definition,

“work unit” may refer to all employees in a particular job category or to a group of employees working together to accomplish tasks, depending on the employer’s organizational structure. In addition, its use is consistent with prior guidance issued by the Department. The Secretary emphasizes that the Department has long maintained that the interaction required between employees with disabilities and employees without disabilities is not dependent on the number of individuals in the work unit and that the criterion must be applied consistently to work units of any size. The Department also has long-held that the interaction between employees with and without disabilities need not be face to face. Nor do we interpret the criterion as necessarily excluding employment settings in which individuals work alone, such as telecommuting, temporary employment, and work in mobile or scattered locations, from the scope of the definition of “competitive integrated employment,” so long as the employee with the disability interacts with employees of the employer in similar positions and interacts with other persons without disabilities to the same extent that employees without disabilities interact with others.

As stated earlier in this section, the Department has long considered the funding of positions through JWOD contracts to be a distinguishing characteristic when determining if a business is typically found in the community. Likewise, the use of the term “work unit” in the definition does not change its application with respect to the required interaction among employees with and without disabilities in the work setting. Entities that are set up specifically for the purpose of providing employment to individuals with disabilities will likely not satisfy the definition’s criteria. The high percentage of individuals with disabilities employed with these entities most likely would result in little to no opportunities for interaction between individuals with disabilities and non-disabled individuals. These entities, therefore, likely would be considered sheltered or non-integrated employment sites. Nonetheless, DSUs must apply these criteria on a case-by-case basis when determining if an individual’s employment is in an integrated location and satisfies the definition of “competitive integrated employment.”

Changes: None.

Interaction during Performance of Job Duties

Comments: One commenter stated that to define “integrated location” as only “the interaction between employees with disabilities and those without disabilities that is specific to the performance of the employee’s job duties, and not the casual, conversational, and social interaction that takes place in the workplace” is too narrow and may not reflect many workers’ interaction patterns in typical work settings.

Discussion: Under the definition of “competitive integrated employment” and consistent with the general principles contained in the prior definition of “integrated setting,” the DSU is to consider the interaction between employees with disabilities and those without disabilities that is specific to the performance of the employee’s job duties, and not the casual, conversational, and social interaction that takes place in the workplace. As a result, it would not be pertinent to its determination of an integrated setting for a DSU to consider interactions in the lunchrooms and other common areas of the work site in which employees with disabilities and those without disabilities are not engaged in performing work responsibilities.

The Secretary recognizes that the application of the integrated location criteria in the manner explained in the preceding paragraphs will restrict the types of employment options available to individuals with disabilities through the VR program. However, these restrictions have been in effect since the definition of “employment outcome” was last revised in 2001 and, therefore, do not reflect new Departmental policy. Specifically, through application of the criteria, individuals with disabilities hired by community rehabilitation programs to perform work under service contracts, either alone, in mobile work crews, or in other group settings (e.g., landscaping or janitorial crews), whose interaction with persons without disabilities (other than their supervisors and service providers), while performing job responsibilities, is with persons working in or visiting the work locations (and not with employees of the community rehabilitation programs without disabilities in similar positions) would not be performing work in an integrated setting. The Secretary believes that, even if such group employment in a community rehabilitation program provides for competitively paid wages, this fact does not change the non-integrated nature of the employment and may result in a less desirable level of integration (e.g.,

interaction with non-disabled co-workers) than individual employment, which supports the autonomy and self-sufficiency of individuals with disabilities.

In summary, the DSU must determine, on a case-by-case basis, that a work location is in an integrated setting, meaning it is typically found in the community, and it is one in which the employee with the disability interacts with employees and other persons, as appropriate to the position, who do not have disabilities to the same extent that employees without disabilities interact with these persons. Finally, the DSU is to consider the interaction between the employee with the disabilities and these other persons that takes place for the purpose of performing his or her job duties, not mere casual and social interaction. We firmly believe that the integrated location criteria within final §361.5(c)(9)(ii), when properly applied, ensure that participants in the VR program, including individuals with the most significant disabilities, are afforded a full opportunity to integrate in their communities and to achieve employment available to the general public.

Changes: None.

Opportunities for Advancement

Comments: One commenter asked whether employment in which individuals with disabilities truly do not have the opportunity to advance in their jobs satisfies the definition of "competitive integrated employment," if the criteria regarding competitive earnings and integrated locations are met. This commenter gave the example of a small business.

Discussion: To ensure that the employment of persons with disabilities is equivalent in all respects to that of persons without disabilities, section 7(5)(C) of the Act, as amended by WIOA, and final §361.5(c)(9)(iii) require that the employee with the disability have the same opportunities for advancement as employees without disabilities in similar positions, regardless of the size of the business. This new criterion is consistent with the prior definitions of "competitive employment" and "integrated settings." If employees in positions similar to that of the employee with the disability have the opportunity to advance in their employment, the individual with the disability must be afforded the same opportunity for this criterion of the definition to be satisfied.

Changes: None.

Construction of a Facility for a Public or Nonprofit Community Rehabilitation Program (§361.5(c)(10))

Comment: One commenter requested that "construction" and "ongoing maintenance" be clearly defined in the regulations.

Discussion: The term "construction of a facility for a public or nonprofit community rehabilitation program" remains unchanged in section 7(6) of the Act, as amended by WIOA, and final §361.5(c)(10).

We disagree with the recommendation that we define "ongoing maintenance" in part 361. Final §361.5(c)(2)(viii) specifies such costs, when incurred for operating and maintaining DSU facilities, may be allowable administrative costs under the VR program. However, ongoing costs of any kind, including ongoing maintenance costs, are not allowable expenditures when establishing, developing, or improving a community rehabilitation program (see final §361.5(c)(16)(iii)).

Changes: None.

Customized Employment (§361.5(c)(11))

Comments: Most commenters supported the new definition of "customized employment" in proposed §361.5(c)(11). A few commenters requested that the definition include the

“discovery phase” of the customized employment model. A few commenters suggested that the definition address when it is appropriate for the DSU to consider customized employment for individuals with disabilities. Further, these commenters stated that DSUs should use customized employment as the last option in assisting an individual with a disability to achieve competitive integrated employment. Another commenter questioned whether customized employment means “job carving.” Furthermore, one commenter requested that we clarify how individuals with disabilities, who are working in customized employment, could advance in their careers. One commenter questioned whether an employer would want to support an individual with a significant disability in customized employment. Another commenter stated that customized employment should not be an unfunded mandate. Finally, one commenter asked that we clarify the impact customized employment might have on the performance accountability measure for the core programs, including the VR program, in the workforce development system under section 116 of WIOA that measures the median wage of participants during the second quarter after they exit from these programs. This

commenter suggested that earnings from customized employment would deflate this measure.

Discussion: We appreciate the comments supporting the new definition of "customized employment" in final §361.5(c)(11). However, we disagree with commenters who recommended that the definition be modified to include additional requirements, such as the inclusion of the discovery phase of the model or when a DSU must consider customized employment for an individual. Section 7(7) of the Act, as amended by WIOA, which defines the term "customized employment," does not include this information. Therefore, we believe final §361.5(c)(11) is consistent with the statute and further regulatory change is not necessary.

We disagree with the commenter that DSUs should use customized employment as a last resort when assisting an individual with a disability to achieve an employment outcome. We believe that customized employment may be an option for some individuals with significant disabilities, while, for other individuals, it may not be a viable path to competitive integrated employment. We strongly encourage DSUs to tailor customized employment services, like all of the services in final §361.48(b) provided to

eligible individuals under an individualized plan for employment, to meet the unique strengths, needs, interests, and informed choice of the individual, so that he or she can achieve an employment outcome in competitive integrated employment. We understand that some may have referred to customized employment in the past as “job carving;” however, the Act, as amended by WIOA, does not use that term. Therefore, we have not incorporated the term “job carving” into these final regulations.

We believe it is possible for individuals with disabilities in customized employment to advance in their careers. Individuals who achieve competitive integrated employment through customized employment could advance in their career with their original employers or by seeking advancement with other employers. The definition of “customized employment” in section 7(7) of the Act, as amended by WIOA, and final §361.5(c)(11) do not include any criteria requiring an individual with a significant disability to remain in customized employment; rather, these individuals may seek additional vocational rehabilitation services for the purpose of advancing in their careers through other forms of competitive integrated employment. Customized employment is an alternative that

enables individuals with disabilities and employers the opportunity to negotiate job tasks and/or reassign basic job duties to improve overall production in the workplace. For employers, customized employment allows an employer to examine its specific workforce needs and fulfill those needs with a well-matched employee. We encourage DSUs to work with employers, particularly those employers that have not been open to employing individuals with significant disabilities, to enable them to hire these individuals through customized employment when appropriate.

We disagree with the commenter that customized employment is an unfunded mandate. Customized employment services are included in the list of allowable vocational rehabilitation services in final §361.48(b). DSUs may expend their resources, including program funds, on supporting individuals in customized employment when appropriate.

Customized employment, as we have discussed, must lead to competitive integrated employment. Section 116(b)(2)(A)(i)(III) of title I of WIOA establishes a primary performance accountability indicator for all core programs of the workforce development system, including the VR program, that measures the median earnings of all

participants who have exited the program in the second quarter after exit. As such, earnings from customized employment will affect the VR program's performance, in the same manner that other earnings will do so. We cannot assume, as the commenter suggests, that individuals in customized employment will earn low wages.

Changes: None.

Employment Outcome (§361.5(c)(15))

Some commenters supported the definition of "employment outcome" in proposed §361.5(c)(15) because it is consistent with the overall purpose of the Act, as amended by WIOA, to promote the achievement of competitive integrated employment and self-sufficiency by individuals with disabilities. As proposed, an "employment outcome" would mean full- or part-time employment in competitive integrated employment, or supported employment. As such, uncompensated employment outcomes (e.g., homemakers and unpaid family workers) would be removed from the scope of the definition for purposes of the VR program. However, most commenters strongly opposed removing "uncompensated employment outcomes," and recommended revisions or clarifications to the proposed definition.

Statutory Basis

Comments: Most of the commenters on the proposed definition of “employment outcome” in §361.5(c)(15) stated that the proposed change is contrary to congressional intent and not mandated by the Act, as amended by WIOA. Many of these commenters requested that the Secretary use the discretion permitted under section 7(11)(C) of the Act to not limit the definition to compensated employment, thereby permitting uncompensated outcomes of homemaker and unpaid family worker to continue to count as an employment outcome under the VR program.

In addition, recognizing that WIOA amends section 102(b)(4) of the Act to require that the individualized plan for employment contain a specific employment goal consistent with competitive integrated employment, a few commenters presented two arguments to support the retention of uncompensated outcomes as an employment outcome. First, the commenters argued that the phrase “consistent with the Act,” as used in the statutory definition, does not require that all components of the term “competitive integrated employment” be satisfied. In the alternative, these commenters suggested that homemaker and unpaid family worker outcomes satisfy the criteria for competitive integrated employment because they are typically found in

the community and the earnings of individuals with disabilities who obtain these outcomes are commensurate with those of non-disabled persons in similar positions.

Discussion: We appreciate the commenters' concerns and recognize that the definition of "employment outcome" in proposed and final §361.5(c)(15) will end a long-standing Department policy. We gave considerable thought to all aspects of the issue and seriously considered the definition in light of the comments received.

We agree with commenters that the change eliminating uncompensated outcomes was not explicitly required on the basis of an amendment to the statutory definition in section 7(11) of the Act, which remained unchanged, in pertinent part, by WIOA. Nonetheless, we believe that the Act as amended by WIOA, when read in its entirety, provides a strong justification for the change.

We agree with the commenters that section 7(11)(C) of the Act permits the Secretary to use his discretion to include other vocational outcomes within the scope of the definition of "employment outcome." This provision is purely discretionary, and there is no requirement that the Secretary exercise this discretion, either to incorporate new outcomes or to retain previously permitted outcomes.

However, if the Secretary chooses to exercise this discretion, the Secretary must do so in a manner that is consistent with the Act.

As noted throughout the preambles to the NPRM and these final regulations, WIOA amended the Act by emphasizing the achievement of competitive integrated employment by individuals with disabilities, including individuals with the most significant disabilities. The Act, as amended by WIOA, refers extensively to competitive integrated employment, including in the statement of the purpose for the VR program, requirements for developing individualized plans for employment and providing services to students and youth with disabilities, and the limitations on the payment of subminimum wages in new section 511. In particular, section 102(b)(4) of the Act, as amended by WIOA, and final §361.46(a) require that the specific employment goal identified in the individualized plan for employment be consistent with the general goal of competitive integrated employment.

The changes made by WIOA provide a marked contrast to the Act, as amended by the Workforce Investment Act of 1998 (WIA). Under WIA, the emphasis in the Act was on achieving integrated employment. Consequently, in 2001, the

Secretary amended the definition of “employment outcome” and required that all employment outcomes in the VR program be in integrated settings, under prior §361.5(b)(16). In so doing, the Secretary eliminated sheltered employment as an employment outcome. At that time, because we considered homemaker and unpaid family worker outcomes to occur in integrated settings, these outcomes continued to constitute an “employment outcome,” for purposes of the VR program.

By contrast, given the pervasive emphasis on achieving competitive integrated employment–-not just integrated employment--throughout the Act, as amended by WIOA, the Secretary has determined that uncompensated employment outcomes, including homemaker and unpaid family worker outcomes, are no longer consistent with the Act. For this reason, the Secretary believes it is no longer an appropriate exercise of the Secretary’s discretion under section 7(11)(C) of the Act to include uncompensated outcomes within employment outcomes in final §361.5(c)(15).

We disagree with the commenters’ argument that an “employment outcome” need not satisfy all criteria of the definition of “competitive integrated employment,” with one narrow exception. Section 7(11)(B) of the Act and final §361.5(c)(15) include supported employment within the

employment outcomes available to individuals with disabilities through the VR program. Under section 7(38) of the Act, as amended by WIOA, and final §361.5(c)(53), supported employment requires that the individual be employed in competitive integrated employment or in an integrated setting in which the individual is working on a short-term basis toward competitive integrated employment. Thus, in limited circumstances, individuals in supported employment may not have achieved employment that satisfies all the criteria of “competitive integrated employment” initially since they will be earning non-competitive wages on a short-term basis. This very narrow exception is the only instance in which the statute permits that all criteria of “competitive integrated employment” need not be satisfied for an individual to achieve an employment outcome. However, even under this narrow exception, the expectation is that, after a short period of time, the individual will achieve competitive integrated employment in supported employment. It is understood, and the commenters do not argue otherwise, that uncompensated employment, such as homemaker and unpaid family worker outcomes, does not satisfy the definition of “supported

employment." There is no expectation that the individuals will ever be compensated in such employment.

We disagree with the first of the commenters' arguments that all criteria of "competitive integrated employment" need not be satisfied for employment to be considered competitive integrated employment. To interpret the Act's definition of "employment outcome" this way would ignore one of the three major components of the definition of "competitive integrated employment"–-competitive wages.

While we agree with the assertion that individuals with disabilities who achieve homemaker or unpaid family worker outcomes perform their work in settings typically found in the community and receive no wages, as would a non-disabled homemaker or unpaid family worker, these similarities are not sufficient to satisfy the definition of "competitive integrated employment." "Competitive integrated employment" requires the payment of wages at or above the applicable Federal, State, or local minimum wage. Neither homemakers nor unpaid family workers earn a wage. Therefore, individuals achieving uncompensated outcomes, such as homemakers and unpaid family workers cannot have achieved an employment outcome in competitive integrated employment.

Changes: None.

Informed Choice

Comments: Many commenters asserted that the definition of "employment outcome" in proposed §361.5(c)(15) is contrary to the principle of informed choice and that individuals with disabilities should have the right to choose homemaker and other uncompensated outcomes just as do persons without disabilities.

Discussion: While we agree that section 102(d) and many other provisions of the Act place a premium on the ability of individuals with disabilities to exercise informed choice throughout the vocational rehabilitation process, including the choice of an employment outcome, we do not agree that the definition of "employment outcome" in final §361.5(c)(15) is inconsistent with the individual's ability to exercise informed choice. We have historically interpreted the statute as allowing individuals who are participating in the VR program to exercise informed choice among those outcomes that satisfy the definition of "employment outcome." Under these final regulations, such outcomes must be in competitive integrated employment or supported employment.

If an individual makes an informed choice to pursue uncompensated employment (e.g., homemaker or unpaid family worker outcomes) or any other outcome that does not meet the definition of “employment outcome” under final §361.5(c)(15), he or she may still do so, but not with the assistance of the VR program. In final §361.37, the DSU is required to refer that individual to other Federal, State, or local programs and providers that can meet the individual's needs for related services (e.g., the State Independent Living Services (SILS) program, Independent Living Services for Older Individuals Who Are Blind program (OIB), Centers for Independent Living program (CIL), and programs for the aging). In addition, final §361.37 requires that individuals receive sufficient information concerning the scope of the VR program and competitive integrated employment opportunities. This information enables individuals to make a fully informed choice regarding whether to pursue an employment outcome through the VR program or homemaker and other uncompensated outcomes through other sources.

We believe the definition of “employment outcome” in final §361.5(c)(15) ensures that the VR program promotes maximum opportunities for individuals with disabilities,

particularly those with significant disabilities, to pursue competitive integrated employment or supported employment options. Individuals with disabilities can achieve competitive integrated employment or supported employment if given appropriate services and supports and, therefore, should be informed that they are not limited to pursuing uncompensated outcomes no matter how significant their disabilities. Nevertheless, we recognize that some individuals will choose to pursue such outcomes. These final regulations require each DSU to preserve individual choice by referring any individual who decides to pursue uncompensated outcomes, or any other outcome that does not meet the definition of an "employment outcome" in final §361.5(c)(15), to other appropriate resources for assistance.

Changes: None.

Legitimacy of Homemaker Outcomes

Comments: Some commenters stated that the definition of "employment outcome" in proposed §361.5(c)(15) does not recognize the legitimacy of homemaker occupations and devalues the work performed by homemakers. Some commenters stated that homemaker outcomes provide economic value for the individual or family, though the individual does not

receive direct wages. Others suggested that homemaker outcomes allow the individual to care for other family members who are disabled and who would otherwise be institutionalized.

Discussion: We agree with the commenters that homemakers perform work that has an economic value for themselves and others in the home. For example, by caring for themselves and the home, homemakers can enable other members of the household to work outside the home and earn an income. In addition, homemakers may care for persons with disabilities in the household, thus helping them to remain in their homes, rather than to reside in institutional settings. Therefore, we emphasize that nothing in these final regulations is intended to alter the fact that homemaker outcomes serve as a legitimate and valued option for people with disabilities. The Secretary does not devalue the dignity or the worth of the individuals who perform this work through this regulatory action. Rather, the definition of “employment outcome” in final §361.5(c)(15), focuses the VR program on its statutory purpose, as set forth in section 100(a)(2)(B)--giving persons with disabilities, including those with significant or the most significant disabilities, the opportunity to work in

competitive integrated employment and to achieve economic self-sufficiency.

Changes: None.

Availability of Services

Comments: Several commenters who opposed the definition of "employment outcome" in proposed §361.5(c)(15) stated that the services provided to individuals pursuing homemaker outcomes through the VR program provide a bridge, gateway, or stepping stone to competitive integrated employment. Many of those commenters stated that services such as Braille training, assistive technology, mobility training, and other home management services are essential to the ability of individuals who are blind and visually impaired to prepare for employment. Many commenters expressed the concern that without homemaker services, many individuals, especially those who are blind and visually impaired, will be unable to function, and either be shut in their homes or forced to live in a care facility. Finally, some commenters stated that the loss of homemaker services could result in low self-esteem, the loss of independence, physical disease, and depression among individuals who are blind and visually impaired.

Discussion: We strongly agree that Braille training, assistive technology, and mobility training are critical to the independence of individuals who are blind and visually impaired, and help to build the foundation on which they can successfully pursue gainful employment. In addition, we recognize that these services can enable individuals who are blind and visually impaired to increase their confidence, as well as their physical and psychological well-being. Most importantly, these services always have been, and continue to be, available to individuals with disabilities under an individualized plan for employment pursuant to section 103(a) of the Act and final §361.48(b), so long as the individuals are pursuing an employment outcome under final §361.5(c)(15), specifically competitive integrated employment or supported employment. To the extent such individuals do not wish to do so, these same services are, and always have been, available under the independent living programs authorized by title VII of the Act.

We understand, from anecdotal evidence, that it has been the practice of some DSUs to provide individuals who are newly blind or experiencing significant vision loss with services designed to help them attain homemaker

outcomes, with the expectation that the individuals will return to the VR program when they are ready to pursue additional training and the achievement of an employment outcome. However, DSUs must provide the vocational counseling and guidance to help individuals pursue an employment outcome consistent with competitive integrated employment, as required by section 102(b)(4) of the Act, as amended by WIOA, and final §361.46(a)(1) at the outset or refer individuals to the independent living programs under final §361.37 depending on their individual goals. DSUs are encouraged to deliver services such as Braille and mobility training throughout the vocational rehabilitation process, in combination with the other education, training, and equipment needed to achieve the identified employment goal. In this way, DSUs can more effectively engage individuals in the VR program and better assist them to achieve the ultimate goal of competitive integrated employment or supported employment.

Changes: None.

Disproportionate Impact

Comments: Many commenters stated that the change in the definition of “employment outcome” in proposed §361.5(c)(15) will have a disproportionate impact on

individuals served through the VR program who are blind and visually impaired. A few commenters requested that we create an exception for agencies that serve individuals who are blind if we maintain the definition as proposed.

Discussion: As stated in the preamble to the NPRM, we believe the definition of "employment outcome" in final §361.5(c)(15) will have minimal impact on most DSUs in their administration of the VR program because, nationally, a steadily decreasing and relatively small number of individuals exit the program as homemakers or unpaid family workers. The data reported by DSUs demonstrate that the majority of DSUs have been placing increased importance and emphasis in their policies and procedures on competitive integrated employment and supported employment outcomes, thereby deemphasizing uncompensated outcomes. This shift in practice has been the product of the DSUs' responding to the changes to the Act since the enactment of WIA in 1998 and reflecting that changing emphasis in their administration of the VR program.

Nonetheless, we recognize that some DSUs, particularly those serving individuals who are blind and visually impaired, report a greater percentage of homemaker outcomes than others. For example, VR agencies serving individuals

who are blind and visually impaired reported that 618 individuals obtained homemaker outcomes in FY 2014, representing 9.8 percent of all employment outcomes for these agencies. In comparison, all other VR agencies reported that 2,436 individuals obtained homemaker outcomes in FY 2014, representing 1.4 percent of all employment outcomes for these agencies. Consequently, we proposed in the NPRM a transition period of six months following the effective date of these final regulations to allow DSUs to complete the VR process for individuals already pursuing homemaker outcomes under individualized plans for employment. See the discussion on “Transition Period” later in this section regarding the comments received on the proposed transition period.

Neither section 7(11) nor any other provision of the Act, as amended by WIOA, permits the Secretary to make an exception when implementing the definition of “employment outcome” to allow DSUs serving individuals who are blind and visually impaired to continue assisting individuals to achieve uncompensated outcomes, such as homemaker outcomes, when that employment is not consistent with the Act. Therefore, there is no statutory authority to make the exception recommended by commenters.

Changes: None.

Resources for Service Provision

Comments: Several commenters stated that services such as training in Braille, orientation and mobility training, and the provision of assistive technology and training in its use are not available to individuals who are blind and visually impaired through any other resources, such as medical insurance and one-stop delivery centers. In particular, many commenters stated that the OIB program lacks sufficient resources to serve the individuals who would no longer be eligible to receive vocational rehabilitation services as a result of the change in the definition of "employment outcome" in proposed §361.5(c)(15), because, to be eligible for the VR program, an individual must intend to achieve an employment outcome. A few commenters asked that we request additional funds for this program. One commenter suggested that we lower the age of eligibility for services from the OIB program to allow younger individuals to receive these services. Additionally, many commenters stated that other independent living programs and providers lack the funds and qualified staff needed to provide individuals who are blind and visually impaired with the complex skills of Braille

literacy and orientation and mobility. Several commenters stated that the change in the definition of “employment outcome” will result in loss of funding needed by community rehabilitation programs to provide these vital services.

One commenter asked if the Department would create a separate homemaker program not directly connected to the VR program. One commenter stated that many DSUs have entered into long-term contractual arrangements for providing services to individuals pursuing homemaker outcomes and requested that we exempt these arrangements from the application of the new rule. Another commenter requested that the Client Assistance Program (CAP) and other advocacy groups conduct outreach to the community of individuals who are blind and visually impaired who otherwise would have chosen homemaker outcomes.

Discussion: We recognize that medical insurance and other one-stop delivery system programs under WIOA typically do not support training in Braille and mobility or the provision of assistive technology for individuals who are blind and visually impaired.

Under final §361.37(b), the circumstances when the DSU must provide referrals to other programs and service providers for individuals who choose not to pursue an

employment outcome under the VR program has been expanded. Similarly, final §361.43(d) expands the requirement for the referral of individuals found ineligible for vocational rehabilitation services, or determined ineligible subsequent to the receipt of such services, to include appropriate State, Federal, and local programs, and community service providers (e.g., the SILS program, OIB program, CILs, and programs for the aging) better suited to meet their needs.

Those programs designed to meet the needs of individuals who choose to pursue homemaker outcomes include the OIB program, the only program authorized under title VII of the Act, as amended by WIOA, which remains under the administration of the Department. There is no authority, in either title I or VII, to permit DSUs to use VR program funds to provide OIB program services in order to alleviate any deficiencies in OIB funding, which may result from an increase in the number of individuals seeking services from the OIB program following the change in the employment outcome definition for purposes of the VR program. However, the Administration has requested a $2.0 million increase over the 2016 level for the OIB program in the fiscal year 2017 President’s Budget to assist States in

meeting an anticipated increase in the demand for OIB services. The Department will consider increases in the demand for OIB program services resulting from this rule change in future budget requests.

We recognize that some CIL staff may not possess the skills necessary to provide individuals who are blind and visually impaired the specialized training and services that will enable them to remain in their homes and care for themselves, such as training in Braille and orientation and mobility. Therefore, we strongly encourage DSUs to strengthen their relationships with the CILs in their States by providing training and technical assistance necessary to build the capacity of the staff that will afford them the option to deliver these services in accordance with the State Plan for Independent Living developed in the State. The Department will support these efforts through technical assistance in collaboration with the Department of Health and Human Services, which is now responsible for the administration of the Centers for Independent Living program under title VII of the Act, as amended by WIOA.

We disagree that the change in the definition necessarily will result in a loss of funding for community

rehabilitation programs to provide homemaker services. Although DSUs may no longer use VR program funds to purchase these services from community providers, they may use other program funds to do so, such as those for the OIB programs.

In response to the comment requesting an exemption for existing contractual relationships between the DSUs and other entities to assist individuals with disabilities to achieve outcomes in uncompensated employment, once final §361.5(c)(15) takes effect a DSU cannot contract with another entity to assist an individual with a disability to achieve an uncompensated outcome, such as homemaker or unpaid family worker. There is no statutory authority that would permit an exemption to the prohibition. However, as discussed in more detail in the Transition Period section, DSUs are able to use VR program funds to continue to engage in contractual arrangements for providing services to individuals with disabilities who are already in the process of pursuing homemaker and other uncompensated employment outcomes under individualized plans for employment approved prior to the effective date of these final regulations.

While we understand the concern raised by the commenter who requested a lower eligibility age for the OIB program, title VII of the Act, as amended by WIOA, retains the eligible age of 55 for OIB program services in the statute; therefore, the Department is not authorized to change the age of eligibility. Nor does the Act, as amended by WIOA, authorize the creation of a homemaker program separate from the VR program.

While we appreciate the commenter's recommendation that the CAP should provide outreach services to individuals affected by the implementation of the revised definition of "employment outcome," section 112 of the Act requires, as it always has, the CAP to provide information and advocacy services to individuals who are applicants or consumers of the VR program or any other program under the Act. The CAP may provide information and advocacy services for those individuals pursuing uncompensated outcomes who are served by the VR program during the transition period or served by the OIB or independent living programs after the transition period. However, no authority exists in section 112 of the Act to permit the CAP to conduct outreach to, or to serve, individuals pursuing uncompensated outcomes under programs not authorized by the

Act. Although the Department is no longer responsible for the administration of the CIL and SILS programs, these programs continue to be authorized under title VII of the Act, and therefore the CAP can provide assistance to individuals receiving independent living services.

Changes: None.

Feasibility Studies

Comments: Some commenters recommended that we conduct a study of homemaker closures to address problems of overuse and that the definition of “employment outcome” include strict criteria to prevent overuse.

One commenter asked whether the Department had conducted a feasibility study to determine if the referral of individuals from VR to other service providers would reasonably result in the provision of services.

Discussion: We have not conducted, nor do we intend to conduct, a study of homemaker closures to address problems of overuse. A study to ensure DSUs do not overuse uncompensated outcomes is not necessary because such outcomes will no longer be permitted under the VR program once these final regulations take effect and the transition period ends. For the same reason, we do not believe it

necessary to change §361.5(c)(15) to prevent the overuse of homemaker and unpaid family worker outcomes.

However, we intend to monitor State implementation of the final regulations during our annual review and periodic on-site monitoring of State VR agencies to ensure that persons with significant disabilities, including those who are blind and visually impaired, receive vocational rehabilitation services in pursuit of competitive integrated employment or supported employment. Additionally, we will review the steps DSUs are taking to ensure that individuals are appropriately referred under final §§361.37(b) and 361.43(d), to other Federal, State, and local programs and providers (e.g., the SILS program, OIB program, CILs, and programs for the aging) that are better able to meet the needs of individuals with disabilities who desire to receive homemaker services. If needed, the Department will consider providing technical assistance to DSUs to enable them to build better relationships with these other entities to increase the potential for successful referrals.

Changes: None.

Transition Period

Comments: A few commenters supported the Department's proposed transition period of six months following the effective date of the final regulations, during which DSUs would finish providing vocational rehabilitation services to, and close the service records of, individuals pursuing uncompensated outcomes, such as homemakers and unpaid family workers, through individualized plans for employment that were approved prior to the effective date.

Some commenters stated that six months would not be long enough to finish providing services and close these service records or to develop relationships with providers of independent living services to which the DSUs could refer these individuals. Of these commenters, some recommended that the Department extend the proposed transition period to 12 months following the effective date of the final regulations, while some others recommended 18 or 24 months.

However, most commenters who commented on the proposed transition period recommended that we adopt a flexible period that DSUs would determine case by case, taking into account the needs of the individual. Finally, one commenter recommended that we permit DSUs to provide vocational rehabilitation services to individuals with the

goal of homemaker on their individualized plans for employment without regard to the duration of the services, but that we not allow DSUs to implement new individualized plans for employment with the goal of homemaker following the effective date of the final regulations.

Discussion: To permit DSUs to develop individualized plans for employment that include uncompensated employment goals, such as those of homemakers and unpaid family workers, after the effective date of these final regulations would be inconsistent with the Act, as amended by WIOA. Section 102(b)(4) of the Act, as amended by WIOA, and final §361.46(a), require all individualized plans for employment developed under the Act to include employment goals consistent with the general goal of competitive integrated employment.

However, we do agree with commenters that DSUs may need longer than six months following the effective date to finish providing services to some individuals who are already pursuing homemaker or other uncompensated outcomes on individualized plans for employment that were developed and executed prior to the effective date. Data obtained through the RSA-911 case service report show that, on average, individuals with disabilities take approximately

24 months to complete the vocational rehabilitation process from the time they apply for services until their service records are closed. These data also demonstrate that individuals who are 55 years and older and blind take approximately 21.5 months to complete the vocational rehabilitation process from the time that they apply for services.

Therefore, the Secretary has concluded that DSUs may continue to provide services to individuals with uncompensated employment goals on their individualized plans for employment that were approved prior to the effective date of the final regulations through June 30, 2017, unless a longer period of time is required based on the needs of the individual, as documented in the individual's service record.

The Secretary believes that DSUs can finish providing services to, and close the service records of, most individuals pursuing homemaker and other uncompensated outcomes during this transition period. However, a DSU can determine on a case-by-case basis, taking into consideration the unique needs of each individual, that the DSU cannot complete the provision of services within that time frame and, therefore, may continue the services until

the individual no longer needs them. For example, services may be interrupted and, consequently, the DSU cannot complete the services prior to June 30, 2017. For this and other reasons, the DSU may extend the provision of services beyond June 30, 2017, until they are completed and the individual's service record is closed.

By extending the transition period, DSUs will have sufficient time to develop and strengthen their relationships with other governmental and nonprofit providers of independent living services so that DSUs may make appropriate referrals to these providers and individuals with disabilities can receive the services they need to maintain their homes and independence. The Department plans to provide guidance and technical assistance to: (1) facilitate the transition to the new definition of employment outcome; and (2) minimize the potential disruption of services to VR program consumers currently receiving services and who do not have a competitive integrated employment or supported employment goal reflected in their individualized plan for employment.

Finally, all participants who exit the VR program after July 1, 2016, including those exiting in uncompensated employment, such as homemakers and unpaid

family workers, must be included in the calculations of the performance accountability measures established in section 116(b)(2)(A)(i) of title I of WIOA and explained more fully in the joint performance information collection request. The performance accountability requirements of section 116 of WIOA take effect July 1, 2016.

Changes: We have included a note in final §361.5(c)(15) allowing for a transition period to permit a DSU to continue services to individuals with uncompensated employment goals on their approved individualized plans for employment prior to the effective date of the final regulations until June 30, 2017, unless a longer period of time is required based on the needs of the individual with the disability.

Extended Services (§361.5(c)(19))

Comments: A few commenters were concerned that the provision of extended services to youth with the most significant disabilities will cause an undue hardship for some DSUs. A few other commenters understood the proposed changes to mean that the DSUs were responsible for funding all individuals in extended services even after the individual transitions from the DSU for support.

Discussion: Final §361.5(c)(19)(iv) specifies that "extended services" are those services provided to individuals with the most significant disabilities, which may include youth with the most significant disabilities, by a State agency, a private nonprofit organization, employer, or any other appropriate resource once an individual has concluded support services from the DSU. The definition of "extended services" in final §361.5(c)(19)(v) specifies that the DSU provides extended services only to "youth with the most significant disabilities" for a period not to exceed four years or until such time as a youth reaches the age of 25 and no longer meets the definition of a "youth with a disability" under final §361.5(c)(58). For further information on the provision of extended services in accordance with final §§363.4 and 363.22, see the Analysis of Comments and Changes section for the Supported Employment Program in 34 CFR part 363.

Changes: None

Indian; American Indian; Indian American; Indian Tribe (§361.5(c)(25))

Comments: Many commenters disagreed with expanding the definition of "Indian tribe" to make tribal organizations

eligible for AIVRS grants. Most of these commenters requested that we establish policies that give tribal governments the authority to designate those tribal organizations or entities acting on their behalf as applicants or recipients of AIVRS funding.

Discussion: We provide a detailed analysis of these comments in a separate regulatory action implementing the amendments made by WIOA to miscellaneous programs under the Act, including the AIVRS program, published elsewhere in this issue of the Federal Register.

Changes: None.

Informed Choice

Comments: Some commenters requested that we define "informed choice."

Discussion: We disagree with the recommendation to define "informed choice" in final §361.5(c). Section 102(d) of the Act and final §361.52 fully describe the critical aspects of informed choice in the context of the VR program and reflect the statutory emphasis that individuals participating in the VR program must be able to exercise informed choice throughout the entire rehabilitation process.

Changes: None.

Supported Employment Definitions

Comments: We received comments on the definitions of "supported employment" and "supported employment services" in proposed §§361.5(c)(53) and 361.5(c)(54), respectively, concerning the short-term basis period, transitional employment, and the duration of supported employment services.

Discussion: We discuss these comments later in the Analysis of Comments and Changes section for the Supported Employment Program in final 34 CFR part 363.

Transition-Related Definitions

Comments: We received comments on definitions pertaining to the transition of students and youth with disabilities from school to postsecondary education and employment, including "pre-employment transition services," "student with a disability," "transition services," and "youth with a disability."

Discussion: We discuss these comments in section B later in this Analysis of Comments and Changes section of the preamble.

Submission, Approval, and Disapproval of the State Plan (§361.10)

Content and Submission of the VR Services Portion of the Unified and Combined State Plan

Comments: Apart from public comments received on the joint regulations proposed by the U.S. Departments of Labor and Education implementing jointly administered requirements for the Unified or Combined State Plan, we received comments on proposed §361.10 pertaining to the VR services portion of the Unified or Combined State Plan. Many commenters expressed support for the revised State Plan requirements and process as described in the proposed joint regulations, noting the regulations promote an opportunity for collaboration across the workforce development system. Additionally, these commenters requested technical assistance and guidance to clarify the State Plan process.

One commenter requested that we clarify the meaning of "The VR services portion of the State Plan" and asked whether this is in fact a separate program-specific component of the Unified or Combined State Plan. This commenter previously submitted a Unified State Plan in which the vocational rehabilitation components of the plan were interspersed throughout the overall plan. One commenter asked whether the proposed joint regulation in 34 CFR 676.130(f), which requires the RSA Commissioner to

approve the VR services portion of the Unified or Combined State Plan before the Secretaries of Labor and Education approve the Unified or Combined State Plans, means that DSUs will have separate timelines for the submission of the VR program-specific components of the plan.

Discussion: We appreciate the commenters' support, as well as the requests for clarifications. Final §361.10 implements section 101(a)(1) of the Act, as amended by WIOA, which requires a State to submit a Unified or Combined State Plan under section 102 or section 103, respectively, of title I of WIOA, in order to receive funding under the VR program. The Unified or Combined State Plan must contain a VR services portion. Section 101(a)(1) of the Act, as amended by WIOA, and final §361.10(a) require the VR services portion of the Unified or Combined State Plan to contain all State Plan requirements under section 101(a) of the Act. Prior to the enactment of WIOA, DSUs submitted a stand-alone State Plan directly to the Department. Under WIOA, the VR services portion will be submitted as part of the Unified or Combined State Plans by the State to the Secretary of the U.S. Department of Labor, who will distribute the plans to the other Federal agencies responsible for their review and

approval, including the Department of Education with respect to the review and approval of the VR services portion of the plans.

The "Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications Under the Workforce Innovation and Opportunity Act," recently approved by the Office of Management and Budget under control number 1205-0522, presents the VR services portion of the Unified or Combined State Plan as a distinct component of the plan. The timelines for submission of the Unified or Combined State Plan, and, hence, the VR services portion of that plan, are governed by sections 102 and 103 of title I of WIOA, and the joint final regulations published elsewhere in this issue of the Federal Register. Thus, there is no statutory authority to establish a separate timeline or date for the submission of the VR services portion of the plan, despite the fact that the Commissioner must approve the VR services portion before the Secretaries of Labor and Education approve the remainder of the plans.

Changes: None.

Alignment of Program and Fiscal Years

Comments: Many commenters were interested in how the new timelines for the submission and modification of the Unified and Combined State Plans will be aligned with the specific requirements of the VR services portion of the Unified or Combined State Plan, including reporting requirements, performance levels, and the difference between the start of the program year on July 1 for the purposes of requirements under title I of WIOA versus the start of the Federal fiscal year on October 1 when the VR program formula grants are issued in accordance with the Act. A few commenters supported the alignment of the program years under the Unified and Combined State Plans among all core programs in the workforce development system, including the VR program.

Discussion: While we understand the concern expressed by commenters regarding the potential confusion caused by differences between the VR program's fiscal year and the other core programs' program year, section 110(a)(2)(A) of the Act, which specifies the manner in which VR program allotments are to be made, was not amended by WIOA. Moreover, section 111(a)(1) of the Act, which also remained unchanged by WIOA, requires that payments are made to States on a Federal fiscal year basis. This provision is

consistent with section 101(a)(1), which requires States to submit a VR services portion of a Unified or Combined State Plan to receive funding "for a fiscal year." Finally, section 101(a)(10) of the Act, as amended by WIOA, requires the DSU to submit certain data to demonstrate the annual performance of the VR program, within the same fiscal year in which the VR program operates. For these reasons, there is no statutory authority to change the period for making allotments to the States from the fiscal year beginning on October 1 to the program year used under title I of WIOA, which is July 1 of each year for most core programs.

In order to align the VR program with the other core programs to the extent practicable, DSUs must submit the VR services portion of the Unified or Combined State Plan and report the data required under final §361.40 in a manner consistent with the jointly administered requirements set forth in the joint regulations governing Unified or Combined State Plan requirements published elsewhere in this issue of the Federal Register. However, States will continue to receive VR program allotments and report fiscal data through the Financial Status Report (SF-425) in accordance with the Federal fiscal year.

Changes: None.

Other Comments

Comments: Several commenters were uncertain about the application of common performance measures and asked whether combined partners under a Combined State Plan would be held to the new performance standards as well. One commenter asked whether, when there is more than one DSU in the State, DSUs serving individuals who are blind will have separate performance levels from DSUs serving individuals with all other disabilities. Another commenter suggested that Unified or Combined State Plans be posted electronically to a Web site that the public could easily access.

We also received comments regarding the determination of eligibility for individuals with autism and on the significance of disability.

Discussion: The Departments of Education and Labor address these comments in the Analysis of Comments and Changes section of the joint final regulations implementing the jointly administered requirements for the submission of a Unified or Combined State Plan under sections 102, and 103 of title I of WIOA and the performance accountability system under section 116 of title I of WIOA, published elsewhere in this issue of the Federal Register, because

they apply to all core programs in the workforce development system, not just the VR program.

We address the comments regarding the determination of eligibility for individuals with autism and the significance of disability in the Assessment for Determining Eligibility and Priority for Services (§361.42) section of this preamble.

Changes: None.

Requirements for a State Rehabilitation Council (§361.17)

Establishment of a State Rehabilitation Council

Comments: One commenter suggested the word "if" be removed from the introductory paragraph in §361.17. This commenter suggested that all States are required to have a State Rehabilitation Council (SRC or Council).

Discussion: Section 101(a)(21) of the Act, which remained unchanged by WIOA, and final §361.16 permit States to establish either an independent State commission or an SRC. Therefore, there is no statutory authority to mandate that States establish a Council, rather than an independent commission. For this reason, we have not revised the introductory paragraph in final §361.17 as the commenter recommended, because it is consistent with the statute. However, the Act does not prohibit a State from

establishing both an independent commission and a SRC if it chooses to do so.

Changes: None.

Additional Members

Comments: Some commenters requested that we require in §361.17(b) that the SRC include additional members, such as a representative of the State's Council on Developmental Disabilities, entities carrying out programs under the Assistive Technology Act of 1998 in the State, and groups of, or representing, individuals with intellectual and developmental disabilities.

Discussion: Section 105(b)(1) of the Act, as amended by WIOA, made only one amendment to the composition requirements of the SRC related to the representation of the AIVRS projects in the State on the SRC. The Act, as amended by WIOA, did not alter the composition requirements in any other way. As a result, there is no statutory basis to require additional representatives from other State entities. However, the Act, as amended by WIOA, does not prohibit a State from electing to add more members to its SRC if it determines this is appropriate.

Changes: None.

Terms of Appointment

Comments: One commenter suggested that we amend the requirements related to terms of appointment in §361.17(e) to allow SRC members who were appointed to fill a vacancy and serve the remainder of their predecessor's term to be appointed to two additional consecutive full terms.

Discussion: WIOA did not amend section 105(b)(6) of the Act or change the requirements governing terms of appointment; therefore, there is no statutory authority to amend these requirements in final §361.17(e). The Department has interpreted these requirements to permit an SRC member who completed the term of a vacating member to be appointed for only one additional consecutive full term of three years.

This long-standing Department interpretation is consistent with section 105(b)(6) of the Act, which limits a term to no more than three years; however, there is no requirement that each member be appointed for a three-year term. Under section 105(b)(6)(A)(i) of the Act, an individual who is appointed to complete a predecessor's unfinished term is appointed for the remainder of that term. This appointment constitutes one full term for that individual. Section 105(b)(6)(B) of the Act prohibits an individual from serving more than two consecutive full

terms. Therefore, if an individual is appointed to complete one year remaining of a predecessor's term and is then reappointed for a second full three-year term, this individual has served two full terms even though the total number of years served is four.

Changes: None.

Coordination with One-Stop Centers

Comments: None.

Discussion: Section 105(c)(8) of the Act and final §361.17(h))(8) permit the SRC to perform functions in addition to those specifically authorized in the Act and final regulations so long as they are comparable to the specified functions. To support the alignment of the VR program with the workforce development system as emphasized throughout the Act and these final regulations, we clarify that SRCs may coordinate and establish working relationships with one-stop centers. This coordination is comparable to the coordination with SILCs and CILs required under section 105(c)(7) of the Act and final §361.17(h)(7).

Changes: None.

Comprehensive System of Personnel Development (§361.18)

Data Report for Comprehensive System of Personnel Development (§361.18(a))

Comments: One commenter recommended revisions to proposed §361.18(a) regarding the submission of data on the comprehensive system of personnel development (CSPD) in the vocational rehabilitation services portion of the Unified or Combined State Plan to reduce burden on DSUs. Specifically, the commenter recommended that DSUs be required to submit information about the vocational rehabilitation personnel via pre-print assurances, rather than descriptions, and be required to submit aggregated data, rather than disaggregated data.

Discussion: WIOA made only technical changes to section 101(a)(7)(A) of the Act, none of which increased the reporting that had been required of DSUs for nearly 20 years. While we are sensitive to the burden imposed by reporting requirements, there is no statutory basis for the Department to make the changes suggested by the commenter. Section 101(a)(7)(A) of the Act, as amended by WIOA, explicitly mandates that DSUs provide the requisite information in a descriptive format and the data in a disaggregated format.

Changes: None.

Applicability of Education, and Experiential Requirements to Rehabilitation Counselors (§361.18(c)(1))

Comments: We received many comments regarding proposed §361.18(c)(1)(ii), which requires DSUs to establish, as part of a CSPD, personnel standards for rehabilitation professionals and paraprofessionals that include educational and experiential requirements. Most of these commenters opposed applying this provision to vocational rehabilitation counselors, and many of these commenters stressed the importance of maintaining the education and experience requirement under prior §361.18(c)(1)(i) for vocational rehabilitation counselors. Specifically, these commenters stated that vocational rehabilitation counselors should be required to meet a national or State-approved or recognized certification, licensing, registration, or other comparable requirements for the area in which such personnel are providing vocational rehabilitation services. These commenters strongly urged the Department to require that vocational rehabilitation counselors meet that higher standard.

Similarly, many commenters urged that the training and education received in a master's degree program in rehabilitation counseling relate in a necessary, direct, and practical way to the work vocational rehabilitation counselors do each day. These commenters asserted that

rehabilitation counseling is a professional career that requires extensive knowledge in a very broad arena. In addition, several commenters stressed that the educational requirements applied to vocational rehabilitation counselors must be sufficient to ensure that they have the following knowledge: medical and psychological aspects of disability, counseling and guidance strategies, vocational assessment, person-centered planning, cultural competency, career services, and building relationships with businesses who would like to hire or retain individuals with disabilities. These commenters maintained that all of these skills are available to individuals pursuing a master’s degree in a program accredited by the Council on Rehabilitation Education.

Several commenters maintained that section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and proposed §361.18(c)(1)(ii), which set education and experience requirements of a baccalaureate degree in an additional field of study such as business administration, human resources, and economics, do not apply to vocational rehabilitation counselors. These commenters strongly believe that since a national certification exists for certified rehabilitation counselors this provision is

inapplicable for vocational rehabilitation counselors. Some commenters stated that because there was no legislative report accompanying WIOA, the Department cannot be certain that Congress intended that the lower education and experience requirements in section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, apply to vocational rehabilitation counselors. One commenter stated that including a business degree in the credentials required for vocational rehabilitation personnel, with respect to qualified vocational rehabilitation counselors, was intended to be supplemental to a Master’s degree in rehabilitation counseling and does not supplant the highest standard in the State, which in many States is the master's degree in rehabilitation counseling. Another commenter stated that since individuals with less experience could be paid less, they potentially could make up a larger portion of the DSU staff. If done correctly, the commenter stated that this could be a great opportunity to add individuals with business and marketing backgrounds to the DSU staff. This could also potentially help reduce caseloads, since recipients who need assistance only with placement could go straight to the marketing/business staff. Some commenters observed that the new requirements appear to be based on an

assumption that a counselor should be able to work with both consumers and employers, as opposed to a team approach where experts in counseling work with consumers and business experts work with employers.

One commenter supported the education and experience requirements in proposed §361.18(c)(1)(ii) because of the heightened emphasis on employer engagement and competitive integrated employment outcomes. This commenter stated that the proposed changes will provide an opportunity for DSUs to adjust the level of expertise and commitment of its personnel. The commenter also stated that establishing these educational requirements and work experiences will ensure that program participants are receiving quality services.

Discussion: We appreciate the many comments we received regarding CSPD and the changes proposed in §361.18(c)(1)(ii). We appreciate the fact that CSPD is an important issue for DSUs and their personnel and that it represents a cornerstone of the VR program, ensuring that individuals with disabilities receive services from staff who are qualified to meet their individual needs.

As stated in the NPRM, proposed §361.18(c)(1)(ii) mirrors section 101(a)(7)(B)(ii) of the Act, as amended by

WIOA, with regard to minimum education and experience requirements for vocational rehabilitation personnel. In so doing, §361.18(c)(1)(i), both proposed and final: (1) retains language in prior §361.18(c)(1)(i) regarding national and State-approved certification and licensure requirements since this requirement remained unchanged by WIOA; (2) incorporates new educational and experiential requirements in proposed §361.18(c)(1)(ii) that range from a baccalaureate degree with at least one year of relevant experience to a master’s or doctoral degree; and (3) deletes the requirement in prior §361.18(c)(1)(ii) that DSUs must re-train staff who do not meet their established personnel standards.

We agree with commenters that the higher standard in section 101(a)(7)(B)(i) of the Act and final §361.18(c)(1)(i), which had been the only personnel standard for vocational rehabilitation personnel prior to the enactment of WIOA, has served a critical role in ensuring that well-qualified staff are available to provide vocational rehabilitation services to individuals with disabilities. We understand other lower education or experience requirements may not prepare DSU staff in the same manner as a national or State-approved certification

or licensure for vocational rehabilitation counseling could. As commenters indicated, programs leading to such national or State-approved certification or licensure in vocational rehabilitation provide vocational rehabilitation counselors with critical knowledge and understanding of medical and psychological aspects of disability, counseling and guidance strategies, vocational assessment, person-centered planning, cultural competency, career services, and building relationships with businesses who would like to hire or retain individuals with disabilities. However, section 101(a)(7)(B) of the Act, as amended by WIOA, requires that States establish and maintain personnel standards, which apply to all vocational rehabilitation professionals and paraprofessionals employed by the DSU, including both national or State-approved certification and licensure requirements in section 101(a)(7)(B)(i) and the education and experience requirements in section 101(a)(7)(B)(ii). This means that the personnel standards apply to vocational rehabilitation counselors and all other vocational rehabilitation professionals and paraprofessionals. There is nothing in the statute that limits the higher standard to vocational rehabilitation counselors. Nor is there any statutory basis to preclude a

DSU from hiring a vocational rehabilitation counselor who meets the education and experience requirements of section 101(a)(7)(B)(ii) but not a national or State-approved certification or licensure requirement. Final §361.18(c)(1) is consistent with the Act as amended by WIOA.

We also agree with the commenters who supported the proposal, and believe that the new education and experience requirements set forth in section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and final §361.18(c)(1)(ii) are beneficial to the VR program and the individuals they serve.

Changes: None.

Applicability of Standards to Other Personnel

Comments: Some commenters stated that the lower educational standards might better be applied to other vocational rehabilitation personnel (e.g., business relations specialists, placement specialists, etc.). One commenter said other positions (such as financial officers, legal counsel, DSU program/division directors, and policy/regulatory compliance officers) should be subject to requirements regarding the development of skills and knowledge and should be required to complete and maintain a

certain amount of training regarding the provision of rehabilitation services.

Discussion: Consistent with our interpretation of the CSPD requirements in a NPRM published pursuant to the 1998 Amendments to the Act, we interpret the Act to require the DSU establish and implement appropriate, certification-based standards for all categories of professionals and paraprofessionals needed to conduct the VR program. However, in light of the difficulty States may experience in developing numerous standards at the same time, we would expect DSUs to give priority to those professions that are generally considered most critical to the success of the VR program (65 FR 10619, 10622-10623 (Feb. 28, 2000)). This requirement under the Act, as amended by WIOA, applies to all personnel positions listed under the State's vocational rehabilitation classification as it had under WIA. The specific positions covered under such a classification will vary from State to State. With respect to financial officers and legal counsel, States have the discretion to determine whether they are classified as vocational rehabilitation professionals or paraprofessionals since their classification varies between States. In many States, these positions are not dedicated solely to the DSU

and its VR program, but rather are more general State personnel positions. We would agree that program and division administrators and policy and regulatory compliance officers for the DSU's VR program must be covered by the requirement in final §361.18(c)(1). Similarly, we would agree that the VR program director or administrator would be covered by the CSPD requirements of section 101(a)(7)(B) because that position would be considered a vocational rehabilitation professional or paraprofessional. The Secretary believes that the individual who oversees vocational rehabilitation professionals and paraprofessionals should satisfy at least the minimum education and experience requirements applicable to all vocational rehabilitation professionals and paraprofessionals.

We appreciate the comment regarding the personnel standards and their applicability to vocational rehabilitation paraprofessionals. Neither the Act nor these final regulations distinguish between vocational rehabilitation professionals and paraprofessionals. By the same token, neither the Act nor these final regulations define what constitutes a vocational rehabilitation professional or paraprofessional as opposed to an

administrative staff position providing clerical or other support to rehabilitation personnel.

The distinction among vocational rehabilitation professionals, paraprofessionals, and administrative (e.g., clerical and other support) staff are made at the State level in accordance with State hiring policies and procedures. Neither section 101(a)(7)(B) of the Act, as amended by WIOA, nor final §361.18(c)(1) require the DSU to develop personnel standards for the hiring of staff who are not classified as vocational rehabilitation professionals or paraprofessionals. However, both the Act and these final regulations require a DSU to develop personnel standards for the hiring of vocational rehabilitation professionals and paraprofessionals that are consistent with the standards set forth in section 101(a)(7)(B) of the Act, as amended by WIOA, and final §361.18(c)(1).

As such, if a national or State-approved standard--or, in the absence of such standards, other comparable requirements (e.g., State personnel standards)--exists for such paraprofessional this should be the standard for such personnel. However, if no such standard exists or the DSU is unable to hire staff that meet such standard, then the DSU must, under final §361.18(c)(1)(ii), hire vocational

rehabilitation paraprofessionals who meet standards consistent with the education and experience levels established in the Act and these final regulations.

Changes: None.

De-Professionalization and Diminution of Vocational Rehabilitation Personnel

Comments: Several commenters stated that the proposed education and experience requirements seemingly discount the role and impact of the professional rehabilitation counselor working with eligible consumers to obtain competitive integrated employment. Many stated that proposed §361.18(c)(1)(ii)(A)(1), which permits a baccalaureate degree plus one year of relevant experience, serves as a guideline to promote the de-professionalization of the expertise level associated with rehabilitation counseling and the professional provision of qualified services for individuals with disabilities. The commenters asserted that an individual with a baccalaureate degree, some related work experience, or volunteer work, is not equivalent to a master’s degree level graduate who is a qualified counselor licensed to practice counseling.

Further, at least one commenter expressed concern that the flexibility offered by the new education and experience

requirements could lead to the unintended diminution of a vocational rehabilitation workforce able to meet the needs of a consumer population with significant disabilities, which is its major focus, especially as public resources diminish. The commenter encouraged the Department to work with DSUs and academic institutions to ensure this diminution does not occur. The commenter stated that some of the degrees listed under these personnel standards would be appropriate for specialized titles such as “business relations specialists” but may not be appropriate for vocational rehabilitation counselors.

Discussion: Prior §361.18(c)(1)(ii) permitted DSUs to hire individuals who did not meet the national or State-approved standard so long as the agency provided training to enable the individual to reach that higher standard. While WIOA deleted the provision that allowed DSUs to hire individuals at a lower standard so long as additional training was provided so that the staff person could eventually satisfy the national or State-approved standard, DSUs under final §361.18(c)(1)(ii) must ensure that individuals who do not meet the higher standard satisfy certain statutorily-required minimum standards. Looking at the new requirements in this way, the new educational and

experiential requirements merely set minimum hiring standards, which previously had been left at the DSU's discretion. In this manner, we disagree with commenters that the new provisions of section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and final §361.18(c)(1)(ii) promote the de-professionalization of the vocational rehabilitation counselor or the diminution of the knowledge and skills needed to meet the vocational rehabilitation needs of individuals with disabilities.

We believe the education and experience requirements set forth in section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and final §361.18(c)(1)(ii) enable DSUs to hire personnel in such a manner that results in an expansion of qualifications of staff available to provide vocational rehabilitation services. For example, the new education and experience requirements could enable DSUs to expand the number of staff trained to provide certain services critical to meeting the employment needs of individuals with disabilities and employers, such as employment specialists or job placement specialists, thereby increasing opportunities for employer engagement and the achievement of competitive integrated employment outcomes by individuals with disabilities. This broader

range of acceptable education and experience could lead to a more diverse workforce in VR agencies.

Looking at the new personnel standard requirements in this way, they could be viewed as a means of enabling DSUs to expand the range of qualified personnel available to provide certain services in-house rather than having to contract for those services. DSUs could employ sufficient qualified personnel to work in teams to meet the holistic needs of the individuals served by the VR program, ranging from specific disability-related services to employment-related services. We believe this interpretation is consistent with the plain meaning of the statutory requirements in section 101(a)(7)(B) of the Act, and the heightened emphasis throughout WIOA on employer engagement and the achievement of competitive integrated employment outcomes.

Changes: None.

State Job Classification Minimum Qualifications

Comments: One commenter noted the various degrees listed (e.g., psychology and business) in section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and proposed §361.18(c)(1)(ii) are not typically seen for the same position when State governments are developing

classification minimum qualifications because each of the degrees provide individuals with different skill sets. The commenter added that, while a DSU would need personnel with skill sets from many of the degrees listed, it would be unreasonable to expect that a single individual would have expertise in two or more specialized skill sets.

Some commenters stated that the standards in proposed §361.18(c)(1) should be sufficient for recruitment of vocational rehabilitation counselors, but that the use of "and" between proposed §§361.18(c)(1)(i) and 361.18(c)(1)(ii) seems to imply that additional standards must be used. They expressed concern that requiring at least one year's paid or unpaid work in the field would make it challenging for DSUs to recruit qualified counselors directly from long-term training programs.

Discussion: We disagree with commenters that the degrees listed in section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and proposed §361.18(c)(1)(ii) necessarily will pose problems for the development of minimum qualifications within State job classification. While we agree that it would be unreasonable for a single job position to list each of those degrees as a minimum qualification, it is reasonable to post various job positions within the

classification for vocational rehabilitation counselors. As stated previously, we believe the amendments to WIOA provide DSUs with an opportunity to employ other personnel, such as business specialists or job placement specialists, who could complement the critical work performed by vocational rehabilitation counselors. In so doing, DSUs could minimize the need to contract for these services. While final §361.18(c)(1)(ii) permits DSUs to hire individuals with a variety of degrees, there is no requirement or expectation that a vocational rehabilitation counselor or any other vocational rehabilitation professional or paraprofessional employed by the DSU be an expert in more than one area.

The education and experience requirements of section 101(a)(7)(B)(ii) of the Act apply only in those circumstances when the DSU is not able to hire vocational rehabilitation professionals and paraprofessionals who satisfy a national- or State-approved certification or licensure standard. Vocational rehabilitation counselors graduating from long-term training programs would meet a national or State-approved standard and could be hired in accordance with personnel standards established under section 101(a)(7)(B)(i) of the Act, which does not require

that the individual satisfy minimum experience requirements.

Changes: None.

Additional or Substitute Qualifications

Comments: Two commenters recommended revising proposed §361.18(c)(1)(ii)(B) by inserting a work experience requirement similar to that required for individuals with a baccalaureate degree as set forth in proposed §361.18(c)(1)(ii)(A)(1).

Many commenters requested the proposed regulations be revised to include a new provision in §361.18(c)(1)(ii) to allow a complement of work experience, in addition to specialized training or certification through either advanced higher education or through a legitimately recognized association that provides specialized training when working specifically with individuals who possess unique barriers to independence and require unique training, such as individuals who are blind.

Another commenter recommended that proposed §361.18(c)(1)(ii) be revised to allow years of experience to substitute for the identified degree(s) for paraprofessionals, which could create reasonable flexibility. A requirement of years of experience, coupled

with staff development required by the regulations, would assure that paraprofessionals are highly qualified to provide appropriate services to individuals with disabilities.

Discussion: We appreciate the suggestion made by two commenters adding minimum paid or unpaid work experience requirements for DSU personnel hired at the master's or doctoral level. We also appreciate the many comments recommending that, in addition to satisfying a national or State-approved standard, work experience be required for those personnel who work with individuals with significant barriers to employment, such as individuals who are blind or visually-impaired.

While we agree work experience can be valuable, section 101(a)(7)(B) sets forth explicit requirements for a DSU's personnel standards, including requirements related to minimum educational and experiential requirements. Given the explicit nature of these requirements, there is no statutory basis to require different or additional personnel standards in final §361.18(c)(1).

Changes: None.

Interplay Between National or State-approved Certification or Licensure Standards and Minimal Educational and Experiential Requirements

Comments: Many commenters requested clarification regarding the interplay between the requirement that a State's CSPD be consistent with a national or State-approved certification or licensure standard in proposed §361.18(c)(1)(i) and the minimal educational and experiential requirements in proposed §361.18(c)(1)(ii). Most of these commenters did not support the proposed regulatory language, stating that it is confusing to have two sets of standards for vocational rehabilitation personnel. A few commenters questioned whether a DSU may choose between the two standards, i.e. choose to maintain the higher standard of §361.18(c)(1)(i) or the lower standard of §361.18(c)(1)(ii). Similarly, some commenters requested clarification about whether the DSUs can maintain their current personnel standards consistent with applicable national or State-approved or recognized certification, licensing, or registration requirements. These commenters were concerned that including lower standards in the regulations would force DSUs to lower their standards. Further, some commenters stated that most

States have a minimum personnel standard that is greater than what is being proposed and asked whether the DSUs will have to hire vocational rehabilitation personnel at the lower educational standard.

Discussion: Contrary to the suggestions made by several commenters, the personnel standards in section 101(a)(7)(B)(i) and (ii) are separate and distinct requirements. Therefore, DSUs may not choose to implement one and not the other but, rather, must develop both standards. Under section 101(a)(7)(B)(i), States must continue to develop personnel standards that are consistent with applicable national or State-approved certification or licensure requirements, as well as develop personnel standards that satisfy minimum education and experience requirements. As has always been the case, CSPD standards do not dictate whom a State may or may not hire. Hiring is solely a State matter. Instead, the CSPD standards simply set parameters for the standards a State must use in establishing its hiring procedures. There is nothing in the Act or these final regulations to preclude a DSU from continuing to hire vocational rehabilitation professionals and paraprofessionals that satisfy the higher standard. However, in hiring individuals who do not meet a national

or State-approved certification or licensure standard, DSUs must hire individuals who meet the educational and experiential requirements set forth in section 101(a)(7)(B)(ii). These individuals must have at least a baccalaureate degree in a specified field of study plus one year of relevant experience, or a master's or doctoral degree in one of the fields specified.

Further, if a vocational rehabilitation counselor is hired under the standard set forth in final §361.18(c)(1)(i) (e.g., a standard consistent with a national or State-approved standard), that vocational rehabilitation counselor is not required to meet the education or experience requirements set forth in final §361.18(c)(1)(ii) as well. There is no requirement that an individual meet both personnel standards set forth in final §361.18(c)(1).

Changes: None.

Succession Planning

Comments: One commenter suggested that the CSPD requirements should address succession planning at the administrative level. The commenter recommended that the final regulations be revised to incorporate CSPD

requirements to address the void in administrative skill and knowledge created in DSUs by retirements.

Discussion: We agree with the commenter's concern that DSUs face a significant loss of knowledge and skills as key personnel retire. We note that DSUs are required, under final §361.18(d)(2)(iii), to include succession planning in their staff development plans when developing personnel standards and providing on-going training.

Changes: None.

Re-Training of Staff Not Meeting Personnel Standards

Comments: Several commenters expressed serious concerns about the elimination of the requirement to re-train staff who are not meeting the DSU's personnel standards for qualified staff, in prior §361.18(c)(1)(ii).

Discussion: While we appreciate the concern expressed by commenters regarding the deletion of the regulatory requirement for the DSU to provide re-training to personnel who do not meet the DSU's personnel standards, the statutory requirement for re-training, which had been contained in section 101(a)(7)(B)(ii) of the Act, as amended by WIA, has been deleted by the amendments made by WIOA. Despite the deletion of the regulatory requirement, there is nothing in the Act or these final regulations that

prohibits a DSU from making the decision to re-train staff as the agency deems appropriate. However, there is no statutory basis for the Department to require such re-training in these final regulations given the specific deletion of that statutory requirement.

Changes: None.

Standards of Personnel Development – Other Comparable Requirements (§361.18(c)(1))

Comments: Several commenters recommended that the Department define "other comparable requirements," which is included in the personnel standard in section 101(a)(7)(B)(i) of the Act and proposed §361.18(c)(1)(i) and applies if there are no applicable national, State-approved, or recognized certification, licensing, or registration requirements. The commenters recommended that "other comparable requirements" should include competence in counseling and guidance, knowledge and application of the medical and psychological aspects of disability, knowledge and implementation of vocational testing, working knowledge and integration of labor market data and disability employment policy, and providing the services required to develop and implement individualized career

plans that assist persons with disabilities in successful employment in a competitive integrated work environment.

Discussion: Section 101(a)(7)(B)(i) of the Act and final §361.18(c)(1)(i) require a DSU to develop personnel standards that are consistent with any national or State-approved or recognized certification, licensing, or registration requirements, or, in the absence of these requirements, other comparable requirements (including State personnel requirements) that apply to the profession or discipline in which that category of personnel is providing vocational rehabilitation services. While we agree with commenters that "other comparable requirements" could include any of the areas suggested, we disagree that the final regulations should define the phrase. This phrase provides DSUs with maximum flexibility when developing personnel standards by enabling DSUs to modify personnel standards as relevant credentials evolve.

Changes: None.

Meaning of "A 21st Century Understanding of the Evolving Labor Force and the Needs of Individuals with Disabilities"

Comments: Many commenters asked for clarification of what is meant by a 21st century understanding of the evolving labor force and the needs of individuals with disabilities,

as used in section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and in proposed §361.18(c)(2)(ii). Many commenters stated that the list of examples of relevant personnel skills in proposed §361.18(c)(2)(ii) either did not help clarify the meaning or was incomplete. Some commenters stated that the list represented skills more oriented to the medical models of the past rather than the employer focus required today. One commenter asserted that the congressional intent behind the requirements for a 21st century understanding included a focus on employment; an understanding of economic and job market trends, business management, and operations; and meeting the needs of local and regional employers.

Many commenters who thought the list of examples was incomplete suggested additions. Some were suggested because the commenters stated that customary, but critical, skills for vocational rehabilitation counselors had been left out of the list. Some brought a more modern focus to the traditional topic, refining knowledge of medical and psychological aspects of disability to include more employment-focused use of such knowledge to determine functional limitations and the vocational implications of

these functional limitations on employment planning and workplace accommodations.

Other commenters provided lists of skills that represented areas in which the focus is on greater knowledge of the world of work, including labor market trends and various sources of labor market information and its use in selecting vocational goals and developing individualized plans for employment. Some commenters suggested that using information about job requirements, labor market trends, and other labor market information would help build relationships with employers through greater knowledge of their businesses and their employment requirements and would also help in job development and job placement efforts.

One group of commenters suggested that a recent U.S. Government Accountability Office (GAO) study, which identified gaps in the knowledge of vocational counselors employed by the U.S. Department of Veterans Affairs, could serve as a starting point for developing a list of skills needed for the 21st century vocational rehabilitation counselor employed by the DSU. Some skills included familiarity with Bureau of Labor Statistics data, the Dictionary of Occupational Titles, and the Department of

Labor’s O*NET occupational system; vocational testing and assessment; job accommodations; training in the Americans with Disabilities Act (ADA) and other employment discrimination laws; vocational implications of various disabilities, including traumatic brain injury, post-traumatic stress syndrome, mental illnesses, and autism; employment plan development; Social Security work incentives, and the Ticket to Work and Self-Sufficiency program; and knowledge of disability programs in the State and local area, including independent living programs.

One commenter suggested that the six areas of knowledge and skills in proposed §361.18(c)(2)(ii) could be used to ensure vocational rehabilitation personnel have a 21st century understanding. The commenter stated the examples focused on critical knowledge domains and closely mirror the knowledge domains required for accreditation by a vocational rehabilitation counseling program. However, the commenter expressed concern that the process of evaluating whether candidates have the necessary knowledge and skills would be insufficient without the assurance that the candidate graduates from an accredited vocational rehabilitation counseling program. The commenter recommended that the Department recognize graduates from

accredited programs as having the knowledge, skill, and experience requirements that are necessary to provide high quality services to individuals with disabilities.

Discussion: We appreciate the many comments and suggestions we received about the skills and knowledge essential to ensuring a 21st century understanding of the evolving labor force and the needs of individuals with disabilities under section 101(a)(7)(B)(ii) of the Act, as amended by WIOA, and in proposed §361.18(c)(2)(ii). Lacking a widely-accepted definition of the term, we proposed several examples in the regulations to help clarify its meaning. Most commenters, however, stated that the examples in proposed §361.18(c)(2)(ii) were not sufficient because they did not include a clear focus on employment or emphasize the use of the most up-to-date techniques.

In considering what changes to make in the examples, we first recognized that the requirements for a 21st century understanding apply to knowledge and skills relevant to working with both employers and individuals with disabilities. We also believe that “21st century” refers to maintaining a cutting edge, state-of-the-art approach to whatever topic is included in the list, not

merely maintaining activities at traditional, established levels. These underlying principles governed the review, selection, and wording of the examples.

We looked at traditional topic areas that are still necessary for working with individuals with disabilities and employers, with the intent to add language that suggests use of contemporary practices or that adds emphasis on an employment focus. For example, we replaced the previous language about knowledge of medical and psychological aspects of disability with language about knowledge of the functional limitations of various disabilities and the vocational implications of these functional limitations for employment.

We considered new approaches to learn about the world of work, large-scale employer needs (e.g., labor market trends and occupational shortages), small-scale employer needs (e.g., specific job requirements, soft skill requirements), and ways to use information differently to inform traditional vocational rehabilitation practices (such as using labor market information to assist in developing vocational goals and employment plans, while providing informed choice). We also took into consideration the GAO report titled “VA Vocational

Rehabilitation and Employment: Further Performance and Workload Management Improvements Are Needed" (GAO-14-61) published January 14, 2014, as well as various lists of suggested examples provided by national organizations and endorsed by other commenters. After considering all of the comments and suggestions received, we have amended the examples in final §361.18(c)(2)(ii). We clarify that the term "apprenticeships" as used in 361.18(c)(2)(ii)(D) does not include Registered Apprenticeships.

In response to commenters asking whether the "21st century understanding" requirement applies only to vocational rehabilitation counselors, section 101(a)(7)(B) of the Act, as amended by WIOA, and final §361.18(c) require the DSU to develop personnel standards that apply to all vocational rehabilitation professionals and paraprofessionals, not just vocational rehabilitation counselors. The revised list of examples set forth in final §361.18(c)(2)(ii) provides a comprehensive, but not exhaustive, list of skills necessary for achieving employment outcomes in the 21st century. Because we realize that States may choose to employ staff in a variety of positions, the skills listed may be applicable to various positions in differing ways.

Finally, as we described earlier in the Applicability of Education, and Experiential Requirements to Rehabilitation Counselors (§361.18(c)(1)) section, we agree with the comment that accredited programs provide vocational rehabilitation counselors with knowledge and skills critical to providing vocational rehabilitation services to individuals with disabilities. However, section 101(a)(7) of the Act does not specify that individuals pursuing employment as vocational rehabilitation counselors must obtain an undergraduate or a graduate-level degree in rehabilitation counseling from accredited programs and final §361.18(c) mirrors the Act in this respect. In addition, we recognize that other DSU personnel, such as employment specialists and job placement specialists, serve a critical role in working with employers and individuals with disabilities. The Secretary believes all vocational rehabilitation professionals and paraprofessionals must have the knowledge and skills necessary to satisfy the "21st century understanding" requirement.

Changes: We have substantially revised the examples in final §361.18(c)(2)(ii) to provide a more robust list of the skills and knowledge needed to meet the needs of

employers and individuals with disabilities in the evolving 21st century labor market.

Staff Development (§361.18(d))

Comments: Several commenters requested clarification regarding proposed §361.18(d)(1)(i), which requires, as part of the DSU's system of personnel development, training implemented in coordination with entities carrying out State programs under section 4 of the Assistive Technology Act of 1998 (29 U.S.C. 3003). Some of these commenters asked whether the purpose of this provision is to require those entities to provide the training to the DSUs. If so, the commenters requested that the Department revise proposed §361.18(d)(1)(i) to make that intent clear. These commenters also sought clarification on how the training is to be coordinated with the State's assistive technology program. Other commenters thought a Federal "training fund" source should be made available for the training, regardless of who provides it. Still other commenters stated that proposed §361.18(d)(1)(i) should be revised to require that the DSUs fund the entities carrying out the State's assistive technology program to provide this training.

Many commenters expressed concerns about insufficient training funds to meet the training needs of vocational rehabilitation personnel and requested that the Department require DSUs to allocate training funds for any required CSPD training. The commenters were further concerned that the potential hiring of staff at the baccalaureate or higher degree in a discipline other than vocational rehabilitation counseling would increase the need for training in order to ensure these personnel have solid knowledge of the VR program. Despite this expected increased need for training, DSUs will face reduced financial resources because of the elimination of the In-Service Training Grant program by WIOA. Therefore, these commenters were concerned that DSUs would allocate less funding for staff development training, certification fees, and other related expenses. One commenter requested that the Department provide training funds to each DSU to assist in providing staff development and personnel training in the areas mandated by WIOA. Still another commenter recommended that the Department offer regional training rather than onsite training through its monitoring or technical assistance process. The commenter said the

regional trainings could benefit a larger group of personnel.

A few commenters recommended that proposed §361.18(d) be revised to require specific training areas for staff development. For example, one commenter stated that many vocational rehabilitation counselors struggle to identify appropriate service providers for individuals with autism. The commenter requested further guidance from the Department on providing vocational rehabilitation services to this population in order to increase opportunities for competitive integrated employment.

Another commenter asked the Department to require DSUs to include in their agency planning and oversight the substantial involvement of mental health advocates, including individuals who have personally experienced mental illness, treatment, and recovery. Similarly, another commenter recommended that DSUs be required to hire and train peer service providers experienced in working with individuals with mental illness who are seeking vocational rehabilitation services, thereby increasing the DSU’s effectiveness in serving this population. Still another commenter recommended that staff development include caseload management training, including

implementation standards, measures, techniques, and strategies.

Another commenter stressed the importance of coordinating personnel development activities under the Act and the IDEA. The commenter recommended that State and local education agencies and DSUs establish memoranda of understanding on coordinating personnel development activities. Yet another commenter recommended that proposed §361.18(d) require staff development to emphasize the need for evolving skills, including understanding the evolving labor market, nondiscrimination laws, the medical and psychosocial aspects of various disabilities, and how this understanding evolves over time.

Discussion: We appreciate the comments seeking clarification of the requirement that the DSU's CSPD must include assistive technology training for vocational rehabilitation professionals and paraprofessionals. Section 101(a)(7)(A)(v)(I) of the Act was amended slightly by WIOA, but not in a manner that imposed additional requirements for this particular training. Therefore, final §361.18(d)(1)(i) contains only technical changes from the prior regulation, and there is no statutory basis for the Department to add new requirements regarding how the

training should be financed. Section 101(a)(7)(A)(v)(I) of the Act, as amended by WIOA, and final §361.18(d)(1)(i) simply require DSUs to ensure their vocational rehabilitation professionals and paraprofessionals are adequately trained. This must include a system for the continuing education of personnel in rehabilitation technology, and it must include training implemented in coordination with the entity carrying out the State's assistive technology program. It is within the DSU's discretion to determine how and by whom such training will be provided, so long as the training is adequate.

Further, it is beyond the scope of the Act and these regulations to mandate that an entity, authorized under a separate Federal law, such as the Assistive Technology Act of 1998, perform any action, including providing the training described here. There is also no separate Federal program from which money may be given to DSUs to pay for this training, as in-service training funds were eliminated from the Act by WIOA. However, the Act does not prohibit DSUs from using title I VR program funds to provide the training directly or through a contract with the entity providing assistive technology services in the State.

There are many possible sources of training on assistive technology and several ways in which the DSUs may coordinate with the State assistive technology program entity. For example, the DSU may select a trainer with input from the State's assistive technology program entity, or the DSU and the State assistive technology program entity may jointly train DSU staff. Final §361.18(d)(1)(i) provides the DSU with maximum flexibility to coordinate with the assistive technology program entity in the manner it deems appropriate.

While we understand the limited financial resources available to DSUs, there is no authority under the Act to provide funding to DSUs for any of the trainings required by section 101(a)(7) of the Act and final §361.18(d)(1)(i). As the commenters noted, WIOA eliminated the In-Service Training Grant program, which had been used by many DSUs to provide staff development training. Nonetheless, the Act has, and continues to, permit DSUs to use title I VR program funds to provide staff development and training. Given the availability of VR program funds for this purpose, we disagree that DSUs necessarily will allocate fewer resources for this effort.

Finally, the Department will explore options for providing staff development trainings on a broader scale, including regional training.

As section 101(a)(7) of the Act is specific about the training areas that may be included for staff development, there is no statutory basis for imposing additional training requirements. However, final §361.18(d)(2) is consistent with the Act in that it gives DSUs maximum flexibility to use staff development trainings that are specific to each DSU's needs. Nevertheless, we understand the concerns raised by commenters requesting training on specific topics. We agree that serving individuals with autism may raise many complex issues, some of which are addressed in an Institute on Rehabilitation Issues Monograph on rehabilitation of individuals with autism spectrum disorders, which may be found at: http://www.iriforum.org//books.aspx.

While there is statutory authority under section 101(a)(21)(A)(i)(III) to require DSUs to involve mental health advocates in the agency's planning and oversight activities when the DSU has an independent commission or council, there is no specific statutory requirement under section 101(a)(7) that DSUs hire mental health peer service

providers. Moreover, there is no statutory basis under section 101(a)(7)(A)(v) of the Act to require caseload management be included in staff development training. However, there is nothing to preclude a DSU from doing these things under §361.18(d)(2) if a need is identified by the DSU.

Finally, we agree with the commenter regarding the need for coordinating staff development between DSUs and State and local education agencies. The Act, as amended by WIOA, places heightened emphasis on providing vocational rehabilitation services to students and youth with disabilities. Although section 101(a)(7) of the Act does not require DSUs to enter into memoranda of understanding with educational agencies, final §361.18(f) continues to mandate this coordination as it has for many years in prior regulations. We also agree that staff development should emphasize the evolving skills needed to provide vocational rehabilitation services so that individuals with disabilities may achieve competitive integrated employment in the evolving 21st century labor market. Only with these evolving skills will vocational rehabilitation personnel be able to engage effectively with employers in the evolving labor market of the 21st century. We believe the staff

development requirement set forth in final §361.18(d)(1) and (2) covers these skills needed in the 21st century evolving labor market.

Changes: None.

Training Based on the Needs of the DSU

Comment: None.

Discussion: After further Departmental review, we have determined proposed §361.18(d)(2) contained a drafting error by inadvertently using the word “should” rather than “must.” The regulation has used the term “must” since final regulations were published in 1997, with regard to the specific training areas for staff development. The specific training areas “must” be based on the needs of the DSU. Final §361.18(d)(2) reflects the correct wording, and this change in these final regulations represents no change in the requirement for DSUs because the provision now reads as it has since 1997.

Changes: Final §361.18(d)(2) has been changed to require training areas for staff development be based on the needs of the DSU, as is true in prior regulations.

Public Participation Requirements (§361.20)

Public Hearings for Changes in an Order of Selection

Comments: Several commenters supported the changes to the prior regulations in proposed §361.20 that outline the requirements for public notice and participation prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the State plan, including substantive amendments. Proposed §361.20 clarifies through descriptive examples the distinction between substantive and administrative changes to VR program rules, policies, and procedures. While "substantive changes" trigger the requirement that the designated State agency provide notice and conduct a public meeting, "administrative changes" typically do not. These commenters stated that the proposed regulation clarifies and supports a more rigorous and open channel of communication between the designated State agency, the SRC, and community stakeholders.

Nonetheless, several commenters requested further clarification. One commenter asked if a DSU must conduct a public meeting every time it opens or closes a priority category under an order of selection.

Discussion: We appreciate the support for, as well as the requests for further clarification of, proposed §361.20, which distinguishes between those substantive changes

requiring public meetings and those administrative changes that do not.

Final §361.20(a)(2)(v) states that adopting or amending policies implementing an order of selection constitutes a substantive change that requires public input. However, it is the Department's long-standing policy that a DSU need not conduct a public meeting each time it opens or closes a priority category if doing so is consistent with the information describing the implementation of the order of selection in that agency's currently approved State Plan (now the VR services portion of the Unified or Combined State Plan).

By contrast, we believe that closing one or more priority categories would be a substantive change in the administration of the VR program, and would consequently trigger the requirement to conduct a public meeting if such change represents a departure from the manner in which the DSU has implemented the order of selection under the approved State Plan. For example, if a DSU implements an order of selection and closes one or more priority categories after one or more years without closing priority categories, we believe this action would constitute a

substantive change in the administration of the VR program and would require a public meeting.

Changes: None.

Public Meetings of the State Rehabilitation Council

Comments: One commenter asserted that meetings of the SRC should fulfill the requirements of proposed §361.20, since these are public meetings, and the Council is charged with the responsibility to review vocational rehabilitation policies and other substantive changes to the VR program. The commenter stated that holding public meetings in addition to the Council's meetings takes time away from the central work of the DSU.

Discussion: Under section 101(a)(16)(A) of the Act and final §361.20, it is the responsibility of the designated State agency, not the SRC, to conduct public meetings. Therefore, the Council's meetings cannot satisfy, on their own, the requirement of final §361.20. Likewise, it is the responsibility of the Council, and not the designated State agency, to conduct its meetings as required by section 105 of the Act and final §361.17. We recognize that the designated State agency works closely with the Council, as it is required to do, with regard to substantive changes made to policies and procedures affecting the VR program.

Therefore, if the designated State agency and the Council determine it would be expedient and effective to do so, they may use the regular or special meetings of the Council as a forum for obtaining input from the Council and the public on substantive changes in VR program rules, policies, and procedures. If the designated State agency chooses to conduct joint meetings in this manner, they must ensure that all requirements concerning the conduct of public meetings in final §361.20 are satisfied. We emphasize that neither the designated State agency nor the Council are required to conduct joint meetings for the purpose of gathering public input on substantive changes to the administration of the VR program under either final §§361.17 or 361.20, though both entities may find it efficient to do so.

Changes: None.

Substantive and Administrative Changes

Comments: A few commenters stated that the distinction between those changes in DSU rules, policies, and procedures that require public comment and those that do not was not clear in the proposed regulation, and requested further clarification.

Discussion: With respect to the comments seeking further clarification and examples of what constitutes a substantive versus administrative change, the commenters did not specify what additional clarification was needed, and so we can provide no further examples. However, the lists of examples in final §361.20(a)(2) and (a)(3) are not exhaustive; rather, they illustrate some of the most common substantive and administrative changes contemplated by DSUs. We recognize that States may contemplate many more changes to their rules, policies, and procedures implementing the VR program than those identified in these final regulations.

In addition, the Act, as amended by WIOA, and these final regulations provide significant flexibility to the States in the manner in which they administer the VR program and deliver vocational rehabilitation services, and States may adopt rules, policies, and procedures governing the administration of the program that best suit their particular circumstances. As a result, States may adopt rules, policies, and procedures that vary widely from one another, and we do not believe that it is practicable to further clarify, or add to, the examples listed in final §361.20(a)(2) and (a)(3). While we believe that final

§361.20 provides States with the guidance necessary to determine if a potential change in rules, policies, and procedures constitutes a substantive change requiring a public meeting, we encourage States to seek guidance from the Department about State specific changes.

Changes: None.

Public Comment through Electronic Means

Comments: One commenter asked if publishing policy changes on a State agency's Web site and receiving public comment and input at the Web site constitutes a public meeting.

Discussion: The publication by the DSU of a proposed change in rules, policies, or procedures governing its administration of the VR program on a Web site does not constitute a public meeting under section 101(a)(16)(A) of the Act or final §361.20. As used in final §361.20(a), which requires public meetings to be held throughout the State, "public meeting" means a gathering of people in a physical or virtual (as in the case of videoconferences or teleconferences) location. Nonetheless, designated State agencies can use postings on a Web site and other innovative strategies to gather valuable input from individuals with disabilities, community rehabilitation

programs, and other stakeholders affected by proposed changes in rules, policies, or procedures.

Changes: None.

Requirements Related to the Statewide Workforce Development System (§361.23)

Comments: Apart from comments on the joint regulations proposed by the Departments of Education and Labor implementing jointly administered requirements for the one-stop delivery system, one commenter requested that we retitle §361.23 to improve the reference to the joint regulations governing the one-stop delivery system. A second commenter expressed concern that one-stop centers cannot meet the needs of individuals who are blind or visually impaired. The commenter did not provide an explanation or recommendation on how the regulations could be revised to address this concern.

Discussion: Final §361.23 provides a cross-reference to the joint regulations governing the one-stop delivery system in subpart F of part 361. Therefore, we believe there is no need to retitle or amend the section further as suggested by the commenter.

We appreciate the concern regarding the availability of services at the one-stop centers for individuals who are

blind or visually-impaired. While we understand that there have been some issues with respect to accessibility and availability of services for individuals with significant disabilities in the past, section 121(b)(1)(B)(iv) of WIOA identifies the VR program as a core partner of the workforce development system. As such, DSUs and other core partners of the workforce development system are required to ensure the programmatic and physical accessibility of the services provided through the one-stop centers. For further information, see the joint regulations governing the one-stop delivery system published elsewhere in this issue of the Federal Register. Furthermore, we strongly encourage DSUs that serve individuals who are blind or visually impaired to ensure the needs of these individuals are met through the one-stop delivery system, as appropriate, by strengthening their relationships with other core programs through the memoranda of understanding required under section 121 of WIOA and the joint regulations in subpart F. The Secretary believes the strengthened relationships between the VR program and other core programs, as well as the delivery of vocational rehabilitation services directly at the one-stop centers,

will ensure the needs of individuals who are blind or visually impaired are met.

Changes: None.

Cooperation and Coordination with Other Entities (§361.24)

General

Comments: Some commenters expressed concerns about the difficulty in establishing new collaborative relationships, the lack of or limited fiscal resources necessary to develop and support collaboration, and mechanisms for accountability and transparency. One commenter indicated that collaborative relationships do not currently exist in their State and that establishing them will require additional money and will alter the methodology for developing the State Plan and the statewide needs assessment.

A few commenters expressed concern that proposed §361.24 contained limited language regarding the contents of agreements and the delineation of issues that should be addressed. For example, a few commenters remarked that there was no requirement for an agreement between the DSU and Medicaid, and mental health agencies, for people with psychiatric disabilities needing long-term employment supports funded by Medicaid. The commenters suggested that

cooperative agreements include identification of individuals needing extended supports, referral mechanisms, the use of Medicaid funds in providing extended supports, how funds will be braided between the DSU and agencies with primary responsibilities to serve individuals with specific disabilities, and sources and criteria for providers of extended supports. A similar comment about waivers for home and community based settings stressed that all parties must work cooperatively at both the policy and individual levels; however, the commenter noted that the proposed regulations merely require there to be an agreement, without specifying minimum contents of those agreements.

Discussion: We appreciate and understand the concerns about the difficulty in establishing new collaborative relationships required under the Act, the lack of or limited fiscal resources necessary to do so, and mechanisms for accountability and transparency. However, DSUs have extensive experience in meeting the requirements under prior §361.24 for cooperating and coordinating with other entities, and we believe that this will enable DSUs to implement the collaboration requirements in the Act as amended by WIOA.

We also appreciate the concerns that proposed §361.24 contained limited language regarding the contents of agreements and the delineation of issues that should be addressed. While section 101(a)(11) specifies the content requirements for only some of the cooperative agreements, nothing in the Act or final §361.24 precludes DSUs from including specific content to clarify the responsibility of collaborating entities through these agreements, and we strongly encourage DSUs to do so. For example, DSUs may enter into cooperative agreements with Medicaid and mental health agencies for people with psychiatric disabilities needing long-term employment support funded by Medicaid. Cooperative agreements may include identification of individuals needing extended supports, referral mechanisms, the use of Medicaid funds in providing extended support, how funds will be braided between DSUs and agencies with primary responsibilities to serve individuals with specific disabilities, and sources and criteria for providers of extended services.

Changes: None.

Cooperation and Collaboration with Other Agencies and Entities

Comments: Many commenters supported proposed §361.24, which expanded the entities with whom the DSU must collaborate and coordinate its activities under the VR program and several offered additional recommendations.

One commenter especially supported the coordination with employers. Other commenters supported the requirement for cooperative agreements with the State Medicaid agency and the State agency primarily serving people with intellectual and developmental disabilities; however, several commenters noted that the State agency responsible for providing mental health services was not included in this requirement and recommended its inclusion.

Many commenters strongly recommended that DSUs be required to enter into formal interagency agreements with AIVRS grant recipients and with Tribal Education Agencies (TEAs) located in the State.

One commenter recommended that the assurance in the VR portion of the Unified or Combined State Plan specify that the DSU coordinate activities with other State agencies functioning as an employer network under the Ticket to Work and Self-Sufficiency Program established under section 1148 of the Social Security Act (42 U.S.C. 1320b-19), and that the network be expanded to include other agencies acting as

employer networks. A related comment inquired whether there should be a Federal Partnership Plus agreement instead of individual State agreements.

A few commenters suggested that in the development of the vocational rehabilitation services portion of the Unified or Combined State Plan, the Department require the DSU to collaborate with the lead entity implementing programs under the Assistive Technology Act of 1998.

Discussion: We appreciate the commenters' review, support, and recommendations. Although some commenters recommended adding the State agencies responsible for providing mental health services to the required cooperative agreement with the State Medicaid agency and the State agency serving individuals with intellectual and developmental disabilities, section 101(a)(11)(G) of the Act does not require such an agreement and, in fact, is very specific about the entities with which the DSU must develop interagency agreements. For this reason, there is no statutory basis for us to require the DSUs to enter into formal cooperative agreements with the State agencies responsible for providing mental health services.

However, we agree with commenters that it could be beneficial to individuals with disabilities to formalize

coordination of services between the DSUs and the State agencies providing mental health services. While final §361.24(f) does not require a formal cooperative agreement, as the commenters suggest, there is nothing in the Act or in this section that prohibits a DSU from entering into a formal cooperative agreement with the State agencies providing mental health services. Furthermore, section 101(a)(11)(K) of the Act, as amended by WIOA, and final §361.24(g) stress the importance of the relationship between the DSU and the State agencies providing mental health services and requires collaboration between them.

Similarly, while we agree with commenters that coordination and collaboration between DSUs and entities holding section 14(c) certificates under the FLSA and Tribal Education Agencies could be beneficial for different reasons and we encourage such coordination and collaboration, there is no basis under section 101(a)(11) of the Act to require this. However, Section 101(a)(11)(H) of the Act and final §361.24(d) do require the VR services portion of the Unified or Combined State Plan to include an assurance that the State has entered into a formal cooperative agreement with each AIVRS grant recipient in the State.

Additionally, the Department does not have the authority under section 101(a)(11)(J) of the Act to expand the requirement in final §361.24(i) to include non-State agencies acting as employer networks. The Act only requires the DSU to coordinate with State agencies serving as employment networks under the Ticket to Work program. While final §361.24(i) does not impose the requirement on the DSUs for non-State agencies serving this function, there is nothing in the Act or these final regulations that would prohibit a DSU from doing so. Similarly, the statute does not provide the authority to develop a Federal Partnership Plus agreement in lieu of individual State agreements.

Section 101(a)(11)(I) of the Act and final §361.24(h) require an assurance in the VR portion of the Unified or Combined State Plan that the DSU and the lead agency and the entity, if any, implementing programs under section 4 of the Assistive Technology Act of 1998 have developed working relationships and will enter into agreements for the coordination of their activities, including the referral of individuals with disabilities to programs and activities described in that section. However, the Act does not require that the DSU collaborate with the

Assistive Technology Act program in developing the VR portion of the Unified or Combined State Plan. Therefore, to add this requirement in final §361.24(h), as recommended, is not supported by the Act. Also, nothing in the Act precludes a DSU from seeking input from the Assistive Technology Act program in the development of the VR portion of the Unified or Combined State Plan.

Changes: None.

Non-Educational Agencies

Comments: One commenter asked for clarification of non-educational agencies and requested examples.

Discussion: Section 101(a)(11)(C) of the Act, as amended by WIOA, and final §361.24(a) require the DSU to describe in the VR services portion of the Unified or Combined State Plan its cooperation with, and use of, a variety of entities, including non-educational agencies serving out-of-school youth. In response to the commenter, the Act does not define non-educational agencies. Therefore, the Act and these final regulations maximize flexibility because the DSU is not limited to a list that may or may not be applicable in any given State. However, we believe that non-educational agencies could include public systems such as welfare services, foster care, and the juvenile or

criminal justice systems serving out-of-school youth. Non-educational agencies also could include those State or local agencies that administer the youth formula grant program authorized under title I of WIOA.

Changes: None.

Federal Agreements

Comments: A few commenters asked whether we intend to establish working arrangements or agreements with agencies at the Federal level to assist States in their efforts to implement proposed §361.24, and one suggestion was made to establish an interagency coordinating workgroup to review any working arrangements or agreements with these agencies.

Discussion: The Department already cooperates and works collaboratively with its Federal partners. The Act does not provide for formal arrangements at the Federal level for the coordination, collaboration, and cooperation required by section 101(a)(11) of the Act; however, we believe that guidance and technical assistance in the development of agreements and cooperative arrangements may be beneficial. Where appropriate, the Department will work collaboratively with Federal partners to assist States.

Changes: None.

Guidance on the Braiding of Funds

Comments: Two commenters suggested that Federal agencies coordinate guidance regarding the ways in which various funding streams may be braided to help States implement agreements to fully support individuals with disabilities. One commenter requested that the Department emphasize transparency of coordination efforts to track resources to ensure accountability and sustainability.

Discussion: Each Federal program has its own requirements for the expenditure of funds, and States must adhere to those requirements when collaborating. Moreover, while the Uniform Guidance, as set forth in 2 CFR part 200, provides for the braiding and blending of funds, it also requires that funds must be spent solely on allowable costs, namely those costs permitted under and allocable to that program. A cost is allocable to the extent that the program receives a benefit relative to the expenditure of those funds (in other words, a proportionate share of those expenditures). While the Department exercises oversight of the expenditure of funds by DSUs under the Act, we do not have the authority to provide guidance related to the expenditure of funds provided by other Federal agencies or programs. However, we support transparency of coordination efforts to

track resources to ensure accountability and sustainability.

Changes: None.

Requirements for Training

Comments: One commenter suggested including joint training among the activities in which the DSU must coordinate with other entities.

Discussion: There is no authority under section 101(a)(11) of the Act to require the DSUs to add joint training to the activities that the DSU must coordinate with other entities, with one exception. Joint training is required in section 101(a)(11)(H) with grant recipients under the AIVRS program, but not with the other entities in section 101(a)(11) of the Act.

Changes: None.

Notification of the Client Assistance Program

Comments: One commenter suggested that proposed §361.24 require that all cooperating agencies notify program participants about the CAP in each State.

Discussion: The suggestion is inconsistent with the Act. Section 20 of the Act requires only programs and projects providing services under the Act, not cooperating agencies, be mandated to notify program participants of the CAP.

Moreover, section 112 of the Act authorizes the CAP to serve only individuals who are applicants or consumers of programs funded under the Act. To the extent that a cooperative entity is serving an individual who is also an applicant or consumer of a program funded under the Act, that individual would already receive information about the CAP under section 20 of the Act.

Changes: None.

Requirements for Third-party Cooperative Arrangements (§361.28)

In-Kind Contributions

Comments: Two commenters agreed with the changes to the prior regulation in proposed §361.28. Many commenters, primarily from one State, noted that excluding costs for administrative time and other indirect costs paid by third parties as an allowable source of match would negatively impact cooperative arrangements between VR agencies and their partners.

One commenter requested that the regulations maintain flexibility for States to use in-kind funding contributions from partners to augment a State's match and leverage State funding. Another commenter expressed concern that as a result of the proposed changes, services for students and

clients in one program would cease, and that school district employees would lose their jobs.

Discussion: We appreciate the commenters' concerns, and agree that eliminating the ability of third-party cooperative agencies from using certified personnel time would indeed pose a hardship, but such prohibition is not contained in §361.28, either proposed or final. Section 361.28(c), both proposed and final, explicitly permits public third-party cooperative agencies to provide match via certified personnel time for staff directly providing the vocational rehabilitation services under the third-party cooperative arrangement, as they have been permitted to do for many years. For example, for a school that is the cooperating agency, the cooperating agency may use the certified time for the teacher responsible for teaching the students under the third-party cooperative arrangement program as a permissible source of match since the teacher is directly providing the service under the third-party cooperative arrangement. Final §361.28(c) does not change the long-standing arrangements that many DSUs have with third-party cooperative agencies, such as the schools, with regard to certified personnel time. However, not all certified personnel time is permissible as a source of

match under a third-party cooperative arrangement. As stated above, the teacher’s time is permissible for match purposes under the VR program because he or she is directly providing the service, but certified time for other school staff such as principals, vice principals, secretaries, and supervisors, is not permissible for match purposes under the VR program because these individuals do not directly provide vocational rehabilitation services. The certified time for these individuals is a third-party in-kind contribution as defined in 2 CFR 200.96 and, as such, is not permissible source of match for the VR program. While final §361.28(c) is a new provision, the content merely clarifies the matching requirements that existed in accordance with §361.60(b), which remains virtually unchanged by these final regulations. The changes made to this section further clarify the allowable sources of match under third-party cooperative arrangements. Consequently, we believe that final §361.28(c) should have little or no effect on the services for students and other individuals with disabilities served through third-party cooperative arrangements or the cooperative agencies and their employees.

Contrary to what some commenters appear to believe, third-party in-kind contributions have never been an allowable source of match under the VR program, including for purposes of third-party cooperative arrangements. Final §361.60(b)(2), which remains unchanged, prohibits the use of third-party in-kind contributions as a source of match for the VR program and this prohibition would apply to third-party cooperative arrangements under the VR program as well. However, during monitoring of the VR program, the Department has found that many DSUs seem to be unaware of this prohibition, especially in the context of third-party cooperative arrangements. For this reason, the Department proposed revisions to §361.28(c), which are maintained in these final regulations, to remind DSUs of the allowable sources of match for third-party cooperative arrangements. Specifically, these sources include cash transfers from the cooperating agency to the DSU and certified personnel expenditures of cooperating agency staff who directly provide vocational rehabilitation services under the third-party cooperative arrangement, both of which were proposed in the NPRM. In final §361.28, we have added a new paragraph (c)(3) to specify that other direct expenditures incurred under the contract with the

cooperating agency only for the direct provision of services under the third-party cooperative arrangement may be an allowable source of match. These expenditures are distinguished from in-kind contributions because the expenditures were incurred specifically for the purpose of the third-party cooperative arrangement and in accordance with the terms and conditions of the contract and within the contract period, all of which can be verified by supporting documentation from the cooperating agency. For example, if it was necessary for a cooperating agency to purchase instructional materials to provide new or expanded services authorized under the third-party cooperative arrangement contract, and if those materials were not already available to the cooperating agency, the expenditures for those materials may be an allowable source of match. On the other hand, expenditures for costs incurred by the third-party cooperating agency not directly for the provision of vocational rehabilitation services, such as, indirect costs, depreciation, existing utilities, space and supplies are not an allowable source of match because they are third-party in-kind contributions as defined in 2 CFR 200.96.

Changes: We have revised final §361.28 by adding new paragraph (c)(3) to permit other direct expenditures incurred by the cooperating agency to be used as a source of match so long as those expenditures were incurred specifically for the purpose of the third-party cooperative arrangement.

Students Who Are Eligible or Potentially Eligible for Services

Comments: One commenter requested that proposed §361.28(a)(2) include services provided by the cooperating agency for students with disabilities who are eligible or potentially eligible for services from the DSU.

Discussion: Under final §361.28(a)(2), which remains unchanged from prior regulations, vocational rehabilitation services provided under a third-party cooperative arrangement are only available to applicants for, or recipients of, services from the VR program. Given amendments to the Act made by WIOA, particularly new provisions in section 103(b)(7) regarding transition services to groups of students and youth with disabilities and section 113 regarding the provision of pre-employment transition services to students with disabilities, it is possible that some of these services will be provided to

youth or students with disabilities who have not yet applied or been determined eligible for vocational rehabilitation services. This means that these students and youth with disabilities would be considered a "recipient" of vocational rehabilitation services for purposes of final §361.28. As such, DSUs could enter into third-party cooperative arrangements for the provision of these group transition services or pre-employment transition services so long as all requirements of final §361.28 are satisfied.

Changes: None.

Statewide Assessment; Annual Estimates; Annual State Goals and Priorities; Strategies; and Reports of Progress (§361.29)

Comprehensive Statewide Needs Assessment

Comments: We received many comments on proposed §361.29 pertaining to statewide assessment, annual estimates, goals and priorities, strategies, and reports of progress. One commenter requested clarification of the role of SRCs in the conduct of a comprehensive statewide needs assessment under WIOA.

Several commenters suggested that we revise §361.29(a) to require that the comprehensive statewide needs

assessment be conducted independently, thereby helping to ensure that the needs assessment is more objective and comprehensive.

Another commenter requested that we add a requirement to proposed §§361.29(a)(1)(i) and 361.29(b) that the statewide assessment include individuals who are working in subminimum wage and sheltered employment for employers using section 14(c) certificates issued by the Department of Labor under the FLSA. The commenter recommended that because States are required to conduct annual reviews of individuals in subminimum wage and sheltered employment, the needs of these individuals should be added to the assessment requirements under §361.29(a).

Additionally, the commenter stated that States should be required to review the quality of supported employment services provided to individuals with the most significant disabilities and ensure that any employer holding subminimum wage certificates under section 14(c) of the FLSA should be able to provide supported employment services. Lastly, the same commenter asserted that States should include data on individuals working in segregated employment in any reports to RSA.

Discussion: In response to the comment requesting clarification of the role of the SRC, there is no authority under section 101(a)(15) or 105 of the Act or under title I of WIOA for the SRC to participate in the conduct of any needs assessments required by title I of WIOA. The activities of the Council are limited to those listed in section 105(c) of the Act and final §361.17(h), both of which remain unchanged by WIOA or these final regulations. In general, the SRC's responsibilities encompass only functions associated with the conduct of the VR program under title I of the Act, not those functions of the VR program as a core partner in the workforce development system under title I of WIOA.

Specifically, section 105(c)(3) and final §361.17(h)(3) authorize the Council to advise the DSU on activities carried out under title I of the Act and part 361 and to assist with the preparation of the VR services portion of the Unified or Combined State Plan, applications, reports, needs assessments, and evaluations required to be carried out under title I and part 361.

We disagree with the recommendation to require that the comprehensive statewide needs assessment be conducted independently. Final §361.29(a) mirrors section

101(a)(15)(A) of the Act, which does not require that the assessment be carried out independently. On the contrary, that provision requires that the DSU and Council jointly conduct the assessment every three years. Therefore, there is no authority to revise §361.29(a) as the commenters recommend.

The contents of the comprehensive statewide needs assessment are outlined in section 101(a)(15)(A) of the Act and final §361.29(a) is consistent with the statute. However, nothing in the Act and these final regulations prohibits a DSU and Council from conducting a needs assessment that includes additional elements, such as the needs of individuals in subminimum wage and sheltered employment.

Changes: None.

Annual Estimates and Reports of Progress

Comments: One commenter supported the change in proposed §361.29 that requires DSUs that have implemented orders of selection to estimate and report how many individuals with disabilities are not receiving services, asserting this will provide indirect data regarding the appropriateness of not implementing an order of selection. One commenter requested clarification as to what the Department means by

the submission of annual estimates “at such time and in such manner to be determined by the Commissioner” and expressed concern that this was not consistent with the continued requirements to submit various annual reports and updates. The same commenter suggested that the phrase “standards and indicators authorized by Section 106 of the Act” be removed as no longer relevant and that only performance measures authorized under WIOA be included.

Another commenter stated that the requirement under WIOA for the increased collection of data would offer evidence of successes and challenges across the Nation but would also impose some additional costs on the DSUs, which are already struggling under budget constraints.

Additionally, one commenter expressed concerns about the apparent lack of annual reporting of progress toward achieving goals and priorities, and that once the WIOA system is fully implemented, annual reporting should not be such a burden. The commenter requested guidance on how best to use data collected under the newly aligned systems to maximize fiscal and staff resources.

One commenter expressed concern that the lack of annual reporting to the Department regarding flaws in the delivery system for persons with significant disabilities,

including those receiving supported employment services, could preclude making timely adjustments to maximize the opportunity for successful, integrated employment in accordance with Section 109 of the Act, as amended by WIOA, which allows for “expanded types of trainings, technical assistance and other services DSUs may provide under the VR program, to employers who have hired or are interested in hiring individuals with disabilities.”

Discussion: We appreciate the support for the requirement to report the numbers of individuals with disabilities who may not be served in the event that an order of selection is implemented, as well as the other comments expressing concerns and suggestions. In response to the comment requesting clarification pertaining to submission of annual estimates, “at such time and in such manner to be determined by the Commissioner” allows the Department to solve a practical problem caused by a statutory inconsistency. Section 101(a)(10) requires that DSUs collect key data to more effectively manage the VR program and ensure that the needs of the program’s consumers, including those with the most significant disabilities, are met. Many of these data must be collected annually, and historically have been submitted as part of annual State

plan updates. However, under sections 102 and 103 of title I of WIOA, the Unified or Combined State Plan is submitted every four years, with modifications made at least every two years, as appropriate. Therefore, the Secretary may determine it appropriate to require the data, which are collected annually by DSUs, to be reported only when the State submits a Unified or Combined State Plan or a modification to that Plan.

Although collected data are to be submitted at a time and in a manner to be determined by the Secretary, DSUs still must gather and analyze required data annually as required by the Act and these final regulations. This will allow the agency to respond in a timely manner to the needs of all consumers, including those with the most significant disabilities who may need supported employment services in order to achieve their vocational goals.

Section 106 of the Act requires that the standards and indicators for the VR program must be consistent with the performance accountability measures required by section 116 of title I of WIOA for all core programs, including the VR program. Therefore, all references to standards and indicators throughout the Act and these final regulations

refer to the performance accountability measures under WIOA and the phrase cannot be removed from final §361.29.

We address comments associated with any burden resulting from the data reporting requirements under section 101(a)(10) of the Act, as amended by WIOA, in the Regulatory Impact Analysis section of these final regulations. The Departments of Education and Labor will jointly issue guidance regarding the alignment of data reporting requirements pursuant to the joint regulations governing the performance accountability system established under WIOA and published in subpart E of part 361.

Changes: None.

Provision of Training and Services for Employers (§361.32)

Comments: While commenters generally appreciated the increased emphasis on engagement with employers, some suggested that the regulations clarify the types of services and activities in which the DSU may engage, and differentiate the roles and responsibilities of the DSU and the employer, especially with regard to providing accommodations.

Some commenters acknowledged the importance and need for training employers about their obligations under the ADA and about vocational rehabilitation services provided

through the VR program, such as work-based learning experiences, pre-employment transition services, disability awareness and the needs of individuals with disabilities in the workplace.

A few commenters suggested that the Department recommend some actions to engage employers, such as encouraging States to establish employer advisory councils at the State, regional, or local level.

One commenter suggested that proposed §361.32 was not strong enough to prioritize the activities under this section because it authorizes, but does not require, an allocation of funding for services. The commenter recommended that the Department more heavily emphasize the importance of activities under this section.

Finally, one commenter recommended aligning allowable activities under this section with WIOA performance measures regarding effectiveness in serving employers and requested guidance on tracking data related to services provided to employers and the effectiveness of such services.

Discussion: We appreciate the supportive comments and the additional recommendations for implementing the requirements for activities DSUs may engage in with

employers. Section 109 of the Act, as amended by WIOA, describes the activities for which States may pay to educate and provide services to employers who have hired, or are interested in hiring, individuals with disabilities under programs carried out under title I of the Act. However, section 109 of the Act does not address prohibited activities or the differentiation of the roles and responsibilities of the DSU and the employer, particularly in providing accommodations. Section 109(1) only allows the DSU to provide training and technical assistance to employers regarding the employment of individuals with disabilities, including disability awareness, and the requirements of the ADA and other employment-related laws. The recommended inclusion of language to describe accommodations that are incumbent upon employers to provide does not fall under the purview of the Department or within the scope and authority of these regulations. Instead, the responsibility of employers for work place accommodations is within the jurisdiction of the Equal Employment Opportunity Commission, which is charged with the enforcement of title I of the ADA.

Section 109 of the Act, as amended by WIOA, and final §361.32 clearly recognize the important role that DSUs can

play in increasing opportunities for competitive integrated employment for individuals with disabilities through the provision of technical assistance and training to employers and specify a wide variety of these activities. For example, the statute and regulation describe the areas in which DSUs may work with employers to provide opportunities for work-based learning experiences and pre-employment transition services to recruit qualified applicants who are individuals with disabilities, to train employees who are individuals with disabilities, and to promote awareness of disability-related obstacles to continued employment. Furthermore, the Act and final regulation provide that the DSU may assist employers through consultation, technical assistance, and support related to workplace accommodations, assistive technology, facilities and workplace access, and using available financial support for hiring or accommodating individuals with disabilities. Given these and other examples, we do not believe that it is necessary to include additional language in final §361.32 to further emphasize the importance of this technical assistance and training. However, we clarify here that the use of the term “apprenticeships” in final §361.32 does not include Registered Apprenticeships.

Although we recognize the value of the DSUs engaging employers through activities such as establishing Statewide or regional/local level employer advisory councils, section 109 of the Act does not require this activity and therefore, we have no statutory authority to require this activity in these regulations. However, final §361.24(c) requires States to describe in the VR services portion of the Unified or Combined State Plan how the DSU will work with employers to identify opportunities for competitive integrated employment and career exploration, and to facilitate the provision of vocational rehabilitation services.

We agree that the provision of training and services for employers by DSUs is important in accomplishing the purposes of the Act, as amended by WIOA; however, final §361.32 mirrors section 109 of the Act, as amended by WIOA, which authorizes, but does not require, the expenditure of funds for activities under this section. Therefore, we have no authority to require DSUs to incur expenditures under this section.

The Departments of Education and Labor appreciate the comment regarding the potential interplay between the activities authorized under section 109 of the Act and

final §361.32, and the performance indicator for the effectiveness of serving employers required by 116(b)(2)(A)(i)(VI) of title I of WIOA. Because the measures apply to all core programs in the workforce development system, not just the VR program, we have addressed this comment in the joint final regulations implementing the performance accountability measures under section 116 of WIOA, and published elsewhere in this issue of the Federal Register.

Changes: None.

Innovation and Expansion Activities (§361.35)

Resource Plans for Statewide Independent Living Councils

Comments: Many of the commenters opposed the changes in proposed §361.35(a)(3) which requires the State to assure that it will reserve and use a portion of its VR program funds to support the funding of the Statewide Independent Living Council (SILC), consistent with the plan prepared jointly by the Council and the State under section 705(e)(1). The commenters contend that WIOA did not amend section 101(a)(18)(A)(ii)(I) of the Act and therefore, the Department should not change its regulation and allow the State and the SILC to determine not to use I&E funds. The commenters further stated that any change to §361.35 would

harm CILs by diverting funds from the SILS program under Part B of title VII if I&E funds are not used. Some other commenters opposed proposed §361.35 allowing innovation and expansion funds to be used at all to support SILC resource plans to the extent needed, arguing that other funding sources are available.

A few commenters requested clarification as to when the DSU uses I&E funds to support the SILC. Of these, one commenter indicated that the DSU, in the commenter's State, has supported the SILC with innovation and expansion funds and would likely continue to do so unless there is a change in the designated State entity (DSE), the State agency responsible for the administration of the independent living programs authorized under title VII of the Act, as amended by WIOA.

Discussion: We appreciate the concerns expressed by commenters. In proposed §361.35, we attempted to set forth our long-standing interpretation of the statutory language in section 101(a)(18)(A)(ii)(II) that a State's contribution of innovation and expansion funds to the SILC resource plan is governed by the resource plan's description of support for the SILC. We consistently have interpreted the statutory requirement in section

101(a)(18)(A)(ii)(II) that the funding of the SILC be consistent with the SILC resource plan to mean that the State and the SILC may decide to use innovation and expansion funds to support the SILC resource plan, or not to do so as they determine how they will use the sources of funding available under section 705(e) to support the SILC.

Our data shows that States and SILCs have been using innovation and expansion funds to support SILC resource plans in this way for many years. Based upon an analysis of the data from all of the State Plans for Independent Living for the period FY 2014 through FY 2016, we found that innovation and expansion funds account for 38 percent of the roughly $8.7 million contributed by States to SILC resource plans. We found that only 32 States contributed innovation and expansion funds to the SILC resource plan. Of these 32 States, 13 States used only innovation and expansion funds to support the SILC.

However, because the innovation and expansion section of the Act remained unchanged by WIOA and our proposed regulation sparked confusion among many commenters, we have decided to return to the current regulation which mirrors the statutory language requiring that the reservation and use of the innovation and expansion funds to support the

funding of the SILC be consistent with the SILC resource plan. We continue to interpret the current regulation, as we always have, that the State and the SILC determine in the SILC resource plan which sources and amounts of available funding, including innovation and expansion funding, will be used in the SILC resource plan, and then the State reserves and uses the innovation and expansion funding to support funding of the SILC, consistent with the SILC resource plan.

Changes: We have revised final §361.35(a)(3) to substitute the language of the current regulation, with conforming edits, for the language in the proposed regulation.

Innovative Approaches with Components of the Workforce Development System

Comments: None.

Discussion: Section 101(a)(18)(A)(i) of the Act and final 361.35(a)(1) require the designated State unit to develop and implement innovative approaches to improve vocational rehabilitation services to individuals with disabilities that are consistent with the comprehensive statewide needs assessment and the State's goals and priorities. To support the alignment of the VR program with the workforce development system as emphasized throughout the Act and

these final regulations, we clarify that these innovative approaches may include activities and partnerships with components of the workforce development system.

Changes: None.

Ability to Serve All Eligible Individuals; Order of Selection for Services (§361.36)

Individuals Who Require Specific Services and Equipment to Maintain Employment

Comments: Most commenters supported proposed §361.36(a)(3)(v), which permits the DSU to elect to serve eligible individuals who require specific services or equipment to maintain that employment, whether or not those individuals are receiving vocational rehabilitation services under the order of selection. The commenters stated that this proposed change from the prior regulations will better serve the needs of individuals with disabilities who are at risk of losing their jobs by allowing the DSU an opportunity to serve them outside an order of selection, as appropriate.

A few commenters expressed concern that proposed §361.36(a)(3)(v) would allow individuals with less significant disabilities to be served before individuals with significant or the most significant disabilities. A

few commenters also questioned whether this new provision applies only to individuals with the most significant disabilities. In addition, a few commenters stated that providing specific services or equipment to eligible individuals who do not meet the order of selection should be mandatory to ensure that they are able to maintain their employment.

Conversely, a few commenters suggested that the DSU should not be required to use this authority at all. One commenter suggested that a DSU should not be required to state its intent to use the authority in the vocational rehabilitation services portion of the Unified or Combined State Plan. One commenter requested clarification of the term “immediate need,” which the Department used in explaining the proposed provision in the preamble of the NPRM.

Discussion: We appreciate the comments supporting the flexibility afforded to DSUs in §361.36(a)(3)(v). We also recognize the need, as expressed by some commenters, for clarification of this exemption from the order of selection.

Final §361.36(a)(3)(v), which implements section 101(a)(5)(D) of the Act, applies to those specific services

or equipment that an individual needs to maintain current employment. The regulation does not apply to other services an individual may need for other purposes. In other words, if an individual is receiving services and equipment from a DSU under this exemption, the individual is within the order of selection for the purpose of receiving any other vocational rehabilitation services not covered by the exemption. This means that if the individual needs services that are not directly tied to maintaining current employment, the individual's ability to receive those services from the VR program depends on the individual's placement in the State's order of selection.

As to whether and how the DSU may exercise its authority under final §361.36(a)(3)(v), that section applies to all eligible individuals, not just those with the most significant disabilities. It is possible that individuals with less significant disabilities would receive vocational rehabilitation services before individuals with significant or the most significant disabilities. The Act, as amended by WIOA, gives the DSU the option to provide services and equipment to individuals at immediate risk of losing employment outside the established order, and the DSU should consider doing so if

financial and staff resources are sufficient. If the DSU elects to do so--again, the exercise of the authority is not mandatory--section 101(a)(5)(D) of the Act requires that it indicate this in the VR services portion of the Unified or Combined State Plan.

The term "immediate need" in the Summary of Proposed Changes section of the NPRM has its common meaning, and it remains the same. The phrase means that the eligible individual would almost certainly lose his or her current job if not provided specific services or equipment in the very near future that would enable him or her to retain that employment.

Changes: None.

Information and Referral

Comments: One commenter sought clarification about referring individuals to other programs under proposed §361.37 for specific services or equipment necessary to help them retain employment, as well as other services that cannot be provided under proposed §361.36(a)(3)(v). This commenter further suggested that if an individual is referred elsewhere for specific services or equipment necessary to maintain employment, the DSU should follow up to ensure the necessary services were delivered.

Discussion: If the individual is placed into a closed category of that order, under sections 101(a)(5)(E) and 101(a)(20) of the Act, and final §§361.36(a)(3)(iv)(B) and 361.37(a)(2), the DSU must refer the individual to other programs and providers for those services not covered by the exemption. These provisions require a DSU to assure in the VR services portion of the Unified or Combined State Plan that individuals who do not meet the order of selection criteria will have access to an information and referral system through which the DSU will refer them to other appropriate Federal and State programs, including other components of the statewide workforce development system.

However, neither section 101(a)(5)(E) nor 101(a)(20) requires the DSU to follow up with the programs to which the individuals are referred, and we have no authority to do so either. While we agree this is a best practice, we also recognize the administrative burden the requirement would impose on the DSU.

Changes: None.

Monitoring by the State Rehabilitation Council

Comments: A few commenters proposed that §361.36(f)(4) allow the SRC to monitor the use of this authority by the

DSU and ensure that individuals with the most significant disabilities are still prioritized for vocational rehabilitation services. A few other commenters also suggested that the SRC be involved in monitoring the use of the new provision but did not propose any additional regulatory language.

Discussion: Section 105(c) of the Act, which sets forth the functions of the SRC, does not authorize it to monitor the DSU's exercise of the order of selection exemption. Rather, section 107(a)(1) of the Act requires the Department to monitor the DSUs.

However, under section 105(c)(1)(A) of the Act and final §361.17(h)(1)(i), the SRC is tasked with reviewing, analyzing, and advising the DSU about the order of selection and the discretion to exercise the authority set forth in section 101(a)(5)(D) of the Act and final §361.36(a)(3)(v). In addition, the SRC has the opportunity to review and comment on the DSU's intent to use the authority under §361.36(a)(3)(v) when the SRC reviews the DSU's order of selection policies under final §361.36(f) and when the SRC advises and assists the DSU in the preparation of the VR services portion of the Unified or Combined State Plan under final §361.17(h)(3).

Changes: None.

Order of Selection Criteria

Comments: A few commenters suggested that the DSU develop a “meaningful” order of selection to ensure that individuals with the most significant disabilities receive vocational rehabilitation services. One commenter suggested that the order of selection be based on something other than the refinement of the three criteria in the definition of “individual with a significant disability” in §361.5(c)(30).

Discussion: Section 101(a)(5) of the Act remained unchanged by WIOA, except for the addition of section 101(a)(5)(D) permitting the DSU to exercise its discretion to provide specific services and equipment to individuals, who are at risk of immediate job loss, outside the order of selection. Therefore, there is no authority to further amend final §361.36 to require the DSU to establish a “meaningful” order of selection or to permit the order of selection to be based on criteria other than those included in the definition of an “individual with a significant disability” in final §361.5(c)(30).

Changes: None.

Prohibited Factors

Comments: Some commenters questioned whether the proposed §361.36 is consistent with the requirement in §361.42(c)(2)(ii)(D), which prohibits the DSU from considering an applicant's particular service needs, the anticipated cost of services required by an applicant, or the income level of an applicant and applicant's family. Other commenters indicated that the proposed §361.36 aligns with §361.42(a)(1)(iii), which permits the DSU to provide vocational rehabilitation services to eligible individuals who require services in order to retain their employment.

Discussion: For States operating under an order of selection, the DSU must determine eligibility under final §361.42 prior to assigning eligible individuals to any priority category. WIOA did not change this requirement. Therefore, under final §361.42(c)(2)(ii)(D) an applicant's particular service needs (including those services necessary to maintain current employment) are not considered in determining eligibility. The order of selection exemption in final §361.36(a)(3)(v) applies only after an individual has been determined eligible. Consequently, the eligible individual would be exempt from the order of selection for the purpose of receiving services necessary to maintain employment.

Changes: We have made a technical amendment to §361.36(d)(2)(vi) to reflect the exemption set forth in §361.36(a)(3)(v).

Pre-Employment Transition Services

Comments: Some commenters raised various concerns, posed questions, or sought clarification about pre-employment transition services, including serving students with disabilities who may not have applied or been determined eligible for vocational rehabilitation services.

Discussion: We address these comments in the Pre-Employment Transition Services (§361.48(a)) section elsewhere in this Analysis of Comments and Changes.

Changes: None.

Information and Referral Programs (§361.37)

Benefits Planning

Comments: Most of the comments received on this regulation were in support of the changes to the prior regulation in proposed §361.37, while some suggested further revisions. A few of these commenters suggested that §361.37 specify to whom referrals are made for benefits planning for individuals with disabilities receiving Social Security benefits under title II or title XVI of the Social Security Act.

Discussion: We appreciate the comments supporting the changes to §361.37 and the comments suggesting further revisions. Section 361.37(b)(5), both proposed and final, which requires the DSU to refer individuals who do not choose to seek an employment outcome under the VR program to the SSA for information about receiving benefits while employed, has remained unchanged from the VR program regulations that were published in 2001. While section 102(b)(2) of the Act, as amended by WIOA, requires the DSU to provide information about benefits planning to individuals with disabilities receiving Social Security benefits, it does not mandate the DSUs to make related referrals to any one agency or organization for this service. Some DSUs have the capacity to provide this information in-house, whereas others may need to refer individuals to other programs or entities. As such, and because the needs of the individuals requiring these services also vary, we believe it best serves DSUs and individuals with disabilities not to require a specific referral program in final §361.37. For the same reason, we have not specified other entities to which DSUs may refer individuals with disabilities for any other type of service.

Changes: None.

Referral Options

Comments: One commenter suggested that a list of all options for referrals be included in proposed §361.37. Another commenter suggested that referral options may not be available in certain geographical areas of the State. The commenter also noted the dilemma facing DSU personnel if it is known, before a referral is made, that individuals with disabilities are unlikely to receive services from other programs in the State.

Discussion: We do not believe it is possible or practicable to include a list of all referral options in final §361.37 because the Federal, State, and local agencies, as well as non-profit organizations that serve individuals with disabilities vary widely from State to State. In addition, DSUs are most familiar with the referral option in their State and we would not want them to believe these options were limited by the inclusion of a list in final §361.37. However, we clarify that these referral options include one-stop centers as components of the workforce development system.

If referral options are not available in a geographic location or if a referral will not result in the individual

with a disability receiving services, we encourage DSUs to continue to build partnerships with a broader set of appropriate Federal and State programs, including other components of the statewide workforce development system, to ensure effective referral options are available in the State. DSUs should not make referrals to other programs unless there is an expectation that the individual with a disability will benefit from the referral.

Changes: None.

Follow-Up

Comments: One commenter suggested that DSUs be required to follow-up on referrals made to other programs to verify that individuals with disabilities are receiving the services for which they were referred.

Discussion: The Act, as amended by WIOA, does not require a DSU to follow-up on the referrals it makes to other programs. Therefore, we have not made the suggested revision. While we agree with commenters that this is a best practice, we also recognize the administrative burden the requirement would impose. However, the criteria for appropriate referrals in final §361.37(c) is designed to ensure effective referrals for individuals with disabilities.

Changes: None.

Independent Living Services

Comments: A few commenters suggested that there may be difficulty in referring individuals with disabilities for independent living services if the DSU is not the same entity administering the independent living programs authorized under title VII of the Act, as amended by WIOA. One commenter stated that the Department would need to partner with the Department of Health and Human Services when referrals are made for independent living services.

Discussion: We acknowledge that some States may establish a designated State entity (DSE) responsible for administering the independent living programs, which is separate from the DSU for the VR program. However, this should not inhibit referrals between the VR and independent living programs as required in final §361.37(b). In these circumstances, we encourage the DSU to partner with the DSE to develop effective referral policies and procedures to enable individuals with disabilities to access both programs. The Department intends to support these partnerships in the State through technical assistance developed and delivered jointly with the Department of

Health and Human Services, which now administers the SILS program and the CIL program.

Changes: None.

Protection, Use, and Release of Personal Information (§361.38)

Comments: None.

Discussion: We anticipate that other Federal and State agencies, and researchers will have an increased interest in using the data required to be collected by core programs in the workforce development system, including the VR program, under section 116(b) of title I of WIOA. Section 116(b) of WIOA requires DSUs to collect significantly more personal information than was required previously under section 101(a)(10) of the Act and prior §361.40. Therefore, after further Departmental review, we have strengthened the protection of the confidentiality of this information by requiring in final §361.38 that DSUs enter into written agreements with any entity seeking access to personal information collected under the VR program for the purpose of audits, evaluations, research, or for other program purposes. We understand that DSUs already enter into such written agreements and the revisions to final

§361.38 will not represent a change in practices under the VR program.

Changes: We have revised final §361.38(a), (d), and (e) by requiring that DSUs enter into written agreements with other organizations and entities receiving personal VR program information during the conduct of audits, evaluations, research, and for other program purposes.

Reports; Evaluation Standards and Performance Indicators (§361.40)

We received numerous comments on proposed reporting requirements under §361.40, including the collection and reporting of data on students with disabilities receiving pre-employment transition services, evaluation standards and performance indicators under section 106 of the Act, common performance accountability measures under section 116 of WIOA, and the timeframe for implementation of reporting requirements. We also received comments on burden estimates that were included in the Regulatory Impact Analysis of the NPRM. While one commenter supported the collection of new data elements required under section 101(a)(10) of the Act and implemented in §361.40(a) of these final regulations, in general, commenters expressed concerns or requested additional clarification concerning

the collection and reporting of data. We address these comments under the subheadings below.

Pre-Employment Transition Services

Comments: We received several comments on the reporting of data on students with disabilities receiving pre-employment transition services under proposed §361.40(a)(ii). One commenter noted that States may opt to track funding and services for students receiving pre-employment transition services in different ways, depending on factors such as staffing patterns, order of selection wait list considerations, and counselor caseload sizes. One commenter expressed the opinion that there are more effective ways to track the expenditures from the 15 percent of the VR program allotment reserved for the provision of pre-employment transition services than collecting individual case information for each student receiving these services.

A few commenters requested guidance about the specific data elements that will be required for students who are receiving pre-employment transition services and are applicants, or potentially eligible, for vocational rehabilitation services. Another commenter asked what additional data will be needed for purposes of performance

accountability reporting pursuant to section 116 of WIOA once the student becomes a participant under the VR program.

Finally, one commenter requested clarification and guidance about the interplay between the data required to be reported under §361.40(a), collected through the Case Service Report (RSA-911), and the content of the VR services portion of the Unified or Combined State Plan regarding the number of students who are receiving pre-employment transition services.

Discussion: We appreciate the concerns expressed regarding the new data reporting requirements in final §361.40(a) related to the provision of pre-employment transition services to students with disabilities. We agree with commenters that it is reasonable to anticipate an increase in the number of individuals that will need to be reported through the RSA-911. Prior to the enactment of WIOA, DSUs could only serve, and thus report, individuals who were applicants or eligible individuals under the VR program. However, section 113 of the Act, as added by WIOA, requires DSUs to provide pre-employment transition services to all students potentially eligible for vocational rehabilitation services who need such services, regardless of whether they

have applied and been determined eligible for vocational rehabilitation services. This change is likely to result in a significant increase in the number of individuals reported under the RSA-911.

Students with disabilities who are not yet served under an individualized plan for employment and who receive pre-employment transition services are not considered "participants" as that term is defined under the joint final regulations for performance accountability purposes published elsewhere in this issue of the Federal Register. However, students with disabilities receiving pre-employment transition services are considered "reportable individuals" for RSA-911 reporting and WIOA performance purposes, regardless of whether they have applied for vocational rehabilitation services or are receiving these services under an individualized plan for employment. This does not, however, preclude a DSU from serving an eligible student with a disability under an individualized plan for employment. Once the student has begun receiving services under a signed individualized plan for employment, he or she will be counted as a participant and included in the applicable performance indicator calculations. At the point the student with a disability becomes a participant,

all the applicable RSA-911 data elements will be collected and reported in the individual's RSA-911 case record.

We have identified and defined the specific data elements needed for all students with disabilities receiving pre-employment transition services in the RSA-911 instructions. We believe this will reduce collection and reporting burden to the maximum extent possible, and prevent a requirement for collecting specific information that would otherwise result in an application for services for students with disabilities who have not intended to apply for these services.

In addition to the tracking necessary to demonstrate compliance with the requirement to reserve at least 15 percent of the State's VR allotment for providing pre-employment transition services, under section 110(d) of the Act, as amended by WIOA, and final §361.65(a)(3), section 101(a)(10) of the Act requires DSUs to have a mechanism to report the number of students with disabilities receiving these services. We recognize the burden this will place on DSUs and we have included a specific, but limited, set of data elements in the RSA-911 to enable DSUs to report the number of students with disabilities receiving these services, including both those who have been determined

eligible for vocational rehabilitation services and those who have not applied for vocational rehabilitation services. For further information regarding the specific data elements DSUs are required to report regarding students receiving pre-employment transition services, see the RSA-911 data collection instrument published elsewhere in this issue of the Federal Register. We believe DSUs should use these data, along with other information (such as that obtained through the comprehensive statewide needs assessment required under section 101(a)(15)(A) of the Act, as amended by WIOA, and final §361.29(a)), when developing the VR services portion of the Unified or Combined State Plan, including the goals and strategies related to the provision of pre-employment transition services under sections 101(a)(15)(C) and (D) of the Act, as amended by WIOA, and final §361.29(c) and (d).

Changes: None.

Standards and Indicators

Comments: With respect to proposed §361.40(b), a few commenters requested that we add indicators to the evaluation standards and performance indicators. Of these, a few requested that separate indicators be added for transition services to students and youth with disabilities

and for services to youth with disabilities. One commenter expressed the concern that students with disabilities will not be counted as participants or included in the performance indicators, thereby eliminating a large number of vocational rehabilitation consumers from the performance measures. This commenter recommended that we establish new performance indicators for students with disabilities receiving pre-employment transition services. Another commenter requested we add performance indicators aligned with evidence-based practices that promote individuals with disabilities entering the labor force. One commenter requested that we include additional performance indicators in these final regulations rather than add them later through an information collection request. Another commenter asked if the Department would continue using the evaluation standards and performance indicators in prior §§361.80 through 361.89 as Federal reporting requirements under the VR program. Finally, one commenter requested that we limit the data selected to only that required to determine the performance accountability measures under section 116 of WIOA.

Discussion: Section 106 of the Act, as amended by WIOA, makes the VR program subject to the common performance

accountability measures, established in section 116 of title I of WIOA, which are applicable to all core programs of the workforce development system. Therefore, we have removed prior §361.80 through §361.89, which established the evaluation standards and indicators in use by the VR program prior to the enactment of WIOA. Final §361.40(b) includes a cross reference to the joint performance accountability regulations developed by the Departments of Labor and Education in subpart E of final part 361.

Section 106 of the Act, as amended by WIOA, does not provide additional VR program-specific performance accountability measures. However, consistent with section 116(b)(1)(A)(ii) of title I of WIOA, section 106(a)(2) permits States, but not the Department, to establish and provide information on additional performance accountability indicators. States must identify any additional performance indicators in the Unified or Combined State Plan. Under this section, States could opt to include additional performance indicators, including any or all of the additional performance measures recommended by commenters or the evaluation standards and performance indicators set forth in prior §§361.80 through 361.89.

In addition, section 101(a)(10)(A) of the Act requires that, in the VR services portion of the Unified or Combined State Plan, the State assures that it will submit certain reports in the form and level of detail and at the time required by the Secretary. Regarding applicants for, and eligible individuals receiving, services, these reports must provide the wide variety of data specified in section 101(a)(10)(C), as well as data related to the evaluation standards and indicators in section 106 of the Act, which are the performance accountability indicators in section 116(b) of title I of WIOA. Therefore, there is no statutory authority to limit the data reported by DSUs through the RSA-911 to those data needed for the performance accountability indicators applicable to the core programs under WIOA, as recommended.

Changes: None.

Program Year

Comments: One commenter requested that the Department use the program year under title I of WIOA, instead of the fiscal year, for the operation of the VR program in order to better align the program with the performance data required under section 116 of WIOA.

Discussion: We understand the concern expressed by commenters and the potential confusion that may result because the annual award and financial reporting cycle for the VR program is no longer aligned with the State planning and performance reporting cycle required under title I of WIOA. The VR program is a current-funded program for which Congress appropriates annual funds to be obligated consistent with the Federal fiscal year and section 110(a)(2)(A) of the Act, which specifies the manner in which allotments are to be made. As noted in the Submission, Approval, and Disapproval of the State Plan (§361.10) section earlier in this preamble, section 110(a)(2)(A) of the Act, which was not amended by WIOA, requires that allotments be made for each fiscal year beginning on or after October 1, 1978. We interpret section 110(a)(2)(A) of the Act to require that VR program allotments coincide with the Federal fiscal year. Thus, we cannot change the year under which the VR program operates in order to align it with the July 1 through June 30 program year for submission of the VR services portion of the Unified or Combined State Plan and the reporting of performance data required under final §361.40. States will continue to receive VR program allotments and report fiscal

data through the Financial Status Report (SF-425) and the VR program Cost Report (RSA-2) in accordance with the Federal fiscal year.

Changes: None.

Performance Accountability Regulations

Comments: One commenter recommended that we include the joint performance regulations in proposed §361.40.

Discussion: We disagree with the recommendation. The extent and detail of the joint regulations governing the performance accountability system under section 116 of title I of WIOA makes it necessary to include them in a separate subpart of these final regulations. For the convenience of the reader, we grouped this subpart E with subparts D and F, which set forth the joint final regulations implementing requirements for unified and combined planning and the one-stop delivery system, respectively, of WIOA. We believe it is sufficient to include a cross reference to subpart E in final §361.40(b).

Changes: None.

Cumulative Caseload Report (RSA-113)

Comments: We received two comments regarding the VR program's Cumulative Caseload Report (RSA-113). One commenter asked whether we intend to make changes to this

data collection instrument and requested that we provide guidance on these changes. Another commenter suggested that the Department discontinue use of the RSA-113 because it is redundant with data reported through the revised RSA-911.

Discussion: We do not intend to make changes to the currently approved RSA-113 or the instructions for its submission. At this time, we use the data reported through the RSA-113, the only source of quarterly VR program data, for program management purposes and to support budget requests for the VR program. However, we intend to reduce the reporting burden on the States by discontinuing use of the RSA-113 when DSUs are able to report similar data through the RSA-911 on a quarterly basis. When appropriate, the Department will provide guidance to DSUs regarding reporting changes.

Changes: None.

States with Two VR Agencies

Comments: One commenter asked whether, in States with two VR agencies, those agencies that serve individuals who are blind and visually impaired would establish levels of performance for purposes of the performance accountability indicators under section 116 of title I of WIOA separate

from those established by agencies serving individuals with all other disabilities. Another commenter expressed concern that VR agencies serving individuals who are blind and visually impaired would be required to establish separate levels of performance due to the relatively low number of individuals served by these agencies and the high variance in outcomes.

Discussion: Section 116(b)(3)(A)(iii) of title I of WIOA requires States to identify, in their Unified or Combined State Plans, expected levels of performance for the performance indicators for the first two years covered by their plans. Because this section, as well as all other provisions of section 116 of WIOA pertinent to the establishment of levels of performance for the performance accountability indicators, refers to the "State," States must establish the expected levels of performance using State-level, not VR agency-level, data. Therefore, in States with more than one VR agency, the agencies must work together to identify expected levels of performance that take into account their individual performance. We will monitor each agency's performance on the performance accountability indicators and their contributions toward achieving the adjusted levels of performance through a

review of the data reported on the RSA-911 and during periodic reviews in accordance with section 107 of the Act. See the Analysis of Comments and Changes section of the joint performance regulations published elsewhere in this issue of the Federal Register for a more detailed discussion about setting expected levels of performance and adjusted levels of performance.

Changes: None.

Reporting Burden

Comments: We received numerous comments on the Department's burden estimates, all of which stated that we underestimated the costs associated with the reporting of data under proposed §361.40 described in the Regulatory Impact Analysis section of the NPRM. In particular, commenters raised concerns about estimates of the amount of time needed for the collection of new data and the quarterly reporting of individual data on all open service records, as well as the cost of changes to State management information systems. Some of these commenters stated that the proposed new reporting requirements will create a burden on the financial and personnel resources of the agency. One commenter noted that documenting and tracking the number of potentially eligible students with

disabilities would be burdensome and costly considering the number of potentially eligible students is staggering when compared to the number of transition-age consumers previously served by the DSUs.

Discussion: We recognize that proposed new data collection and reporting requirements, including data on students with disabilities receiving pre-employment transition services, will have an impact on the financial and personnel resources of the agency. However, the collection and reporting of such data are required by the amendments made by WIOA to section 101(a)(10) of the Act. In addition, the collection and reporting of data regarding the number of students with disabilities receiving pre-employment transition services and the costs of these services will enable the Department and the States to better track the use of VR program funds that must be reserved for the provision of these services.

In response to the comments regarding the burden associated with the reporting of data under final §361.40 and as a result of further Departmental review, we have adjusted the burden estimates as described in the Regulatory Impact Analysis section of the preamble of these final regulations. Comments pertaining to specific

estimates of reporting burden included in the Regulatory Impact Analysis of the NPRM are addressed in the Regulatory Impact Analysis of these final regulations. No changes are needed to the regulatory text of final §361.40.

Changes: None.

RSA-911 Case Service Report

Comments: We received comments related to the definitions of data elements, the reporting of Social Security numbers, the reliability of data, the data elements used to report services to employers, the reporting of barriers to employment as required by section 116 of title I of WIOA, and the timelines by which States must report data required for the performance accountability indicators.

Discussion: We discuss comments related to the manner in which the data are required to be reported under final §361.40(a) and (b) through the RSA-911 in the supporting statement for this data collection instrument published elsewhere in this issue of the Federal Register, and under the joint performance accountability system final regulations, also published elsewhere in this issue of the Federal Register, as appropriate.

Assessment for Determining Eligibility and Priority for Services (§361.42)

Advancing in Employment and Other Eligibility Criteria

Comments: Many commenters expressed strong support for proposed §361.42(a)(1)(iii) permitting an applicant to be eligible if he or she requires vocational rehabilitation services to advance in employment and meets all other eligibility criteria. However, some of these commenters requested clarification regarding the effect of the regulation when an individual is unable to advance in employment due to his or her disability. These commenters also asked whether advancing in employment refers only to the individual's current employment, or if it extends to preparations, including graduate education services, for advancing in future employment. A few commenters requested clarification about whether a DSU would be required to support the pursuit of a graduate degree by an individual already employed successfully in a competitive integrated environment and about how financial need shall be assessed.

Some commenters expressed concern that the term "advance in employment" was too vague and that it would be difficult to know when an individual has achieved his or her goal since one can always advance in employment to some degree. These commenters also expressed concerns that serving more individuals who want to advance in employment

could force a DSU to implement an order of selection. Some commenters suggested that the regulations should clarify that advancement in employment should be explicitly linked to the individual's impairment, rather than broader developmental needs.

A few commenters inquired whether the proposed changes in §361.1, which establishes the purpose of the VR program, affect the determination of eligibility under §361.42. These commenters expressed concern that the deletion of the term "gainful employment" in proposed §361.1 could be misconstrued as disallowing entry level employment as a vocational goal. A few commenters asked whether the new emphasis on self-sufficiency and competitive integrated employment means that those who apply for vocational rehabilitation services intending only to work part-time will be a lower priority for the purpose of determining eligibility.

Discussion: We appreciate the strong support for the changes in final §361.42. We also understand the need for clarification.

Section 102(a)(1)(B) of the Act, as amended by WIOA, allows for an individual with a disability, whose physical or mental impairment constitutes a substantial impediment

to employment, to be determined eligible for vocational rehabilitation services if he or she requires services to prepare for, secure, retain, advance in, or regain employment. By adding the phrase “advance in,” section 102(a)(1)(B) of the Act, as amended by WIOA, reinforces the Department’s long-standing commitment that the VR program must provide comprehensive services to assist individuals with disabilities to achieve their maximum vocational potential. The VR program is not intended solely to place individuals with disabilities in entry-level jobs but rather to assist them to obtain appropriate employment, given their unique strengths, resources, priorities, concerns, abilities, capabilities, and informed choice. The VR program’s purpose is the same regardless of whether an individual wants to advance in employment or obtain employment. We disagree with the commenter that the provision of vocational rehabilitation services to assist an individual to advance in employment should be limited to disability needs rather than other needs or desires. The extent to which DSUs should assist eligible individuals to advance in their careers by providing vocational rehabilitation services depends upon whether the individual has achieved employment that is consistent with this

standard. The DSU's assistance could include, as appropriate for the individual, graduate-level postsecondary education, if necessary to achieve the advancement in employment specified in the vocational goal on the individual's approved individualized plan for employment. All other eligibility criteria still apply to applicants seeking to advance in employment.

Consistent with long-standing Department policy, we interpret the phrase "advance in employment," as used in section 102(a)(1)(B) of the Act and final §361.42(a)(1)(iii), broadly to include advancement within an individual's current employment or advancement into new employment. In this way, the VR program ensures that individuals with disabilities obtain the services necessary so they can pursue and engage in high-demand jobs available in today's economy.

The addition of the phrase "advance in" in §361.42(a)(1)(iii), both proposed and final, underscores long-standing policy. Because DSUs have been assisting individuals to advance in employment prior to this statutory and regulatory revision, we do not anticipate that the change will result in a DSU implementing an order of selection due to an increased number of individuals

seeking to advance in employment. As stated, although the phrase “advance in” employment is new in both the statute and these final regulations, its inclusion merely mirrors long-standing Departmental policy as set forth in RSA-PD-97-04, dated August 19, 1997.

As discussed in more detail in the Purpose (§361.1) section earlier in this preamble, inclusion of the term “economic self-sufficiency,” rather than “gainful employment” as contained in prior §361.1, does not alter the eligibility criteria set forth in final §361.42(a)(1) or establish a priority of services for individuals seeking any particular form of employment. Therefore, the changes contained in final §§361.1 and 361.42(a)(1)(iii) do not require DSUs to treat individuals seeking part-time or self-employment differently (e.g., given lower priority) than individuals seeking full-time employment. Neither the Act, as amended by WIOA, nor these final regulations, supports such an interpretation. Section 361.42(c)(2), for example, prohibits the DSU from considering the nature of an applicant’s vocational goal when determining eligibility and priority for services. Therefore, a DSU may not prioritize the determination of eligibility for individuals who choose to pursue full-time employment over those who

elect to seek part-time employment or self-employment. In addition, economic self-sufficiency is intended to serve as a goal to maximize employment, which may be achieved through a variety of employment options, including entry-level employment for individuals for whom it is consistent with their skills, interests, and informed choice. However, the achievement of economic self-sufficiency is not among the criteria used to determine eligibility for the VR program under section 102(a) of the Act.

Changes: None.

Substantial Impediment to Employment

Comments: One State VR agency asked whether a substantial impediment to employment for the purpose of determining eligibility meant an impediment to any employment, or just to the employment the individual wished to pursue.

Discussion: Although this particular eligibility criterion was not changed in the Act, as amended by WIOA, or §361.42, either proposed or final, we clarify in this Discussion that the term “substantial impediment to employment” should be interpreted in its broadest context, not just considered with respect to the applicant’s specific vocational goal when determining eligibility. Final §361.42(c)(2)(ii)(B), as it did in prior regulations, prohibits the DSU from

considering the individual's desired employment objective, even if known, during this stage of the vocational rehabilitation process.

Changes: None.

Prohibited Factors

Comments: A number of commenters expressed concerns about the inability to consider an applicant's employment history when determining eligibility, particularly for those who are currently employed and apply for vocational rehabilitation services to advance in employment. One commenter stated that not being able to evaluate disability barriers from previous or current employment experiences, or not being able to assess abilities and capabilities by examining past and current educational credentials, could prevent the qualified rehabilitation counselor from determining whether an individual has a substantial impediment to employment and whether the individual requires services to achieve an employment outcome.

Other commenters expressed concern that proposed §361.42(c)(2), which precludes the consideration of an applicant's employment history, current employment status, level of education, or educational credentials when determining eligibility for services, contradicts the

definition of “assessment” in §361.5(c)(5)(ii)(E), which states that the vocational rehabilitation counselor must rely on information obtained from the eligible individual’s experience in integrated employment settings in the community and other integrated settings.

Some of these commenters requested that we remove the requirement that a DSU must not consider an applicant’s employment history, current employment status, level of education, or educational credentials when determining eligibility for services. A commenter requested that criminal records be added to the list of prohibited factors when determining eligibility for vocational rehabilitation services, except when the criminal background is related to the employment outcome.

Discussion: The additional factors, set forth in both proposed and final §361.42(c)(2)(ii)(E) and (F), that a DSU must not consider when determining an applicant’s eligibility for vocational rehabilitation services are consistent with long-standing policy. A DSU must examine a variety of factors when developing an individualized plan for employment, including the individual’s past and current employment and education credentials, to ensure that the appropriate vocational rehabilitation services are

identified to assist the individual to achieve his or her chosen vocational goal specified in the approved individualized plan for employment. However, a DSU may not use an applicant's employment or education to determine his or her eligibility for vocational rehabilitation services. The change from the prior regulation in proposed and final §361.42(c)(2)(ii)(E) and (F) clarifies existing eligibility criteria and the list of prohibited factors in order to ensure consistency with the phrase "advance in employment" in the Act, as amended by WIOA, and these final regulations. Because an individual may be eligible for the VR program if he or she requires vocational rehabilitation services to advance in employment, the Act seems to take into account that the individual could have more than minimal educational or employment history. Regardless of his or her education or employment history, the applicant still must demonstrate that he or she has a disability and that the disability constitutes a substantial impediment to employment as required in §361.42(a)(1)(ii) and requires vocational rehabilitation services to prepare for, secure, retain, advance in, or regain employment in accordance with final §361.42(a)(1)(iii). In making these determinations, the qualified vocational rehabilitation counselor would

review all known information about the applicant in order to assess the individual's impediments and service needs, but the eligibility determination itself must not be based on the fact that the individual has an extensive employment or educational history.

Although final §361.42(c)(2) does not specifically prohibit a DSU from considering an applicant's criminal background when determining an individual's eligibility for vocational rehabilitation services, the Act and these final regulations require that a DSU base the determination of eligibility only on those factors identified in section 102(a)(1) of the Act and final §361.42(a)(1). However, the DSU may develop policy and issue guidance to its vocational rehabilitation counselors about managing an individual's criminal background when developing the individualized plan for employment to ensure that the vocational goal is appropriate and that any necessary vocational rehabilitation services to address this background are provided in a manner that is consistent with limitations that might be imposed by Federal, State, and local law and regulations due to that criminal history. For further information regarding Federal law and guidance in this

area, see: http://wdr.doleta.gov/directives/ and http://www.eeoc.gov/laws/guidance/.

Changes: None.

Residency

Comments: A number of commenters requested clarification about the definition of "residency" for the purpose of determining eligibility and providing vocational rehabilitation services. Several commenters noted that individuals may apply for services when living just across the border in a neighboring State, while other individuals receive services from one State but intend to work in another State and continue working with the VR agency with which they began their rehabilitation program.

Discussion: We proposed only one change from the prior regulation in §361.42(c)(1) to clarify that a DSU is prohibited from establishing de facto duration of residency requirements by requiring the applicant to produce documentation that would, under State or local law, result in a duration of residence requirement. Although the clarification regarding documentation did not exist in prior §361.42(c)(1), the provision as contained in final §361.42(c)(1) is consistent with long-standing Department policy. The explicit prohibition against a duration of

residency requirement existed in prior §361.42(c)(1) and remains unchanged in all other respects in these final regulations and is consistent with section 101(a)(12) of the Act.

Nonetheless in response to the requests for clarification, as stated in Technical Assistance Circular 12-04, titled "Provision of Vocational Rehabilitation Services to An Individual by More Than One Agency" and dated June 11, 2012, we clarify here in this Discussion that an individual may receive vocational rehabilitation services from more than one DSU simultaneously, including those in different States, when appropriate, and in accordance with the implementation of an order of selection, as applicable, in each State. In this way, the individual can receive the services that best support his or her vocational needs and the achievement of an employment outcome.

Changes: None.

Compliance Threshold

Comments: A few commenters recommended that we establish a compliance threshold of 90 percent with the requirement to determine eligibility within 60 days of the receipt of the application. These commenters stated this would provide a

national benchmark by which DSUs would be held accountable by community stakeholders as well as State and Federal auditors.

Discussion: Section 102(a)(6) of the Act and final §361.41(b)(1) require DSUs to determine the eligibility of an applicant within 60 days from the receipt of an application for vocational rehabilitation services, unless exceptional circumstances preclude the determination and the individual agrees to a specific extension of time. This requirement remains unchanged in the Act, as amended by WIOA and these final regulations; therefore, it is not a new requirement imposed on DSUs.

We appreciate the recommendations made by commenters for a mechanism to ensure compliance. Section 106(a)(1) of the Act requires States to comply with the common performance accountability system requirements imposed on all core programs of the workforce development system, including the VR program, established by section 116 of title I of WIOA. Section 116(b)(1)(A) requires a State to comply with the six primary performance indicators set forth in section 116(b)(2)(A)(i), as well as any other additional performance indicators developed by the State. While there is no statutory authority for the Department to

impose a performance accountability measure, such as that recommended by commenters, there is nothing to preclude a State from developing such a measure for itself. We will continue to assess the compliance of DSUs with the 60-day eligibility determination requirement in accordance with section 107 of the Act using all available data and information.

Changes: None.

Entities Holding Special Wage Certificates

Comments: Many commenters requested clarification about whether a DSU may contract with a community rehabilitation program to provide assessments used in the determination of eligibility, if the community rehabilitation program holds a subminimum wage certificate under section 14(c) of the FLSA.

Discussion: Neither the Act, as amended by WIOA, nor these final regulations prohibit a DSU from contracting with a community rehabilitation program for assessment services regardless of whether that provider also holds a subminimum wage certificate under section 14(c) of the FLSA. Nevertheless, we strongly encourage DSUs to contract with providers that can conduct assessments in competitive integrated settings. It is through these assessments that

DSUs may best determine the individual's eligibility for the VR program and the vocational rehabilitation services needed to achieve competitive integrated employment.

Changes: None.

Extended Evaluation and Trial Work Experiences

Comments: Many commenters supported eliminating extended evaluation as a tool for determining eligibility for some individuals with the most significant disabilities. However, many other commenters also requested clarification of the circumstances under which it might be appropriate to use extended evaluation for the determination of eligibility for vocational rehabilitation services. Some commenters expressed concern that individuals for whom a trial work opportunity may not be available may inappropriately be determined ineligible for services and requested an evidentiary standard in the absence of the term "clear and convincing evidence" in §361.42. Some commenters explicitly requested that extended evaluation be reinserted into the regulations.

Some commenters asked whether the term "clear and convincing evidence" was removed from proposed §361.42(e)(2)(iii) by mistake and recommended retaining this standard. The proposed language required that

“sufficient evidence” be obtained through trial work experiences to determine if an individual cannot benefit from vocational rehabilitation services to achieve a vocational goal. These commenters believed sufficient evidence is not a strong enough standard and that individuals with significant disabilities may be inappropriately determined ineligible as a result.

One commenter recommended that we revise §361.42(e)(2)(i) to require that all trial work experiences take place in integrated settings by deleting the phrase “to the maximum extent possible.” One commenter requested that we add examples of supports for individuals with serious mental illness to §361.42(e)(2)(iv), such as individual placement and supported employment services.

Discussion: We appreciate the support by many commenters for the elimination of the use of extended evaluations for the purpose of determining that an individual is unable to benefit from vocational rehabilitation services due to the severity of the individual’s disability and, thus, is ineligible for vocational rehabilitation services under section 102(a)(2)(B) of the Act, as amended by WIOA, and §361.42. The Act’s amendment and these final regulations help to ensure that before a DSU makes an ineligibility

determination, it must conduct a full assessment of the capacity of the applicant to perform in realistic work settings, without the use of lengthy extended evaluations. We appreciate the comment recommending that all trial work experiences be conducted in competitive integrated employment settings. While we agree that these experiences should be provided in competitive integrated employment settings, to the maximum extent possible, as stated in both proposed and final §361.42(e)(2)(i), there is no statutory authority to do as the commenter recommends. Section 102(a)(2)(B) of the Act, as amended by WIOA, requires a DSU to explore an individual with a disability's ability to work through trial work experiences prior to determining that the individual is not eligible for the VR program due to the severity of his or her disability. The trial work experiences must be of "sufficient variety" and must provide the individual with the opportunity to "try different employment experiences" and "become employed in competitive integrated employment." There is no mandate in section 102(a)(2) that all trial work experiences be in competitive integrated employment. In fact, the use of the phrases "sufficient variety" and "different employment opportunities" suggest the congressional understanding that

some trial work experiences may need to be provided in a setting other than competitive integrated employment. However, given the Act's heightened emphasis on the achievement of employment outcomes in competitive integrated employment, as well as the fact that section 102(a)(2)(B) of the Act, as amended by WIOA, specifically mandates that trial work experiences provide individuals with the opportunity to become employed in competitive integrated employment, we believe that final §361.42(e)(2)(i) is consistent with the statute. Proposed and final §361.42(e)(2)(i), are both consistent with prior §361.42(e)(2)(i), with only minor wording changes to conform to terms used in the Act, as amended by WIOA. The Department also believes that trial work experiences in integrated settings, rather than simulated or mock experiences in sheltered environments, provide the DSU with the best and most comprehensive evidence of an individual's capacity to achieve competitive integrated employment. Therefore, consistent with the intent of the Act to provide individuals with disabilities the opportunity to achieve competitive integrated employment, we strongly recommend that DSUs exhaust all opportunities to provide trial work experiences through actual work experiences in integrated

community environments to obtain the evidence necessary for making the determination of an individual's eligibility for vocational rehabilitation services.

We do not expect that individuals with significant disabilities will be determined ineligible in greater numbers as a result of this change. Rather, we expect that more individuals, including those with the most significant disabilities, and those who may require supported employment services, will achieve competitive integrated employment outcomes.

We appreciate the comments regarding the inadvertent deletion of prior regulatory provisions regarding clear and convincing evidence from proposed §361.42(e)(2)(iii) and appreciate the strong support that this provision be retained in these final regulations. We agree with commenters that "sufficient evidence" is insufficient for a determination of ineligibility and that some individuals with significant disabilities may be inappropriately determined ineligible as a result. The deletion of the provision related to clear and convincing evidence was indeed an error and we have revised final §361.42(e)(2)(iii) to read exactly as it had in prior

regulations, thus resulting in no regulatory change from prior regulations to these final regulations.

We believe retaining prior regulatory text in these final regulations is consistent with the statutory requirements of section 102 of the Act, as amended by WIOA. Specifically, section 102(a) of the Act, read in its entirety, establishes the information that is sufficient to make a determination of eligibility for an individual with a disability for purposes of the VR program. There is no, and never has been, a statutory requirement that clear and convincing evidence be used to make an eligibility determination. This long-standing statutory interpretation is consistent with use of the phrase “sufficient evidence” in §361.42(e)(2)(iii)(A), both prior and final, with respect to eligibility determinations. However, when making a determination of ineligibility due to the severity of an individual’s disability, section 102(a)(5)(C)(i) of the Act, which remained unchanged by WIOA, requires the DSU to inform the individual in writing of the reason for the ineligibility determination, including the clear and convincing evidence that formed the basis for that determination. This long-standing statutory requirement is consistent with use of the phrase “clear and convincing

evidence” in §361.42(e)(2)(iii)(B), both prior and final, with respect to determinations of ineligibility. Therefore, given the error noted by commenters, the Department has retained prior §361.42(e)(2)(iii) in these final regulations.

In addition, prior to WIOA, section 102(a)(2)(B) of the Act required that trial work experiences be of sufficient variety and provided over a sufficient period of time to enable the DSU to determine the eligibility of the individual, or to obtain clear and convincing evidence of the individual’s inability to achieve an employment outcome due to the severity of his or her disability.

Section 102(a)(2)(A) and section 102(a)(2)(B) now state only that the trial work experiences must be of sufficient variety and over a sufficient period of time to determine the eligibility of the individual. Section 102 of the Act, as amended by WIOA, no longer makes reference to the need for clear and convincing evidence for the purpose of determining an individual’s ineligibility for vocational rehabilitation services. Consistent with these amendments, we proposed to revise §§361.42(e)(1) and 361.42(e)(2)(iii) to require that trial work experiences be of sufficient variety and over a sufficient period of time

for the DSU to obtain sufficient evidence that the individual cannot benefit from participation in the VR program.

In proposing this change, we believe that the Act, as amended by WIOA, did not intend, to weaken the evidentiary standard required for this determination. It remains our long-standing policy that individuals with disabilities, including those with the most significant disabilities, must be afforded every opportunity to obtain the vocational rehabilitation services needed to achieve high quality employment and that a DSU should only deny an individual this opportunity in limited circumstances, and based on the highest level of proof.

Therefore, we have revised final §361.42(e)(2)(iii) to clarify that the trial work experiences must yield clear and convincing evidence before a DSU may determine an individual is incapable of benefiting from the provision of vocational rehabilitation services, and, thus, is ineligible for the program.

We agree with the commenter that individuals with serious mental illness should be afforded the necessary supports, such as--but not limited to--individual placement or supported employment services, to ensure trial work

experiences are beneficial. The same is true for any individual with significant disabilities participating in trial work experiences. Proposed §361.42(e)(2)(iv) remained unchanged from prior regulations. While we disagree with the commenter that specific examples pertinent to mental illness should be included in final §361.42(e)(2)(iv) because to do so could cause more confusion as to why other examples were not added. However, assistive technology services and personal assistance services are not the only support that should be provided during a trial work experience. Although we believe the provision was clear that the two examples given were just two examples of many given the use of the word "including," we have nonetheless made a small change to §361.42(e)(2)(iv) to add further clarity.

Changes: We have revised final §361.42(e)(2)(iii) to retain prior §361.42(e)(2)(iii), thereby specifying that a DSU must base eligibility determinations on sufficient evidence, but that determinations of ineligibility due to the severity of an individual's disability must be based on clear and convincing evidence. We have also revised final §361.42(e)(2)(iv) to add the phrase "including, but not limited to" when providing examples of the types of support

services that may be provided to an individual participating in a trial work experience. This change clarifies that DSUs should ensure an individual with a disability receives the supports he or she needs so that the trial work experience is beneficial.

Development of the Individualized Plan for Employment (§361.45)

Time Frame for Developing the Individualized Plan for Employment

Comments: Many commenters supported the change from the prior regulations in proposed §361.45(e) which required that the DSU develop the individualized plan for employment for each eligible individual as soon as possible, but no later than 90 days following determination of eligibility, unless the DSU and the individual agree to a specific extension of that time frame. Some commenters supported the 90-day standard but were concerned that the quality of plans be maintained and that plans continue to be individualized based on interests, abilities and informed choice and not be made uniform out of expediency. These commenters stated that DSUs may not take the time needed to develop a comprehensive individualized plan for employment within the 90-day time limit, and may settle for a more

generalized plan rather than seeking an extension of time. Some commenters, though they supported a specific time limit, stated that the limit should be shorter than 90 days and recommended that we strengthen the regulation to promote the more timely development of the individualized plan for employment. One commenter recommended the adoption of a 90 percent compliance standard for this regulation to strengthen the adherence to the time limit. Another commenter asked how long the extended period should be to ensure that there are no additional delays in the development of the individualized plan for employment. Finally, one commenter requested guidance concerning how to proceed in situations where the individual does not agree to an extension.

Discussion: We appreciate the comments supporting the proposed regulatory changes, as well as the concerns expressed by commenters about those same changes. As explained in the NPRM, the change to §361.45(e), which mirrors section 102(b)(3)(F) of the Act, as amended by WIOA, is intended to efficiently and effectively serve eligible individuals, move them through the VR process with minimal delay, and achieve employment outcomes in competitive integrated employment. We believe that DSUs

can implement the regulation in a manner that does not negatively affect the quality and individualized nature of the plan for employment for each eligible individual and that this requirement will have a minimal impact on the majority of DSUs that have already adopted the 90-day time frame. Despite the 90-day time frame, these plans must be of sufficient quality to incorporate mandatory components in section 102(b)(4) of the Act, and meet requirements under §361.46(a)(1), which requires the individualized plan for employment to be consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interest, and informed choice consistent with the general goal of competitive integrated employment (except that in the case of an eligible individual who is a student or a youth with a disability, the description may be a description of the individual's projected post-school employment outcome).

In addition, the change to §361.45(e) is necessary to implement the statutory requirement in section 102(b)(3)(F) of the Act, as amended by WIOA, that specifically mandates DSUs to develop the individualized plan for employment for each individual within 90 days following the determination of eligibility, unless the DSU and the individual agree to

an extension of that time frame. Therefore, we do not have the statutory authority to shorten the time frame because to do so would be inconsistent with the statute.

DSUs must comply with the requirements of section 102(b)(3)(F) of the Act and final §361.45(e) when developing the individualized plans for employment for each eligible individual. We will assess the DSUs' compliance with the requirement during the monitoring and review we conduct under section 107 of the Act. We do not believe that it is necessary, therefore, to include a 90 percent compliance standard in this regulation to strengthen the adherence to the time frame.

Section 102(b)(3)(F) of the Act and final §361.45(e) permit the DSU and individual to agree to a specific extension of the 90-day time limit without imposing a limitation on the length of that extension. DSUs should ensure that the extension is warranted based on the particular circumstances and needs of the individual and that the extensions are not so long as to cause unnecessary delays in providing services.

The individualized plan for employment is an evolving document and may be amended to effect changes of goal, services, providers, and time frames. If the individual

disagrees with the vocational rehabilitation counselor's request to extend the time for developing the plan, the counselor should determine whether the plan, as written at that time, addresses the mandatory components of section 102(b) of the Act and final §361.46, and whether the information in the plan is sufficient to allow the DSU and individual to proceed with the delivery of services, with the understanding that the plan may be amended. If the counselor determines that the plan does not contain sufficient information on which to base the provision of services and the individual still disagrees with the request to extend the development of the plan beyond 90 days after further vocational guidance and counseling, the counselor should refer the individual to the CAP for help in resolving the disagreement, and must, in accordance with section 102(c)(2)(B)(ii), inform the individual of the due process rights set forth in section 102(c) of the Act and final §361.57.

Changes: None.

Options for Developing the Individualized Plan for Employment

Comments: All comments received on proposed §361.45(c)(1) supported the requirement that a DSU provide eligible

individuals information about the option of requesting assistance from a disability advocacy organization when developing the individualized plan for employment. Many of the commenters recommended that we include in the regulation examples of disability advocacy organizations, such as agencies funded under the Act, entities providing services under the Ticket to Work and Work Incentive Act of 1998, and agencies assisting individuals with disabilities under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the IDEA.

All commenters supported our inclusion of benefits planning in proposed §361.45(c)(3). A few commenters requested that we define that term. One commenter asked whether we would support the development of additional benefit planning resources and what documentation would be required to verify the individual's completion of benefits planning.

Discussion: We appreciate the comments supporting the proposed regulations. Section 102(b)(1)(A) of the Act, as amended by WIOA, and final §361.45(c)(1)(ii)(C) are intended to empower eligible individuals by clarifying that they can choose to seek assistance from disability advocacy organizations when developing their individualized plans

for employment. Section 102(b)(1)(A) of the Act does not specify examples of these disability advocacy organizations, and we do not believe it necessary to include examples in final §361.45(c)(1)(ii)(C) because to do so could have an unintended limiting effect. However, we encourage DSUs to provide eligible individuals with a list of the advocacy organizations in the State so that they may identify those organizations with expertise in disability-related needs, responsibilities, and services that are required to achieve the individuals' employment goals.

Consistent with section 102(b)(2) of the Act, as amended by WIOA, final §361.45(c) requires DSUs to provide certain information in writing to eligible individuals when developing the individualized plan for employment. Specifically, final §361.45(c)(2) and (3) require DSUs to provide general information on additional supports and assistance for individuals with disabilities desiring to enter the workforce, including assistance with benefits planning, to individuals receiving Supplemental Security Income or Social Security Disability Insurance benefits. We recommend that DSUs retain a copy of this written information and guidance in the individual's service

record, as they would be documents pertinent to the development of the individualized plan for employment.

In addition, we understand that benefits planning may take many different forms over a course of time. Furthermore, benefits planning and the individuals certified to provide these types of support services are determined by the SSA's work incentive program. We believe it is important that States retain sufficient flexibility to work with providers appropriately certified or defined by SSA. Therefore, we disagree with the recommendation to define "benefits planning" in these final VR program regulations.

Furthermore, although DSUs must provide information about benefits planning and available resources, they are not required to document the completion of these services. However, if benefits planning is included and the services in the individualized plan for employment, it should be documented upon completion.

Changes: None.

Data for preparing the Individualized Plan for Employment

Comments: One commenter stated that the determination of eligibility only requires that an individual have impediments to employment but not necessarily impediments

to the specific employment outcome the individual desires, and questioned why only this data would be used.

Discussion: While we appreciate the concerns expressed by the commenter, this section of the Act was not changed by WIOA and, therefore, no changes were proposed in the NPRM. We address other comments we received on this section regarding the use of sheltered employment settings for the conduct of assessments in the Assessment for Determining Eligibility and Vocational Rehabilitation Needs section under the Applicable Definitions section previously in this preamble.

Changes: None.

Content of the Individualized Plan for Employment (§361.46)

Comments: The majority of commenters supported proposed §361.46(a)(1), requiring that the individualized plan for employment specify an employment goal consistent with the general goal of competitive integrated employment under section 102(b)(4) of the Act, as amended by WIOA. However, a few commenters expressed concern that the proposed regulation does not satisfactorily address the needs of all individuals with disabilities because it limits options for employment goals to competitive integrated employment, and stated that the regulation is in conflict with

congressional intent regarding the full range of employment options.

A few commenters recommended adding to or clarifying the requirement in proposed §361.46(a)(7)(iii) that the individualized plan for employment contain a description of how the responsibilities for service delivery will be divided between the employment network and the DSU under section 102(b)(4)(H) of the Act.

Discussion: We appreciate the support for the proposed regulation. WIOA did not amend section 102(b)(4)(H) of the Act, which requires that the individualized plan for employment for an individual receiving assistance from an employment network through the Ticket to Work and Self-Sufficiency program established under the Social Security Act include a description of how the responsibility for providing services will be divided between the employment network and the DSU. Therefore, we do not believe that further clarification of this long-standing requirement is necessary.

We received comments about eliminating uncompensated employment outcomes through the individualized plan for employment, and we address them in the discussion on the definition of “employment outcome” in final §361.5(c)(15)

under the Applicable Definitions section elsewhere in this Analysis of Comments and Changes section.

Changes: None.

Scope of Vocational Rehabilitation Services for Individuals with Disabilities

Services for Individuals Who Have Applied or Been Determined Eligible for Vocational Rehabilitation Services (§361.48(b))

Advanced Training

Comments: A few commenters supported including advanced training in STEM fields (science, technology, engineering, or mathematics, including computer science), medicine, law, or business as a vocational or other training service in proposed §361.48(b)(6) so that individuals with disabilities can be prepared for the high-demand careers available in today's economy. One commenter recommended that advanced training be provided, as appropriate, not only for those specific careers mentioned in proposed §361.48(b)(6), but for all careers. Another commenter suggested that §361.48(b)(6) explicitly state that advanced training must be provided under an individualized plan for employment. Still another commenter requested that

proposed §361.5(c) include a definition of “advanced training.”

By contrast, a few commenters expressed concern about the potential cost burden upon VR agencies that would result from individuals pursuing advanced training under proposed §361.48(b)(6). These commenters suggested that comparable benefits are typically limited for graduate students; as a result, DSUs would need to cover all or a substantial portion of the cost of advanced degrees.

Additionally, one commenter requested that we clarify in §361.48(b) that vocational rehabilitation services are not intended to assist individuals to obtain employment in only entry-level careers.

Discussion: We appreciate the support for including advanced training among the individualized services available. The Department has a long history of encouraging DSUs to provide advanced training, when appropriate, to assist eligible individuals in achieving their employment goals. Section 103(a)(18) of the Act, as amended by WIOA, specifically permits DSUs to provide vocational rehabilitation services that encourage qualified eligible individuals to pursue advanced training in the STEM fields, medicine, law, or business. Section 103(a)(5)

of the Act and our prior regulation in §361.48(f) (now final §361.48(b)(6)) have historically permitted DSUs to provide training at institutions of higher education, including in advanced degree programs, to qualified eligible individuals.

While section 103(a)(18) of the Act specifically mentions advanced education in certain fields, that does not exclude advanced training in other fields under section 103(a)(5) of the Act. In reviewing proposed §361.48(b)(6), the Department recognizes that it could be interpreted as allowing advanced training in only certain fields. This was not our intent, and that restriction would not be consistent with section 103(a) of the Act or long-standing Department policy. Therefore, we have revised final §361.48(b)(6) to clarify that DSUs may provide advanced training in any field, not just the specific fields listed in section 103(a)(18) of the Act.

We do not believe that a definition of “advanced training” is necessary. Neither section 7, nor section 103(a), of the Act, as amended by WIOA, defines “advanced training.” We understand that “advanced training” may have multiple meanings, such as degrees conferred by institutions of higher education and advanced

certifications in certain fields, all of which may be permissible under the VR program. Therefore, we will not define this term in final §361.48(b)(6) or elsewhere in final part 361 to avoid limiting the meaning of “advanced training.”

As stated earlier, final §361.48(b)(6) continues the long-standing availability of financial support for advanced training through the VR program. Therefore, though comparable benefits for graduate-level education may be limited, we anticipate that DSUs will experience little, if any, increase in the costs of providing this existing service.

The Secretary agrees that providing vocational rehabilitation services is not limited only to helping an individual with a disability obtain entry-level employment. Under section 102(a)(1) of the Act, as amended by WIOA, and final §361.48(b), DSUs are to provide vocational rehabilitation services to help eligible individuals advance in employment, consistent with each individual’s approved individualized plan for employment and his or her unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

Changes: We have revised §361.48(b)(6) to clarify that DSUs may provide advanced training in any field.

Other Services

Comments: Some commenters recommended that proposed §361.48(b) include other services not already specifically mentioned. Of these commenters, a few suggested that §361.48(b)(6) allow DSUs to provide tuition and other services for students with intellectual or developmental disabilities in a Comprehensive Transition and Postsecondary Program for Students with Intellectual Disabilities, as defined by the Higher Education Act of 2008. One commenter asked that assistive technology be included among the individualized services listed in this section. Another commenter suggested that §361.48(b) require that DSUs recruit, train, and hire peer service providers and mental health advocates to offer individualized support services to individuals experiencing mental illness.

Finally, one commenter requested that we clarify the difference between job retention services and follow-along services in §361.48(b)(12).

Discussion: We disagree with the commenters' recommendations to identify in final §361.48(b) other

services not specifically listed. The list of services in section 103(a) of the Act and final §361.48(b) is not exhaustive. Therefore, DSUs may provide other services, not specifically listed, if necessary for the individual to achieve an employment outcome. Similarly, we clarify here that the vocational and other training services specified in final §361.48(b)(6) encompass tuition and other services for students with intellectual or developmental disabilities in a Comprehensive Transition and Postsecondary Program for Students with Intellectual Disabilities, as defined by the Higher Education Act of 2008. In addition, assistive technology is encompassed in the definition of "rehabilitation technology" in final §361.5(c)(45), which is included among the individualized services in final §361.48(b)(17). Also, section 103(a) of the Act, as amended by WIOA, does not specifically require a DSU to provide mental health advocacy services or peer-counseling services for individuals with mental health diagnoses. However, a DSU may provide peer-counseling services, on an individualized basis, under final §§361.48(b)(3), (12), and (21).

Finally, job-retention services and follow-along services are both types of job-related services. Job-

retention services may include any vocational rehabilitation service (i.e., vocational rehabilitation counseling and guidance, maintenance, or tools) necessary to help an individual maintain employment. Follow-along services typically mean direct contact with an employed individual to provide support with issues arising from employment, such as on-the-job performance, or with addressing employment barriers, such as absenteeism or tardiness, that could jeopardize employment.

Changes: None.

Scope of Vocational Rehabilitation Services for Groups of Individuals with Disabilities (§361.49(a))

Establishment, Development, or Improvement of Community Rehabilitation Programs

Comments: One commenter suggested that vocational rehabilitation services provided under §361.49(a)(1) for establishing, developing, or improving a public or other nonprofit community rehabilitation program should be allowable only if these services result in competitive integrated employment for the individuals receiving services from the program.

Discussion: We agree with the comment that services for groups provided under §361.49(a)(1) must be provided for

the purpose of achieving competitive integrated employment. Section 103(b)(2) of the Act remained unchanged by the amendments in WIOA, except for a technical amendment. As such, services provided under this authority have always been for the purpose of promoting integration in the community through employment, and final §361.49(a)(1), like the Act, as amended by WIOA, emphasizes employment outcomes in competitive integrated employment, including supported employment and customized employment.

Changes: None.

Technical Assistance to Businesses

Comments: Another commenter sought clarification about the difference between technical assistance to businesses seeking to employ individuals with disabilities in proposed §361.49(a)(4) and training and services for employers in proposed §361.32. This commenter inquired whether both authorities may be used to fund these similar services.

Discussion: In answer to the request for clarification, DSUs are permitted to partner with employers and businesses under both final §§361.49(a)(4) and 361.32, as authorized by sections 103(b) and 109, respectively, of the Act, as amended by WIOA. Under final §361.49(a)(4), DSUs may use VR program funds to provide technical assistance to

businesses seeking to hire individuals with disabilities, and this authority must be exercised in a manner consistent with the ultimate purpose of the program--achieving competitive integrated employment. Final §361.32 is similar, and it identifies specific activities DSUs may engage in when providing training and technical assistance to businesses. These activities may include, but are not limited to, general training and technical assistance for employers about employing individuals with disabilities, disability awareness, and employment law; recruitment, training, retention of, and workplace accommodations for, employees with disabilities; and improving opportunities for work-based learning experiences for individuals with disabilities. The specific activities in final §361.32 are encompassed within the more general authority of final §361.49(a)(4). Thus, there is little distinction between the two authorities, and DSUs may rely on both when providing training and technical assistance to businesses seeking to employ individuals with disabilities in competitive integrated employment.

Changes: None.

Establishment, Development, or Improvement of Assistive Technology Programs

Comments: A few commenters opposed proposed §361.49(a)(8), because it requires that individuals with disabilities be applicants of or be determined eligible for vocational rehabilitation services to access assistive technology services through the establishment, development, or improvement of assistive technology demonstration, loan, reutilization, or financing programs established under the Assistive Technology Act of 1998.

Discussion: We agree with commenters that section 103(b)(8) of the Act, as amended by WIOA, is not explicitly limited to individuals with disabilities who have applied or been determined eligible for the VR program. We also agree that individuals with disabilities who are not applicants or eligible individuals of the VR program may benefit from the coordination of programming with activities authorized under the Assistive Technology Act of 1998.

After further review, we recognize that limiting these generalized assistive technology services to applicants and eligible individuals of the VR program, as we did in proposed §361.49(a)(8), may have created an unintended barrier for these individuals in accessing generalized assistive technology services. Our intention of limiting

this service to applicants and eligible individuals of the VR program in proposed §361.49(a)(8) was to be consistent with the establishment authority in section 103(b)(2) of the Act and proposed §361.49(a)(1), which remained substantially unchanged by WIOA.

However, we acknowledge that the nature of the services provided under the new establishment authority of section 103(b)(8) of the Act and proposed §361.49(a)(8) is quite different. We also acknowledge that neither section 103(b) of the Act, as amended by WIOA, nor proposed §361.49 mandates the DSU to provide any one of these services, including the assistive technology related services in section 103(b)(8) of the Act and proposed §361.49(a)(8). Furthermore, consistent with section 103(b) of the Act, under final §361.49(a), some of the services to groups are available to individuals who may not have applied or been determined eligible for vocational rehabilitation services.

We acknowledge that some individuals with disabilities may require generalized assistive technology services before they are able to apply for vocational rehabilitation services, or that, through the receipt of generalized assistive technology services, individuals with disabilities may realize their potential to achieve

competitive integrated employment and subsequently apply for vocational rehabilitation services. Therefore, the final regulations do not limit assistive technology services to applicants and eligible individuals of the VR program.

Finally, the assistive technology services provided under this authority are more generalized in nature and for the benefit of a group of individuals; they are not tied to the individualized plan for employment of any one individual. Individualized assistive technology services and devices may only be provided, under section 103(a)(14) of the Act and final §361.48(b)(17) and in accordance with an agreed upon individualized plan for employment.

Changes: We have revised final §361.49(a)(8) so that DSUs are permitted to provide any individual with a disability generalized assistive technology services provided under programs established, developed, or improved by the DSU in coordination with activities authorized under the Assistive Technology Act of 1998.

Advanced Training

Comments: One commenter sought clarification of the authority of the DSU to provide support to eligible individuals (including, as appropriate, tuition) for

advanced training in specific fields under proposed §361.49(a)(9).

Discussion: As stated in the NPRM, because §361.49(a)(9) addresses services to groups, we believe there are only limited circumstances in which it would be appropriate for the DSU to provide support for advanced training under that section. Examples include supporting an advanced degree program for multiple eligible individuals at the same institution of higher education or developing and implementing specific programming to benefit a group of eligible individuals working toward advanced degrees at institutions of higher education.

Final §361.49(a)(9), which mirrors section 103(b)(9) of the Act, as amended by WIOA, is not intended, and must not be used, to replace the authority of the DSU to provide advanced training to eligible individuals on their individualized plans for employment under section 103(a)(5) and (18) of the Act and final §361.48(b).

Changes: None.

Comparable Services and Benefits (§361.53)

Accommodations and Auxiliary Aids and Services

Comments: Although a few commenters supported the proposed regulation, many commenters recommended that accommodations

and auxiliary aids and services be exempt from a search for comparable services and benefits when they are needed to help an individual participate in services that are exempt from such a search. Two commenters recommended removing the requirement to search for comparable benefits for auxiliary aids and devices altogether. Some commenters indicated that, prior to WIOA, providing accommodations or auxiliary aids and services was typically done in support of another service and rarely a stand-alone service.

A few commenters noted a technical error in proposed §361.53(b), which cross-referenced the vocational rehabilitation services exempt from a determination of the availability of comparable services and benefits in proposed §361.48(a) instead of proposed §361.48(b), the correct citation. These commenters also recommended revising the regulation to specify that a comparable service review is not required prior to providing an accommodation or auxiliary aid or service if it is necessary for an individual to receive one of the exempt services listed in proposed 361.48(b).

Discussion: We appreciate the comments and recommendations about comparable services and benefits. Although many commenters suggested that we exempt accommodations and

auxiliary aids and services from a search for comparable services and benefits, especially when they are needed to enable an individual to participate in services that are exempt from such a search, doing so would be contrary to the statute. Whereas some commenters noted that prior to WIOA, providing accommodations for auxiliary aids and services was typically done in support of another service and rarely as a stand-alone service, section 101(a)(8)(A)(i) of the Act, as amended by WIOA, specifically added accommodations or auxiliary aids and services to those services that require a determination of available comparable services and benefits before the DSU may provide them. Moreover, section 101(a)(8)(A)(i) specifically exempts certain services from this search, but accommodations or auxiliary aids and services are not among those that are exempt.

We agree that there was an error in the cross-reference to proposed §361.48(a), as noted by several commenters. We have made the correction.

Changes: We have revised final §361.53(b), which cross-references §361.48, to correct a typographical error that appeared in the NPRM. The correct cross-reference is §361.48(b).

Pre-Employment Transition Services and Personally Prescribed Devices

Comments: A few commenters suggested that pre-employment transition services be added to the list of services exempt from a search for comparable services and benefits because the vocational rehabilitation agency must ensure that these services are provided or provide them directly.

One commenter suggested that personally-prescribed devices, such as eyeglasses, hearing aids, and wheelchairs, be added as an exempt service under proposed §361.53(b). The commenter based this recommendation on a statement in the preamble of the NPRM about identifying agency financial responsibilities in interagency agreements under proposed §361.53(d) that personally prescribed devices are not included in accommodations or auxiliary aids and services for the purposes of these regulations.

Discussion: While we agree with commenters that DSUs must provide, or arrange for the provision of, pre-employment transition services, section 101(a)(8)(A)(i) of the Act, as amended by WIOA, does not exempt these services from the search for comparable services and benefits as it does for other specific services. A DSU may satisfy its mandate under section 113 of the Act by arranging for pre-

employment transition services provided by another public entity after conducting a search for comparable services and benefits. Similarly, section 101(a)(8)(A)(i) of the Act does not exempt personally-prescribed devices, such as eyeglasses, hearing aids, and wheelchairs. Given that the Act specifically exempts some services, there is no statutory basis to exempt other services or devices from the search for comparable services and benefits; therefore, personally prescribed devices may not be added as an exempt service under final §361.53(b) as referenced in final §361.53(d).

Changes: None.

Interagency Agreements

Comments: Several commenters addressed interagency agreements between DSUs and public institutions of higher education for providing accommodations and auxiliary aids and services. A few commenters shared their concern that students may not receive services they need because the DSU and an institution of higher education cannot agree on financial responsibilities. One commenter suggested that DSUs be required to provide the services and then pursue reimbursement from the universities if no interagency agreement exists. Other commenters supported interagency

agreements so long as they did not result in denial or delays in providing needed aids or accommodations. Some commenters stated that interagency agreements should not require negotiation of the financial responsibilities for providing accommodations or auxiliary aids and services, which should be the responsibility of the agency that is providing the service, aid, or accommodation. Other commenters stated that these financial responsibilities should be defined at a national level. One commenter suggested that interagency agreements should be explicit in specifying who is responsible for accommodations, services, and auxiliary aids, and that the regulations should include a required time frame of six months from the publication of the final regulations for completing interagency agreements.

A few commenters objected to one example in the NPRM describing agency financial responsibilities in interagency agreements with public institutions of higher education. Specifically, the commenters thought the example of a DSU providing interpreters or readers both in and out of a classroom in a State where tuition is free for deaf or blind students could be misinterpreted as guidance or direction from the Department about how to assign financial

responsibilities rather than as an example of negotiating financial responsibilities.

Discussion: We appreciate the concerns expressed by commenters regarding negotiation of financial responsibilities in interagency agreements and the potential delay in students receiving services. Pursuant to section 101(a)(8)(A)(i) of the Act and final §361.53(c)(2), DSUs must provide a service if that service is not available as a comparable service at the time it is needed. This provision should not be interpreted as precluding the required negotiation of financial responsibilities under an interagency agreement required by section 101(a)(8)(B) of the Act and final §361.53(d).

Although some commenters suggested that accommodations and auxiliary aids and services should be the responsibility of the agency providing the service requiring the accommodations, section 101(a)(8)(B) of the Act, as amended by WIOA, mandates that State-level interagency agreements identify who is financially responsible for providing vocational rehabilitation services, including accommodations or auxiliary aids and services.

There is no statutory authority for the Department to define these financial responsibilities at the national level. While the statute and these final regulations establish some parameters, both permit States to develop interagency agreements appropriate to their unique needs, thereby ensuring maximum flexibility. For example, States may choose to explicitly identify the financial responsibilities of each party to the interagency agreement as suggested by the commenter.

Additionally, there is no statutory authority for the Department to impose a deadline of six months from the publication of the final regulations to complete interagency agreements. Moreover, we do not believe such a deadline is necessary because the requirement to enter into interagency agreements, set forth in section 101(a)(8)(B) of the Act and final §361.53, existed prior to the enactment of WIOA. The requirement to enter into an interagency agreement is long-standing, with the only change being the explicit inclusion of accommodations or auxiliary aids and services. However, as noted in the preamble to the NPRM, we believe that these services were always included in the search for comparable services and benefits, as is any vocational rehabilitation service that

is not explicitly exempt. For this reason, the changes made to the interagency agreements pursuant to the amendments made by WIOA are technical--not substantive--in nature, and additional time to implement the requirement is not necessary.

Finally, in response to comments expressing concern about one of the examples provided in the preamble to the NPRM, that example is one of several in a non-exhaustive list. Determination of agency financial responsibilities in interagency agreements is a State matter and should be developed appropriately to meet each State's unique circumstances. We provided the examples only to demonstrate how some States have resolved financial responsibilities in interagency agreements. However, these examples do not necessarily represent best practices or the complete universe of how such issues may be resolved.

Changes: None.

Semi-Annual and Annual Review of Individuals in Extended Employment and Other Employment Under Special Certificate Provisions of the Fair Labor Standards Act (§361.55)

Effective Date

Comments: Many commenters strongly supported or endorsed proposed §361.55, which was viewed as helpful in increasing

the potential of as many people with disabilities as possible moving into competitive integrated employment. A few commenters requested clarification about the effective date.

Discussion: We appreciate the many comments supporting this regulation, which is consistent with section 101(a)(14) of the Act, as amended by WIOA. The additional review requirement in §361.55 is one of many new requirements by which WIOA places heightened emphasis on ensuring that individuals with disabilities, including those with the most significant disabilities, can achieve competitive integrated employment if given the necessary services and supports.

In response to the comments seeking clarification of the effective date of the requirements in final §361.55, most provisions of the Act, as amended by WIOA (with only a few exceptions not applicable here), took effect on July 22, 2014, the date WIOA was signed into law. This includes section 101(a)(14), which requires the semi-annual review and reevaluation for the first two years following the beginning of employment, and annually thereafter, for individuals with a disability who have received services under the VR program and who are employed in an extended

employment setting in a community rehabilitation program or any other employment under section 14(c) of the FLSA. The purpose of these reviews is to determine each individual's interest, priorities, and needs with respect to competitive integrated employment or training for such employment.

Changes: None.

Who Is Subject to the Requirements?

Comments: A few commenters requested that we clarify who is subject to these requirements (e.g., all individuals, only youth, or individuals in day habilitation programs).

Discussion: Final §361.55 applies to all individuals with disabilities, regardless of age, who have been served by the VR program and are employed in extended employment or in any employment setting at subminimum wage. This includes any individual who has received services under an individualized plan for employment but has been determined by the DSU to be no longer eligible for services under final §361.43.

Changes: None.

Documentation

Comments: A few commenters asked that we clarify the documentation required for the semi-annual and annual reviews.

Discussion: The documentation required in final §361.55(b)(2) for the semi-annual or annual reviews must be consistent with final §361.47(a)(10). We believe that the DSU could satisfy the requirement by: (1) documenting the results of the semi-annual or annual review; (2) obtaining a signed acknowledgment that the individual with a disability, or if appropriate, the individual's representative, has provided input to the review; and (3) obtaining a signed acknowledgment by the individual, or the individual's representative as appropriate, that the review was done.

Final §361.47(b) requires the DSU, in consultation with the SRC, if the State has a Council, to determine the type of documentation that the DSU will maintain in order to meet service record requirements, including those in final §361.55(b)(2). We encourage the DSU to document the interests, priorities, and needs discussed in final §361.55(b)(1) and the maximum efforts made under final §361.55(b)(3) to assist the individual in achieving competitive, integrated employment.

Changes: None.

Costs of Conducting the Reviews

Comments: One commenter noted the unknown costs to the DSU associated with conducting semi-annual and annual reviews.

Discussion: We agree with the commenter that the costs associated with conducting semi-annual and annual reviews may not be readily known; however, prior to the amendments made by WIOA, DSUs were required to conduct annual reviews for up to two years and annually thereafter at the request of the individual with a disability or his or her representative. Therefore, the DSU should have a historical cost basis for estimating the current costs of conducting these reviews.

Changes: None.

Informed Choice

Comments: Other commenters suggested allowing an individual, directly or indirectly through his or her representative, to exercise informed choice to opt out of future reviews after any review has taken place.

Discussion: While we appreciate the commenter's suggestion to allow an individual to opt out of future reviews after any given review has taken place, section 101(a)(14) of the Act, as amended by WIOA, does not permit this. WIOA removed the previous statutory provision that required the reviews to be conducted annually only for the first two

years of employment. Under the prior requirement, the reviews would continue past the mandatory two years only if requested by the individual or, if appropriate, the individual's representative. By removing this language, WIOA requires the reviews and provides no ability for an individual to opt out.

Changes: None.

Retroactive Reviews

Comments: One commenter was concerned that the semi-annual and annual reviews would not be conducted by the DSU in that State. The commenter observed that the DSU had not been tracking individuals or conducting reviews, despite beginning tracking efforts in 2014. The commenter suggested that we require DSUs to conduct, within a specified time, retroactive semi-annual and annual reviews for all individuals with disabilities in subminimum wage or extended employment that have been found ineligible to benefit from vocational rehabilitation services.

Discussion: We appreciate both the concern about the DSU not tracking and conducting reviews, as well as the recommendation to require DSUs to conduct retroactive semi-annual and annual reviews within a specified time. Since the enactment of WIOA, DSUs have been required to conduct

semi-annual reviews on individuals with disabilities in extended employment, or any other employment under section 14(c) of the FLSA, for two years following the beginning of such employment and annually thereafter. To require a set period of time for retroactive reviews is inconsistent with the Act; however, the conduct of reviews, albeit with differing time frames, has been a requirement prior to the passage of WIOA and a responsibility of the DSU. Therefore, a DSU that historically has not, and is not conducting reviews currently, would be out of compliance with the requirement under the Act.

Changes: None.

Cross-Reference with 34 CFR 397.40

Comments: A few commenters suggested that the language in proposed §361.55 and proposed 34 CFR 397.40, regarding semi-annual and annual reviews, be cross-referenced and reconciled to ensure consistency and avoid confusion about which requirements apply and the respective responsibilities of the DSU under each provision. One commenter suggested we add a new §361.55(c) to indicate that: (1) the requirements in part 361 supersede any requirements that may apply in 34 CFR 397.40 regarding the responsibilities of a DSU for individuals with

disabilities, regardless of age, who are employed at a subminimum wage; and (2) reviews conducted under §361.55 are subject to the requirements under 34 CFR 397.40, regarding informing the individual of self-advocacy, self-determination, and peer mentoring training opportunities available in the community.

Discussion: Although a few commenters suggested that the language in proposed §361.55 and proposed §397.40 regarding semi-annual and annual reviews be cross-referenced and reconciled to ensure consistency and avoid confusion about applicable requirements and responsibilities of the DSU, the sections are under separate titles in the Act and have differing effective implementation dates. Section 101(a)(14) took effect upon enactment (July 22, 2014); section 511 of the Act, as amended by WIOA, will take effect on July 22, 2016. Moreover, final part 361 and 34 CFR part 397 apply to different, although sometimes intersecting, groups of individuals with disabilities. Final §361.55 applies only to individuals who have received or are receiving vocational rehabilitation services, whereas final 34 CFR 397.40 covers a much broader population of individuals with disabilities because many of those individuals may not have ever received vocational

rehabilitation services. Neither section supersedes the other; therefore, the specific responsibilities of the DSU and the requirements for reviews must be met under both. While it is conceivable that the required reviews under final §361.55 and final 34 CFR 397.40 may be fulfilled concurrently for some individuals with disabilities to whom both apply, it cannot be assumed that a review required under final §361.55 sufficiently replaces the review required under final 34 CFR 397.40 or vice versa.

Changes: None.

Individuals with a Record of Service

Comments: None.

Discussion: Upon further Departmental review of proposed §361.55 in light of the practical implementation of these requirements with regard to students with disabilities receiving pre-employment transition services under section 113 of the Act, as amended by WIOA and final §361.48(a), we have determined that clarifying technical amendments are necessary. Thus, we clarify in final §361.55(a)(1) and (a)(2) that the requirements of final §361.55 apply to those individuals who have a record of service--in other words, individuals who have applied for or been determined eligible for, vocational rehabilitation services––and

achieved employment either at subminimum wage or in extended employment. This clarifying change retains the long-standing applicability of these requirements to such individuals. Without this clarifying change, it may be construed that the requirements may also apply to students with disabilities receiving pre-employment transition services. As noted in a separate discussion related to "Transition Services," there is no requirement that these students apply for or be determined eligible for vocational rehabilitation services in order to receive pre-employment transition services. As such, it is possible that a DSU will have no information about the student to form the basis for these semi-annual or annual reviews.

Changes: Final §§361.55(a)(2)(i) and (ii) now explicitly applies these requirements to individuals who have a record of service.

B. Transition of Students and Youth with Disabilities from School to Postsecondary Education and Employment

This section presents the analysis of comments we received on proposed regulations regarding the provision of transition and other vocational rehabilitation services to students and youth with disabilities to ensure that they have meaningful opportunities to move from school to post-

school activities, including competitive integrated employment. The analysis is presented by topical headings relevant to sections of the regulations in the order they appear in part 361 as listed. We discussed some of these regulatory sections, such as §§361.24, 361.46, 361.48(b), and 361.49, under section A as they also pertain to the general administration of the VR program and the provision of vocational rehabilitation services to individuals with disabilities of any age.

Topical Headings:

Transition-Related Definitions (§361.5(c))

Pre-Employment Transition Services (§361.5(c)(42))

- The Term “Pre-Employment Transition Services”
- Scope of Definition
- Definitions for Required Activities
- Acronym for Pre-Employment Transition Services

Student with a Disability (§361.5(c)(51))

- Scope of Definition
- Educational Programming
- Students Who Have Applied or Been Determined Eligible for Vocational Rehabilitation Services

Transition Services (§361.5(c)(55))

Scope of “Pre-Employment Transition Services” and “Transition Services”

Outreach and Engagement of Parents or Representatives

Youth with a Disability (§361.5(c)(58))

Distinction Between “Student with a Disability” and “Youth with a Disability”

Scope of Definition

Coordination with Education Officials (§361.22)

Coordination of Pre-Employment Transition Services

Financial and Programmatic Responsibilities

Contracting with Subminimum Wage Programs

Coordination and Outreach to Parents and Representatives

Dispute Resolution

Cooperation and Coordination with Other Entities (§361.24)

Content of the Individualized Plan for Employment (§361.46)

Scope of Vocational Rehabilitation Services for Individuals with Disabilities (§361.48)

Pre-Employment Transition Services (§361.48(a))

Scope of Pre-Employment Transition Services and Use of Reserve

Potentially Eligible

Discretion to Provide Pre-Employment Transition Services to All Students with Disabilities

Provision of Required Activities Based on Need

Continuation of Pre-Employment Transition Services

Required Activities

Continuum of Services

Other Vocational Rehabilitation Services as Pre-Employment Transition Services

Pre-Employment Transition Coordination Activities

Documentation and Reporting

Performance Measures

Services for Individuals Who Have Applied for or Been Determined Eligible for Vocational Rehabilitation Services (§361.48(b))

Scope of Vocational Rehabilitation Services for Groups of Individuals with Disabilities (§361.49)

Transition-Related Definitions (§361.5(c))

Pre-Employment Transition Services (§361.5(c)(42))

The Term “Pre-Employment Transition Services”

Comments: Some commenters suggested revising the term “pre-employment transition services” to “student career services.”

Discussion: We appreciate the suggestions raised by the commenters. However, we will not change the term "pre-employment transition services" in final §361.5(c)(42) to "student career services" because this term is not used in the Act. Rather, section 7(30) of the Act, as amended by WIOA, defines "pre-employment transition services," and it is the term used throughout title I of the Act, including in sections 101(a)(25), 103(a)(15), 110(d), 112(a), and 113.

Changes: None.

Scope of Definition

Comments: A few commenters recommended alternate definitions for the term "pre-employment transition services" that would include: (1) the pre-employment transition coordination responsibilities in proposed §361.48(a)(4); (2) each of the five required activities in proposed §361.48(a)(2); and (3) use of the term "potentially eligible" and its definition.

Discussion: While we appreciate the suggestions, we disagree that the definition of "pre-employment transition services" should be expanded to include more specific information regarding the types of services that constitute "pre-employment transition services" and the population to

be served. The definition of “pre-employment transition services” in final §361.5(c)(42) is consistent with the statutory definition in section 7(30) of the Act because it refers to the required and authorized activities specified in detail in final §361.48(a), which are the only services permitted.

We also disagree with the recommendation to include pre-employment coordination services in the definition of “pre-employment transition services.” We agree that coordination activities are necessary for arranging and providing pre-employment transition services. However, coordination activities are more akin to the related activities performed by vocational rehabilitation counselors and other vocational rehabilitation personnel during the course of providing pre-employment transition services rather than the services themselves. As such, we included pre-employment transition coordination activities under the implementation of pre-employment transition services in final §361.48(a), but have not included them as part of the definition of “pre-employment transition services.”

We also do not believe it is necessary to define the term “potentially eligible,” either within the definition

of “pre-employment transition services” or separately in final §361.5(c). Because this term is unique to implementing pre-employment transition services and is not applicable to any other vocational rehabilitation service, we interpret the phrase “potentially eligible” in §361.48(a)(1) as meaning all students with disabilities, regardless of whether they have applied or been determined eligible for vocational rehabilitation services. In so doing, the term is applicable only when implementing the requirements governing pre-employment transition services in final §361.48(a).

Changes: None.

Definitions for Required Activities

Comments: A few commenters recommended that we define the required activities listed in proposed §361.48(a)(2), including work-based learning experiences, and career (or job exploration) counseling. In this same vein, many suggested that we define work-based learning experiences in a manner consistent with section 103(a) of the School to Work Opportunities Act of 1994, and include job training, work experiences, workplace mentoring, and instruction in general workplace competencies. One commenter requested that we define career counseling, expressing concern that

many States may provide this service in ways that are less effective than one-on-one counseling, such as presentations to groups of students. One commenter requested that we broadly define the five required pre-employment transition services to facilitate maximum use of the VR funds reserved for those services. However, a few commenters requested that the required activities not be defined so as to maintain the flexibility permitted in the Act, as amended by WIOA, to allow States to be innovative in the types of activities provided to students with disabilities and to maximize use of the VR funds reserved for providing pre-employment transition services.

Discussion: We considered the requests to define the required activities listed in §361.48(a)(2). We reviewed section 103 of the School-to-Work Opportunities Act of 1994, which expired on October 1, 2001, and found that it included mandatory activities under the work-based learning component that are similar to the five required activities identified in section 113(b) of the Act, as amended by WIOA. Given the similarities, we do not believe further clarifications are needed.

We agree with the comment that, by not defining the required activities, we maintain flexibility for States and

enable the use of creative and innovative strategies that are State specific and tailored to meet the needs of students with disabilities. We also considered the comment about defining career counseling. DSUs must provide career counseling, or job exploration counseling as the term is used in section 113 of the Act, in a manner that most effectively meets the needs of the student with a disability in an individual or group setting, as they would any other vocational rehabilitation service. By providing job exploration counseling in group settings, DSUs can prepare students with disabilities for one-on-one counseling.

Changes: None.

Acronym for Pre-Employment Transition Services

Comments: A few commenters expressed concerns about the use of an acronym for "pre-employment transition services."

Discussion: We agree with the commenters that an acronym should not be used as shorthand for "pre-employment transition services." We did not use the most obvious acronym for "pre-employment transition services" in the NPRM or in these final regulations, and we do not intend to use it in administering the VR program because of its negative connotations.

Changes: None.

Student with a Disability (§361.5(c)(51))

Scope of Definition

Comments: A few commenters supported the proposed definition. However, most commenters did not agree, for differing reasons, with the Department's proposed definition or its interpretation set forth in the preamble of the NPRM. Most of those disagreeing stated the Department narrowed the scope of the definition of a "student with a disability."

Some commenters disagreed with the regulatory definition because it did not mirror the statutory definition. Specifically, they believed the addition of the phrase "a student who is" to the phrase "an individual with a disability for the purposes of section 504" in proposed §361.5(c)(51)(i)(C)(2) narrows the scope of the statutory definition. In fact, one commenter believed that the interpretation effectively eliminated individuals qualifying on the basis of section 504 of the Act.

A few commenters recommended that the Department adjust the age range of a "student with a disability," while other commenters recommended that the definition require a consistent age range across the Nation.

Discussion: We appreciate the comments supporting the definition, as well as those expressing concern or disagreement. We anticipated many of the same concerns when developing the proposed regulations. However, we firmly believe that §361.5(c)(51), both as proposed and final, is consistent with both the plain meaning and intent of the definition in section 7(37) of the Act, as amended by WIOA. We agree with commenters that §361.5(c)(51)(i)(C)(2), both as proposed and final, limits the definition to students. We adopted almost verbatim section 7(37) of the Act, as amended by WIOA, and, in so doing, we attempted to eliminate confusion that the term "student with a disability" could be construed to apply to someone not in an educational program. We recognize that the applicability of section 504 of the Act, in any other context, is much broader. Therefore, in an effort to reduce confusion and potential non-compliance, we clarified in §361.5(c)(51)(i)(C)(2), both proposed and final, that this particular criterion, as all others, applies only to students with disabilities. We believe this clarification is consistent with the statute because the term itself--"student with a disability"–-describes a population that encompasses only individuals with disabilities who are

participating in educational programs. For this reason, we also disagree with the recommendations to remove any explicit requirement in the definition of a “student with a disability” that the individual be a participant in an educational program because to do so would contradict the plain meaning of the term itself and section 7(37) of the Act.

The definitions of “student with a disability” in section 7(37) of the Act and final §361.5(c)(51) allow for a certain degree of flexibility in the age range of students with disabilities. States may elect to use a lower minimum age for receipt of pre-employment transition services than the earliest age for the provision of transition services under section 614(d)(1)(A)(i)(VIII) of the IDEA. The section applies beginning with the first individualized education program (IEP) to be in effect when a child with a disability turns 16, or younger if determined appropriate by the IEP Team, and updated annually thereafter. Pursuant to 34 CFR 300.320(b) of the the IDEA regulations, transition services may be provided for students with disabilities younger than age 16, if determined appropriate by the IEP Team. Furthermore, a “student with a disability” may not be older than 21,

unless a State law provides for a higher maximum age for the receipt of special education and related services under the IDEA. Therefore, there is no statutory authority to revise the definition of a "student with a disability," for purposes of the VR program, by adjusting the specified age range or creating a standard age range to be applied across the Nation because to do so would be inconsistent with the age criteria contained in the statutory definition.

Changes: None.

Educational Programming

Comments: Some commenters stated that the Department's interpretation that the definition applies only to students in secondary school directly contradicts congressional intent, as expressed in section 2(b)(5) of the Act, as amended by WIOA, because the narrower interpretation does not ensure, to the greatest extent possible, that students and youth with disabilities have opportunities for postsecondary success. Most of these commenters stated that students in postsecondary education should be included within the definition, as should students in GED, ESL, home school, vocational/technical programs, and juvenile justice or mental health treatment facilities, so long as they meet the age requirements in the definition. These commenters

stated that students in these educational programs and settings also need pre-employment transition services, which are available only to individuals who meet the definition of a “student with a disability.” One commenter requested that the Department share documentation of congressional intent in support of the interpretation that the definition does not include individuals in postsecondary education. A few commenters were concerned that the emphasis on serving only secondary students might decrease emphasis by DSUs on services for individuals enrolled in postsecondary education.

Some commenters expressed concern about the impact of the Department’s interpretation of the definition of “student with a disability” on the use of funds reserved for the provision of pre-employment transition services. These commenters believed the definition of a “student with a disability” should be broader in order for States to maximize use of the funds reserved for pre-employment transition services.

Discussion: We appreciate the concerns expressed by the commenters and have reconsidered our interpretation, as described in the preamble to the NPRM, that the definition of a “student with a disability” should be limited to

students in a secondary education program. Our intention in the NPRM was to be consistent with congressional intent for the definition, given the requirements governing the availability of a free appropriate public education under the IDEA, which is limited to services included in the individualized education programs of children with disabilities who are enrolled in secondary education under State law (20 U.S.C. 1412(a)(1) and 1401(9)). Services provided under the IDEA are not affected by our interpretation here, which applies only to the VR program.

Nonetheless, we agree that section 7(37) of the Act, as amended by WIOA, is silent on the educational setting for a student with a disability. After much consideration of the potential effects for such change in interpretation, the Secretary agrees that the definition of a "student with a disability" in final §361.5(c)(51), for purposes of the VR program, should be interpreted as applying to students also enrolled in educational programs outside secondary school, including postsecondary education programs, so long as the students satisfy the age requirements set forth in final §361.5(c)(51). We believe this change will eliminate the concern expressed by commenters regarding the potential negative effect a different interpretation would have on a

DSU providing and maximizing postsecondary education opportunities to eligible individuals with disabilities needing such services under an approved individualized plan for employment. Furthermore, as was set forth in the NPRM, the Secretary believes that the definition applies to secondary students who are homeschooled, as well as students in other non-traditional secondary educational programs. This interpretation is not affected by this discussion, and these individuals remain covered by the definition of a “student with a disability” in final §361.5(c)(51).

We also agree with commenters that postsecondary education students may benefit from certain pre-employment transition services set forth in section 113 of the Act, as amended, and final §361.48(a), all of which are limited to “students with disabilities.” We believe this broader interpretation of the definition will increase the potential for DSUs to maximize the use of funds reserved for the provision of pre-employment transition services by increasing the number of students who can receive these services. Therefore, we have revised the definition of “student with a disability” in final §361.5(c)(51) to

include students in secondary, postsecondary, and other recognized education programs.

However, this broader interpretation does not expand the list of required or authorized activities in section 113 of the Act, as amended by WIOA, and final §361.48(a). A DSU can use the reserved funds to provide pre-employment transition services, as set forth in final §361.48(a), to students with disabilities in postsecondary education or other educational programs who meet the age requirements of the definition. For example, a DSU may provide work-based learning activities such as internships to an individual with a disability in a postsecondary education program who otherwise satisfies the definition of a “student with a disability,” but may not use the reserved funds (dedicated to the provision of pre-employment transition services under final §361.48(a)) to provide services and activities not specifically included in section 113 of the Act and final §361.48(a). In other words, a DSU may not use the funds reserved for pre-employment transition services to pay for tuition and other costs of attending postsecondary education, since this is not among those activities that are required or authorized under section 113 of the Act and final §361.48(a). These and other necessary services,

however, may be provided with VR funds not reserved for the provision of pre-employment transition services so long as they are provided pursuant to an approved individualized plan for employment under section 103(a) of the Act and final §361.48(b) of these final regulations.

Section 113 of the Act, as amended by WIOA, requires DSUs to coordinate pre-employment transition services with local educational agencies. This applies to students with disabilities in educational programs administered by local educational agencies. DSUs should coordinate the pre-employment transition services provided to students who are not participating in programs administered by local educational agencies with the public entities administering those educational programs, as described in section 101(a)(11)(C) of the Act, as amended by WIOA, and final §361.24.

Changes: We have revised the definition of "student with a disability" in final §361.5(c)(51) to includes students in secondary, postsecondary, and other recognized education programs.

Students Who Have Applied or Been Determined Eligible for Vocational Rehabilitation Services

Comments: A few commenters recommended that the definition apply only to individuals with disabilities who have applied for and been determined eligible for vocational rehabilitation services.

Discussion: We disagree with the comments recommending that a "student with a disability" should be limited to individuals who have applied or been determined eligible for vocational rehabilitation services. The definition in final §361.5(c)(51) is consistent with section 7(37) of the Act, which does not limit the definition to applicants and eligible individuals of the VR program. Furthermore, to impose such a limitation would be contrary to the Department's interpretation of "potentially eligible," students with disabilities, as used in section 113 of the Act, as amended by WIOA, and final §361.48(a). We have repeatedly stated in both the NPRM and these final regulations that all "students with disabilities," regardless of whether they have submitted an application or been determined eligible for vocational rehabilitation services, may receive pre-employment transition services under final §361.48(a). See a more detailed discussion of "Potentially Eligible" later in this section in connection with comments received under final §361.48(a).

Upon further Departmental review of this issue, the Secretary has determined that other conforming changes are needed throughout final part 361 to ensure these students, who may not have applied or been determined eligible for the VR program, would still be protected by fundamental rights under the VR program, namely the protection of their personal information under final §361.38 and the right to exercise informed choice under final §361.52. We have revised these provisions to refer to "recipients of services" rather than "eligible individuals."

Changes: We have revised final §361.38 and final §361.52 to refer to "recipients of services" rather than "eligible individuals," thereby ensuring that students and youth with disabilities who may receive pre-employment transition services or transition services to groups, as applicable, are still protected by requirements governing confidentiality and informed choice even if they have not applied or been determined eligible for the VR program.

Transition Services (§361.5(c)(55))

Scope of "Pre-Employment Transition Services" and "Transition Services"

Comments: A few commenters supported the definition of "transition services" in proposed §361.5(c)(55), while a

few commenters requested clarification regarding the difference between “transition services” and “pre-employment transition services,” and the responsibility of DSUs to provide job placement assistance within the context of these services.

Discussion: We appreciate the support from commenters to maintain the proposed definition of “transition services” in final §361.5(c)(55). As to the difference between “pre-employment transition services” and “transition services,” we believe the distinction between the two is critical. As stated in the preamble to the NPRM, vocational rehabilitation services are provided on a continuum, with pre-employment transition services being the earliest set of services available to students with disabilities.

Pre-employment transition services, authorized by section 113 of the Act, as amended by WIOA, and implemented by final §361.48(a), are designed to help students with disabilities to begin to identify career interests that will be further explored through additional vocational rehabilitation services, such as transition services. Furthermore, pre-employment transition services are only those services and activities listed in section 113 of the Act, as amended by WIOA, and final §361.48(a). Job

placement assistance is not included among the listed pre-employment transition services, but it could constitute a transition service under section 103(a)(15) of the Act and final §361.48(b). Finally, pre-employment transition services are available only to students with disabilities, whereas transition services may be provided to a broader population--both students and youth with disabilities.

Following the continuum, transition services represent the next set of vocational rehabilitation services available to students and youth with disabilities. They are outcome-oriented and promote movement from school to post-school activities, including postsecondary education, vocational training, and competitive integrated employment. As such, transition services may include job-related services, such as job search and placement assistance, job retention services, follow-up services, and follow-along services, based on the needs of the individual.

Individualized transition services under section 103(a)(15) of the Act and final §361.48(b) must be provided to students who have been determined eligible for the VR program and in accordance with an approved individualized plan for employment. Transition services also may be provided in group settings to students and youth with

disabilities under section 103(b)(7) of the Act, as amended by WIOA, and final §361.49(a)(7). Although these group services are not individualized, they can still be beneficial for job exploration, including presentations from employers in the community and group mentoring activities.

Changes: None.

Outreach and Engagement of Parents or Representatives

Comments: A few commenters requested that we revise the definition to incorporate parental outreach and engagement.

Discussion: We agree that engaging and coordinating with parents or representatives of students and youth with disabilities is consistent with the network of services and activities included in the definition, and we have revised the definition accordingly.

Changes: We have revised final §361.5(c)(55) by adding paragraph (v) to include outreach to and engagement of parents or, as appropriate, the representatives of students or youth with disabilities in the definition of "transition services."

Youth with a Disability (§361.5(c)(58))

Distinction Between "Student with a Disability" and "Youth with a Disability"

Comments: While a few commenters praised the clarity of the proposed definition, most stated that making a distinction between a student with a disability and a youth with a disability creates unnecessary complexity and burden. These commenters recommended that services available to students with disabilities, such as pre-employment transition services, also be available to youth with disabilities. One commenter recommended that "youth with a disability" be defined more broadly than "student with a disability" so that individuals who are homeschooled and others could be covered by the definition.

Discussion: We appreciate all of the comments and concerns about the definition of "youth with a disability" in §361.5(c)(58). While we understand the commenters' concerns, the Act, as amended by WIOA, defines the terms "student with a disability" and "youth with a disability" differently. Moreover, the Act and these final regulations use the terms differently, depending on the context. For example, only students with disabilities can receive pre-employment transition services under section 113 of the Act and final §361.48(a), but both students with disabilities and youth with disabilities can receive transition services under section 103 of the Act and final §§361.48(b) and

361.49(a). The definitions set forth in these final regulations are consistent with the statute, and we have no statutory authority to consolidate the two definitions or to delete one of them because to do so would be inconsistent with the statute.

The age range in the definition of "youth with a disability" in final §361.5(c)(58) is broader than that for "student with a disability" in final §361.5(c)(51). Therefore, a student with a disability always meets the definition of a "youth with a disability" because a student with a disability has an age range that fits within the age range prescribed by the definition of a "youth with a disability."

However, a youth with a disability may not necessarily meet the definition of a "student with a disability." A youth with a disability could also be a student with a disability if the individual meets the age range in the definition of "student with a disability" and participates in an educational program (see the earlier discussion of educational programming under Student with a Disability section §361.5(c)(51)). On the other hand, a youth with a disability who is outside the age range for a student with a disability or is not participating in an educational

program does not meet the definition of a “student with a disability.”

Changes: None.

Scope of Definition

Comments: One commenter questioned whether the definition of “youth with a disability” includes criteria related to the IDEA or section 504, as is the case with the definition of a “student with a disability.”

Discussion: As previously discussed, the definition of “youth with a disability” in final §361.5(c)(58) not only is broader in age range but also is not tied to participation in an educational program under the IDEA or section 504 of the Act, as is the definition of “student with a disability.”

Changes: None.

Coordination with Education Officials (§361.22)

Coordination of Pre-Employment Transition Services

Comments: A few commenters expressed support for proposed §361.22, suggesting minimal to no changes. A few, however, stated that DSUs are required to provide pre-employment transition services in collaboration with educational agencies, and recommended that we include in proposed §361.22(b) reference to these services wherever the

interagency coordination of transition services is mentioned. One commenter stated that a major challenge in transition is determining which entity is responsible for job placement assistance and support, and recommended proposed §361.22(b) be revised to incorporate specific mention of these services in the coordination of pre-employment transition services.

A few commenters recommended that we consider including in proposed §361.22 a reference to technical assistance circular 14-03 (RSA-TAC-14-03), which discusses transition-related principles.

Discussion: We appreciate the comments supporting proposed §361.22, as well as those seeking further clarification or expressing concerns. We agree that pre-employment transition services should be added to final §361.22(b) as it is referenced in final §361.22(a)(1). However, there is no statutory basis to require job placement services in connection with pre-employment transition services, as job placement services are not among the required or authorized activities under section 113 of the Act, as amended by WIOA. Yet, while we cannot require it, nothing in the Act prohibits States from including job placement activities as a transition service in the formal interagency agreement.

We disagree with the request to add a reference in final §361.22(b) to technical assistance circular 14-03 because the content of technical assistance circular 14-03 has been significantly affected by the amendments to the Act made by WIOA. As a result, we will be revising this particular technical assistance circular accordingly.

Changes: We have revised §361.22(b)(1) to state that the formal interagency agreement must include collaboration between the DSU and the State educational agency for providing pre-employment transition services to students with disabilities. We have also revised §§361.22(b)(3) and (b)(4) to similarly cover pre-employment transition services when identifying personnel responsible for providing services and when developing procedures for outreach to and identification of students with disabilities.

Financial and Programmatic Responsibilities

Comments: One commenter suggested that we revise proposed §361.22 by requiring that the formal interagency agreement between the DSU and the State educational agency contain more robust minimum content provisions, since the agreement is critical to providing services to students with

disabilities and a successful transition from school to post-school activities.

Many commenters stated that additional guidance is needed to determine which entity, the school or the DSU, is financially responsible for providing transition services to students with disabilities. Many requested that we revise proposed §361.22 to explicitly identify the financial roles and responsibilities of each entity, stating that the interagency agreement cannot be effective if it is broad, general or abstract. Other commenters recommended that the formal interagency agreement provide clear direction about agencies' responsibilities for services under particular circumstances, stating that specificity is essential to coordinating shared responsibilities and funding.

A few commenters expressed concern that major problems and delays in implementing transition planning services occur because neither WIOA nor the IDEA state explicitly which entity is responsible for providing transition services. These commenters stated that the financial responsibilities must be made clear so that neither the local educational agency nor the DSU may shift the burden

for providing a service, for which it otherwise would be responsible, to the other entity.

A few commenters also noted that while many of these decisions can be resolved at the State and local level, there are still instances where it is difficult to determine the responsible entity, such as in the determination of which entity is responsible for job placement assistance and related work supports. Conversely, one commenter, representing school officials, stated that decisions about providing and assuming financial responsibility for transition services must be made at the State and local level through interagency collaboration and coordination, cannot be wholly dictated by regulation, and must be made based on the circumstances of the situation and the eligibility of the student.

One commenter expressed the concern that the budget for the VR program is not as significant as the budget for special education, and vocational rehabilitation funds may be quickly exhausted if the VR program were to provide pre-employment transition services to every student with a disability. Another commenter noted that the schools and DSUs need to collaborate with other entities that have shared responsibilities and funding. Similarly, one

commenter stated that the IDEA, WIOA, and the Americans with Disabilities Act seem to be in a competitive relationship, since the entities covered by these statutes are responsible for providing and funding some of the same services.

Discussion: As discussed in the preamble of the NPRM, over the years many individuals have sought clarification and posed questions about the financial responsibilities of schools and DSUs when services fall under the purview of both entities. For example, pre-employment transition services and transition services can be both vocational rehabilitation services under the VR program and special education or related services under the IDEA. While neither the Act, as amended by WIOA, nor the IDEA is explicit as to which entity--the DSU or the State educational agency and, as appropriate, the local educational agency--is financially responsible for providing pre-employment transition services and transition services, both final §361.22(c) and 34 CFR 300.324(c)(2) provide that neither the DSU nor the local educational agency may shift the burden for providing services, for which it otherwise should be responsible, to the other entity. It is essential that section 101(c) of the Act, as

amended by WIOA, and section 612(a)(12) of the IDEA, along with their implementing regulations in §361.22(c) and 34 CFR 300.154, are read in concert to avoid any inconsistency or conflict between the two requirements.

Section 113(a) of the Act, as amended by WIOA, requires the DSU to provide, or arrange for the provision of, pre-employment transition services in collaboration with local educational agencies. Therefore, decisions as to which entity will be responsible for providing services that are both special education services and vocational rehabilitation services must be made at the State and, as appropriate, local level as part of the collaboration between the DSU, State educational agencies, and, as appropriate, the local educational agencies.

We agree that the formal interagency agreement should facilitate the transition of students with disabilities receiving special education services to receiving vocational rehabilitation services without delay or disruption. Since the decisions about financial responsibility for providing pre-employment transition services and transition services must be made at the State and local level during collaboration and coordination of services, a formal interagency agreement or other mechanism

for interagency coordination can explicitly address all aspects of these issues. As suggested in the NPRM, the agreement criteria could address criteria such as:

1. The purpose of the service. Is it related more to an employment outcome or education? That is, is the service usually considered a special education or related service, such as transition planning necessary for the provision of a free appropriate public education?

2. Customary Services. Is the service one that the school customarily provides under part B of the IDEA? For example, if the school ordinarily provides job exploration counseling or work experiences to its eligible students with disabilities, the mere fact that those services are now authorized under the Act as pre-employment transition services does not mean the school should cease providing them and refer those students to the VR program. However, if summer work experiences are not customarily provided by a local educational agency, the DSU and local educational agency may collaborate to coordinate and provide summer work-based learning experiences.

3. Eligibility. Is the student with a disability eligible for transition services under the IDEA? The definition of a “student with a disability” under the Act

and these final regulations is broader than under the IDEA because the definition in the Act includes those students who are individuals with disabilities under section 504 of the Act. It is possible that students receiving services under section 504 do not have individualized education programs under the IDEA because they are not eligible to receive special education and related services under the IDEA. As a result, DSUs are authorized to provide transition services under the VR program to a broader population under WIOA than local educational agencies are authorized to provide under the IDEA.

The Secretary believes that these criteria may assist DSUs, State educational agencies, and local educational agencies as they collaborate and coordinate the provision of transition services, including pre-employment transition services, to students with disabilities. We strongly encourage that formal interagency agreements have clearly defined parameters for collaborating and coordinating the delivery of pre-employment transition services and transition services and clearly defined responsibilities for each entity. However, there is no statutory basis for the Department to establish service delivery or financial responsibilities. Those decisions must be made at the

State level while developing an interagency agreement and considering the population, available resources, and needs of the students and youth. Consequently, States have maximum flexibility to develop these interagency agreements in a manner that best meets the unique needs and capacities of both the DSUs and educational agencies.

Changes: None.

Contracting with Subminimum Wage Programs

Comments: Some commenters recommended that proposed §361.22(b)(6) be revised to prohibit contracts or arrangements with, or referrals to, programs in which youth with disabilities are employed at subminimum wage. They stated that the agreements should go beyond documentation requirements and make proactive efforts to identify individuals being considered for employment at subminimum wage. One commenter expressed support for using the existing formal interagency agreement as the mechanism to develop and document the process required in section 511 of the Act as proposed in §361.22.

Discussion: We agree with commenters that the Act emphasizes the need to ensure that individuals with disabilities, especially students and youth with disabilities, are given the opportunity to receive training

for and obtain work in competitive integrated employment. The commenters misunderstood our proposal because §361.22(b)(6), both proposed and final, requires the interagency agreement between the DSU and the State educational agency to include an assurance that, in accordance with 34 CFR 397.31, neither the State educational agency nor the local educational agency will enter into a contract or other arrangement with an entity, as defined in 34 CFR 397.5(d), for the purpose of operating a program for a youth with a disability under which work is compensated at a subminimum wage. Moreover, new requirements in section 511 of the Act, as amended by WIOA, and in final 34 CFR part 397 place additional limitations on the use of subminimum wages for individuals with disabilities, especially youth with disabilities. For example, final 34 CFR 397.10 requires the DSU, in coordination with the State educational agency, to develop a process that ensures youth with disabilities receive documentation demonstrating their completion of the various required activities.

Changes: None.

Coordination and Outreach to Parents and Representatives

Comments: A few commenters urged the Department to ensure that coordination efforts include outreach to parents of students who are in need of transition services. One such commenter recommended proposed §361.22(b)(4) be revised to include systematic outreach to, and engagement of, parents, including through the IEP process for the IDEA eligible students. The commenter stated that without this outreach and engagement, parents will not have a meaningful understanding of the benefits of vocational rehabilitation services for their children.

Discussion: While there is no statutory basis in section 101(a)(11)(D) of the Act to require outreach to parents, we agree that family members, caregivers, and representatives play a critical role in the transition process. We believe that for pre-employment transition services and transition services to be meaningful and to lead to successful outcomes for students and youth with disabilities, their family members, caregivers, and representatives must be aware of the services and benefits offered by DSUs and be involved in the transition process. Although DSUs may conduct outreach to parents and representatives, this activity may be affected by State laws governing the age of majority.

Under section 615(m) of the IDEA and 34 CFR 300.520, a State may transfer all rights accorded to parents under Part B of the IDEA to the student when he or she reaches the age of majority under State law that applies to all children. If rights under the IDEA transfer to the student, a student may have the right to make his or her own education, employment, and independent living decisions under the IDEA. DSUs may conduct outreach directly to these students. Parental consent to participate in pre-employment transition services and transition services should be obtained pursuant to State law, as well as policies of the educational programs and the DSU. We further emphasize here that the Department funds programs and projects that advise and assist parents and representatives of students and youth with disabilities as their children prepare for adult life. The Department awarded grants to more than 65 Parent Training and Information Centers funded by the Office of Special Education Programs and seven Parent Information and Training Programs funded by RSA during FY 2015. Individuals will find additional resources regarding age of majority at www.parentcenterhub.org\repository\age-of-majority-parentguide\.

Changes: None.

Dispute Resolution

Comments: Some commenters expressed the concern that proposed §361.22(c) is limited and provides no safeguards for students if an agreement is not reached about financial responsibility for a particular service, which can lead to delays in services or no services at all. Some commenters stated that the formal interagency agreement should include a mechanism to resolve disputes between the State educational agency and the DSU about providing pre-employment transition services and transition services. One commenter also suggested that we require language in the formal interagency agreement to inform individuals of the availability of the CAP.

Discussion: We disagree with the recommendations to require that the formal interagency agreement include: (1) a mechanism for resolving disputes between the DSU and the State educational agency or local educational agency; (2) a method for resolving disputes between an individual with a disability and these entities; and (3) information about the CAP. Section 101(a)(11)(D) of the Act, as amended by WIOA, which provides the statutory authority for final §361.22(b), does not require that States create a grievance

procedure for disputes under the agreements, in general, or, more specifically, about the provision of pre-employment transition services or transition services. Likewise, section 101(a)(11)(D) of the Act does not require the interagency agreement to identify a process for resolving disputes between an individual with a disability and the DSU, State educational agency, or local educational agency about pre-employment transition services and transition services, or to include information about the CAP. We believe final §361.22 is consistent with the Act, and it provides States maximum flexibility to develop the interagency agreements in a manner that best meets their unique needs and circumstances. However, there is nothing in the Act or these final regulations that prohibits States from including in the formal interagency agreement a grievance procedure (e.g., similar to the one in section 101(a)(8) of the Act) to resolve disputes between the DSU and the State educational agency, or the local educational agency, as appropriate, as well as procedures to resolve disputes between an individual with a disability and the DSU, State educational agency or local educational agency, and information about the CAP. We encourage States to

include these procedures and information in their interagency agreements.

Section 20 of the Act requires all programs providing services under the Act, including the VR program, to inform applicants and recipients of services of the availability and purpose of the CAP. Therefore, regardless of whether the formal interagency agreement between the DSU and the State educational agency addresses the CAP, all students and youth with disabilities receiving vocational rehabilitation services, including pre-employment transition services and transition services, will be informed about it. In addition, an applicant for, or eligible individual under, the VR program who is dissatisfied with a decision made by vocational rehabilitation personnel, including those about pre-employment transition services and transition services, may request a review of that decision under section 102(c) of the Act. Upon further Departmental review, the Secretary has realized that the statute has created an unintended inconsistency among sections 20, 102(c), 103(b)(7), 12(a), and 113. Specifically, section 20 requires programs funded under the Act to inform applicants for and recipients of those services about the CAP. There is no requirement that

the recipients be determined eligible for those services in order to receive information about the CAP. Section 103(b)(7) of the Act permits the DSU to provide transition services to youth and students with disabilities in a group setting, regardless of whether those students or youth have applied for or been determined eligible for vocational rehabilitation services. Section 112(a) specifically authorizes the CAP to assist students with disabilities receiving pre-employment transition services. Section 113 makes clear that students with disabilities are eligible to receive pre-employment transition services regardless of whether they have applied or been determined eligible for the VR program. All of these provisions, read in concert, make clear that due process rights under the Act would be available to students and youth with disabilities receiving pre-employment transition services and transition services even if they have not yet applied for or been determined eligible for the VR program. However, section 102(c) refers only to “applicants and eligible individuals,” thus creating an internal inconsistency within the Act. Because it is clear that students and youth with disabilities are able to receive certain services without having applied or been determined eligible for vocational rehabilitation

services and they are eligible for advocacy assistance from the CAP, the Secretary has determined it is necessary to amend final §361.57 throughout to make clear that "recipients" of vocational rehabilitation services may exercise due process rights when disagreements arise during the receipt of pre-employment transition services and transition services. We have also made conforming changes throughout final part 361, such as with the definition of "impartial hearing officer" in §361.5(c)(24) and "qualified and impartial mediator" in 361.5(c)(43).

The student or youth with a disability, or the individual's parent, as appropriate, will be informed of the CAP. Disputes or disagreements between parents and educational personnel are beyond the scope of the Act and these final regulations.

Changes: We have revised final §361.57 throughout to replace "eligible individuals" with "recipients." We also made conforming changes to the definitions of "impartial hearing officer" and "qualified and impartial mediator" in final §361.5(c).

Cooperation and Coordination with Other Entities (§361.24)

Comments: A few commenters disagreed with proposed §361.24(d), stating that the regulations do not ensure that

American Indian students and youth with disabilities enrolled in, but disconnected from, the education system are adequately served. These same commenters specifically requested that reference to the American Indian Vocational Rehabilitation Services (AIVRS) program funded under §121 of the Act be made throughout the final regulations whenever “new transition services” are mentioned. A few other commenters addressed transition services for American Indian students with disabilities without referring to proposed §361.24.

Some commenters recommended that we require DSUs to include in their formal interagency agreements with AIVRS projects and to address in their agreements with Tribal Education Agencies in the State how the State VR agency plans to provide equitable pre-employment transition services to American Indian students with disabilities, particularly those that attend schools on Indian reservations. The commenters also recommended that we require State VR agencies to address how services to American Indian students with disabilities will be incorporated into the budgeting and spending plans for the funds reserved for providing pre-employment transition services for students with disabilities.

One commenter encouraged the Department to consider using Impact Aid funds for youth in transition.

Discussion: While the Department understands the commenters' concerns regarding the need to ensure that coordination among the DSU, AIVRS program, and educational agencies is taking place and that transition services, including pre-employment transition services, are provided to American Indian students with disabilities, the Department does not believe a revision to the final regulations is necessary to do this.

Final §361.24, as it did when proposed, addresses the need for coordination among these entities and for providing transition services to American Indians living on or near a reservation. Section 361.24(d)(1) requires the VR services portion of the Unified or Combined State Plan to assure that DSUs have entered into formal cooperative agreements with AIVRS programs in their States. Section 361.24(d)(2) sets out requirements for cooperative agreements with AIVRS programs, and those include strategies for providing transition planning under §361.24(d)(2)(iii). Furthermore, the Federal funds reserved in accordance with §361.65, and any funds made available from State, local, or private funding sources,

are to be used to provide pre-employment transition services to all students with disabilities, including American Indian students with disabilities, in need of such services, regardless of whether an application for services has been submitted. Finally, §361.30 requires that the DSU assure in the VR services portion of the Unified or Combined State Plan that it will provide services to American Indians with disabilities to the same extent that it provides services to other populations with disabilities in the State.

Final §361.22 provides for a formal interagency agreement with the State Educational Agency that would include educational services, including transition services and pre-employment transition services, provided by local educational agencies for Indian students with disabilities living on reservations. DSUs coordinate with schools on reservations that provide services through the Bureau of Indian Education or TEAs under the requirement in §361.24(a) that the DSU cooperate with Federal and local agencies and programs. Because the final regulations provide appropriate mechanisms for coordination with the Federal, State and Tribal agencies that provide educational services to Indian students with disabilities on

reservations, we do not believe a change in the regulations is necessary.

As for using funds for transition services provided under the Impact Aid law (formerly Title VIII of the Elementary and Secondary Education Act of 1965 (ESEA) and now in Title VII as a result of the Every Student Succeeds Act reauthorization), the comment is beyond the scope of these regulations. That said, however, the Impact Aid provides assistance to local school districts with concentrations of children residing on Indian lands, military bases, low-rent housing properties, or other Federal properties and, to a lesser extent, concentrations of children who have parents in the uniformed services or employed on eligible Federal properties who do not live on Federal property. The majority of Impact Aid funds is general aid to the school district recipients and may be used in whatever manner the districts choose, as long as it is consistent with State and local requirements. The Department does not have the statutory authority to direct Impact Aid general aid money, including for the use suggested by the commenter.

Changes: None.

Content of the Individualized Plan for Employment (§361.46)

Comments: A few commenters requested additional guidance regarding the use of a "projected post-school employment outcome" in an individualized plan for employment for a student or youth with a disability and asked whether the use of the broad category "Standard Occupational Codes" would meet this description.

Discussion: In response to the request for additional guidance, the individualized plan for employment with a projected post-school employment outcome should outline the services and activities that will guide the individual's career exploration. The projected post-school employment outcome facilitates the individual's exploration and identification of a vocational goal based upon his or her informed choice. It may be a specific goal, such as a Web designer, or a broader goal, such as medical practitioner. The projected goal may be amended during the career development process, and eventually it must be revised to a specific vocational goal once this process is completed.

Changes: None.

Scope of Vocational Rehabilitation Services for Individuals with Disabilities (§361.48)

Pre-Employment Transition Services (§361.48(a))

Scope of Pre-Employment Transition Services and Use of Reserve

Comments: Some commenters expressed support for the proposed regulation. However, most commenters recommended revisions or sought clarification about the scope and provision of pre-employment transition services. One commenter suggested that we revise proposed §361.48(a) to include only direct services to individuals, while another commenter requested clarification as to whether pre-employment transition coordination activities in proposed §361.48(a)(4) could be paid for with funds reserved for providing pre-employment transition services.

Discussion: Section 113(a) of the Act, as amended by WIOA, states that the funds reserved under section 110(d) and any funds made available from State, local, or private (other) sources shall be used to provide, or arrange for the provision of, pre-employment transition services. The coordination activities required by section 113(d) of the Act, as amended by WIOA, and final §361.48(a)(4) are essential for arranging and providing the “required” and “authorized” activities set forth in section 113(b) and (c) of the Act and final §361.48(a)(2) and (3). Therefore, there is no statutory authority to limit the scope of final

361.48(a) to only the direct services required by section 113(b) of the Act. See a more detailed discussion of the definition of "Pre-Employment Transition Services," and the services included in that definition, earlier in this section.

We agree with the commenter that proposed §361.48(a) should be revised to clarify that pre-employment transition coordination services provided under §361.48(a)(4) may be paid with funds reserved for providing pre-employment transition services, because coordination activities are essential for arranging and providing those services, as required by section 113(a) of the Act and §361.48(a).

Changes: We have revised final §361.48(a) to clarify that the funds reserved for the provision of pre-employment transition services may be used to pay for pre-employment transition coordination activities.

Potentially Eligible

Comments: Through the NPRM, we sought public comments and alternate suggestions related to our interpretation of "potentially eligible" to mean all students with disabilities, regardless of whether they have applied for and been determined eligible for the VR program. Of the comments received, most agreed with this interpretation.

However, some commenters provided alternate interpretations.

Of those commenters, a few suggested that the term should be interpreted as meaning students with disabilities who have at least applied for vocational rehabilitation services, with one commenter suggesting this would both allow for providing individualized services and ensure parental consent for students with disabilities to work with a vocational rehabilitation counselor. Other commenters stated that serving applicants for vocational rehabilitation services would allow the counselor not only to gather sufficient information to meet the specific needs of the student with a disability but also to track and report the provision of services and expenditure of funds. One commenter recommended revising proposed §361.48(a)(1) to limit the “potentially eligible” population to those individuals who have both applied for and been determined eligible for vocational rehabilitation services.

Furthermore, some commenters provided alternate interpretations for limiting or expanding the population to students or youth based upon age-range, or enrollment in secondary, postsecondary, or dual enrollment educational programs. One commenter recommended that “potentially

eligible" be defined to ensure consistent implementation across States. A few commenters expressed concerns that the regulations significantly limit the resources for students who have applied for and been determined eligible for the full scope of vocational rehabilitation services, as well as individuals with most significant disabilities. A few commenters expressed concerns that spending funds required to be reserved for providing pre-employment transition services on students who are potentially eligible for vocational rehabilitation services may force DSUs to implement an order of selection or close priority categories under an existing order of selection. One commenter raised concerns that DSUs may have limited fiscal and human resources required to address the needs of potentially eligible students. One commenter requested clarification as to how students would be identified.

Another commenter suggested that proposed §361.48(a) does not conform to section 112 of the Act, as amended by WIOA, because the CAP is unable to provide assistance or advocacy services to individuals who are not vocational rehabilitation clients or client-applicants. A few commenters also expressed concerns about students being able to make informed choices, as well as obtaining

parental consent for potentially eligible students who are minors and participating in pre-employment transition services, prior to submitting an application for vocational rehabilitation services.

Discussion: We appreciate the comments supporting the proposed regulation, as well as comments expressing concerns and suggestions for changes. After much consideration of all available options, we have decided to maintain our interpretation of “potentially eligible” for purposes of pre-employment transition services. In so doing, all students with disabilities, regardless of whether they have applied for or been determined eligible for the VR program, may receive pre-employment transition services. The Secretary believes this is the broadest legally supportable interpretation and the one that is most consistent with the apparent congressional intent.

Most notably, section 113 of the Act is the only statutory section that references “potentially eligible” students with disabilities. All other sections of title I of the Act refer to “applicants” or individuals determined eligible for services. Given the stark contrast in the use of “potentially eligible” in section 113 of the Act, the Secretary believes it imperative that meaning is given to

that phrase by not limiting it to individuals who have applied for or been determined eligible for the VR program.

The broader interpretation means all students with disabilities will be able to obtain much-needed pre-employment transition services and begin the early phase of job exploration without the potential delays, and the administrative burden on DSU personnel and resources, caused by application processing, eligibility determinations, assignment to an order of selection category, and development of an individualized plan for employment. However, there is nothing that precludes a DSU from taking an application as soon as a student expresses an interest in pre-employment transition services or other vocational rehabilitation services and making a timely determination of eligibility.

We want to emphasize that the phrase “potentially eligible” applies only in the context of pre-employment transition services. This means that students with disabilities who need individualized services beyond the scope of pre-employment transition services (e.g., transition and other vocational rehabilitation services) must first apply for, and be determined eligible for, the VR program, be assigned to the appropriate category if the

State is on an order of selection, and develop an approved individualized plan for employment. We recommend that DSUs request students with disabilities who are “potentially eligible” for vocational rehabilitation services and receiving pre-employment transition services submit an application for services as soon as possible in the event further vocational rehabilitation services are needed.

This recommendation is especially pertinent for those States that have implemented an order of selection. A student’s position on the wait list for services other than pre-employment transition services, in the event the student is placed in a closed category, is based on the date of application, not the date of referral or the receipt of pre-employment transition services. To provide students with disabilities an opportunity to apply for services as early as possible in the transition process and ensure a smooth transition into the VR program, it is imperative that DSUs collaborate with educational programs to identify students who may be eligible or potentially eligible for vocational rehabilitation services and engage parents and representatives. The earlier a student is placed on a wait list, the sooner his or her turn will open

in the State’s order in the event a State is on an order of selection.

We want to make clear that neither the Act nor these final regulations exempt these students with disabilities from the State’s order of selection, if one has been implemented, or VR program requirements once they apply and are determined eligible for services. While under the order of selection regulations at §361.36, the student could continue to receive pre-employment transition services if such services have begun, a student could not begin to receive pre-employment transition services if such services had not begun prior to applying and being determined eligible. To permit such would create an exemption from the order of selection requirements and the statute does not provide such authority. However, we recognize the benefit early services can have for students. Therefore, we want to make clear that these students could receive transition services offered to groups of students and youth with disabilities under §361.49. While not identical to pre-employment transition services, many similar services could be provided under the services to groups authority.

A detailed discussion regarding comments related to the continuation of pre-employment transition services under an order of selection is provided in the Continuation of Pre-Employment Transition Services section later in this Analysis of Comments and Changes.

In response to the concern related to the availability of services from the CAP, section 112(a) of the Act, as amended by WIOA, specifically authorizes CAP grantees to assist individuals receiving services under sections 113 and 511 of the Act. Therefore, these individuals are clients and client-applicants for purposes of the CAP.

Finally, as discussed previously under "Coordination with Education Officials," parental consent to participate in pre-employment transition services is governed by State law, as well as policies of the educational programs and the DSU. Furthermore, informed choice, as outlined in final §361.52, applies throughout the vocational rehabilitation process; therefore, students with disabilities receiving pre-employment transition services under final §361.48(a) must be given the opportunity to exercise their informed choice.

Changes: None.

Discretion to Provide Pre-Employment Transition Services to All Students with Disabilities

Comments: One commenter requested that we clarify whether States have the option, under proposed §361.48(a), to provide pre-employment transition services to all students with disabilities, including those who have not applied for vocational rehabilitation services. Another commenter requested that we revise the "may" in proposed §361.48(a)(1) to "shall" in order to ensure that pre-employment transition services are provided to all students with disabilities, regardless of whether they have applied for services.

Discussion: We agree that clarification is necessary. Section 110(d)(1) of the Act, as amended by WIOA, requires States to reserve at least 15 percent of their Federal vocational rehabilitation allotment for providing pre-employment transition services. Moreover, section 113 of the Act, as amended by WIOA, requires States to use the reserved funds to provide, or arrange for the provision of, pre-employment transition services to all students with disabilities in need of such services who are eligible or potentially eligible for services. Therefore, the requirement to reserve and use funds for providing pre-

employment transition services is mandatory, not discretionary. A State must provide pre-employment transition services to all students with disabilities needing those services and may not limit or expand those services. We used the term ”may” in proposed §361.48(a)(1) to recognize that, for the first time, the Act permitted the delivery of pre-employment transition services to students with disabilities who have not applied for or been determined eligible for the VR program. However, we acknowledge the confusion caused by the use of the term. We therefore clarify that States must provide pre-employment transition services not only to students with disabilities who have applied for vocational rehabilitation services but also to those students with disabilities who have not applied for services.

Changes: We have revised final §361.48(a)(1) to clarify that DSUs must make pre-employment transition services available statewide to all students with disabilities, not just those who have applied for or been determined eligible for vocational rehabilitation services.

Provision of Required Activities Based on Need

Comments: Some commenters requested that we clarify whether a student must be provided all five required

services or only those required services based upon a student's need. Of these comments, many recommended the latter, as students with disabilities may not need all five activities set forth in section 113(b) of the Act, as amended by WIOA.

A few commenters requested clarification about, or criteria for, making a determination of need. One commenter also recommended that the regulations promote client choice about participating in pre-employment transition services to ensure that students are not coerced into participating in these services. Finally, one commenter expressed concern that DSUs may require students with disabilities to participate in pre-employment transition services as readiness or preparatory activities before applying for vocational rehabilitation services, thereby delaying the transition from school to post-school activities.

Discussion: Section 113(a) and (b) of the Act, as amended by WIOA, when read in concert with each other, as well as final §361.48(a)(2), require the DSU to make certain "required" pre-employment transition services available to all students with disabilities who need them. However, none of these provisions mandate that all five "required"

activities be provided to each student with a disability if all the activities are not necessary. Pre-employment transition services, as is true for any vocational rehabilitation service, must be provided solely on the basis of the individual's need for that service.

Under final §361.50, DSUs are responsible for developing policies, in consultation with the SRC, for determining the need for pre-employment transition services. These policies must include clear and consistent criteria based on the needs of students identified in the comprehensive statewide needs assessment. The policies will guide the DSU, in consultation with school personnel, family members, and students with a disability, in determining which pre-employment transition services each student needs, consistent with his or her interests and informed choice.

Finally, pre-employment transition services are designed to be an early start at job exploration for students with disabilities and should enrich, not delay, transition planning, application to the VR program, and the continuum of vocational rehabilitation services necessary for movement from school to post-school activities. Neither section 113 of the Act, as amended by WIOA, nor

final §361.48(a) requires students with disabilities receiving pre-employment transition services to apply for, or be determined eligible for, the VR program or to receive other vocational rehabilitation services. The Act and these final regulations maximize opportunities for achieving competitive integrated employment by imposing no requirement that would delay or hinder the student's ability to access these crucial early services or that would permit a DSU to coerce an individual to participate in any of them. However, should the student with a disability need additional vocational rehabilitation services, he or she must apply for and be determined eligible for those services. See the more detailed discussion of comments related to "Potentially Eligible" earlier in this section.

Changes: None.

Continuation of Pre-Employment Transition Services

Comments: Some commenters expressed concerns about the continuation of pre-employment transition services and availability of reserved funds for those services once a student with a disability applies for and is determined eligible for the VR program. Of those commenters, many expressed the need for a continuation of services for those

students who received pre-employment transition services prior to applying for the VR program and aging out of or exiting an educational program. Some commenters requested that States be permitted to use funds reserved under section 110(d) of the Act to continue to provide services for any student with a disability who has received pre-employment transition services and who cannot receive vocational rehabilitation services due to a State's implementation of an order of selection. One commenter suggested that those students found eligible for the VR program while, or after, receiving pre-employment transition services should be given an automatic service priority under a State's order of selection, while another commenter requested clarification as to why students with disabilities have not received a service priority under proposed §361.36. Some commenters expressed concerns that serving students who have not applied for services, regardless of the severity of their disability, will result in a delay of services to other students who have applied and been determined eligible for vocational rehabilitation services, including individuals with the most significant disabilities. A few commenters expressed the concern that

the emphasis on serving students would limit the funds available to serve adult consumers.

Discussion: We understand the commenters' concerns about the continuation of services for students with disabilities after receiving pre-employment transition services, as some students may apply but not be determined eligible for the VR program. Others may no longer satisfy the definition of a "student with a disability" because they are no longer within the required age range or are no longer participating in an education program. These issues arise only when a student with a disability who is receiving, or has received, pre-employment transition services also needs other vocational rehabilitation services. All students with disabilities who apply for vocational rehabilitation services, even if they are still receiving pre-employment transition services, will be subject to all relevant requirements for eligibility, order of selection, and development of the individualized plan for employment (including its development prior to leaving school under final §361.22(a)(2)). Neither the Act nor these final regulations exempt students with disabilities from any of these requirements, which apply to all VR program applicants.

Section 101(a)(5) of the Act, as amended by WIOA, does not exempt students with disabilities receiving pre-employment transition services prior to the determination of eligibility from a State's order of selection; therefore, we do not have the statutory authority to include such an exemption in final §361.36. Nonetheless, consistent with the policy underlying prior §361.36(e)(3), which requires a DSU to continue providing vocational rehabilitation services to individuals who had begun receiving these services under an individualized plan for employment prior to the implementation of an order of selection, it is imperative that students with disabilities not experience a disruption in the pre-employment transition services that they are receiving and that are so critical to their transition to postsecondary education and employment. Thus, we have revised final §361.36(e)(3) by requiring DSUs implementing an order of selection to continue the provision of pre-employment transition services to students with disabilities who were receiving these services prior to the determination of eligibility and assignment to a priority category. DSUs may use the funds reserved under section 110(d) and final §361.65(a)(3) for the continuation of these services. This change does

not permit the DSU to provide any other transition or vocational rehabilitation services for students with disabilities assigned to closed priority categories.

As for ceasing to satisfy the definition of “student with a disability,” pre-employment transition services under section 113 of the Act and final §361.48(a) are available only to students with disabilities. Therefore, if an individual no longer meets the definition of a “student with a disability,” despite the fact that he or she has received or is receiving pre-employment transition services, he or she is no longer able to receive these services under section 113 of the Act and final §361.48(a). However, if the individual has been determined eligible for vocational rehabilitation services and has been assigned to an open category in the State’s order of selection, if the State has implemented one, he or she may continue to receive the same types of pre-employment transition services under section 103(a) of the Act and final §361.48(b), in accordance with an approved individualized plan for employment. The DSU would pay for these services with VR funds, other than those reserved for the provision of pre-employment transition services under section 113 of the Act because the reserved funds must be used solely for

the provision of pre-employment transition services to individuals who satisfy the definition of a “student with a disability.”

Changes: We have revised final §361.36(e)(3) by requiring a designated State unit implementing an order of selection to continue to provide pre-employment transition services to students with disabilities who have begun receiving these services prior to the determination of eligibility and assignment to a closed priority category.

Required Activities

Comments: Several commenters provided alternate suggestions for the required activities specified in proposed §361.48(a)(2). One commenter recommended that States be permitted to develop their own menu of pre-employment transition services, while many other commenters recommended a variety of revisions to proposed §361.48(a)(2). Specifically, one commenter requested that job exploration counseling include actual work experience in competitive integrated employment settings. A few commenters requested that work-based learning experiences include paid or unpaid work experiences in school or community settings, as well as experiential learning opportunities. Some commenters who recommended paid work

experiences suggested that placement be aligned with the definition of competitive integrated employment. Many commenters on work-based learning experiences requested that the Department delete “to the maximum extent possible” from the regulation, prohibit sheltered work in segregated settings, and require that the experiences only be provided in integrated settings. However, a few commenters requested clarification as to whether entities with certificates issued by the Department of Labor under section 14(c) of the FLSA could provide pre-employment transition services.

A few commenters suggested that we revise proposed 361.48(a)(2) to conform to similar language in the Higher Education Opportunity Act of 2008 by replacing “or” with “and” in the language that governs counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education. In addition, these commenters recommended language specific to counseling on opportunities for enrollment of students with intellectual disabilities in postsecondary educational programs at institutions of higher education. A few other commenters proposed revising the focus of workplace readiness training

to replace the development of social skills and independent living with a focus on soft skills, financial literacy, mobility skills, and other skills necessary for employment. Another few commenters recommended that the regulations require instruction in self-advocacy to be provided by a recognized self-advocacy group of the individual's choosing and that peer mentoring occur during work experiences. A few commenters recommended that the required activities include outreach to and engagement of parents of students with disabilities in conjunction with parent centers and parent training information centers.

Discussion: We appreciate the commenters' suggestions, concerns, and requests for clarification. However, section 113(b) of the Act, as amended by WIOA, specifically itemizes the pre-employment transition services that must be provided–-the "required" activities. Furthermore, section 113(c) of the Act itemizes the pre-employment transition services that may be provided–-the "authorized" activities--in the event funds remain after providing the required activities. Given the Act's specificity about the pre-employment transition services that must be provided, as well as those that may be provided, there is no statutory basis to require additional activities or impose

additional requirements, such as requiring that instruction in self-advocacy be provided by a recognized self-advocacy group of the individual's choosing or that peer mentoring occur during work experiences.

We disagree with the commenters' request to revise §361.48(a)(2)(iii) to conform to similar language in the Higher Education Opportunity Act of 2008 and specifically includes programs and services for students with intellectual disabilities. Final §361.48(a)(2)(iii) mirrors section 113(b)(3) of the Act, as amended by WIOA, and we do not believe the replacement of "or" with "and" helps to better describe the manner in which DSUs are to provide this service. In addition, Section 113(b)(3)of the Act and final §361.48(a)(2)(iii) encompass counseling on the broad range of comprehensive transition or postsecondary education programs available to all students with disabilities, including students with intellectual disabilities. Therefore, we do not believe it is necessary to revise final §361.48(a)(2)(iii).

Moreover, there is no statutory basis for States to develop their own menu of pre-employment transition services. Rather, under section 113(b) of the Act and final §361.48(a)(2), each State must make all "required"

pre-employment transition services available to students with disabilities who need such services.

Similarly, contrary to recommendations made by commenters, we do not have the authority to remove, by regulation, statutory requirements. Accordingly, §361.48(a)(2)(ii) must be consistent with section 113(b)(2) of the Act, as amended by WIOA, which requires that work-based learning experiences occur in integrated settings to the maximum extent possible. While we agree with commenters that work-based learning experiences in integrated settings are optimal, the Act's use of the phrase "to the maximum extent possible" leaves open the possibility for work-based learning experiences in non-integrated settings. Consequently, we cannot require that all work-based learning experiences occur in integrated settings. However, DSUs should exhaust all opportunities for work-based learning experiences in competitive integrated employment settings before considering provision of these services in non-integrated work settings, as appropriate for the needs, and consistent with the informed choice, of the individual student with a disability, and his or her family or guardian, as applicable.

Having said this, the Department agrees that actual work experiences in integrated settings, rather than simulated or mock experiences in sheltered environments, provide students with disabilities with the most beneficial opportunities for job exploration, work-based learning, work readiness, and peer mentoring. The Secretary believes that DSUs, to the maximum extent possible, should provide work-based learning experiences, which may be paid or unpaid, through actual work experiences in integrated community environments to prepare students with disabilities for community-based competitive integrated employment, instead of using classrooms and educational facilities as settings for work-based learning experiences that segregate, replicate the tasks performed in adult sheltered employment, and often result in referrals to segregated employment settings following exit from school.

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If these are paid work-based learning experiences, students with disabilities must be paid competitive wages to the extent competitive wages are paid to students without disabilities. Training stipends are also permissible for students with disabilities to the same extent that they are provided to students without

disabilities participating in these experiences. Similarly, nothing in the Act prohibits States from coordinating the provision of pre-employment transition services with entities that hold certificates issued by the Department of Labor under section 14(c) of the FLSA. However, the Department strongly encourages training in competitive integrated settings to prepare students for competitive integrated employment. In addition, there is no statutory basis here to require that self-advocacy instruction be provided by a specific entity.

We agree that engaging students' parents or representatives is essential to their participation in pre-employment transition services and vital to their success. Since DSUs will be delivering pre-employment transition services to students with disabilities at a much younger age, parents must be involved, as required by State law and the policies of educational agencies and the DSU. We encourage DSUs to provide information regarding the application process and availability of services to all students with disabilities, and their parents or representatives, early in the transition process. As such, parent centers funded through the Rehabilitation Act and

the IDEA may serve as mechanisms for outreach to, and engagement of, parents.

Changes: None.

Continuum of Services

Comments: A few commenters requested clarification about "required activities" under pre-employment transition services in §361.48(a)(2). One commenter stated that pre-employment transition services appear to be a continuum of services and requested clarification as to whether a student might initially receive a general level of pre-employment transition services and then later receive a customized level of pre-employment transition services. Another commenter requested clarification as to how individualized pre-employment transition services would be funded for a student or youth with a disability who is not a vocational rehabilitation client. One commenter suggested that general pre-employment transition services be reserved for students who are potentially eligible for the VR program, while reserving individualized level pre-employment transition services for those students with disabilities determined eligible for vocational rehabilitation services. The same commenter suggested that pre-employment transition services be directed toward

determining whether further vocational rehabilitation services are required for the individual to be successful in securing and maintaining employment. A few commenters requested clarification of the difference between employment assistance under pre-employment transition services and transition services, including the role of the vocational rehabilitation counselor.

Discussion: In response to requests for clarification, DSUs may provide, or arrange for the provision of, "required" pre-employment transition services to students with disabilities in classroom, employment, or community (group) settings. These services may be general in nature for students with disabilities who have not applied and been determined eligible for vocational rehabilitation services. As a student progresses through the vocational rehabilitation process by applying and being determined eligible for services, the DSU will have the information necessary to conduct assessments and provide more individualized and customized services to address the student's particular needs. But in some instances DSUs may nonetheless have sufficient information to provide individualized pre-employment transition services to students with disabilities who have not applied and been

determined eligible for vocational rehabilitation services. Thus, we decline to require in final §361.48(a)(2) that providing more individualized pre-employment transition services be limited to students with disabilities who have applied and been determined eligible for vocational rehabilitation services.

Finally, section 113 requires that DSUs use the funds reserved under section 110(d) of the Act, as amended by WIOA, to provide pre-employment transition services not only to students with disabilities who are eligible for vocational rehabilitation services but also to students with disabilities who are potentially eligible for vocational rehabilitation services, which includes all students with disabilities regardless of whether they have submitted an application for these services.

Examples of the five “required” activities and how they may be provided in either a group or individualized setting include, but are not limited to, the following:

One, general job exploration counseling may be provided in a classroom or community setting and include information regarding in-demand industry sectors and occupations, as well as non-traditional employment, labor market composition, administration of vocational interest

inventories, and identification of career pathways of interest to the students. Job exploration counseling provided on an individual basis might be provided in school or the community and include discussion of the student's vocational interest inventory results, in-demand occupations, career pathways, and local labor market information that applies to those particular interests.

Two, work-based learning experiences in a group setting may include coordinating a school-based program of job training and informational interviews to research employers, work-site tours to learn about necessary job skills, job shadowing, or mentoring opportunities in the community. Work-based learning experiences on an individual basis could include work experiences to explore the student's area of interest through paid and unpaid internships, apprenticeships (not including pre-apprenticeships and Registered Apprenticeships), short-term employment, fellowships, or on-the-job trainings located in the community. These services are those that would be most beneficial to an individual in the early stages of employment exploration during the transition process from school to post-school activities, including employment. Should a student need more individualized services (e.g.,

job coaching, orientation and mobility training, travel expenses, uniforms or assistive technology), he or she would need to apply and be determined eligible for vocational rehabilitation services and develop and have an approved individualized plan for employment.

Three, counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education in a group setting may include information on course offerings, career options, the types of academic and occupational training needed to succeed in the workplace, and postsecondary opportunities associated with career fields or pathways. This information may also be provided on an individual basis and may include advising students and parents or representatives on academic curricula, college application and admissions processes, completing the Free Application for Federal Student Aid (FAFSA), and resources that may be used to support individual student success in education and training, which could include disability support services.

Four, workplace readiness training may include programming to develop social skills and independent living, such as communication and interpersonal skills, financial literacy, orientation and mobility skills, job-

seeking skills, understanding employer expectations for punctuality and performance, as well as other “soft” skills necessary for employment. These services may include instruction, as well as opportunities to acquire and apply knowledge. These services may be provided in a generalized manner in a classroom setting or be tailored to an individual’s needs in a training program provided in an educational or community setting.

Five, instruction in self-advocacy in a group setting may include generalized classroom lessons in which students learn about their rights, responsibilities, and how to request accommodations or services and supports needed during the transition from secondary to postsecondary education and employment. During these lessons, students may share their thoughts, concerns, and needs, in order to prepare them for peer mentoring opportunities with individuals working in their area(s) of interest. Further individual opportunities may be arranged for students to conduct informational interviews or mentor with educational staff such as principals, nurses, teachers, or office staff; or they may mentor with individuals employed by or volunteering for employers, boards, associations, or organizations in integrated community settings. Students

may also participate in youth leadership activities offered in educational or community settings.

The wide variety of pre-employment transition services described in these examples is designed to be an early start at job exploration for students with disabilities. DSUs are not to use these activities as assessment services for the purpose of determining whether additional vocational rehabilitation services are needed, or if the individual will be successful in employment. In response to commenters' requests for clarification of the difference between employment assistance under pre-employment transition services and transition services, see more detailed descriptions of the distinctions between the two types of services in the Transition Services (section 361.5(c)(55)) and Scope of Pre-Employment Transition Services and Use of the Reserve sections earlier in this section B.

Changes: None.

Other Vocational Rehabilitation Services as Pre-Employment Transition Services

Comments: A few commenters recommended that we interpret the scope of required activities under section 113 of the Act, as amended by WIOA, to include both support services

and individualized vocational rehabilitation services necessary to participate in pre-employment transition services. The commenters requested that the funds reserved for providing pre-employment transition services also be permitted to pay for services provided under section 103(a) of the Act, as amended by WIOA, and proposed §361.48(b), including, but not limited to job coaching services, maintenance, transportation to and from work-based learning experiences, travel, uniforms, tools, sign language interpreters, reasonable accommodations, assistive technology, independent living, and orientation and mobility services for students who are blind. One commenter requested that pre-employment transition services be expanded to include all transition services for students determined eligible for vocational rehabilitation services. Another commenter requested that we include all services listed on an individualized plan for employment within the scope of pre-employment transition services, including postsecondary education and training costs.

Discussion: Section 113 of the Act, as amended by WIOA, and final §361.48(a) set out a list of pre-employment transition services that must be made available to all students with disabilities who are eligible or potentially

eligible for vocational rehabilitation services (“required” activities), as well as those that may be provided (“authorized” activities). Under section 113(a) of the Act, the funds required to be reserved for pre-employment transition services must be used solely for providing pre-employment transition services. Therefore, the Department has no statutory authority to expand or limit the pre-employment transition services listed in section 113 of the Act, as amended by WIOA. Furthermore, if a student with a disability needs any additional individualized vocational rehabilitation services, including those necessary for participating in pre-employment transition services, such as those provided under final §361.48(b), the student must apply and be determined eligible for vocational rehabilitation services and develop an individualized plan for employment that includes the additional necessary services. These additional services must be charged as a vocational rehabilitation expenditure separate from the funds reserved for providing pre-employment transition services.

Changes: None.

Pre-Employment Transition Coordination Activities

Comments: A few commenters expressed concerns that proposed §361.48(a)(4) did not permit alternate means of participation in the meetings required by section 113 of the Act, as amended by WIOA, and permitted in section 103(b)(6) of the Act. Many commenters recommended we include language to allow for alternate means of participation in meetings as vocational rehabilitation counselors may not be available to participate in all individualized education program or person-centered planning meetings across a State.

A few commenters stated that pre-employment transition coordination activities must occur between DSUs and parent training and information centers funded by the Office of Special Education Programs and RSA to ensure that parental outreach concerning the benefits of pre-employment transition services is coordinated among these federally funded centers.

Discussion: We agree that alternate means for participating in pre-employment transition coordination activities (e.g., video conferences and teleconferences) could minimize travel time and costs and maximize both the number of individualized education program and person-centered planning meetings in which a vocational

rehabilitation counselor could participate, as well as the number of direct services a vocational rehabilitation counselor could provide to students with disabilities. Although §361.48(a)(4), both as proposed and final, does not explicitly permit DSUs to use alternate means to participate in individualized education program or person-centered planning meetings, it does not prohibit them. DSUs may therefore use these alternate means.

Decisions on how to conduct meetings is a matter of agency administration. Conducting these meetings via alternate means would be consistent with the explicit authority to conduct alternate format meetings under section 101(a)(11)(D)(i) of the Act and final §361.22(b)(1). Additionally, section 614(f) of the IDEA and its implementing regulations in 34 CFR 300.328 allow the parent of a child with a disability and a public agency to agree to use alternative means of meeting participation requirements, such as video conferences and conference calls, when conducting individualized education program team meetings and placement meetings under the IDEA, as well as carrying out administrative matters under section 615 of the IDEA (such as scheduling, exchange of witness lists, and status conferences). Since the Act and the IDEA

provide for alternate means for conducting meetings very similar to those required by section 113 of the Act and final §361.48(a), DSUs may use alternate means to conduct these meetings as well. We do not believe a regulatory change is necessary to accomplish this.

We agree that coordinating with federally funded parent centers is a mechanism that would help parents of students with disabilities understand the benefits of pre-employment transition services. Section 113(d) of the Act, as amended by WIOA, however, does not require this. The statute is clear that the funds reserved for providing pre-employment transition services must only be spent on the activities specified in section 113 of the Act, as amended by WIOA, and final §361.48(a). Given the Act's specificity of the activities that constitute pre-employment transition services, there is no statutory authority for final §361.48(a)(4) to include any additional required coordination responsibilities.

Changes: None.

Documentation and Reporting

Comments: Some commenters requested clarification as to how States should document the provision and costs of pre-employment transition services for students with

disabilities who have not yet applied and been determined eligible for vocational rehabilitation services and for whom limited personal information is available. Additionally, one commenter requested additional guidance about the tracking of funds expended on groups of students who have not applied or been determined eligible for the VR program.

A few commenters requested flexibility in the reporting of pre-employment transition services because it is burdensome for DSUs to develop and implement tracking systems for a large potentially eligible population. These commenters also stated this tracking could be difficult because DSUs may not have access to the personal identifying information, including Social Security numbers, typically used to document and report vocational rehabilitation services provided. A few commenters suggested that the Department establish reporting requirements for pre-employment transition services that are similar to the child count reporting requirements under the IDEA. One commenter requested clarification regarding reporting requirements for the funds reserved for providing pre-employment transition services and whether expenditures are only to be reported during the time period for which an

individual meets the definition of a student with a disability or during the entire fiscal year in which the individual was served.

Discussion: Because sections 110(d) and 113 of the Act require a State to reserve and use at least 15 percent of its total vocational rehabilitation allotment for providing, or arranging for the provision of, pre-employment transition services to students with disabilities, it will be critical that the DSU implement administrative methods and procedures that ensure proper data collection and financial accountability of these reserved funds, as required by final §361.12 and 2 CFR 200.302 of the Uniform Guidance. In addition, section 101(a)(10)(C) of the Act, as amended by WIOA, expands the VR program -specific data that DSUs must report, including data elements related to students with disabilities who are receiving pre-employment transition services. These reporting requirements are included in final §361.40(a) to ensure that the Secretary has the information needed to assess the performance of the VR program, especially with regard to providing pre-employment transition services to students with disabilities.

Although the Department recognizes the burden placed on DSUs to develop procedures for tracking pre-employment transition services and related expenditures for students who have not yet applied or been determined eligible for vocational rehabilitation services, DSUs are required by section 101(a)(10)(C) of the Act to do so in order to properly account for, and report, the provision of pre-employment transition services and the reserved funds spent on those services. Moreover, the State's accounting procedures must be such that the DSU will be able to complete accurately all required forms, including financial reports, that show the reservation and use of these funds for this purpose, as required by final §361.12 and 2 CFR 200.302.

The Department does not have the authority to grant exceptions from, or waivers of, these reporting requirements. Regardless of whether students with disabilities are receiving pre-employment transition services without having applied or been determined eligible for vocational rehabilitation services, i.e. by virtue of the fact they are "potentially eligible" for the program, if Federal funds are being spent, expenditures must be tracked and monitored in accordance with final §361.12 and

the Uniform Guidance in 2 CFR §200.302 (Financial Management), §200.328 (Monitoring), as well as the Federal cost principles in §§200.403 (Allowability), 200.404 (Reasonable) and 200.405 (Allocable). Furthermore, the Department issued Policy Directive (PD) 15-05 on February 5, 2015, which provided technical assistance on reporting the total Federal expenditures for providing pre-employment transition services. We appreciate the commenters' proposed alternate suggestions for reporting. However, the Department uses the SF-425 to collect financial data from DSUs so that it can monitor the financial status of the VR program and assess grantee compliance with Federal fiscal requirements under the VR program, including requirements for the reservation and use of funds for providing pre-employment transition services.

As they have been required to do for many years, DSUs must submit completed SF-425 reports semi-annually. The end dates for each reporting period in a fiscal year are March 31 and September 30. Semi-annual reports must be submitted no later than 45 days after the end of the reporting period. Final reports must be submitted no later than 90 days after the period of performance. "Period of performance" means the time during which the non-Federal

entity may incur new obligations to carry out the work authorized under the Federal award. These final regulations do not affect any of these reporting requirements. To ensure the proper accounting and reporting of services provided and funds expended, especially with regard to pre-employment transition services, DSUs must track and report data on students with disabilities until they no longer meet the definition of a student with a disability. At that point, DSUs must track and report services provided to, and funds expended on, these individuals as they would any other individual receiving vocational rehabilitation services.

Changes: None.

Performance Measures

Comments: A few commenters expressed concern that pre-employment transition services and expenditure of funds are not included in the proposed common performance accountability measures. These commenters recommended that we revise the common performance accountability measures to include and evaluate these services. One commenter requested clarification regarding how group service expenditures would inform statistical adjustment model calculations, as it was unclear how the ratio of reportable

individuals to participants may reflect on the performance of a DSU.

Discussion: The VR program is no longer subject to its own set of performance standards and indicators established by the Department, as it had been prior to the enactment of WIOA. Because the common performance accountability indicators are mandated by section 116(b) of title I of WIOA and apply to all six core programs of the workforce development system, including the VR program, the Departments of Education and Labor do not have the authority to establish additional performance accountability indicators beyond those identified in the statute. However, section 106(a)(2) of the Act and section 116(b)(1)(A)(ii) of title I of WIOA permit States to develop additional accountability measures to evaluate the performance of the core partners in the workforce development system. We intend to monitor State implementation of pre-employment transition services and expenditure of funds during our annual review and periodic on-site monitoring of State VR agencies to identify areas of concern and the need for technical assistance. The Departments of Education and Labor address the remaining comments in the joint final regulations implementing the

performance accountability system under title I of WIOA, and published elsewhere in this issue of the Federal Register.

Changes: None.

Services for Individuals Who Have Applied for or Been Determined Eligible for Vocational Rehabilitation Services (§361.48(b))

Comments: A few commenters supported proposed §361.48(b)(18) and agreed that youth may be provided transition services that are similar to pre-employment transition services under an individualized plan for employment. Another commenter requested that proposed §361.48(b)(18) require DSUs to provide students and youth with disabilities an application for vocational rehabilitation services at the beginning of the transition process. A few commenters expressed concerns regarding the expansion of services for students and youth with disabilities at the expense of other individuals with disabilities served by DSUs. One commenter expressed such concerns in terms of potential harm to the Randolph-Sheppard program.

Some commenters requested that we identify the services, including transition services, that would be

allowable if provided by community rehabilitation programs that hold section 14(c) certificates under the FLSA. A few commenters recommended that the regulations prohibit DSUs from contracting with section 14(c) certificate holders to provide transition services. One commenter requested that we clarify if entities holding section 14(c) certificates may provide transition services and proposed alternatives for providing these services if they may not.

One commenter requested that incentives be added for providing transition services or supported employment services.

Discussion: We appreciate the support for, and consideration given by commenters to, proposed §361.48(b)(18). We agree that students and youth with disabilities should receive adequate information and applications for vocational rehabilitation services at the beginning of the transition from secondary programs to post-secondary activities. A DSU may provide the information and application under final §§361.41 and 361.52, which require the DSU to establish and implement standards for promptly processing referrals, informing individuals of application requirements, and facilitating individuals' informed choice as they transition.

Therefore, we do not believe it is necessary to add further requirements to final §361.48(b)(18).

We acknowledge that the heightened emphasis on providing services to students and youth with disabilities may cause some DSUs concern about their ability to serve all individuals. We believe that the process for implementing an order of selection established within section 101(a)(5) of the Act, as amended by WIOA, is adequate to address these concerns in the event that vocational rehabilitation services cannot be provided to all eligible individuals.

We acknowledge the commenters' support and concerns about section 14(c) certificate holders providing transition and other vocational rehabilitation services. While the Act does not prohibit community rehabilitation programs that are section 14(c) certificate holders from providing transition or other vocational rehabilitation services or training in sheltered settings, section 511 of the Act prohibits local and State educational agencies from entering into a contract or other arrangement with section 14(c) entities for the purpose of operating a program for youth with disabilities under which work is compensated at a subminimum wage. The Department strongly encourages

training in competitive integrated settings to prepare students for competitive integrated employment, as stated in the discussion of "required" activities in final §361.48(a) and discussed in more detail in Required Activities earlier in this section B. There is no statutory basis for requiring or permitting incentive payments for providing vocational rehabilitation services, including transition and supported employment services.

Changes: None.

Scope of Vocational Rehabilitation Services for Groups of Individuals with Disabilities (§361.49)

Comments: A few commenters sought clarification of, or suggested revisions to, proposed §361.49(a)(7) governing the provision of transition services for groups of youth and students with disabilities. Of these, one commenter questioned whether transition services may be provided under this authority to students and youth with disabilities who have not applied or been determined eligible for vocational rehabilitation services. Similarly, another commenter suggested that DSUs be required to provide an application to all students and youth with disabilities receiving transition services under proposed §361.49(a)(7). One commenter communicated

concerns that allowing transition services under this authority will lead to students and youth with disabilities receiving services in segregated environments. Another commenter suggested that pre-employment transition services under proposed §361.49 be limited to group orientations. Yet another commenter supported providing transition services for groups of students and youth with disabilities and then providing transition services to this population under final §361.48(b) if more individualized services are necessary.

One other commenter suggested that we add the term “competitive integrated employment” to proposed §361.49(a)(7) to emphasize that transition services for groups of students and youth with disabilities are to support the achievement of competitive integrated employment. The same commenter recommended that we add outreach to and engagement of parents to §361.49(a)(7) as an allowable service to groups. Finally, one commenter requested clarification of how informed choice of both the individual and the individual’s representative would be provided and documented if transition services are provided to groups of youth and students with disabilities.

Discussion: We appreciate all of these comments. A student with a disability or a youth with a disability is not required to have applied or been determined eligible for vocational rehabilitation services to receive general transition services provided to groups under section 103(b)(7) of the Act, as amended by WIOA, and final §361.49(a)(7). Therefore, a DSU may, but is not required to, provide or collect applications from students and youth with disabilities receiving transition services under final §361.49(a)(7). Students with disabilities may receive these services in a variety of settings, including classroom, employment, and community-based settings. However, the Department strongly encourages DSUs to provide these services in integrated settings to the maximum extent possible to best prepare students and youth with disabilities for competitive integrated employment. Furthermore, students and youth with disabilities may continue to receive generalized transition services under this authority while also receiving individualized vocational rehabilitation services under an individualized plan for employment pursuant to section 103(a) of the Act and final §361.48(b).

Pre-employment transition services may be provided in a group setting to students with disabilities who have not applied or been determined eligible for vocational rehabilitation services, as discussed in the examples in final §361.48(a). Contrary to the assumption in some comments, pre-employment transition services cannot be provided to students with disabilities as a service for groups under section 103(b)(7) of the Act, as amended by WIOA, or final §361.49(a)(7). Pre-employment transition services must only be provided under section 113 of the Act and final §361.48(a).

The intent of these generalized transition services when provided under final §361.49(a)(7) is to benefit groups of students and youth with disabilities. We understand the concern that these services are limited to only students and youth with disabilities. Transition services provided under final §361.48(b) under an individualized plan for employment are more individualized in nature, and the settings in which they are delivered are typically more diverse.

We agree that the purpose of transition services to groups should ultimately be achieving competitive integrated employment for students and youth with

disabilities consistent with the purpose of the VR program set forth in final §361.1. Nonetheless, the transition services provided under final §361.49(a)(7) are not limited to those individuals who have been determined eligible for the VR program and who are pursuing an employment outcome in competitive integrated employment or supported employment. Therefore, we cannot require that the transition services authorized in final section 361.49(a)(7) be provided only for the purpose of assisting students and youth with disabilities to obtain competitive integrated employment.

We also agree that the families of students and youth with disabilities should be involved in all transition services, even though section 103(b) of the Act, as amended by WIOA, does not specifically include outreach to and engagement of parents within its requirements. Neither the Act nor these final regulations prohibit a DSU from providing outreach to, and engaging parents in, the provision of transition services under final §361.49(a)(7).

Finally, informed choice, as outlined in final §361.52, applies throughout the vocational rehabilitation process; therefore, students and youth with disabilities receiving transition services under final §361.49(a)(7)

must be given the opportunity to exercise their informed choice.

Changes: None.

C. Fiscal Administration of the VR Program

Section C includes the Analysis of Comment and Changes to the regulations in subpart C of part 361 that pertain to the fiscal administration of the VR program and covers requirements for matching funds, maintenance of effort, program income, and the allotment and payment of funds. The analysis is presented by topical headings relevant to sections of the regulations in the order they appear in part 361 as listed.

Topical Headings:

Matching Requirements (§361.60)

Third-Party In-Kind Contributions

Additional Sources of Match

Differences Between Prior and Proposed Regulations

Maintenance of Effort Requirements (§361.62)

Program Income (§361.63)

Waiver

Legal Basis

Pre-Employment Transition Services

Amount of Program Income Earned

Addition Alternative

Allotment and Payment of Federal Funds for Vocational Rehabilitation Services (§361.65)

Exemption from the Reservation of Funds Requirement for Pre-Employment Transition Services

Use of Reserved Funds for Other Vocational Rehabilitation Services

Amount of Funds to Be Reserved

Application of the Reservation of Funds to the State and to the State Allotment

Effect of Reallotment and Carryover on the Reservation of Funds

Administrative Costs

Tracking of the Reserved Funds

Use of Reserved Funds for Authorized Activities

Matching Requirements (§361.60)

Third-Party In-Kind Contributions

Comments: Several commenters requested that the Department either include third-party in-kind contributions as an allowable source of match under the VR program or clarify whether these contributions are an allowable source of match. One commenter questioned whether the Department has the authority to exclude third-party in-kind contributions

as a source of match under the VR program, given that these contributions are a permissible source of match in the Uniform Guidance contained in 2 CFR part 200.

Discussion: We have addressed the comments regarding the allowability and use of third-party in-kind contributions as match under the VR program in the discussion of third-party cooperative arrangements in final §361.28 earlier in section A of this Analysis of Comments and Changes section. We received similar comments about that regulation, and issues of third-party in-kind contributions most often arise in the third-party cooperative arrangement context.

For more than two decades, the Department has excluded third-party in-kind contributions from the allowable sources of match for the VR program. Neither the NPRM nor these final regulations reflect any substantive changes to this prohibition.

In addition, we do not agree that §361.60 is inconsistent with 2 CFR part 200 with regard to third-party in-kind contributions. Specifically, 2 CFR 200.306 states that for all Federal awards, any shared costs or matching funds and all contributions, including cash and third-party in-kind contributions, must be accepted as part of the non-Federal entity’s cost sharing or matching when specific

criteria are met. However, 2 CFR 200.102(c) states that "the Federal awarding agency may apply more restrictive requirements to a class of Federal awards or non-Federal entities when approved by OMB, or when required by Federal statutes or regulations…."

Section 361.60(b)(2) has prohibited, and continues to prohibit, DSUs from considering third-party in-kind contributions as a permissible source of match under the VR program. The Department is within its authority to continue to exclude third-party in-kind contributions as an allowable source of match under the VR program, as it has done for more than two decades, and thus the VR program regulations are consistent with 2 CFR part 200. Nevertheless, given the comments questioning the relationship between the prohibition against using third-party in-kind contributions for match purposes under the VR program in §361.60(b)(2) and the permissibility of these contributions under 2 CFR 200.306(b), we have revised final §361.4(d) to reduce confusion. These revisions are purely technical and do not affect the long-standing prohibition against using third-party in-kind contributions as a source of match under the VR program.

Changes: We have revised final §361.4(d) to exempt 2 CFR 200.306(b), as it relates to third-party in-kind contributions, from the VR program, thereby ensuring consistency with final §361.60(b)(2) and the long-standing prohibition against third-party in-kind contributions as a source of match under the VR program.

Additional Sources of Match

Comments: Another commenter requested that the Department include additional sources of non-Federal share as examples of potential matching sources.

Discussion: We appreciate the commenter's request for additional examples of permissible sources of match under the VR program. The 1988 regulations (53 FR 16978 (May 12, 1988)), which remained in effect until 1997, contained a short list of examples of permissible match sources, none of which included third-party in-kind contributions.

Similarly, the 1997 final regulations (62 FR 6307 (Feb. 11, 1997)) simplified the requirements by removing the list of permissible sources of expenditures to meet the non-Federal share. Instead, it referred to former 34 CFR 80.24 for a list of allowable match sources, to the extent that provision was not inconsistent with §361.60(b), which prohibited third-party in-kind contributions from being

used for match purposes under the VR program. We emphasized in the preamble to the 1995 NPRM (60 FR 64475 (Dec. 15, 1995)) that the proposed regulation would not prohibit the use of any funding sources that had been allowable for match purposes under the VR program, but third-party in-kind contributions were not among them. Although we do not believe the list of permissible match sources should be re-inserted into final §361.60, we provide here the still-effective permissible match sources that had been contained in prior §361.76, which existed until the 1997 regulations took effect and subsequently was replaced by prior §361.60.

The old regulations in 34 CFR 361.76, which formed the basis for both prior and final §361.60, indicated that the allowable sources of match were:

1. Direct State appropriation to the VR agency,

2. Transfers or allotments from other public agencies,

3. Expenditures incurred by other public agencies pursuant to a cooperative agreement in accordance with 34 CFR 361.13 (which formed the basis for both prior and final §361.28),

4. Funds set aside from Business Enterprise Programs, established under the Randolph-Sheppard Act, for which the DSU provides supervision and management services, and

5. Private contributions deposited into the VR agency's account.

Section 361.60 has remained substantively unchanged from 1997 through these final regulations.

Changes: None.

Differences Between Prior and Proposed Regulation

Comments: One commenter requested we clarify the differences between the prior and proposed §361.60(b)(3).

Discussion: We made only technical changes to proposed §361.60(b)(3)(iii) in the NPRM. Specifically, we replaced the phrase “grant, subgrant, or contract” with the word “subaward” in order to be consistent with the use of this term in the Uniform Guidance, as set forth in 2 CFR part 200. We made no further changes to final §361.60(b)(3)(iii).

Changes: None.

Maintenance of Effort Requirements (§361.62)

Comments: A few commenters supported proposed §361.62. One commenter stated that section 241(b) of WIOA did not support the proposed VR regulations and recommended

allowing flexibility for States to choose the fiscal year in which maintenance of effort penalties would be paid.

Discussion: We appreciate the comments supporting proposed §361.62. Section 241(b) of WIOA, referenced by the commenter, does not apply to the VR program but rather to programs authorized under the Adult Education and Family Literacy Act in title II of WIOA. Instead, section 420 of WIOA amended section 111(a)(2)(B) of the Act, which governs the maintenance of effort requirements for the VR program. Final §361.62(a) is consistent with section 111(a)(2)(B) of the Act, as amended by WIOA.

Changes: None.

Program Income (§361.63)

Waiver

Comments: Several commenters requested that we waive the requirement for States to expend program income prior to drawing down Federal grant funds. One commenter stated that the role of the Department in placing restrictions on the use of program income should be limited since VR program grantees are not required to generate program income.

Discussion: We appreciate the comments submitted regarding proposed §361.63. The Act gives the Secretary the

authority to grant waivers of only two VR program requirements, specifically those related to statewideness (section 101(a)(4)) and maintenance of effort (section 111(a)(2)(C)). The Act, as amended by WIOA, does not provide a general waiver authority or a specific authority to waive program income requirements. Therefore, we may not include in final §361.63 a waiver of the requirement to expend program funds prior to drawing down Federal VR program funds.

Changes: None.

Legal Basis

Comments: Another commenter noted that following the 1992 amendments to the Rehabilitation Act, the Department interpreted the Act as allowing program income, including transferred program income, to be obligated and/or expended on or before September 30th of the carryover year of the grant period. According to the commenter, WIOA did not amend the Act to require the expenditure of program income under the VR program as soon as it was received. The commenter also recommended that we review both the 1992 amendments to the Rehabilitation Act and WIOA to determine whether there is a sufficient legal basis to exempt DSUs from the requirement to expend program income before

requesting additional Federal grant funds and that we include this exemption in the VR program final regulations. One commenter noted that the NPRM incorrectly cited 2 CFR 200.305(b)(5) as the legal authority requiring that program income be disbursed prior to drawing down Federal funds.

Discussion: While we agree that DSUs are not required to earn program income under the VR program, we disagree that the Secretary's authority over program income is, therefore, limited. As a recipient of Federal VR program funds, DSUs must comply with all applicable Federal requirements, including those in the Act, the VR program regulations in final part 361, Education Department General Administrative Regulations (EDGAR), and government-wide regulations in 2 CFR part 200 (see final §361.4). Requirements governing program income affecting the VR program are found in final §361.63 and 2 CFR 200.305, both of which are under the Secretary's purview. Moreover, final §§361.4(b) and (d) make final part 361 and 2 CFR part 200, respectively, applicable to the VR program. For this reason, DSUs must comply with all Federal requirements governing program income to the extent that they earn such income under the VR program.

We agree that section 19(a)(2) of the Act allows program income to remain available for obligation and expenditure in the year following the year in which the program income was earned. However, we also believe that final §361.63(c)(3) is consistent with both section 19(a)(2) of the Act and 2 CFR 200.305. In the event that a DSU receives program income at the end of a fiscal year and is unable to disburse it prior to the end of that year, the DSU may carry over that program income for use in the following Federal fiscal year; however, that DSU must spend that program income prior to drawing down Federal funds.

The Department reminded DSUs of this requirement-–program income must be disbursed prior to drawing down Federal funds-–in PD-11-03 (dated October 26, 2010), as well as in PD-12-06 and PD-15-05 (dated February 13, 2012 and February 5, 2015, respectively). The Department also reminded DSUs of this requirement in a PowerPoint presentation at the FY 2011 Fiscal Conference, held in Washington, DC, in August 2011.

Prior to developing proposed §361.63, the Department reviewed the legislative and regulatory history about program income. Our review found that, while the Act has not addressed this issue specifically, EDGAR has long done

so. The Federal government has had a long-standing requirement under the common rule implementing former OMB Circular A-102, codified by the Department of Education in former 34 CFR 80.21(f)(2), that States must expend program income prior to drawing down Federal grant funds. The Uniform Guidance, codified in 2 CFR part 200, was adopted by the Department in 2 CFR 3474 on December 19, 2014, in 79 FR 76091. The Uniform Guidance in 2 CFR 200.305(a) specifies the payment procedures that States must use to draw down Federal funds; however, these procedures appear, on the surface, to apply only to funds included in a Treasury-State Agreement (TSA), and not all Federal program funds made available to States are subject to TSAs.

For this reason, the Uniform Guidance in 2 CFR 200.305(a) has created an ambiguity about how States should draw Federal funds under non-TSA programs. Moreover, TSAs do not cover program income earned by State grantees. Thus, in addition to the ambiguity regarding non-TSA programs, 2 CFR 200.305(a) does not address whether States must expend available program income funds before requesting additional Federal cash, as had been the long-standing government-wide requirement in OMB Circular A-102 and codified for Department grantees in former 34 CFR

80.21(f)(2). This silence creates concern because, for all other non-Federal entities, §200.305(b)(5) clearly requires those entities to expend available program income funds before requesting payments of Federal funds.

While the §200.305(a) silence creates an ambiguity, we do not believe that this ambiguity should be construed to no longer require States to expend program income funds before requesting additional Federal cash because no such policy change was discussed in the preambles to either the final guidance in 2 CFR part 200, which was published on December 26, 2013 (78 FR 78589), or in the Interim Final Guidance published on December 19, 2014 (79 FR 75867). This issue is critical to the Department because DSUs earn more than $100 million in program income annually under the VR program--an amount that far exceeds amounts earned under any other program administered by the Department. For this reason, the Secretary believes it is essential that we resolve this ambiguity in these regulations. Therefore, we proposed in the NPRM to incorporate the requirement to expend program income before requesting payment of funds by referencing 2 CFR 200.305(a).

Upon further review of that proposed change, and in consideration of one comment, we have determined that the

proposed amendment, as presented in the NPRM, would not achieve the needed objective because it referenced the wrong citation from 2 CFR part 200. We resolved the ambiguity by revising final §361.63(c)(3) to explicitly require States to expend available program income funds before requesting additional cash payments, maintaining the long-standing requirement that applied to VR program grantees under 34 CFR 80.21(f)(2). The Secretary believes this change is essential to protect the Federal interest by using program income to increase the funds devoted to the VR program and keep to a minimum the interest costs to the Federal government of making grant funds available to the States. There is no legal basis to exempt DSUs from this long-standing government-wide requirement.

Changes: We have revised final §361.63(c)(3) to explicitly require States to disburse available program income funds before requesting additional cash payments.

Pre-Employment Transition Services

Comments: Some commenters expressed concerns that the requirement to spend program income first creates an undue barrier to the ability of DSUs to reserve 15 percent of their VR program allotments for providing pre-employment transition services. According to these commenters,

grantees cannot predict the arrival of program income to the same extent that they can anticipate the arrival of allotted funds. As a result, DSUs may have to expend program income for pre-employment transition services instead of their State allotments, thereby failing to expend the 15 percent reserve required for the provision of pre-employment transition services.

Discussion: We recognize the challenge for States to meet both the requirements to disburse program income prior to drawing down Federal funds as well as to reserve VR program funds for providing pre-employment transition services. While final §361.63(c)(1)(ii) requires States to expend available program income funds before requesting additional cash payments, it does not preclude States from executing allowable accounting adjustments between program income disbursed on pre-employment transition services and other Federal funds expended on non-pre-employment transition services for the same time period. These accounting adjustments must be in accordance with Generally Accepted Accounting Principles (GAAP) and the State's accounting procedures and must be reflected in the State accounting system that is required by final §361.12 and 2 CFR 200.302.

Changes: None.

Amount of Program Income Earned

Comments: One commenter noted that it is unable to determine the actual amount of program income earned until after the end of the Federal award because the program income must be "netted out."

Discussion: Program income, as defined in 2 CFR 200.80 and used in final §361.63, means the "gross" program income earned by the grantee. Furthermore, as stated earlier, program income is considered earned when received. In other words, if a DSU receives $100,000 in program income in November, it should report this amount as received––or earned––on the SF-425 covering the first quarter of the Federal fiscal year. Therefore, DSUs should not wait until the end of a fiscal year to determine the amount of program income received, and all reports should reflect gross––not net––amounts.

Changes: None.

Addition Alternative

Comments: None.

Discussion: Upon further Department review, we determined it necessary to clarify in §361.63(c)(3) that the deduction method is no longer available to DSUs for expending program income. In examining the grant formula set forth in the

statute more closely, we have concluded that the use of the deduction method would, in effect, result in a reduction of a VR grant allotment. Absent specific statutory authority, these reductions would be inconsistent with the statute and general appropriations law principles. In reviewing the grantees' financial reports, we have found that very few, if any, DSUs elect to use the deduction method. Instead, most, if not all, grantees elect to use the addition method, which is still permissible and, in fact, will be the only permissible use of program income under the VR program final regulations. We do not believe this change will negatively impact many, if any, grantees. Therefore, we have revised final §361.63(c)(3) to require VR program grantees to use program income only to supplement the VR grant through the addition alternative.

Changes: We have revised final §361.63(c)(3) to require DSUs to use the addition alternative when expending program income.

Allotment and Payment of Federal Funds for Vocational Rehabilitation Services (§361.65)

Exemption from the Reservation of Funds Requirement for Pre-Employment Transition Services

Comments: Some commenters agreed with the changes to proposed §361.65. Many commenters recommended that we exempt DSUs from the requirement to reserve at least 15 percent of their State allotments for providing pre-employment transition services in cases where the DSUs lack resources to do so.

Discussion: We appreciate the commenters who supported proposed §361.65 and those who expressed concern or sought clarification. Section 110(d)(1) of the Act, as amended by WIOA, requires States––not the Department--to reserve at least 15 percent of their VR program allotment for providing pre-employment transition services. Given this explicit requirement, the Secretary lacks statutory authority to exempt States from the reservation requirement or to modify this requirement because to do so would be inconsistent with the statute. While we understand the concerns expressed by commenters regarding an inability to expend the full amount of reserved funds on pre-employment transition services, we encourage DSUs to work closely with the school systems and other entities to identify students with disabilities who might benefit from pre-employment transition services. Through these outreach activities, DSUs may be able to identify students with disabilities who

could benefit from pre-employment transition services and who were not previously known to the agencies.

Changes: None.

Use of Reserved Funds for Other Vocational Rehabilitation Services

Comments: A few commenters requested that agencies who may not meet the reservation requirement, due to a lack of individuals who qualify to receive pre-employment transition services, be allowed to use the remaining reserved funds to provide vocational rehabilitation services listed under proposed §361.48(b) to other eligible individuals.

Discussion: Funds reserved, pursuant to section 110(d)(1) of the Act, for providing pre-employment transition services must be used solely for the activities set forth in section 113 of the Act, as amended by WIOA, and final §361.48(a). If a student with a disability requires other vocational rehabilitation services, the DSU must pay for those services with the remainder of the VR program allotment.

Changes: None.

Amount of Funds to be Reserved

Comments: A few commenters recommended creating a benchmark for pre-employment transition services provided, rather than tying those services to actual Federal funds spent. Two commenters recommended basing the reservation of funds on the number of individuals in the State who would be eligible to receive pre-employment transition services. These commenters added that the remaining funds would be used for the provision of all other allowable vocational rehabilitation services.

Two commenters stated that the requirement to reserve at least 15 percent is too high. One commenter recommended that we consider DSUs to have satisfied the requirement if they demonstrate progress toward the minimum 15 percent requirement in the first 2 years of implementation, based upon the amount of funds spent in the previous fiscal year for pre-employment transition services. One commenter recommended that we allow States to negotiate the reservation requirement based upon populations of students with disabilities in the States. One commenter expressed concern that requiring at least 15 percent of the VR award to be used for pre-employment transition services will reduce the Federal VR funds available to support the Randolph-Sheppard program.

Discussion: Section 110(d)(1) of the Act, as amended by WIOA, requires States to reserve “at least” 15 percent of their VR program allotment for providing pre-employment transition services. Final §361.65(c)(3) mirrors the statutory requirement. Although several commenters referred to the 15 percent reservation requirement as a “limit,” the Act as amended by WIOA, and final §361.65(c)(3) do not restrict States from spending more than 15 percent of their allotments for the provision of these services.

We appreciate the many recommendations for alternative ways for DSUs to meet the pre-employment transition services reservation requirement under proposed §361.65(a)(3)(i). We also appreciate the concerns that the reservation of funds for the sole purpose of providing pre-employment transition services will reduce the amount of funds available for other VR program purposes, including services for individuals who are blind or visually impaired who wish to start a vending facility under the Randolph-Sheppard program. Nevertheless, the Act requires States to reserve at least 15 percent of their VR program allotment for providing pre-employment transition services. The Act provides no exceptions to this requirement and, therefore,

we do not have the authority to make the changes suggested by the commenters because to do so would be inconsistent with the statute.

Changes: None.

Application of the Reservation of Funds to the State and to the State Allotment

Comments: Many commenters requested that RSA apply the pre-employment transition reservation requirement to the State as a whole and not to the DSU in States with separate agencies serving individuals who are blind and individuals with all other disabilities. One commenter requested clarification regarding how pre-employment transition services are to be funded. A few commenters requested that we clarify whether the reservation requirement applies to the State funds, or just the Federal funds

Discussion: Section 113(a) of the Act requires pre-employment transition services to be paid for with funds reserved from the VR program allotment pursuant to section 110(d)(1) of the Act, as amended by WIOA. We agree with commenters that the reservation of funds for providing pre-employment transition services is a State requirement, not a DSU-specific requirement. Section 110(d) of the Act, as amended by WIOA, and final §361.65(a)(3)(i) require the

State--not the DSU--to reserve the funds, thereby making this a matter that must be resolved at the State level when there are two agencies in the State. For this reason, the Department encourages DSUs to coordinate to ensure State compliance. While the Department recommends that each DSU, when a State has two DSUs, reserve at least 15 percent of its allotment to facilitate the tracking of State compliance with the reservation requirement, the Act does not require that this be done. If one DSU (when a State has two DSUs) uses more of its funds than the other, the State would be in compliance so long as the State's total of funds reserved for providing pre-employment transition services is at least 15 percent of the State's total allotment, including any additional funds received during reallotment by one or both DSUs.

The State allotment, from which funds must be reserved, refers to the Federal funds awarded pursuant to section 110(a) of the Act, not State funds appropriated to the DSUs by State legislatures.

Changes: None.

Effect of Reallotment and Carryover on the Reservation of Funds

Comments: One commenter requested clarification regarding whether funds received during reallotment would count toward the State's allotment for purposes of the pre-employment transition services reservation requirement. One commenter requested clarification regarding whether the reservation requirement applies to the carryover period.

Discussion: Under section 110(b)(3) of the Act, funds received during reallotment are an increase to the State's allotment. Similarly, funds relinquished during reallotment are a reduction to the State's allotment. Therefore, funds received or relinquished by a State during reallotment affect the amount of funds that must be reserved for providing pre-employment transition services.

Section 19 of the Act, which governs the carryover of grant funds, applies to all VR program funds, including funds reserved for providing pre-employment transition services. Section 19(b) of the Act permits grantees to carry over Federal funds for obligation and expenditure in the subsequent Federal fiscal year only to the extent that the DSU has provided sufficient non-Federal expenditures to match those funds. This means that grantees may carry over Federal funds reserved for providing pre-employment transition services into the subsequent Federal fiscal year

only to the extent that they have provided the requisite 21.3 percent non-Federal share by the end of the Federal fiscal year in which the funds were awarded. In addition, because they have been matched in the fiscal year for which they were appropriated, the funds reserved for providing pre-employment transition services that are eligible for carryover into the succeeding Federal fiscal year may only be obligated in that succeeding Federal fiscal year and expended for providing pre-employment transition services.

Changes: None.

Administrative Costs

Comments: Some commenters requested clarification regarding fiscal reporting requirements, including staff time, counted toward the reservation requirement given that DSUs may not expend funds reserved for providing pre-employment transition services on administrative costs. One commenter requested clarification regarding the apparent contradiction of some of the authorized activities listed in proposed §361.48(a)(3), which might appear to be administrative in nature, and the prohibition in proposed §361.65(a)(3)(ii) against using reserved funds for administrative costs.

Discussion: We appreciate the comments requesting clarification regarding whether DSUs may pay for staff-related costs from funds reserved for the provision of pre-employment transition services. Section 110(d)(2) of the Act, as amended by WIOA, prohibits DSUs from using the reserved funds for administrative costs. Section 7(1) of the Act and final §361.5(c)(2) define "administrative costs" as including, among other things, "administrative salaries, including clerical and other support staff salaries, in support of these administrative functions." It has been the long-standing Department policy that staff-related costs, including salaries, fringe benefits, and travel, incurred while providing vocational rehabilitation services, constitute service costs, not administrative costs. As such, costs associated with staff time spent providing pre-employment transition services may be paid with the funds reserved for providing those services.

By contrast, supervisory costs, rent, utilities, indirect costs, and other similar associated costs are administrative costs–not service costs–and, as such, cannot be paid with the reserved funds. In considering the various pre-employment transition services specified in section 113 of the Act and final §361.48(a) in this way, we

do not believe there are actual conflicts between final §361.48(a) and §361.65.

However, we have revised final §361.65(a)(3)(ii)(B) to add a cross-reference to the definition of "administrative costs" in final §361.5(c)(2), to clarify that these costs are still allowable under the VR program and may be paid for with VR program funds not reserved for the provision of pre-employment transition services under final §361.65(a)(3).

Changes: We have revised final §361.65(a)(3)(ii)(B) to clarify that the administrative costs referred to in this provision are those that meet the definition of "administrative costs" in final §361.5(c)(2). This change is technical, not substantive.

Tracking of the Reserved Funds

Comments: Some commenters requested that we provide flexibility regarding the tracking of pre-employment transition service expenditures to minimize time-consuming administrative requirements. One commenter requested that the Department issue guidance to States regarding tracking expenditures, for example, creating a separate accounting code to track the reservation requirement. One commenter requested that the Department allow agencies with

counselors who work with schools or support the provision of pre-employment transition services to count all of the counselor's time toward the reservation requirement, thereby easing the burden on DSUs associated with tracking these costs.

Discussion: When tracking expenditures incurred for the provision of pre-employment transition services, DSUs may need to develop a cost objective (i.e., a separate accounting code) that is different from the one used for other VR program cost allocation purposes, thereby enabling DSUs to track pre-employment transition services expenditures properly with the reserved funds. Similarly, DSUs should account for personnel time to ensure the proper allocation of staff time between the provision of pre-employment transition services and other vocational rehabilitation services, just as the DSU does when its personnel work on multiple programs. DSUs must track pre-employment transition services in a manner that ensures the reserved funds are used only for the provision of services set forth in section 113 of the Act and final §361.48(a). Although this could increase administrative burden slightly, it is only in this manner that a DSU can be certain it is expending reserved funds appropriately. The

Department will issue guidance separately about tracking expenditures from the reserved funds and other fiscal matters relevant to the reservation of funds for providing pre-employment transition services.

Changes: None.

Use of Reserved Funds for Authorized Activities

Comments: Some commenters requested that we clarify when the authorized activities (as opposed to the required activities) in proposed §361.48(a)(3) are allowable pre-employment transition expenditures in meeting the reservation requirement. Specifically, the commenters wanted to know the threshold for determining when funds are remaining after providing the required activities under §361.48(a)(3).

Discussion: As stated in final §361.48(a)(3), a DSU may provide "authorized" pre-employment transition services only to the extent that reserved funds remain after providing the "required" activities. As part of the Comprehensive Statewide Needs Assessment, States should determine the number of potential individuals eligible for pre-employment transition services. This data will enable the States to target the amount of the reserved funds necessary for ensuring the "required" pre-employment

transition services are provided to students with disabilities. To the extent the States demonstrate that they have made the required pre-employment transition services available to the population identified in the Comprehensive Statewide Needs Assessment, the States have met the requirement to provide the “required” pre-employment transition services prior to the “authorized” activities. Any reserved funds remaining beyond the targeted amount necessary for the “required” activities may then be used for “authorized” activities in final §361.48(a)(3).

Changes: We have revised proposed §361.65(a)(3)(ii)(A) to clarify that funds reserved for providing pre-employment transition services may be used to pay for the costs of providing all of the services “specified” in final §361.48(a). Proposed §361.65(a)(3)(ii)(A) referred to services “authorized” in final §361.48(a). We believe this technical change is necessary to avoid any confusion about the general use of the term “authorized” and the distinction between “required” and “authorized” services in the context of pre-employment transition services.

Part 363 - The State Supported Employment Services Program

The discussion of comments on part 363 is presented by topic in the order that the relevant sections appear in this part.

Competitive Integrated Employment and Short-Term Basis (§363.1)

Comments: Overall, commenters strongly supported the focus and emphasis in part 363 on individuals with the most significant disabilities, including youth with the most significant disabilities, achieving competitive integrated employment. One commenter suggested, however, that supported employment should not be assumed automatically as the first option for people with significant, or the most significant, disabilities. Another commenter urged that "States" (presumably designated State agencies) track all individuals working in segregated settings and at subminimum wage to help identify the need for supported employment.

Other commenters pointed out discrepancies in the definition of "supported employment" between proposed 34 CFR 361.5(c)(53) and proposed §§363.1(b) and (c) and urged that these be made consistent.

One commenter suggested adding other approaches or evidence-based models such as Individual Placement and

Support (IPS) to supported employment and customized employment. This commenter also asked whether funds could be used to train new or existing providers in various models of supported employment.

Many commenters responded to the short-term basis provisions in proposed §363.1(c) and proposed 34 CFR 361.5(c)(53) under which individuals with the most significant disabilities working in an integrated setting are working toward competitive integrated employment and can reasonably anticipate achieving competitive integrated employment within six months of entering supported employment. A few commenters endorsed the six-month period, indicating that the six-month period would not allow individuals to linger for long periods in subminimum wage employment.

A few commenters considered six months to be too long and even recommended eliminating the short-term basis period altogether, indicating that under no circumstance should any individual with a disability be employed at a subminimum wage. However, most commenters considered six months to be arbitrary, too restrictive, or not sufficient, especially for individuals with the most significant disabilities, such as individuals who are blind who, as

indicated by multiple commenters, might require additional training or specialized services in order to achieve competitive integrated employment. Others recommended extensions of up to 12, 18, or 24 months, or even an unspecified time based upon an individual's needs, in order to achieve competitive integrated employment consistent with the individual's unique strengths, priorities, concerns, abilities, capabilities, interests, and informed choice.

Some commenters suggested adding unpaid internships, apprenticeships, and transitional employment as examples of "working on a short term basis." These commenters also recommended emphasizing that employment in sheltered workshops and enclaves and group employment settings does not constitute supported employment. A few commenters stated that individuals working on a short-term basis should be only in integrated settings as they work toward competitive integrated employment. Other commenters, however, referenced competitive, but non-integrated, settings when commenting on the short-term basis provision. One commenter asked for clarification to ensure that AbilityOne contracts with non-profit agencies that employ individuals with disabilities remain a viable option for

individuals with the most significant disabilities to achieve employment outcomes in supported employment.

Discussion: We appreciate the many supportive comments regarding the goal of competitive integrated employment for all individuals with significant disabilities, including youth with significant disabilities, and particularly for those with the most significant disabilities.

We also agree with the commenter who suggested that supported employment should not be considered automatically as the first choice for individuals with significant disabilities or the most significant disabilities. The State Supported Employment Services program (Supported Employment program) and supported employment services exist to support individuals with the most significant disabilities who need intensive services and supports to achieve an employment outcome. Supported employment should be considered when determining an individual's employment goal, consistent with his or her unique strengths, priorities, concerns, abilities, capabilities, interests, and informed choice.

The Act, as amended by WIOA, specifically mentions customized employment and supported employment. We do not believe that including examples of additional approaches or

models of supported employment, such as Individual Placement and Supports, is necessary. However, we support developing and implementing evidence-based models of supported employment, so long as they are consistent with the Act, as amended by WIOA, and the implementing regulations. Furthermore, administrative funds under this part, subject to the 2.5 percent administrative cost limitation, and funds under 34 CFR part 361, as appropriate, may be used to support training of providers and others on various models of supported employment.

Although the tracking of all individuals working in segregated settings and at subminimum wage would be useful to designated State units (DSUs) in identifying and assessing the need for supported employment, we do not have the authority under the Act to require this unless the individuals have been served through the VR program (see 34 CFR 361.55, which requires the DSU to conduct semi-annual or annual reviews, as applicable, of individuals in extended employment and other employment under special wage certificate provisions of the Fair Labor Standards Act), or the individuals have become known to the DSU through the activities required in section 511 of the Act.

We agree with commenters who noted discrepancies in the definition of “supported employment” in proposed 34 CFR 361.5(c)(53) and proposed §363.1(b) and (c), and we have made the definitions consistent in these final regulations.

We also appreciate the many comments about “short-term basis.” As proposed, §363.1(c) is consistent with the requirement in the Act, as amended by WIOA, that supported employment be in competitive integrated employment or in an integrated work setting in which the individual is working on a short-term basis toward competitive integrated employment. Therefore, despite the payment of competitive wages, employment in a non-integrated work setting does not meet the requirement under the Act, as amended by WIOA, for an employment outcome in supported employment.

The Secretary acknowledges the diverse views, concerns, and recommendations of the commenters about the variables that should be considered in determining the short-term basis period but believes six months is consistent with the intent of the Act. The Secretary agrees with the commenters, however, that, in limited circumstances, an extended period of time may be appropriate based upon the needs of the individual and upon demonstrated progress toward competitive earnings

documented in his or her service record. Therefore, an individual with a most significant disability, including a youth with a most significant disability, may, in limited circumstances, have up to 12 months from achieving a supported employment outcome, as appropriate, to address fully his or her individualized needs to secure competitive earnings in supported employment.

In response to the concerns about the availability of sufficient time to help individuals achieve an employment outcome, particularly in relation to the short-term basis, we want to clarify when the six-month short-term basis period, and the additional six months that may be available in limited circumstances, begins. This period begins only after an individual with a most significant disability, including a youth with a most significant disability, has completed up to 24 months of supported employment services (unless a longer period of time is necessary based upon the individual's needs) and the individual is stable in the supported employment placement for a minimum period of 90 days following the transition to extended services. At this point, the individual has achieved a supported employment outcome in accordance with the criteria set forth in final §363.54. We believe that this provides

sufficient time, considering both the time allowed for providing supported employment services and the short-term basis period, if needed, to address fully the needs of an individual in supported employment and to enable that individual to achieve competitive integrated employment. Our data support this belief and show that most supported employment outcomes are achieved in less than 24 months.

In response to multiple commenters' concerns about individuals with the most significant disabilities, such as individuals who are blind who may require additional training or specialized services to achieve competitive integrated employment, we want to clarify that vocational rehabilitation services, as well as supported employment services, are available to them. The vocational rehabilitation services generally occur prior to placement in supported employment as part of the individual's approved individualized plan for employment.

Again, because the definition of "employment outcome," which includes supported employment, requires achieving competitive integrated employment as defined in final §361.5(c)(9), all supported employment outcomes must be in integrated settings with the expectation that individuals

with the most significant disabilities can and will achieve competitive wages.

We appreciate the recommendations regarding activities that commenters stated should constitute employment during the short-term basis period, including unpaid internships, apprenticeships, and transitional employment; however, we want to emphasize that the short-term basis period begins following the achievement of the supported employment outcome. Unpaid internships, pre-apprenticeships, apprenticeships (including Registered Apprenticeships), and transitional employment are vocational rehabilitation services that lead to employment outcomes, but they do not constitute supported employment outcomes within the meaning of the definition of “supported employment” in final 34 CFR 361.5(c)(53) and §363.1(b) and (c). Therefore, they would not be appropriate placements for employment on a short-term basis.

Finally, we agree with commenters that employment in sheltered workshops and enclaves and group employment settings does not constitute supported employment under this part because an individual achieves a supported employment outcome only if, at a minimum, the supported employment is in an integrated setting. There is a full

discussion about why non-integrated employment does not meet the definition of “competitive integrated employment” in the responses to comments on the definition of competitive integrated employment in 34 CFR 361.5(c)(9). That discussion also addresses whether entities that are set up specifically for providing employment to individuals with disabilities, such as AbilityOne non-profit agencies, will be able to place individuals with the most significant disabilities in competitive integrated employment and achieve employment outcomes in supported employment.

Changes: We have revised the definition of “supported employment” to be consistent in both final §363.1(b) and (c) and final 34 CFR 361.5(c)(53). In the NPRM, the definition in proposed 34 CFR 361.5(c)(53) did not include the phrase “and customized” when referring to competitive integrated employment, and proposed §363.1(b) did not include the phrase “including a youth with a most significant disability” when referring to individuals with the most significant disabilities. Additionally, proposed 34 CFR 361.5(c)(53) included “transitional employment,” which has been removed in final 34 CFR 361.5(c)(53). We have corrected other, minor inconsistencies in singular and

plural references to individuals with the most significant disabilities.

We have also revised final §363.1(c) by adding a limited circumstance in which an individual can extend the short term basis up to a 12-month period from the achievement of the supported employment outcome to demonstrate progress toward competitive earnings based on information contained in the service record.

Definitions (§363.6(a))

Comments: We received several comments regarding changes in proposed 34 CFR 361.5(c) to definitions relevant to the Supported Employment program. A few commenters requested the removal of the definition of “transitional employment” in proposed 34 CFR 361.5(c)(56). These commenters also suggested removing the reference to transitional employment from the definitions of “supported employment” in proposed 34 CFR 361.5(c)(53) and “ongoing support services” in proposed 34 CFR 361.5(c)(37). They noted that WIOA eliminated “transitional employment” and that the definition of “supported employment” in WIOA supersedes the definition in the Workforce Investment Act of 1998, which included “transitional employment” for individuals with mental illness. The commenters suggested that Congress

deliberately removed “transitional employment” to ensure people with the most significant disabilities have access to competitive integrated employment.

Some commenters sought clarification about the definition of “extended services” in proposed 34 CFR 361.5(c)(19)(v) related to youth with the most significant disabilities.

Discussion: We agree with the commenters’ assessment of the congressional intent behind removing the definition of “transitional employment” and the reference to transitional employment in both the definition of supported employment and the definition of ongoing support services. The term is no longer supported by the Act.

We discuss the commenters’ request for clarification about the definition of “extended services” in proposed 34 CFR 361.5(c)(19)(v) for youth with the most significant disabilities in this Analysis of Comments and Changes under “Services to Youth with the Most Significant Disabilities” in §363.4(a)(2).

Changes: We have removed the definition of “transitional employment” in final 34 CFR 361.5(c), as well as the references to it in the definition of “supported

employment” in 34 CFR 361.5(c)(53) and “ongoing support services” in 34 CFR 361.5(c)(37).

The definition of “extended services” in 34 CFR 361.5(c)(19)(v) has been revised as discussed in §363.4(a)(2) of this Analysis of Comments and Changes section under “Services to Youth with the Most Significant Disabilities.”

Extension of Time for the Provision of Supported Employment Services (34 CFR 361.5(c)(54)(iii))

Comment: A few commenters recommended either basing the time frame for providing supported employment services on an individual’s need rather than a prescribed period of time or revising the regulatory language to make it easier to extend the 24-month time frame, as needed. A few other commenters disagreed with extending the time frame beyond 18 months.

Discussion: We appreciate the concerns regarding the time frame for providing supported employment services. WIOA extended the availability of supported employment services from 18 months to 24 months, and this mandate cannot be changed by the Department. The extension provides additional time for individuals with the most significant disabilities to receive the services and supports necessary

to achieve an employment outcome in supported employment, either in competitive integrated employment or working on a short-term basis to achieve competitive integrated employment. In accordance with section 7(39)(C) of the Act, under special circumstances, the eligible individual and the rehabilitation counselor or coordinator can jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment.

Changes: None.

Services to Youth with the Most Significant Disabilities (§§363.4(a)(2) and 363.22)

Extended Services (§363.4(a)(2))

Comments: Many commenters suggested changing the statutorily defined time frame of up to four years during which the DSU may expend supported employment program funds for extended services for youth with the most significant disabilities, either by establishing a longer or shorter period for providing extended services or by basing this period upon individual circumstances.

Additionally, commenters requested clarification regarding the point at which the DSU would be required to terminate its provision of extended services for a youth who turns 25 years of age and no longer meets the

definition of a “youth with a disability” in 34 CFR 361.5(c)(58).

With respect to the use of funds allotted under the Supported Employment program for extended services, a few commenters recommended changing the word “may” in proposed §363.4(a) to “shall” or “will” to establish that it is mandatory for DSUs to provide extended services to youth with the most significant disabilities.

A few commenters asked for clarification whether providing extended services is mandatory or optional, citing discrepancy between the language in proposed §363.22, which appears to indicate that the reserve must be used for extended services, and proposed §363.4(a)(2), which uses the word “may” when referring to the use of funds allotted under this part.

Other commenters also proposed making the DSU either the initial payer or the payer of last resort for extended services for youth with the most significant disabilities. Still other commenters raised questions about providing extended services to youth with the most significant disabilities who have not been served by the DSU as an applicant or eligible individual.

Discussion: We appreciate the suggested revisions to proposed §363.4(a)(2). While many commenters sought to limit the DSU's responsibility for extended services, given limited available resources, we cannot do so. Section 604(b)(2) of the Act mandates that the DSU make available extended services for youth with the most significant disabilities for up to four years. Nothing in the Act authorizes the Department to grant a waiver of this requirement or to change the time period from four years to any other time period for youth with the most significant disabilities.

While the DSU cannot "opt out" of any of the activities authorized under §363.4 by refusing to fund them, DSUs determine the need for and fund services on a case-by-case basis dependent upon each individual's need for services. Therefore, it is not appropriate to change the "may" in 34 CFR 363.4(a) to "shall" or "will," and doing so would not be consistent with the authorizing language in section 604 of the Act. In light of the responsibility to make available funds for extended services for youth with the most significant disabilities, DSUs should continue to explore the availability of funding from other sources, as is done for other individuals with

the most significant disabilities transitioning from supported employment services to extended services.

Regarding the point at which the DSU may no longer provide extended services to a youth with the most significant disabilities, in no case may a DSU provide more than four years of extended services. Also, once a youth with the most significant disabilities reaches 25 years of age, he or she no longer meets the definition of "youth with a disability" in 34 CFR 361.5(c)(58), and the DSU must discontinue funding extended services. We appreciate the commenters bringing this last scenario to our attention. Final §363.4(a)(2) now states that at the age of 25, a youth with a most significant disability is no longer eligible to receive extended services, even if he or she has not yet received services for four years. Nevertheless, under final §363.53(b)(2)(ii), the DSU must identify another source of extended services to ensure that there will be no interruption of services.

As indicated by a few commenters, section 606(b)(7)(D) of the Act provides that the State shall use supported employment funds only to supplement, and not to supplant, title I VR program funds in providing supported employment services. A few commenters suggested that this provision

means that the Supported Employment program or VR program funds should be the payer of last resort (others suggested the payer of first resort) for extended services to youth with the most significant disabilities. The “supplement, not supplant clause,” as it is known, addresses only the relationship between the Supported Employment program and the VR program when providing supported employment services, which now includes extended services. It does not affect at all the relationship of the Supported Employment program or VR program to sources of funds that have historically been the providers of extended services to individuals after they have transitioned from supported employment services provided by the DSU. We expect those State and other sources of funding to coordinate with the Supported Employment and VR programs to provide the extended services needed by youth with the most significant disabilities. One of the purposes of the Supported Employment program is to assist States in developing collaborative programs with appropriate public and private nonprofit organizations to provide supported employment services for individuals with the most significant disabilities.

As to whether the DSU can provide extended services to youth with the most significant disabilities who have not been served by the DSU as an applicant or eligible individual, we emphasize that in order to be eligible for supported employment services, including extended services, provided by the DSU, youth with the most significant disabilities must meet the requirements of §363.3, which include being determined eligible for vocational rehabilitation services. The DSU therefore may not provide extended services to a youth with the most significant disabilities who has not received services from the DSU through an individualized plan for employment simply because he or she meets the definition of a youth with a disability and is in need of extended services.

Changes: We have revised §363.4(a)(2) to clarify that extended services to youth with the most significant disabilities provided by the DSU may be for a period not to exceed four years, or until such time as the youth reaches age 25 and no longer meets the definition of "youth with a disability" under final 34 CFR 361.5(c)(58), whichever occurs first.

Reserve of Supported Employment Funds for Services for Youth with the Most Significant Disabilities (§363.22)

Comments: One commenter agreed with the reserve requirement, indicating that the reserve funds should also be targeted to “school-to-work” transition services to place youth in competitive integrated employment.

Of the commenters that expressed concern regarding the requirement for reserving 50 percent of supported employment funds for supported employment services to youth with the most significant disabilities, most requested an exemption to ensure that adults with the most significant disabilities, particularly those with adult onset visual impairment or blindness, are able to be served.

Discussion: We appreciate these concerns. However, WIOA mandates the 50 percent reservation of funds for supported employment services, including extended services, for youth with the most significant disabilities. The reserved funds may not be used for “school-to-work” transition services because the funds must be used for supported employment services for youth with the most significant disabilities, including extended services, which occur after placing such youth in competitive integrated employment. WIOA does not provide any exceptions or authorize the Department to grant an exemption or waiver.

Changes: None.

Match Requirements for Funds Reserved for Serving Youth with the Most Significant Disabilities (§363.23)

Comments: Some commenters preferred that the 50 percent reserve not have a match requirement, and others indicated the match tracking and monitoring requirements are burdensome. A few commenters sought clarification regarding whether the match required new funding by the State or whether the State could realign current funding. The commenters indicated that it was difficult to comprehend the intent of the match without a defined plan for allocating the funds.

Other commenters requested that in-kind match, such as those used and tracked in the Independent Living Services for Older Individuals Who Are Blind program, be allowed to meet the match requirements under this section. A few commenters requested examples of match and asked whether certified personnel expenditures are permitted as a third-party contribution.

Discussion: We appreciate the concerns expressed by the commenters regarding the required match for funds reserved for providing supported employment services, including extended services, to youth with the most significant disabilities. This is a new requirement that will require

all States to provide a non-Federal share; however, States that have historically expended non-Federal funds to supplement the Federal supported employment award now may count those expenditures for the provision of services to youth with the most significant disabilities as match for the reserve requirement.

WIOA mandates the match requirement for supported employment and does not provide any exceptions to it or authorize the Secretary to grant a waiver. The activities and internal processes necessary for States to track and expend the non-Federal share for the reserve should not be burdensome because they may be modeled after those used for the part 361 match requirements.

In addressing what may be used as match, allowable sources of match for the supported employment program follow the same guidelines for those sources allowable under the VR program. Under final 34 CFR 361.28(b)(2), which addresses third-party cooperative arrangements for providing vocational rehabilitation services, which in turn include supported employment services under final 34 CFR §361.48(b)(13), certified personnel expenditures for time cooperating agency staff spent providing direct vocational rehabilitation services pursuant to a third-party

cooperative arrangement are allowable. Certified personnel expenditures include staff salary and fringe benefits allocable to the third-party cooperative arrangement. To ensure consistency with part 361, third-party in-kind contributions are not permitted as match.

In reviewing proposed §363.23 further, we determined that it did not effectively describe the calculation of the 10 percent match, which must be based upon the total expenditures, made up of the Federal funds reserved and the non-Federal share, incurred for providing supported employment services to youth with the most significant disabilities.

Changes: We have revised final §363.23(a)(2)(i) to demonstrate that the match calculation is based upon the total expenditures, including the Federal funds reserved and the non-Federal share, associated with the 50 percent reserve of Federal funds for providing supported employment services to youth with the most significant disabilities.

Program Income (§363.24)

Comments: A commenter disagreed with limiting the use of program income and supported eliminating the requirement to disburse program income prior to requesting additional cash draws from its Federal award.

Discussion: There has been a long-standing government-wide requirement under the common rule implementing former OMB Circular A-102, as codified by the Department in former 34 CFR 80.21(f)(2), that States must expend program income prior to drawing down Federal grant funds. The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), codified in 2 CFR part 200, were adopted by the Department in 2 CFR 3474 on December 19, 2014 (79 FR 76091). The new 2 CFR 200.305(a) specifies the payment procedures that States must use to draw down Federal funds; however, these procedures appear, on the surface, to apply only to funds included in a Treasury-State Agreement (TSA), but not all Federal program funds made available to States are subject to TSAs. For this reason, there is an ambiguity in 2 CFR 200.305(a) about how States should draw Federal funds under non-TSA programs. Moreover, TSAs do not cover program income earned by State grantees, and 2 CFR 200.305(a) does not address whether States should expend available program income funds before requesting additional Federal cash, as had been the long-standing government-wide requirement in OMB Circular A-102 and codified for Department grantees in 34 CFR 80.21(f)(2).

This silence creates concern because, for all other non-Federal entities, 2 CFR 200.305(b)(5) requires those entities to expend available program income funds before requesting payments of Federal funds. We do not believe, however, that this ambiguity should be construed to lift the requirement that States expend program income funds before requesting additional Federal cash because no such policy change was discussed in the preambles to either the final guidance in 2 CFR part 200, which was published on December 26, 2013 (78 FR 78589), or in the Interim Final Guidance published on December 19, 2014 (79 FR 75867).

Here, 34 CFR 361.63(c)(2) permits the transfer of VR Social Security reimbursement program income to carryout programs under title VI of the Rehabilitation Act (Supported Employment). Historically, some State VR agencies have transferred a portion of VR Social Security reimbursement program income to the Supported Employment programs for use by those programs. For this reason, we believe it is essential that we resolve this ambiguity via these regulations.

Thus, we proposed in the NPRM to incorporate the requirement to expend program income before requesting payment of funds by referencing 2 CFR 200.305(a), but that

provision is ambiguous. These final regulations now resolve the ambiguity by revising §363.24(b)(1) to require States to expend available program income funds before requesting additional cash payments from their Federal Supported Employment grant. We believe this change is essential to protect the Federal interest by using program income to increase the funds devoted to this program to which VR Social Security reimbursement program income may be transferred, keeping to a minimum potential interest costs to the Federal government of making grant funds available to the States. These final regulations should not negatively impact States because this change merely maintains the status quo that existed under former 34 CFR 80.21(f)(2).

In addition, upon further review of the proposed program income regulation, we determined that it was necessary to address the relationship between program income and match. Just as with program income in the VR program, program income earned in the Supported Employment program may not be used to meet the required non-Federal share under §363.23.

Changes: We have revised §363.24 by removing the inapplicable reference to the Uniform Guidance in

§363.24(b)(1), leaving only the requirement that program income earned in the Supported Employment program must be disbursed prior to requesting additional cash draws from its Federal award. We have also added a new §363.24(b)(3), which provides that program income cannot be used to meet the non-Federal share requirement under §363.23.

Period of Availability of Funds (§363.25)

Comment: None.

Discussion: In reviewing proposed §363.25(b), we determined that it would be beneficial to clarify the use of Federal funds reserved for the provision of supported employment services to youth with the most significant disabilities that have been matched in the fiscal year for which the funds were appropriated and thus are available for obligation in the succeeding fiscal year. The Federal supported employment reserve funds eligible for carryover into the succeeding Federal fiscal year, because they have been matched in the fiscal year for which the funds were appropriated, may only be obligated and expended in that succeeding Federal fiscal year for supported employment services to youth with the most significant disabilities.

Changes: Final §363.25(b) states that any reserved funds carried over may only be obligated and expended in that

succeeding Federal fiscal year for providing supported employment services to youth with the most significant disabilities.

Limitations on Administrative Costs (§363.51)

Comment: One commenter stated that the reduction of the administrative cost limit from 5 percent to 2.5 percent would severely limit the agency's ability to hire and retain staff.

Discussion: Despite this mandated reduction in section 603(c) of the Act, funds from the VR program remain available for costs related to the Supported Employment program, including administrative costs under §363.4(c)(1) and section 608(a) of the Act. The limitation of administrative costs under the Supported Employment program expands the availability of funds for supported employment services to individuals with the most significant disabilities, and the availability of VR program funds for administrative costs related to the Supported Employment program helps to mitigate the impact of the reduction in administrative costs upon the DSU's ability to hire and retain staff.

Changes: None.

Requirements for Transition to Extended Services, the Achievement of an Employment Outcome, and Closure of a Service Record (§363.53, §363.54, and §363.55)

Comments: Many commenters requested clarification of requirements related to the transition to extended services, especially for youth with the most significant disabilities; the interplay of the short-term basis with the achievement of an employment outcome; and the requirements related to case closure, particularly when youth with the most significant disabilities are receiving extended services from the DSU.

Discussion: We acknowledge the questions and confusion that many commenters expressed about the transition to extended services, employment outcome, and closure of the service record as they pertain to individuals receiving supported employment services. The transition to extended services continues to take place after an individual has completed supported employment services. WIOA makes two changes to the transition to extended services.

First, an individual receiving supported employment services can now receive those services for up to 24 months, instead of the previous 18, and, under special circumstances, may receive an extension based upon the

individual’s need as described in 34 CFR 361.5(c))(54)(iii). The transition to extended services begins after all supported employment services are complete. Second, the DSU may now provide extended services to youth with the most significant disabilities in accordance with §363.4(a) and 34 CFR 361.5(c)(19)(v). The DSU’s responsibilities necessitated by both of those changes have been outlined more comprehensively in a revised section 363.53.

By including the requirement to achieve competitive integrated employment into the definition of “supported employment” in Section 7(38) of WIOA, Congress stated its expectation that all individuals with disabilities, even those with the most significant disabilities, could achieve competitive integrated employment. Recognizing, however, that those individuals with the most significant disabilities may need more time and supports to reach that goal, Congress permitted those individuals to be employed in an integrated setting with non-competitive wages on a short-term basis, as long as they were working toward competitive integrated employment. The definition of “employment outcome” in 34 CFR 361.5(c)(15) addresses the achievement of competitive integrated employment in

supported employment. Therefore, final §363.54 explains when an individual with a most significant disability is considered to have achieved an employment outcome in supported employment, either in competitive integrated employment or when he or she is working on a short-term basis toward competitive employment in an integrated work setting.

When the DSU closes the service record of an individual with a most significant disability now depends on whether the DSU is providing services during the short-term basis period or providing extended services for youth. A new final §361.55 describes how the new statutory requirements for employment on a short-term basis working toward competitive integrated employment, extended services for youth, and achieving an employment outcome relate to closing the service record.

Changes: We have reformatted and revised §363.53 to better identify the steps that the DSU must take prior to transitioning an individual with a most significant disability, including a youth with a most significant disability, to extended services. Those steps include both a joint decision made by the counselor and the individual that the individual needs no further supported employment

services, as defined in §361.5(c)(54), and identifying providers of extended services, including the DSU in the case of a youth with a most significant disability, under 34 CFR part 361.5(c)(19).

We have reformatted and revised final §363.54 to better identify the considerations that the DSU must take into account when determining when an individual with a most significant disability, including a youth with a most significant disability, who is employed in competitive integrated employment or in an integrated setting and is working on a short-term basis toward competitive integrated employment, will be considered to have achieved an employment outcome in supported employment.

We have removed the cross-reference from proposed §363.54(b) to the closure of the service record requirement in 34 CFR 361.56 as a criterion for achieving an employment outcome.

Final §363.54 sets forth four requirements that must be satisfied for an employment outcome. First, the individual must have completed supported employment services under this part and 34 CFR part 361, meaning the individual has received services for up to 24 months, or longer if the counselor and the individual have determined

that such services are needed to support and maintain the individual in supported employment. Any other vocational rehabilitation services listed on the individualized plan for employment provided to individuals who are working on a short-term basis toward the achievement of competitive integrated employment in supported employment need not be completed prior to satisfying the achievement of an employment outcome.

Second, the individual has transitioned to extended services provided either by the DSU for youth with the most significant disabilities, or another provider, consistent with the provisions of §§363.4(a)(2) and 363.22.

Third, the individual has maintained employment and achieved stability in the work setting for a minimum of 90 days after transitioning to extended services, and, finally, the employment must be individualized and customized consistent with the strengths, abilities, interests, and informed choice of the individual.

New final §363.55 addresses when the service record of an individual who has achieved an employment outcome in supported employment may be closed. Separate requirements are specified for different scenarios, depending on whether individuals with a most significant disability, including

youth with a most significant disability, achieve competitive integrated employment or work toward competitive integrated employment on a short-term basis and whether they are receiving extended services and any other vocational rehabilitation services from the DSU or from other service providers.

Limitation on Use of Subminimum Wage (34 CFR part 397)

The Analysis of Comments and Changes of part 397 is presented in the order in which relevant subjects and sections appear in this part.

General Comments (part 397)

Comments: More than 550 commenters responded to proposed part 397. Some commenters expressed strong support for all or various sections. A few commenters suggested that section 511 of the Act, as added by WIOA, does not go far enough, and stated that the payment of subminimum wages to individuals with disabilities perpetuates the perception that these individuals are less valued. The commenters recommended that the payment of subminimum wages to individuals with disabilities should be entirely eliminated. Others supported Congress' steps to reinforce the belief that, with the proper supports and services, individuals with all types of disabilities can attain

competitive integrated employment. A few commended the Department for its efforts in issuing important regulations designed to curb subminimum wage employment, especially for youth with disabilities, who too often transition from school directly into sheltered employment at subminimum wages without ever having the opportunity to try competitive integrated work or explore their interests and abilities.

Some commenters remarked that section 511 of the Act and the implementing regulations in part 397 will help to eliminate practices that have not worked to benefit individuals with disabilities, such as the overuse of employment at subminimum wages, years of extended evaluation, and cycles of performance evaluations that result in low wages based upon an individual's productivity without necessary supports and services. In addition, a few commenters suggested that supporting subminimum wage employment appeared to be inconsistent with the purpose of the VR program and that resources should not be used to provide services or activities that result in individuals being employed in segregated settings at subminimum wages.

Generally, however, supporters of proposed part 397 regarded the regulations as helping individuals who are

considering subminimum wage employment, or those already employed at subminimum wage, access opportunities for competitive integrated employment.

Multiple commenters voiced opposition to, or concerns about, proposed part 397. These commenters expressed concern that proposed part 397 would eliminate or phase out section 14(c) certificates and subminimum wages, close sheltered workshops, and cause individuals employed at subminimum wages to lose their jobs. Some of these commenters stated that individuals employed in sheltered employment were mostly incapable of working in competitive integrated employment, enjoyed a supportive and safe environment and social network in sheltered employment, and would lose income-based financial and medical benefits if they were paid minimum wages. Additionally, many of these commenters expressed concern that employers in the community would not hire individuals with low productivity who are unable to perform at expected levels and that it was unrealistic to believe that there are enough jobs for them in competitive employment. As a result, these individuals with disabilities would remain at home or need increased support from day programs.

Many commenters suggested that there should be a continuum of employment opportunities for individuals with disabilities, including sheltered workshops, and that the proposed regulations do not consider the choices that individuals and families make among these options.

Discussion: We appreciate the many thoughtful recommendations to change, clarify, and improve the regulations. Section 511 of the Act, as added by WIOA, and final part 397 set forth the requirements that must be satisfied: (1) before an entity holding a special wage certificate issued by the Department of Labor under section 14(c) of the Fair Labor Standards Act (FLSA) may hire a youth with a disability or continue to employ an individual with a disability of any age at subminimum wages; and (2) by DSUs and local educational agencies with regard to services and documentation that must be provided to these individuals. Neither section 511 of the Act nor final part 397 eliminates the payment of subminimum wages or section 14(c) certificates. Both of these actions are outside the scope of the Department's authority and these final regulations. We also understand the concerns about the potential loss of needed disability-related and income-based benefits and the availability of sufficient jobs in

the community; however, WIOA embodies the belief that with appropriate skills and supports, all individuals with disabilities can participate in the competitive workforce and achieve self-sufficiency. The Act, as amended by WIOA, and WIOA itself, could result in more job opportunities becoming available to individuals with disabilities, including those with the most significant disabilities. Two of the core purposes of WIOA are to ensure that: (1) individuals who face barriers to employment, such as individuals with disabilities, receive the services and supports they need to acquire the skills necessary to obtain competitive integrated employment; and (2) employers receive the training, technical assistance, and other services they need to understand and tap into the full potential of individuals with disabilities in the workforce, for example through supported employment or customized employment. In addition, the Act, as amended by WIOA, and final part 361 require DSUs to work with other public agencies to ensure that individuals with disabilities receive the benefits planning they need to better understand the interplay of income-based benefits and work and to make informed decisions about the type of employment to pursue. Through all of these efforts, the

Secretary hopes that individuals with disabilities, including those with the most significant disabilities, have more employment opportunities.

In addition, neither section 511 of the Act nor final part 397 restricts or eliminates sheltered employment. Individuals with disabilities continue to have a continuum of choices and options for employment ranging from competitive integrated employment to employment in sheltered workshops. Therefore, individuals with disabilities choosing to pursue or continue in sheltered employment may do so; however, certain requirements must be satisfied before the employer hires or continues to employ them at subminimum wages. While we recognize that many subminimum wage jobs for individuals with disabilities are in sheltered settings, section 511 of the Act and final part 397 focus exclusively on the requirements that must be satisfied before an entity holding a section 14(c) certificate may hire or continue to employ an individual with a disability at subminimum wages, not on the setting in which those wages are paid.

Changes: None.

Purpose (§397.1)

Comments: One commenter recommended that §397.1(b)(1) require the DSU to ensure that youth with disabilities actually have completed certain services, not just provide documentation about the completion of those services to the youth. The commenter further suggested we revise this section to maximally limit the use of subminimum wage employment by requiring the DSU to: (1) track youth with disabilities receiving pre-employment transition services and transition services from the DSU who are considering subminimum wage employment; (2) identify all individuals currently receiving services from the DSU considering subminimum wage employment; (3) identify all individuals over the past three years who applied for and were found ineligible for the VR program and may be currently working in, or considering, subminimum wage employment; (4) track referral agreements with, and conduct outreach to, State and local educational agencies to identify youth with disabilities considering subminimum wage employment; and (5) track referral agreements with, and conduct outreach to, the State agency with primary responsibility for providing services and supports for individuals with intellectual and developmental disabilities, and any other State agency providing services to a significant number of

individuals in subminimum wage employment. The commenter also recommended that we revise §397.1 by clarifying that nothing in this part supersedes the requirements of 34 CFR 361.55 regarding semi-annual and annual review of individuals in extended employment or other employment under special certificates issued under section 14(c) of the FLSA.

Discussion: We appreciate the commenter's time and consideration in reviewing this section and making substantive suggestions that would assist DSUs in carrying out the intent of section 511. In particular, the Secretary believes the proactive steps recommended by the commenter offer potential ways in which DSUs could increase the number of youth and other individuals with disabilities considering subminimum wage employment who become known to the DSUs, thereby significantly impacting the DSU's ability to assist in limiting the use of subminimum wages. That said, the Act does not require DSUs to seek out or solicit youth and others with disabilities considering, or already employed at, subminimum wages. Similarly, the Act does not require DSUs to track youth with disabilities or others with disabilities, except for those individuals who have become known to the DSU through the vocational

rehabilitation process or through activities required in §§397.20, 397.30, 397.40 and 397.50. However, there is nothing in the Act or these final regulations that would prohibit a DSU from working with local educational agencies or other public agencies that may be able to identify individuals seeking or working in subminimum wage employment, for example, when implementing the requirements in section 101(a)(11) of the Act, as amended by WIOA, and the final regulations in 34 CFR 361.22 related to coordination with education officials, 34 CFR 361.24 regarding cooperation and coordination with other entities, and the documentation process requirements in final part 397. This could increase the number of individuals known to the DSU and allow the DSU to provide services, especially employment-related counselling and guidance, earlier than it otherwise would.

While we encourage the DSUs and State and local educational agencies to work together to identify these students and youth with disabilities as early as possible, any referrals by educational agencies that are subject to the confidentiality requirements of the Family Education Rights and Privacy Act (FERPA) (20 U.S.C. 1232g(b) and 34 CFR 99.30 and 99.31) and/or the IDEA (20 U.S.C. 1417(c) and

34 CFR 300.622) would need to comply with the applicable confidentiality standards . Although we are not revising the final regulations as recommended, the Department will consider ways to incorporate some of the suggestions into technical assistance to the DSUs.

The Secretary understands the recommendation to require the DSU to ensure that youth with disabilities actually complete certain services, in addition to providing documentation. However, the Secretary disagrees that this is necessary. Under section 511(c)(1)(A) of the Act and final §397.40(a), DSUs must provide certain information and career counselling services to all individuals with disabilities, known by the DSUs, who want to continue employment at subminimum wage. Upon the completion of those services, the DSU must provide the individual with documentation that the services were provided. As such, the documentation “ensures,” as the commenter desired, that the services were actually completed. Similarly, a youth with a disability must complete certain services, such as transition and, as appropriate, pre-employment transition services, prior to beginning work in subminimum wage employment. Again, the DSUs and local educational agencies must provide

documentation that the youth has completed these services, thus ensuring that the services were completed.

Finally, the Secretary agrees that nothing in this part supersedes the requirements of final 34 CFR 361.55 regarding semi-annual and annual review of individuals in extended employment or other employment under special wage certificate provisions in section 14(c) of the FLSA. We received similar suggestions to cross-reference and reconcile the requirements under final 34 CFR 361.55 and final §397.40 to ensure consistency and avoid confusion about which requirements apply and the respective responsibilities of the DSU under each provision. While the Secretary understands the concerns, such revisions are not necessary or appropriate. The DSUs must satisfy their responsibilities under both final 34 CFR 361.55 and final §397.40. These sections implement requirements under separate titles in the Act and apply to different-–although sometimes intersecting--populations. We discuss these requirements of final 34 CFR 361.55 more fully in the Analysis of Comments and Changes section earlier in this preamble and those in final §397.40 in a following section.

Changes: None.

Jurisdiction (§397.2)

Jurisdiction of the Departments of Education and Labor

Comments: One commenter agreed that proposed §397.2 is consistent with the statutory authority granted to the Department. The commenter noted that the Department has the authority to regulate the actions of State educational agencies and collect data, citing Executive Order 11761 (To Facilitate Coordination of Federal Education Programs), and, therefore, has the authority to impose documentation requirements; to impose requirements for educational agencies, as detailed in proposed §§397.2(a)(1) and (2); and to regulate the actions of State and local educational agencies with regard to subminimum wage placements as detailed in proposed §397.2(a)(3).

The same commenter agreed with proposed §397.2(b), which states that nothing in this part will be construed to grant the Department or its grantees jurisdiction over requirements set forth in the FLSA. The commenter added that, although the Department of Labor has the authority to grant entities section 14(c) certificates allowing subminimum wage employment to individuals with disabilities, the Department has the authority to regulate, and thus restrict, the placement of individuals with

disabilities in subminimum wage employment as it relates to public schools.

Another commenter stated that the Department has express legal authority to administer funding for the VR program under the Act and to oversee services by local school districts under the Individuals with Disabilities Education Act (IDEA). The commenter urged the Department to assume a central enforcement role over programs that facilitate employment outcomes for youth with disabilities, something which, according to the commenter, was lacking in the proposed regulations.

Other commenters stated that the Department should take a more proactive and vigorous role in enforcement, working collaboratively with the Department of Labor's Wage and Hour Division to enforce fully and meaningfully the requirements of section 511 of the Act, including provisions under which both Departments have overlapping jurisdiction. Similarly, several commenters viewed the enforcement of section 511 of the Act as a shared responsibility between the Departments of Education and Labor.

Several commenters expressed concerns about the enforcement of section 511, including the concern that

entities holding section 14(c) certificates would continue their current practices and not comply with requirements under the Act. Some commenters suggested the Department require entities holding special wage certificates to refer youth and other individuals with disabilities to the DSU or educational agency. Many commenters recognized that these entities are subject to enforcement action from the Department of Labor and may have their certificates revoked under 29 CFR 525.17.

Similarly, since section 511 of the Act is entitled "limitations on the use of subminimum wage," one commenter suggested that there is a legal basis under WIOA for the Department of Labor to revoke section 14(c) certificates for violations of section 511 of the Act, which these final regulations should require. The same commenter stated that after the effective date of section 511 on July 22, 2016, when an entity holding a section 14(c) certificate hires a person with a disability who is age 24 or younger without completing the required steps in section 511(a)(2)(B) of the Act, the entity should face enforcement action from the Departments of Labor and Education under both the FLSA and the Act, as amended by WIOA. Without vigorous enforcement by both Departments, particularly the Department of

Education, the commenter suggested that entities holding section 14(c) certificates would view the responsibility for meeting the requirements under section 511 of the Act as resting with the DSUs.

Discussion: The Secretary appreciates the many comments and recommendations about jurisdiction and enforcement. In response to the many comments received, the Department consulted further on the matter with the Department of Labor's Wage and Hour Division. Although the Secretary understands the various concerns expressed, both the Departments of Education and Labor agree that under FLSA and WIOA, the authority to administer and enforce Federal requirements governing the payment of subminimum wages by entities holding special wage certificates under section 14(c) of the FLSA resides with the Secretary of Labor. The Secretary of Labor administers and enforces the minimum wage and overtime requirements of the FLSA, issues and revokes subminimum wage certificates, and remedies unauthorized payment of subminimum wages. See 29 U.S.C. 206, 207, and 214(c); 29 CFR Part 525. Section 511 states that its provisions "shall be construed in a manner consistent with the provisions of the Fair Labor Standards Act of 1938 (29 USC 201 et seq.), as amended before or

after the effective date of this Act." Accordingly, if an employer fails to comply with the section 511 criteria for payment of a subminimum wage, the Secretary of Labor would take enforcement action pursuant to the FLSA in the same manner as he would against any other employer who failed to satisfy the requirements of the FLSA. The Secretary of Labor has delegated his authority to administer the FLSA to the Department of Labor's Wage and Hour Division.

The Secretary agrees with commenters who called for greater collaboration between the Department and the Department of Labor's Wage and Hour Division to ensure that the requirements of section 511 of the Act are enforced fully and meaningfully. Additionally, the Secretary agrees that the provisions of section 511 are dependent on the DSUs and educational agencies knowing the identities of individuals seeking employment or who are already employed at subminimum wage. However, despite the recommendations made by commenters, there is no statutory authority for the Department to require entities holding special wage certificates to refer youth and other individuals with disabilities to the DSU or educational agency. Section 511 of the Act does not grant the Department the authority to impose this or any other requirement on entities holding

special wage certificates under the FLSA. Recognizing the importance of these requirements, the Secretary proposed part 397, taking the initiative to regulate on those provisions for which the Department is solely responsible. Under section 511 of the Act, the Department has the authority to regulate the activities and services that must be provided to an individual before the individual is eligible for, or may continue work compensated at a subminimum wage. Additionally, the Department has the authority to regulate how documentation of these actions is provided by the DSU to the individual with a disability, including the documentation process developed by the DSU in consultation with the State educational agency. We have revised final §397.2(a)(1) to specify the Department's jurisdiction over the documentation process. Lastly, while States, not the Department, have oversight of services by local school districts under the IDEA, the Department has the authority under section 511 of the Act to prohibit State and local educational agencies from entering into a contract or other arrangement with certain entities for the purpose of operating a program under which a youth with a disability is engaged in work compensated at a subminimum wage. The Department has enforcement authority over State

and local educational agencies that violate this prohibition.

Contrary to the opinion of some commenters, the Department of Labor rather than the Department has enforcement authority and jurisdiction over entities holding special wage certificates, including the suspension or revocation of these certificates. Despite recommendations that we require the Department of Labor to revoke violators' section 14(c) certificates if entities are found to be in violation of section 511, the statute does not authorize the Department of Education to do so; any suspension or revocation and any related regulations must be undertaken and promulgated by the Department of Labor.

Changes: We have revised final §397.2(a)(1) to state that the Department has jurisdiction over the documentation process developed by the DSU in consultation with the State educational agency.

Interplay of the Other WIOA Rulemakings

Comments: One commenter noted that the Department of Labor's NPRM covering programs authorized under titles I and III of WIOA, as well as the joint NPRM issued by the Departments of Education and Labor for the workforce

development system, did not address section 511 or the Department of Labor's enforcement of the documentation requirements for hiring or retaining individuals with disabilities in subminimum wage employment.

Discussion: In response to the comment regarding the lack of mention of section 511's requirements or the Department of Labor's enforcement responsibilities either in its program-specific NPRM (80 FR 20690 (April 16, 2015)) or in the joint NPRM issued by the Departments of Education and Labor (80 FR 20574 (April 16, 2015)), the Secretary believes it would not have been appropriate to do so for two reasons. First, the joint NPRM focuses solely on jointly administered requirements imposed by title I of WIOA on the Department of Education and the Department of Labor's Employment and Training Administration. The explicit requirements set forth in title I make both the Department and the Department of Labor's Employment and Training Administration equally responsible for administering and monitoring all jointly administered requirements governing the workforce development system.

Section 511, on the other hand, imposes requirements on State and local educational agencies and DSUs administered by the Department, that are separate and

distinct from the restrictions imposed on entities holding section 14(c) certificates that fall under the exclusive purview of the Department of Labor's Wage and Hour Division. There is nothing in section 511 of the Act that shifts the responsibility for enforcement under the FLSA either to the Department exclusively or to the Department jointly with the Department of Labor. In fact, section 511(b)(3) of the Act requires that section 511 be construed in a manner that is consistent with the FLSA. Therefore, the Department of Labor retains the authority to enforce all minimum wage and subminimum wage requirements for entities holding special wage certificates.

Second, the Department of Labor's program-specific NPRM focuses solely on program-specific requirements imposed by titles I and III of WIOA. Section 511, on the other hand, is contained in title V of the Act, which is contained in title IV of WIOA. As such, the provisions of section 511 would not have been appropriate for the Department of Labor's program-specific NPRM. Moreover, the enforcement authority in section 511 that belongs to the Department of Labor resides with a different division, specifically the Wage and Hour Division, than that covered by the Department of Labor's program-specific NPRM. Rules

required under the FLSA related to the provisions of section 511 are the responsibility of the Department of Labor.

Changes: None.

Reviewing Documentation

Comments: Many commenters suggested that the final regulations specify timelines for reviewing documentation. One commenter stated that proposed §397.2 does not address enforcement, either by DSUs or the Department of Labor, for the failure of section 14(c) certificate holders to maintain required documentation. The commenter also stated that it is unclear whether the Department of Labor has the ability to revoke a license for a workshop that fails to keep the required documentation under final §§397.20, 397.30, and 397.40.

Several commenters emphasized the importance of enforcing the document review process. They suggested that the DSU or its contractor authorized to review individual documentation maintained by entities holding section 14(c) certificates have an enforcement mechanism to address deficiencies and violations. These commenters urged the Department to take a stronger stand to ensure that corrective actions can be taken by the DSU or its

contractor. Another commenter requested that the final regulations define the consequences for non-compliance. One commenter suggested that the DSU should be required to report deficiencies to the Department of Labor or the Client Assistance Program (CAP).

Some commenters stated that DSUs are not enforcement or compliance agencies and requested clarification regarding enforcement authority in the documentation review process. One commenter agreed that while it was clear in the proposed regulations that the Department of Labor oversees entities holding section 14(c) certificates and the payment of subminimum wages to individuals with disabilities, further clarification of the DSU's role and scope was required. Without it, the DSU might become the "de facto" organization responsible for policing subminimum wage certificates rather than providing guidance and technical assistance.

One commenter urged that the final regulations task the Department of Labor with enforcing provisions related to the review of documentation since it already monitors entities holding special wage certificates and reviews employee documentation, unlike DSUs. If the final regulations also include the remedy of revoking an entity's

14(c) certificate for failure to maintain the required documentation for individuals employed at subminimum wage, the Department of Labor has the capacity to implement that remedy. In the view of the commenter, imposing an enforcement obligation on the DSUs would be burdensome and likely result in no enforcement at all.

Discussion: Many commenters suggested final part 397 include timelines for the review of documentation. Section 511(e)(2)(B) of the Act imposes no specific requirements on when, how often, or how reviews must be done. Rather, the statute states that the reviews will be conducted at a time and in a manner as necessary, consistent with regulations established by the DSU or the Secretary of Labor. Therefore, under section 511(e)(2)(B) of the Act, requirements governing the reviews, including whether or when they must be done, are beyond the scope of these final regulations.

Although some commenters requested that we provide the DSU or its contractor an enforcement mechanism for addressing documentation deficiencies and violations by entities holding section 14(c) certificates, the Secretary lacks the statutory authority to do as the commenters suggest. Likewise, the Secretary lacks the statutory

authority to define the consequences for non-compliance by entities holding special wage certificates under the FLSA, which rests with the Department of Labor, or to require the DSU to report non-compliance by these entities to the Department of Labor or to the CAP. Having said this, nothing in section 511 prohibits a DSU from informing the Department of Labor's Wage and Hour Division of non-compliance it finds during any documentation review and doing so may assist in supporting the Department of Labor's efforts in monitoring compliance. A more detailed discussion of this issue is presented in the Review of Documentation (§397.50) section later in this preamble. As discussed under the CAP and PAIR (Protection and Advocacy of Individual Rights) section, the reporting of non-compliance to the CAP is not authorized.

We acknowledge that reviewing individual documentation held by the entities holding special wage certificates, as authorized by section 511(e)(2)(B) of the Act, may be regarded as burdensome to DSUs. Section 511 does not require that DSUs conduct these reviews. Rather section 511(e)(2)(B) merely subjects entities holding section 14(c) certificates to these reviews in an effort to ensure that the intent of section 511 is being fulfilled. These

reviews may be conducted in a manner and at such time as is deemed necessary, consistent with a DSU's or the Department of Labor's regulations. While the Secretary agrees with the comment that the Department of Labor is experienced with conducting these reviews, the Secretary does not have the statutory authority to require that the Department of Labor be solely responsible for the documentation reviews. Section 511(e)(2)(B) of the Act clearly grants authority to the DSUs to conduct these reviews as well.

Changes: None.

CAP and PAIR

Comments: Many commenters suggested that CAPs and PAIR programs have jurisdiction for reviewing compliance with section 511. To ensure that required activities are completed and are meaningful (i.e., not just checklist actions), some commenters recommended that the CAP or the PAIR agency be empowered to represent students and others with disabilities employed at subminimum wages under section 511. Commenters emphasized that, given the role of CAPs in the new requirements in sections 113 and 511 of the Act, the regulations should define this role and provide the CAPs the authority and ability to monitor and effectively advocate for individuals with disabilities.

The commenters noted that the CAPs have access to workers in sheltered workshops and their records, regardless of whether they are VR program consumers. The commenters endorsed the need for independent advocates to ensure that DSUs and entities adhere to the requirements of section 511 to make the most of the opportunity presented in the Act to improve the employment of individuals with disabilities.

One commenter requested that we require that the protection and advocacy systems have access to any entity covered under sections 113 and 511 of the Act to monitor for rights and safety compliance, which includes the ability to speak with individuals with disabilities privately and to access records with the consent of an individual service recipient, parent, or guardian. Additionally, the commenter suggested that we require CAP staff with similar access to advise individuals employed by an entity holding a section 14(c) certificate of their rights and, with consent, to access their records.

Discussion: With respect to the comments regarding the CAPs, section 112(a) of the Act, as amended by WIOA, specifically requires CAPs to inform and advise clients and client-applicants of all available benefits under the Act, including under section 511. Clients or client-applicants,

as defined in final 34 CFR 370.6(b) for purposes of the CAP, are individuals seeking or receiving services under the Act, including individuals seeking or receiving services under section 511. Upon the request of clients or client-applicants, CAPs may assist and advocate for them, including by pursuing legal, administrative, or other appropriate remedies to protect their rights and ensure access to the services under the Act.

Although several commenters expressed concerns that the proposed regulations did not provide CAP and PAIR programs with the authority to access records and conduct monitoring, the Secretary does not agree that CAP or PAIR programs have the authority to access records in the manner the commenter suggests. The advocacy provided by CAPs, whether individual or systemic, must be at the request of clients or client-applicants and must be solely for the purpose of protecting their rights or to facilitate their access to services under the Act. In representing the client or client-applicant upon that individual's request, CAPs could access relevant records of individuals with disabilities under section 511 of the Act, so long as they follow the requirements of the holder of those records,

which typically require the informed written consent of the client or client-applicant.

PAIR programs have limited monitoring authority. PAIR programs provide advocacy and legal services to protect the rights of individuals with disabilities who are not eligible for services from other components of the protection and advocacy system and whose concerns are beyond the scope of the CAP. Since section 112 of the Act specifically authorizes the CAP to assist individuals with disabilities receiving services under section 511, such activities would fall outside the scope of the PAIR programs.

Despite the suggestion that independent advocates ensure that DSUs and entities adhere to the requirements of section 511 to make the most of the opportunity presented in the Act to improve the employment of individuals with disabilities, there is no statutory basis to require independent advocates to take on this role. There is no mention of independent advocates in section 511 of the Act, and these entities are not within the purview of the Department. Having said this, there is nothing in section 511 to preclude a DSU or the Department of Labor from

contracting with an independent advocate to conduct reviews of documentation.

On the other hand, section 112 of the Act, as amended by WIOA, does not authorize CAPs to engage in advocacy for the sole purpose of gaining general access to records or conducting monitoring. Since section 112 of the Act, as amended by WIOA, references the applicability of the requirements of the CAP to section 511 already, we do not believe that additional language is needed in final part 397. The Department has, however, made minor revisions to final 34 CFR part 370 to clarify that CAPs may advocate on behalf of clients or client-applicants requesting assistance with issues arising under section 511. Final 34 CFR part 370 is published elsewhere in this issue of the Federal Register.

Changes: None.

Rules of Construction (§397.3)

Comments: A few commenters requested that we revise §397.3 to emphasize that nothing in section 511 or final part 397 changes or affects a State's obligations under the U.S. Supreme Court's 1999 Olmstead decision, subsequent U.S. Department of Justice enforcement actions, or the rules established for home- and community-based services by the

U.S. Department of Health and Human Services' Center for Medicare and Medicaid Services (CMS).

Discussion: Section 511 and final part 397 are consistent with the Olmstead decision and other requirements for community- and home-based services. Under each of the requirements mentioned by the commenters, services must be provided in the community to the extent possible.

Section 511 gives individuals every opportunity possible to obtain competitive integrated employment by requiring that youth with disabilities receive certain services before beginning employment at subminimum wages and that individuals with disabilities of any age receive certain services every six months for the first year of subminimum wage employment and annually thereafter as long as subminimum wage employment continues.

Moreover, under section 511(b)(1) of the Act, nothing in section 511 is to be construed as changing the purpose of the Act, which is to empower individuals with disabilities to maximize their opportunities to achieve competitive integrated employment, nor is section 511 to be construed as promoting subminimum wage. Final §397.3 sets forth the "rules of construction" consistent with those set forth in section 511(b) of the Act. Paragraphs (a) and (b)

of final §397.3 promote opportunities for competitive integrated employment for individuals with disabilities. Therefore, the Secretary declines to make the suggested revision.

Changes: None.

What Regulations Apply (§397.4)

Comments: None.

Discussion: Although we received no comments specific to proposed §397.4, we received several comments about various provisions in part 397 regarding informed choice and confidentiality. Specifically, we received comments asking whether an individual with a disability has the right to refuse to participate in activities required by section 511 of the Act and part 397. As the Secretary has stated throughout this preamble, an individual has the right to exercise informed choice regarding participation in the activities required by this part. The Secretary has revised final §397.4(b) to highlight 34 CFR §361.52 as being applicable to final part 397.

In addition, we received comments asking whether the DSU could provide documentation to a family member of an individual with a disability. A DSU must protect all personal information regarding an individual in its

possession, pursuant to final 34 CFR §361.38. To highlight this requirement, we have revised final §397.4(b) to specifically mention the confidentiality requirements of final 34 CFR §361.38.

In addition to these specific changes in final part 397, we also made conforming changes in final 34 CFR part 361 to make clear that final 34 CFR §§361.38 and 361.52 apply to applicants and recipients of services. In so doing, we ensure that individuals receiving services required by part 397, regardless of whether they have applied for or been determined eligible for vocational rehabilitation services, are still protected by the confidentiality and informed choice requirements. These changes were discussed in the preamble to final part 361 in Part B of the Analysis of Comments.

Changes: We have revised final §397.4(b) to highlight final 34 CFR §361.38 and 34 CFR §361.52 as being applicable to final part 397.

What Definitions Apply? (§397.5)

Comments: A few commenters suggested that the Department provide specific definitions for the terms “self-advocacy,” “self-determination,” and “peer mentoring training opportunities” to ensure integrity and reflect the intent

of section 511. One commenter requested a definition for "certain information." Another commenter asked whether the term "special wage certificate" in proposed §397.5(c)(2) included all types of section 14(c) certificates issued by the Department of Labor (e.g., business certificate holders and patient workers) among those certificate-holding entities that must comply with section 511 of the Act. The commenter also asked that we clarify in §397.5(d) whether "entity" includes associated businesses affiliated with a section 14(c) certificate holder, such as a non-profit community rehabilitation program that has a for-profit business in the same location.

Discussion: We appreciate the commenters' recommendations for additional definitions; however, we use these terms in part 397 as they are commonly understood, just as they are used in section 511 of the Act. Attempting to define these terms could cause us to inadvertently define the terms too broadly or too narrowly. This is of particular concern both because we would be defining these terms after the comment period has ended, without the benefit of public input, and because this is a new statutory provision, and we do not yet have institutional experience with how DSUs may implement them in this context.

As commonly understood, “peer mentoring” generally involves individuals with disabilities providing guidance, counseling, and advice to other individuals with disabilities based upon their own experiences and training and the experiences of others they know. “Self-advocacy” generally involves developing the skills, knowledge, and confidence to stand up for oneself and using appropriate means to obtain one’s goals. Finally, “self-determination” generally means having the abilities, attitudes, skills, and opportunities to play an active and prominent role in living and planning one’s life and future. Neither final part 397 nor section 511 of the Act includes the phrase “certain information.”

Next, “special wage certificate” applies to all entities holding section 14(c) certificates, including work centers (also known as community rehabilitation programs), hospital/residential care centers (facilities that employ patient workers), business establishments that are not a work center or an employer of patient workers, and School Work Experience Programs (SWEP). All must comply with section 511 of the Act, which provides for no exceptions and refers simply to entities holding special wage certificates issued under section 14(c) of the FLSA.

Whether “entity,” as defined in final §397.5(d), includes associated businesses affiliated with a section 14(c) certificate holder depends upon individual circumstances. As defined, “entity” refers to any employer who holds a special wage certificate issued under section 14(c) of the FLSA. Therefore, the factors to consider include, but are not limited to, whether the associated business is separately incorporated, operates under the same or a separate special wage certificate described in section 14(c) of the FLSA, employs or jointly employs as defined in the FLSA, individuals with disabilities at subminimum wages, shares subminimum wage employees with the section 14(c) certificate holder, or operates as a contractor or subcontractor for the section 14(c) certificate holder. The for-profit nature of an associated business of a non-profit is not a determining factor since both may hold a special wage certificate under the FLSA.

Changes: None.

Coordinated Documentation Process (§397.10)

Comments: Most commenters on proposed §397.10 supported the requirement that the DSU, in consultation with the State educational agency, develop a process, or utilize an existing process to document the completion of required

activities under section 511 of the Act by youth with disabilities prior to seeking or entering subminimum wage employment. A few commenters strongly supported using the DSU's formal interagency agreement with the State educational agency required by 34 CFR 361.22(b) as the mechanism to develop a robust documentation process, and a few commenters requested that final §397.10 reflect the role of the State Rehabilitation Council in this process. One commenter suggested that we require the interagency agreement to include a requirement that students and parents or guardians be provided training on subminimum wage employment. One commenter recommended that we require the interagency agreements to be developed with local educational agencies, in addition to State educational agencies. In addition, the commenter recommended that interagency agreements that specify data sharing requirements be developed with State agencies serving individuals with intellectual and developmental disabilities as well. The commenter suggested that the interagency agreements indicate how each agency will ensure compliance with the requirements in this section.

Several commenters recommended that the Department provide guidance detailing the documentation and

collaboration requirements of DSUs, educational agencies, and other entities under section 511. Similarly, one commenter requested that we include more specific language in the regulations regarding the types of documentation that would be acceptable, emphasizing that guidance should be sufficient to ensure that documentation is complete and meets the intent of section 511 of the Act. Some stated that proposed §397.10 focused heavily on compliance with the documentation requirements, and not the congressional intent of limiting the use of subminimum wages.

Many commenters expressed concerns about the 90-day time frame for providing documentation to youth with disabilities in proposed §397.10(c)(2) and recommended shorter time frames, such as 30 or 45 days. They noted that allowing the DSU up to 90 days to provide documentation to youth with disabilities after completing each of the required activities, which may or may not take place concurrently, could result in prolonged delays for such youth seeking to enter subminimum wage employment since there are several steps and multiple activities in the process that the youth must complete.

One commenter asked the Department to define “completed” in proposed §397.10(b)(2)(i), stating that

transition services are typically ongoing and may continue until a student graduates from high school. The same commenter posed a series of additional questions about proposed §397.10(b)(2)(ii). The commenter asked about what constitutes documentation; the level of detail required; requirements for the rigor and quality of the activities; the need for signatures, dates, descriptions and settings of activities; information about the location or setting of activities; and the DSU's obligations if the educational agency fails to provide documentation of transition activities or such activities are deemed substandard.

One commenter urged the Department to include a new paragraph in §397.10 or, alternatively, in §397.50, to require the DSU to retain copies of documentation required by this part and to provide this documentation for review by the CAP or a protection and advocacy agency.

One commenter remarked that documentation of required activities denotes completion of these activities without regard to consumer choice to participate, whereas other commenters requested clarification of what documentation would be required if an individual, exercising informed choice, refuses vocational rehabilitation services.

Finally, one commenter asked for clarification regarding whether a documentation process between the DSU and the State educational agency must be developed and what documentation is required in those States that prohibit subminimum wages for individuals with disabilities. Alternatively, the commenter suggested that emphasis should be placed upon tracking services in the regulations regardless of whether a subminimum wage prohibition exists.

Discussion: We appreciate the many comments we received regarding the documentation process. Compliance with the documentation process requirements is intended to result in limiting the use of subminimum wages. The Secretary agrees that the formal interagency agreement between the DSU and the State educational agency provides an optimal mechanism to develop and describe the documentation process required in final §397.10, and the Department appreciates the strong support we received from commenters on this point. As noted by the commenters, final 34 CFR 361.22(b)(5) requires the DSU and State educational agency to develop a formal interagency agreement that, at a minimum, provides for coordination necessary to satisfy documentation requirements set forth in final §397.10. Under final 34 CFR 361.20(c) and (d), the State Rehabilitation Council

(SRC) must provide input into the VR services portion of the Unified or Combined State Plan, and the DSU must actively consult with the SRC, if it has a Council, on its policies and procedures governing the provision of vocational rehabilitation services. The functions of the SRC in final 34 CFR 361.17(h) support Council involvement in developing the coordinated documentation process. Therefore, the Secretary does not believe it necessary to specifically state the role of the SRC in the documentation process in final §397.10.

While the Secretary agrees that students and parents or guardians can benefit from training about subminimum wage employment, the Act does not require the formal interagency agreement to include such a requirement. To add it would be inconsistent with the statutorily required actions that must be taken by either the DSU or the State educational agency with regard to the documentation process. Nonetheless, nothing in the Act precludes the DSU and State educational agency from including a training requirement in the formal interagency agreement.

Similarly, we do not believe it necessary to require, in final part 397, the DSU to enter into interagency agreements with local educational agencies and State

agencies serving individuals with intellectual and developmental disabilities, because final 34 CFR 361.24(f) and (g) provide for the DSU to enter into cooperative agreements and engage in interagency collaboration with these State agencies. These cooperative agreements could provide a mechanism for addressing, as appropriate, the requirements in final §397.10 and promote data sharing. The Secretary encourages the DSUs, local educational agencies, and State agencies serving individuals with developmental and intellectual disabilities to work collaboratively to identify individuals with disabilities, particularly youth with disabilities, who are considering or who are already engaged in subminimum wage employment.

The Secretary agrees that further operational guidance regarding the requirements for collaboration, development, and implementation of the documentation process is warranted. Therefore, the Department's Office of Special Education and Rehabilitative Services intends to collaborate with the Department of Labor's Wage and Hour Division in issuing guidance about implementing the requirements in final part 397, particularly the documentation process. This guidance will help to ensure that the documentation process works smoothly within

already-established procedures for the DSUs and State and local educational agencies, especially with regard to the protection of personally identifiable information, while also enabling efficient and effective reviews of any such documentation by the Department of Labor.

Final §§397.10 and 397.30 specify the documentation requirements. Final §397.20 describes the activities for which documentation must be provided, all of which are familiar to DSUs and local educational agencies and should pose no additional administrative burden. Each DSU has case management practices for documenting various steps in the vocational rehabilitation process, such as eligibility and ineligibility determinations, the individualized plan for employment, the provision of vocational rehabilitation services (including pre-employment transition services), and case closure. State educational agencies also have methods for documenting transition services provided to students under the IDEA. In developing the documentation process, each DSU, in coordination with the State educational agency, has flexibility to determine the most appropriate procedures for documenting required activities and for timely provision of the documentation to youth with

disabilities upon their completion of the required activities.

As proposed, §397.10(c)(2) required the DSU to provide the documentation of the completion of each of the required actions in §§397.20 and 397.30 to a youth as soon as possible, but no later than 90 days, following the completion of each of the actions. We understand the concerns raised by commenters, and we want to emphasize that we anticipate DSUs and State educational agencies will develop a process whereby the documentation in most instances will be provided either concurrently with the completion of the activity or very shortly thereafter, and we encourage them to do so.

For example, DSUs typically provide documentation of eligibility or ineligibility determinations to the individual within a very short time after the decision is made. Similarly, DSUs typically provide a copy of the individualized plan for employment to the individual at the time both parties sign the document. With regard to providing services, such as pre-employment transition services or transition services, we anticipate that the DSUs and schools will develop a streamlined approach for transmittal of the documentation by the DSU to the youth.

We proposed a period of up to 90 days to be consistent with other time frames in the vocational rehabilitation process and to enable DSUs to obtain documentation from local educational agency personnel who may not be available due to extenuating circumstances. It was never the Department's intent to delay the provision of the required documentation to any individual seeking subminimum wage employment. After considerable deliberation and balancing competing interests while not imposing undue burden on the DSUs or schools, the Secretary has modified the time frame in these final regulations. Final §397.10(c)(2) requires the DSU to provide the requisite documentation, including documentation received from the local educational agency, to the youth within 45 calendar days of completion of the activity.

For example, if a student completes a required activity provided by the local educational agency, the documentation must be transmitted to the DSU and provided to the youth all within 45 calendar days. However, if, due to extenuating circumstances additional time is needed, documentation must be provided to the youth within 90 calendar days after completion of the activity. As provided in final §397.10(c)(2)(i)(B), this exception for

extenuating circumstances is a limited exception that would cover circumstances such as , the unexpected absence of the individual necessary to provide the documentation, or a natural disaster. That said, DSUs and State educational agencies could establish a shorter time frame in their documentation processes.

We recognize that providing transition services, as well as pre-employment transition services, may be ongoing for students with disabilities. For example, under the IDEA, a student with a disability may receive transition services until the student graduates from high school with a regular diploma or exceeds the age of eligibility for a free appropriate public education. Similarly, students with disabilities may receive pre-employment transition services under the Act for as long as the student remains in an educational program and meets the definition of a "student with a disability" under final 34 CFR 361.5(c)(51). For purposes of final §397.10(b)(2)(i), the local educational agency must, consistent with confidentiality requirements of FERPA and/or the IDEA, provide the DSU documentation of transition services when a student has completed all transition services in the individualized education program. The final regulations do

not contain a definition of “completion,” as suggested by commenters, because the definition would vary widely depending on the activity. The Secretary will provide more guidance in the general operational guidance for the documentation process required by section 511 and final part 397.

Section 511 of the Act does not address what constitutes documentation, the level of detail required, requirements related to the rigor and quality of the activities, the need for signatures, dates, descriptions and settings of activities, information about the location or setting of activities, and the DSU’s obligations if the education agency fails to provide documentation of transition activities or such activities are deemed substandard. Some of these issues are best left to the DSU and State educational agency to negotiate when developing the interagency agreement or the documentation process to maximize State flexibility and accommodate the unique needs within a State. However, the Secretary agrees that some guidance would be helpful. Therefore, the Secretary has revised final §397.10(a) to state that the documentation process must address both the actual production and transmittal of documentation. Again, the transmittal of

all documentation by the educational agency to the DSU must comply with the confidentiality requirements of FERPA and the IDEA.

In addition, the Secretary has revised final §397.10(a) by adding three new paragraphs. Final §397.10(a)(1) establishes minimum requirements for information to be contained in the documentation of determinations made or the completion of an activity. Final §397.10(a)(2) establishes minimum requirements for information that must be contained in documentation in the event that a youth, or his or her parent or guardian, exercises informed choice and refuses to participate in an activity required by section 511 of the Act or final part 397. Final §397.10(a)(3) requires the DSU to retain a copy of all required documentation provided to the youth. The DSU must retain this documentation just as it would any other documentation in its case management system, and the documentation must be retained in accordance with the requirements of 2 CFR 200.333, which governs record retention for all Federal grantees.

In using an existing process or developing a new documentation process, the DSU and the State educational agency may wish to consider questions such as those posed

by the commenter but not addressed in these final regulations. In addition, the Secretary has revised final §397.10(b)(2)(i) to require the educational agency to provide the documentation to the DSU. The Secretary has also added a new requirement in final §397.10(c)(3) that the DSU provide, when transmitting documentation of the last determination made or activity completed, a cover sheet that itemizes all documentation provided to the youth. The Secretary hopes that these additions will assist DSUs and State educational agencies in developing a streamlined documentation process that will enable the expedient completion and transmittal of the documentation to the youth, and allow for the expedient review of the documentation, if a review is conducted by the DSU or the Wage and Hour Division of the Department of Labor.

Additionally, for the reasons discussed in the section titled Jurisdiction (§397.2), any access to these records by CAPs or protection and advocacy systems is subject to the requirements of sections 112 and 509 of the Act, respectively, and implementing final regulations in 34 CFR part 370 and 34 CFR part 381.

Although section 511 of the Act and final part 397 establish prerequisites for a youth with a disability to

work in subminimum wage employment, as with any vocational rehabilitation service, the youth with a disability, or his or her parent or guardian, as applicable, may exercise informed choice and refuse to participate. If a youth chooses not to participate in the activities required by section 511 of the Act and final part 397, or chooses to opt out of the vocational rehabilitation process entirely, such a choice will impact the permissibility of the youth to work at subminimum wage and preclude him or her from obtaining subminimum wage employment given the limitations imposed by section 511 of the Act and final part 397. Accordingly, DSUs should inform youth with disabilities and/or their guardians of the youth's ineligibility for subminimum wage employment if he or she refuses to participate in the required activities. As discussed previously, final §397.10(a)(2) establishes documentation requirements for when a youth refuses to participate in the required activities. Meeting these requirements demonstrates the DSU's compliance under section 511 and final part 397. The Secretary believes it is appropriate to establish an even shorter time frame for the transmittal of documentation demonstrating the youth's refusal to participate in required activities under final part 397

because there should be few administrative reasons for delay. Thus, in this circumstance, final §397.10(b)(2)(ii) requires that the documentation be provided to the youth, within 10 calendar days of the youth's refusal.

In a State that prohibits the payment of subminimum wages to individuals with disabilities, the DSU and the State educational agency still must develop a documentation process in accordance with final §397.10, although it may be used infrequently. This documentation would be necessary if a youth with a disability seeks subminimum wage employment in another State that does not prohibit subminimum wages.

Finally, the Department, upon further review, notes that the documentation of pre-employment transition services in final §397.10(b)(1) refers to a "student with a disability" rather than a "youth with a disability" because only a student with a disability may receive pre-employment transition services. Further, the section states more directly that the appropriate school official responsible for providing transition services will provide the DSU documentation of completion of appropriate transition services under the IDEA.

Changes: We made several changes to final §397.10. First, we revised final §397.10(a) to state that the documentation process must cover both the production and transmittal of the documentation. The process must ensure all confidentiality requirements of FERPA and the IDEA are satisfied.

Second, we revised final §397.10(a) by adding three paragraphs. Final §397.10(a)(1) establishes minimum information that must be contained in documentation of a youth's completion of required activities. Final §397.10(a)(2) establishes the minimum information that must be contained in documentation when a youth refuses to participate in the required activities. Final §397.10(a)(3) requires the DSU to retain copies of all documentation required by final part 397.

We revised final §397.10(b)(1) to clarify that we are referring to a "student with a disability" with regard to the documentation of the completion of appropriate pre-employment transition services. We also revised §397.10(b)(2)(i) to clarify that the appropriate school official responsible for the provision of transition services must provide the DSU documentation of completion of appropriate transition services under the IDEA. We

revised final §397.10(c)(2) by adding two new paragraphs. Final §397.10(c)(2)(i) requires the DSU to provide all requisite documentation to the youth within 45 calendar days of the determination or the completion of the required activities, unless extenuating circumstances make additional time necessary. In that case, the documentation must be provided to the youth within 90 calendar days of the determination or completion of the activity or service. The final regulations also provide examples of what could constitute extenuating circumstances necessitating the additional time. Final §397.10(c)(2)(ii) requires the DSU to provide documentation of the youth's refusal to participate in required activities within 10 calendar days of the refusal. Lastly, final §397.10(c)(3) was added to require the DSU to provide a coversheet that itemizes all documentation provided to the youth when transmitting documentation of the last determination made or activity completed.

Responsibilities of A DSU to Youth with Disabilities Who Are Known to Be Seeking Subminimum Wage Employment (§397.20)

Reasonable Period of Time

Comments: Most commenters on this section recommended changes in proposed §397.20(a)(2)(ii)(B) and proposed §397.20(b)(3)(i) related to the determination that a youth with a disability is not able to achieve the employment goal specified in his or her individualized plan for employment, other than supported employment, after working toward the goal for a reasonable period of time with appropriate supports and vocational rehabilitation services. The commenters recommended that, for these youth, the reasonable period of time be consistent with, or no less than, the time period provided in proposed §397.20(b)(3)(ii) for individuals with disabilities whose specified employment goal is in supported employment. A few commenters recommended defining the time frame for "reasonable period of time" for all youth, regardless of whether they were seeking supported employment outcomes or other outcomes, as 36 months or up to four years since the DSU is being allowed to provide up to four years of extended services for youth in supported employment. The commenters stated that limiting the length of time the DSU can devote to helping youth with disabilities achieve competitive integrated employment creates barriers to the policy of maximizing steps to facilitate attaining

competitive integrated employment and requested that the Department amend the proposed rule to designate a minimum, not maximum, period of time during which DSUs must assist youth with disabilities to attain integrated employment outcomes, including supported employment. Citing the low participation rate of individuals with disabilities in the labor force, coupled with the significant barriers to employment faced by these individuals, one commenter recommended a minimum of three years as the appropriate amount of time for youth with disabilities to work toward competitive integrated employment before considering segregated work and subminimum wage employment. This commenter stated that, without a minimum time frame, the proposed regulations offer little to prevent youth from continuing to settle for subminimum wage employment. Some premised their suggestion of extending the time frame to four years based upon the DSU being allowed to provide up to four years of extended services for youth in supported employment. On the other hand, one commenter suggested that, consistent with the provision of supported employment services, in no case should the reasonable period of time exceed two years.

Suggesting that the distinctions in “reasonable period of time” between those youth with supported employment goals and those with other employment goals prove more confusing than helpful, a few commenters supported language that reflects an individualized approach for defining “reasonable period of time” for all youth, including those individuals in supported employment. One commenter stated that, without uniform time frames for both youth with disabilities seeking supported employment outcomes and youth seeking other competitive integrated employment outcomes, DSUs may circumvent the necessary level of effort needed in working with individuals by simply writing an individualized plan for employment that does not include the goal of supported employment.

Discussion: We appreciate the many comments we received about defining “reasonable period of time” before closing a service record as unsuccessful when a youth has been pursuing, through an individualized plan for employment, an employment outcome (as defined under final 34 CFR 361.5(c)(15)), other than in supported employment. Although many commenters requested a specified time frame—of anywhere from 24 months, to coincide with that for the provision of supported employment services, to up to four

years to coincide with the amount of time allowed for the provision of extended services for a youth with a disability—we believe that a “reasonable period of time” must take into account the disability-related and vocational needs of the individual, as well as the anticipated length of time required to complete the services identified in the individualized plan for employment to achieve an employment outcome. The time frame for providing supported employment services is prescribed in section 7(39) of the Act, as amended by WIOA, and final 34 CFR 361.5(c)(54), but the Act does not limit the amount of time for providing any other vocational rehabilitation service. Therefore, we believe that it is not in the best interest of individuals with disabilities to limit the time for providing vocational rehabilitation services other than supported employment services. To do so might unnecessarily restrict the amount of time an individual may need to complete the services necessary to achieve an employment outcome in competitive integrated employment.

We understand the concerns expressed by many of the commenters about limitations on the amount of time the DSU may devote to assisting youth with disabilities to achieve

competitive integrated employment, especially if someone is not seeking supported employment. We also understand the desire to provide a minimum time, rather than a maximum time, during which the DSU may help youth with disabilities attain employment outcomes, including supported employment. However, we believe that with allowable extensions, and based upon the needs of the individual and the individual's disability, DSUs have the flexibility to provide all services and supports necessary for an individual to achieve competitive integrated employment in a reasonable time prior to closing the individual's service record as unsuccessful.

Changes: None.

Requirements for Closure

Comments: A few commenters recommended that we revise proposed §397.20(a)(2)(ii)(C) to reference 34 CFR 361.47(10) rather than the more general 34 CFR 361.47 when addressing the requirements for closure of the service record of a youth with a disability. The commenters stated that under 34 CFR 361.47(10), the vocational rehabilitation counselor will not accidentally classify the youth with a disability as having achieved competitive integrated employment, when, in fact, the youth has obtained

subminimum wage employment. One commenter also suggested that this change would serve as a reminder to vocational rehabilitation counselors that a placement of a youth with a disability in a subminimum wage environment is less desirable than a placement into competitive integrated employment.

Discussion: We do not agree with the recommendation that we revise proposed §397.20(a)(2)(ii)(C) to reference final 34 CFR 361.47(10), rather than the more general final 34 CFR 361.47, when addressing the requirements for closure of a service record for a youth with a disability. Final 34 CFR 361.47 contains other requirements, and limiting the reference to final 34 CFR 361.47(10) could provide the impression that other requirements do not apply. We anticipate that the discussion in part 361 of these regulations found elsewhere in this issue of the Federal Register regarding "competitive integrated employment" and "employment outcome" will serve to clarify that employment at subminimum wages is not a successful outcome for purposes of the VR program.

Changes: None.

Pre-employment Transition Services

Comments: Several commenters provided comments about the DSU's responsibility to document completed pre-employment transition services. One commenter asked that the final regulations specifically prohibit the use of segregated settings such as sheltered workshops for providing pre-employment transition services, regardless of whether these settings pay subminimum wages. Given that this section applies to youth with disabilities, a commenter requested clarification regarding how youth with disabilities who are age 24 or younger, who are not students with disabilities, may be provided pre-employment transition services that are, by definition, provided to students with disabilities. The commenter stated that although a youth with a disability who is no longer a student may have received pre-employment transition services, or transition services under the IDEA, a DSU would find it challenging to document the services after the youth has left the education system. As an alternative, the commenter suggested that we make an exception to the definition of "pre-employment transition services" for the purpose of proposed §397.20 to include all youth in the provision and documentation of pre-employment transition services. Another commenter stated that it would be overly burdensome to track all individuals

receiving pre-employment transition services and their activities in order to provide documentation to those few considering subminimum wage employment. The commenter recommended removing the requirement for documentation of pre-employment transition services from proposed §397.20(a)(1).

One commenter was concerned that proposed §397.20 served as a loophole for the education system to continue to view subminimum wage employment as a viable alternative and suggested that the final regulations be strengthened by specifying that youth must be provided exposure to, and opportunities for, experiences such as integrated work-based learning programs, summer jobs, summer volunteering, and summer internships to enable them to make an informed choice to pursue subminimum wage employment.

Discussion: As discussed in the Analysis of Comments and Changes section for part 361 earlier in this preamble, we do not have the authority to prohibit the use of segregated settings, such as sheltered workshops, for providing pre-employment transition services. That being said, assessment services and pre-employment transition services are to be carried out in an integrated setting to the

maximum extent possible in accordance with final 34 CFR 361.5(c)(5) and final 34 CFR 361.48(a)(2), respectively.

We understand the confusion created by proposed §397.20(a)(1), which covered the documentation of completed pre-employment transition services that must be provided to youth by the DSU, when, in fact, pre-employment transition services are provided to students with disabilities, not to all youth with disabilities. We have revised this paragraph to clarify that documentation for the completion of pre-employment transition services applies to students with disabilities. We have made further revisions for the documentation of the completion of transition services under the IDEA, which the DSU is also responsible for providing to youth once the local educational agency has provided such documentation to the DSU.

We disagree with the commenter’s alternative suggestion of making an exception to the definition of “pre-employment transition services” in final 34 CFR 361.5(c)(42) to include all youth for purposes of this part, as that would be inconsistent with section 113 of the Act.

We understand that a DSU would find it challenging to obtain documentation of services after a youth has left the

education system; however, educational systems must maintain records of the provision of transition services to students provided through an individualized education program.

We appreciate the commenter’s concern about the burden of tracking individuals receiving pre-employment transition services and their activities in order to provide documentation to a few individuals that might seek subminimum wage employment. The commenter recommended removing the requirement from final §397.20(a)(1). However, this would be inconsistent with section 511(d)(2)(a) of the Act.

We agree that youth with disabilities may find integrated work based learning programs, summer jobs, summer volunteering, and summer internships valuable and these experiences could better enable them to make an informed choice of whether to pursue subminimum wage employment. However, we do not believe that embedding this language in the regulations in part 397 would strengthen the final regulations, as they already incorporate the requirements to document the completion of pre-employment transition services and/or transition services for youth with disabilities, which include these activities.

Finally, we made a technical change in the title of this section, replacing “considering” with “seeking” to be consistent with §397.30. “Seeking” more appropriately describes those youth who have determined that they would like to pursue subminimum wage employment.

Changes: We added §§397.20(a)(1)(i) and (ii) to require DSUs to document completion of transition services under the IDEA in addition to completion of pre-employment transition services under the VR program. Additionally, we inserted “a student with a disability” in final §397.20(a)(1)(i) because pre-employment transition services are available only to students with disabilities. Finally, we replaced the word “considering” with “seeking” in the title of this section to be consistent with the title in §397.30.

Other Comments

Comments: A commenter posed a series of questions and concerns about how to serve eligible VR consumers who might be contemplating subminimum wage employment if there is a lag time or lack of supported employment providers or customized employment and the consequences to consumers and families, as well as DSUs, if an individual chooses to opt out of the vocational rehabilitation process.

Other commenters asked whether the employment goal specified in the individualized plan for employment needs to be consistent with competitive integrated employment when considering the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests and informed choice. Also, they asked what the expectations are around the determination of ineligibility, including how many work experiences must be provided and how long to pursue supported employment after the 24-month period or customized employment when resources for long-term supports are not available. Finally, commenters asked how to consider an individual's geographic area when providing referrals to Federal and State programs and other resources that offer employment-related services and supports designed to enable the individual to explore, discover, experience, and attain competitive integrated employment.

Discussion: We understand that commenters have concerns and questions about the responsibilities of DSUs in this section. Limited resources and available providers of services, including providers of long-term supports, provide a challenge for DSUs as they work to locate services that will assist individuals with disabilities in

achieving competitive integrated employment or supported employment. Without sufficient service providers or resources, a youth may choose to opt out of the VR process entirely, precluding him or her from achieving even subminimum wage employment given the limitations imposed by section 511 of the Act and final part 397. In the event a youth opts out of the vocational rehabilitation process because of a lack of resources in the community, there would be no consequences for the DSU under this part.

The specified employment goal must be consistent with the general goal of competitive integrated employment when considering the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice in accordance with section 102(b)(4) of the Act, as amended by WIOA, and final 34 CFR 361.46(a). The answers to the other questions posed by the commenter are dependent upon circumstances and require the judgment of the DSU and the vocational rehabilitation counselor in consideration of the consumer's choice and needs.

Changes: None.

Responsibilities of A Local Educational Agency to Youth with Disabilities Who Are Known To Be Seeking Subminimum Wage Employment (§397.30)

Comments: Commenters recommended several changes to proposed §397.30 regarding the responsibilities of a local educational agency to youth with disabilities seeking subminimum wage employment. Several commenters recommended that we require the local educational agency to retain copies of documentation that a youth has completed transition services and to make this documentation available for review by the CAP or a protection and advocacy system. A few commenters also recommended that the phrase “who are known to be seeking subminimum wage employment” or, alternatively, “who are known to be” be deleted from the title of proposed §397.30, presumably to include all youth with disabilities under the responsibilities of the local educational agency in this part, not just those seeking subminimum wage employment. Commenters also recommended that the language indicating that a local educational agency may provide a youth with a disability documentation of transitions services received under the IDEA be changed to indicate that this is not optional, but a requirement. Finally, one commenter offered additional language that a local educational agency is responsible for referring youth with disabilities considering subminimum wage employment as a transition

outcome to the designated State unit in order to complete the requirements under proposed §397.20.

Discussion: We appreciate all of the comments and suggestions on this section. While the suggestion to require local educational agencies to retain copies of documentation that a youth has completed transition services is unnecessary given the requirements of 2 CFR 200.333, we understand the concerns expressed. After much consideration, the Secretary has revised final §397.30 to require the educational agency to retain a copy of all documentation provided to the DSU in accordance with 2 CFR 200.333. This requirement in final §397.30(d) should pose no additional burden to the local educational agencies because the agencies are already subject to Federal record retention requirements. Final §397.30(d) is consistent with a similar provision in final §397.10(c), thereby ensuring consistency between the DSU and local educational agencies for purposes of the documentation process. Similarly, the Secretary has revised final §397.30(a) to state that the documentation transmitted to the DSU must comply with the confidentiality requirements of FERPA and the IDEA. Additionally, final §397.30 is revised to establish minimum information content requirements for the

documentation to be provided to the DSU upon completion of the transition services under the IDEA or the youth's refusal to participate in those activities. In addition, the Secretary has also added a new paragraph in final §397.30 to require a time frame for the transmittal of the documentation to the DSU—of no more than 30 calendar days after completion of the transition service, or no more than 60 calendar days after completion of the transition service if additional time is needed due to extenuating circumstances, or within 5 calendar days of the youth refusal to participate. This gives the DSU the time necessary to transmit the documentation to the youth within the time required by final §397.10(c).

In addition, final §397.30(c)(2) requires educational personnel, when transmitting documentation of the last service or activity completed by the youth to the DSU, to provide a coversheet that itemizes all documentation transmitted to the DSU regarding that youth. In so doing, the DSU will have a checklist to ensure receipt of each documentation, thereby ensuring the youth obtains all necessary documentation. These additional provisions are necessary to ensure consistency between the DSU and the local educational agencies in the documentation process.

All of these changes are consistent with those made in final §397.10.

As previously discussed in other sections of this part, the CAP and protection and advocacy systems already have access to records in accordance with their governing statutes and regulations and section 511 of the Act does not expand this access.

We disagree with the recommendation to remove the phrase “who are known to be seeking subminimum wage employment” or, alternatively, “who are known to be” from the title in final §397.30. The provisions relate directly to youth who are contemplating or seeking subminimum wage employment, and local educational agencies have knowledge of these individuals in meeting the IDEA requirements for transition services in the individualized education program in 20 U.S.C. 1414(d)(1)(A)(i)(VIII)(aa)-(bb).

In considering the commenter who recommended making it mandatory for the local educational agency to provide documentation of the completion of required activities to the student, upon further review, the Department has determined that providing documentation of completed activities by the local educational agency directly to a youth with a disability seeking subminimum wage employment

is not mandatory, and we are removing this language in the final regulation to be more consistent with the statute and final §397.10. The documentation must be provided by the local education agency to the DSU in accordance with section 511(d)(2)(ii) and (iii).

The local educational agency, in accordance with the requirements in section 511(d)(2) and the documentation process developed by the DSU in consultation with the State educational agency, must provide documentation to the DSU. The DSU is then responsible under section 511(d)(2)(A)(iii) to provide this documentation to the student with a disability. Final §§397.10 and 397.30 make this requirement clear and ensure consistency with specific statutory requirements.

While we agree that it is in the best interest of a student with a disability considering subminimum wage employment to be referred by a local educational agency to the DSU in order to complete the requirements under final §397.20, we believe that this is best left to the DSU and the State educational agency to negotiate when developing the interagency agreement required by 34 CFR 361.22. Nevertheless, we believe that this practice represents the type of coordination and cooperation that should exist

between DSUs and local educational agencies and enables collaboration with the student with a disability to provide a complete program of services that may result in an employment outcome in competitive integrated employment. See a more detailed discussion of this issue earlier in this preamble. Regardless, once the DSU receives documentation of completed transition activities from the local educational agency, then the individual will become known to the DSU, and thus "referred."

Changes: We have revised final §397.30 in several ways. We have revised final §397.30(a) by deleting the language stating that a local educational agency may provide documentation to a youth of the completion of actions described in §397.20(a) and inserting in its place language that the local educational agency must provide the DSU with such documentation in accordance with section 511(d)(2). We also stated that the documentation must be transmitted in a manner that complies with the confidentiality requirements of FERPA and the IDEA. We added final §397.30(b), which establishes minimum content requirements for the documentation that must be transmitted by the local educational agency to the DSU. We added final §397.30(c), which establishes the time frame under which a local

educational agency must provide the DSU with required documentation and requires the local educational agency to retain a copy of all documentation provided to the DSU under this part. Final §397.30(c)(2) requires educational personnel to transmit a coversheet to the DSU that itemizes all documentation provided to the DSU regarding the youth. This coversheet is to be provided when the educational personnel transmits documentation of the last activity completed by the youth. Lastly, we added final §397.30(d), which establishes the timeline in which documentation must be transmitted by the educational agency to the DSU.

Contracting Prohibition on Educational Agencies (§397.31)

Comments: A few commenters supported proposed §397.31. A few commenters also suggested that the Department of Labor has the responsibility to oversee the DSUs and State educational agencies to ensure that subminimum wage employment is not being used inappropriately.

Most commenters expressed concern that the proposed regulation was being interpreted by educational agencies and DSUs to mean that an entity that holds a section 14(c) certificate is automatically prohibited from providing any service paid for by local and State educational agencies and that this was not the intent of section 511(b)(2) of

the Act. The commenters requested that we clarify that State and local educational agencies may contract with entities holding section 14(c) certificates such as community rehabilitation programs for other purposes, including transition and pre-employment transition services that are beneficial to students with disabilities and supported by parents of these individuals. One commenter asked whether proposed §397.31 eliminates the ability of local educational agencies to contract with holders of section 14(c) certificates for the provision of internships and work-based tryouts, among other services.

One commenter mentioned that in rural States or areas, the availability of services may be limited to providers who hold special wage certificates, thus provisions in part 397 should not preclude students from accessing the expertise section 14(c) certificate holders have in assisting people into competitive integrated employment.

Additionally, a commenter strongly emphasized the desire to sustain a wide range of quality rehabilitation services for youth with disabilities and believed that restricting the legitimate engagement of State educational agencies with section 14(c) certificate holders would result in a reduction of service availability, and curtail

learning opportunities and services available to youth with disabilities.

A commenter asked whether schools may contract with providers that offer subminimum wage and minimum wage services when the only service being contracted for would be opportunities paid at minimum wage.

A few commenters suggested that the regulatory language as proposed should not be modified to suggest that some types of contracts between an educational agency and an entity using section 14(c) certificates are permissible. A few others expressed support for the regulation but suggested that the language should clearly indicate that States cannot engage at all in any contracts for any vocational rehabilitation services with agencies that pay subminimum wages.

One commenter emphasized that the types of jobs students with disabilities are introduced to during high school correlate to the types of jobs they will obtain following graduation. They therefore supported proposed §397.31, which reduces students' exposure to subminimum wage employment and increases students' opportunities for obtaining competitive integrated employment. Similarly, another commenter stated that limiting the opportunity for

inadvertent slotting into subminimum wage employment is a step in the right direction for students with disabilities toward achieving competitive integrated employment. One commenter, citing research predicting post-school employment, suggested that all work-related activities to prepare individuals with disabilities for jobs and careers should happen in realistic integrated environments, not in segregated workplaces or where an individual is paid a subminimum wage.

A few commenters suggested that the formal interagency agreement between the DSU and the State educational agency in proposed 34 CFR 361.22 prohibit contracts or arrangements with, or referrals to, programs in which youth with disabilities are employed at subminimum wages. Commenters also recommended inserting the requirement for referrals in proposed §397.31.

Other commenters suggested inserting the word “sub-contract” between “contract” and “other arrangements” to align proposed §397.31 with the language in section 511(a) of the Act regarding entities, including contractors and subcontractors of entities. Additionally, many of these commenters also requested that the prohibition be extended to local and State educational agencies that operate a

program where a youth with a disability is engaged in subminimum wage employment. A few commenters were unclear about the term “other arrangement” and interpreted this as not specifically prohibiting referrals to programs employing youth with disabilities at subminimum wages.

A number of commenters requested either that the Department issue guidance to local and State educational agencies clarifying that the contracting prohibitions only apply to contracts for the purposes of operating a program under which a youth with disabilities is employed at subminimum wage. In the alternative, the commenters suggested that the Department require State educational agencies to issue clear policy directives to local educational agencies regarding the prohibition on State and local educational agencies contracting with section 14(c) certificate holders in order to pay individuals subminimum wages. In addition, commenters asked that the Department add additional language regarding the responsibilities of State educational agencies to enforce this provision.

Discussion: We appreciate the support for proposed §397.31. We disagree with the recommendation that the Department of Labor should have oversight responsibility for the DSUs and the State educational agencies to ensure

that subminimum wage employment is not being used inappropriately. Rather, both the Departments of Education and Labor have responsibilities for oversight under section 511. Specifically, the Department has sole responsibility for overseeing all requirements under section 511 and final part 397 that relate to requirements that fall under its purview, such as the documentation process and the prohibition against a State or local educational agency entering into a contract with an entity holding a special wage certificate for the purpose of operating a program in which a youth is compensated for work at subminimum wage. The Department of Labor, on the other hand, has sole responsibility for overseeing requirements that fall under its purview, such as those related to entities holding special wage certificates paying individuals with disabilities subminimum wages without the requirements of section 511 of the Act and final part 397 being met. There is no statutory authority for the Department to compel the Department of Labor to oversee entities, such as the DSUs and educational agencies, that are under the Department's purview.

We appreciate the significance of the contracting prohibition in section 511(b)(2) of the Act and the

comments received in response to proposed §397.31 seeking clarification and making recommendations. We agree with the substantial number of commenters that this section does not preclude State and local educational agencies from contracting with entities holding section 14(c) certificates, such as community rehabilitation programs, for purposes other than operating a program for youth under which work is compensated at a subminimum wage. In other words, nothing in section 511(b)(2) of the Act or final §397.31 precludes a State or local educational agency from contracting with an entity, even if that entity holds a special wage certificate under section 14(c) of the FLSA, for another purpose, including the provision of transition and pre-employment transition services that are beneficial to students with disabilities, so long as they are not paid subminimum wage if compensation is provided. Pre-employment transition services under final 34 CFR 361.48(a) and assessment services provided to vocational rehabilitation consumers must be provided in integrated settings to the maximum extent possible. Further, nothing in section 511(b)(2) of the Act or final §397.31 prohibits a State or local educational agency from contracting with an entity holding a special wage certificate for the

purpose of operating a program in which the youth is paid at or above minimum wage. A State or local educational agency, prior to entering into such a contract, must ensure that the youth will be paid at least minimum wage. Only in doing this can the local or State educational agency ensure its compliance with section 511(b)(2) and final §397.31. It is not necessary to revise final §397.31 because the regulation mirrors the statute and states that the prohibition is against contracting for "the purpose" of operating a program for youth under which work is compensated at a subminimum wage.

The Department also agrees with commenters who regard the contracting prohibition as a step toward limiting the progression of students and transition-age youth into subminimum wage employment, since it seeks to limit the exposure of these individuals to settings that pay subminimum wages. Final §397.31 raises expectations for both youth with disabilities and their families, and redirects them toward experiences leading to competitive integrated employment in the community.

While we understand the commenters' desire to align the language in final §397.31 with section 511(a) of the Act, which references entities holding special wage

certificates as well as their contractors and subcontractors, we disagree that it is necessary to specifically mention “subcontractors” in these final regulations. Final §397.31 prohibits the State or local educational agency from entering into a contract or other arrangement with an “entity, as defined in §397.5(d)” for the purpose of operating a program in which the youth is engaged in work compensated at a subminimum wage. Final §397.5(d) defines “entity” as an employer, or a contractor or subcontractor of that employer, that holds a special wage certificate described in section 14(c) of the FLSA. Therefore, contractors and subcontractors of the employer holding the special wage certificate are already included in that definition, making specific reference to contractors and subcontractors unnecessary. The reference to “other arrangements” in both section 511(b)(2) and final §397.31 refers to any other type of agreement (other than a contract), such as a memorandum of understanding or subcontract, through which the State or local educational agency makes arrangements with entities operating programs in which youth with disabilities are paid subminimum wages under section 14(c) of the FLSA. The term allows for a broad interpretation of the relationships that might exist

between a local or State educational agency and an entity, as well as the types of agreements they may enter into to establish those relationships, including sub-contracts. For purposes of the requirements and limitations in final part 397 (including the contracting prohibition in final §397.31), a local or State educational agency that holds a section 14(c) certificate to operate a program in which a youth with a disability is engaged in work compensated at a subminimum wage is treated in the same manner as any other entity holding a special wage certificate under section 14(c) of the FLSA.

We agree that the interagency agreement between the DSU and State educational agency, as described in 34 CFR 361.22, should include reference to the prohibition in final §397.31. Therefore, 34 CFR 361.22(b)(6), both proposed and final, requires the interagency agreement to include an assurance that neither the State or local educational agency will enter into a contract or other arrangement for the purpose of operating a program in which youth with disabilities are engaged in work compensated at a subminimum wage. Thus, final 34 CFR 361.22(b)(6) ensures consistency between the interagency agreement required under that part and the requirements of final §397.31.

The Secretary disagrees with the recommendation to revise final §397.31 to prohibit local or State educational agencies from making referrals to entities holding special wage certificates. As discussed previously, as well as in detail in the preamble to final 34 CFR part 361, the Act does not prohibit services such as assessments, pre-employment transition services, and other services from being provided by entities holding special wage certificates under section 14(c) of the FLSA. However, the Act requires that each of these services be provided, to the maximum extent possible, in integrated settings. We wish to point out that entities holding special wage certificates under section 14(c) of the FLSA, also include businesses, in addition to community rehabilitation programs, that operate in integrated settings in the community. The focus of the prohibition in final §397.31 is the payment of subminimum wages to youth with disabilities–not the setting in which the work is performed. Therefore, there is nothing in the Act to prohibit a State or local educational agency from making a referral to such entity, so long as the purpose of the referral is not for the payment of subminimum wages to the youth with a disability.

With regard to the request that final §397.31 be revised to specify that the State educational agency is responsible for enforcing final §397.31, the Secretary disagrees that such change is necessary. First, the Department will be enforcing this provision through its regular monitoring activities. Second, the prohibition applies to both the State and local educational agencies; therefore, it would not be appropriate for the State educational agency to enforce a requirement against itself. As stated above, the Department intends to issue operating guidance to the States regarding the implementation of the requirements of final part 397, including the prohibition contained in final §397.31.

Changes: None.

Responsibilities of A DSU for Individuals Regardless Of Age in Subminimum Wage Employment (§397.40)

Counseling, Information and Referral Services

Comments: Many commenters expressed support for the provision of services by DSUs described in proposed §397.40 for individuals employed at a subminimum wage, regardless of age. Many were encouraged by the requirement for ongoing information and referral, as well as, career counseling and the potential benefit that it could bring to

consumers in the future. Others suggested that proposed §397.40 require information be provided to family members and/or caregivers as appropriate, in addition to the individual. Still others asked that this section require the provision of benefits counseling so that individuals would understand the impact and benefits, rather than the perceived barriers, of moving out of subminimum wage employment into competitive integrated employment. A few indicated that it is imperative that any career counseling provide participants with information on Federal and State programs that continue healthcare and income supports to individuals with disabilities who engage in the workforce.

A few commenters expressed concerns related to the requirement to provide information and career counseling-related services to adults working in subminimum wage jobs, suggesting that the requirement places pressure on DSU staff and fiscal resources due to the sheer numbers of these individuals, and could impact the ability to serve all eligible individuals in the State through the VR program without implementing an order of selection.

Another commenter asked whether the services described in proposed §397.40 were for all individuals or just those individuals that have been served by the DSU.

Regarding required intervals for providing information and referral and career counseling, many commenters provided requests for clarification and recommendations related to the semi-annual and annual intervals for providing these services to individuals in subminimum wage employment. Several recommended referencing and reconciling the requirements under proposed §397.40 with those under proposed 34 CFR 361.55 related to semi-annual and annual reviews for individuals in extended employment or subminimum wage employment.

A few commenters sought clarification regarding the individuals to be served and whether there were differences in the requirements for youth and other individuals with disabilities. One commenter asked whether entities were to refer every subminimum wage employee for career counseling by January of 2017 or whether this section only applies to individuals who become employed in subminimum wage after the effective date of section 511, July 22, 2016, citing that, either way, the workload would be significant.

Another commenter questioned why these services were available every six months for the first year of employment only, suggesting that the more often individuals received career counseling and information and referral services,

the more likely that the individual would become comfortable with the idea of future competitive integrated employment.

Discussion: We appreciate the support for, and extensive comments and recommendations received in response to, proposed §397.40. Section 511 of the Act does not require that the DSU provide the information to the family or caregivers, as well as to the individual with a disability. As a recipient of services from a DSU, the individual with a disability would be protected by the provisions in final 34 CFR 361.38, governing the protection, use, and release of personal information, and other Federal and State privacy laws and regulations. For this reason, we lack the statutory authority to make the recommended change in final §397.40. However, if an individual chooses to include family members and caregivers in such activities, nothing would prohibit DSUs or their contractors from doing so with the informed consent of the individual. On the other hand, if a parent, other family member, or another individual has power of attorney for or guardianship over, or has any other legal authority to act as the individual's representative, the DSU could provide the information to

that representative in accordance with the laws governing that representation.

We agree with commenters that income-based benefits counseling would be beneficial to individuals with disabilities who are employed at subminimum wage. There is no prohibition in section 511 against providing benefits counseling as a part of information and referral or career counseling. The Secretary believes that information provided as part of benefits counseling could enable individuals with disabilities to have the information they need to understand the full opportunities provided by competitive integrated employment. For this reason, the Secretary has revised final §397.40(a) by adding paragraph (4) to specify that career counseling and information and referral services may include benefits counseling, particularly with regard to the interplay between earned income and income-based financial, medical, and other benefits.

We understand the concerns and challenges with meeting the requirements under this section due to the potentially large numbers of individuals to be served on an annual or semi-annual basis. DSUs may contract these services to help mitigate the demands upon the DSU staff and resources.

We also recognize these additional activities could impact a State's needs and decisions regarding order of selection. However, section 511 is explicit about the activities that must be performed by the DSU with regard to individuals with disabilities employed at subminimum wage. Therefore, there is no statutory basis to limit the DSU's responsibilities under final §397.40, which is consistent with section 511(c) of the Act.

To clarify, the services under this section are for any individual in subminimum wage employment, not just individuals who have been applicants or recipients of services under the VR program or who have been served by the DSU under another program administered by that agency.

With respect to career counseling, and whether requirements for information and referral and career counseling differ between youth and other individuals with disabilities, all are required. The timing for the semi-annual provision of career counseling and information and referral services applies only for an individual with a disability who begins employment at subminimum wage on or after the effective date of section 511 (July 22, 2016). This means, for example, that an individual who begins employment at subminimum wage on July 30, 2016, must

receive the first provision of the semi-annual career counselling and information and referral services no later than January 30, 2017, and the second provision of the semi-annual services no later than July 30, 2017, and the annual set of services no later than July 30, of each year thereafter for as long as the individual maintains subminimum wage employment. For individuals who were already employed at subminimum wage when section 511 takes effect (July 22, 2016), the individual must receive career counseling and information and referral services at least once a year. Neither the statute nor these final regulations dictate when those annual reviews must be done. This is a matter for the entity holding the special wage certificate and/or the DSU to determine in terms of what works best within their operations. However, the Secretary clarifies here that all individuals employed at subminimum wage must have received the requisite first annual career counseling and information and referral services no later than July 22, 2017, and annually thereafter by that date. Consistent with the Act, all individuals employed at subminimum wage, regardless of date of employment, must receive career counseling by at least one year after the effective date of section 511.

We agree that frequent career counseling and guidance activities may assist individuals in subminimum wage employment to consider competitive integrated employment. Although the Act requires DSUs to provide these career counseling and information and referral services on a semi-annual basis for the first year of employment and annually thereafter, nothing in the Act prohibits a DSU from providing these services on a more frequent basis. The specific requirements for youth, and the semi-annual and annual counseling and information and referral requirements, along with the documentation requirements, as required by the statute become effective on July 22, 2016. The Secretary has revised final §397.40(c) to make these requirements related to the required intervals more clear.

Changes: In final §397.40(a), we added paragraph (4) to specify that the career counseling and information and referral services a DSU must provide may include benefits counseling, particularly with regard to the interplay between earned income and income-based financial, medical, and other benefits. We made revisions to final §397.40(c) to provide that the required intervals for providing services under final §§397.40(a) and (b) will be calculated based upon the date the individual becomes known to the

DSU. We revised final §397.40(c) to clarify when the required services are due for both individuals hired at subminimum wage on or after the effective date of the statute and also for individuals hired at subminimum wage prior to that date. As part of the revisions to final §397.40(c), we specified in paragraphs (c)(3)(i) and (ii) that DSUs are responsible for providing the required services only when that individual becomes "known" to the DSU, and we specified what it means to become "known."

Identification and Referral of Individuals

Comments: Several commenters requested that the phrase "who are known" be clarified, defined, or replaced with more specific language. A few thought that the language in proposed §397.40(a)(2) was vague, limiting, or misleading and could be interpreted to mean it applies only to individuals who have been through the vocational rehabilitation process or who have been referred by the CAP.

A few commenters suggested that language be added mandating interagency agreements with the State educational agency, the State intellectual and developmental disabilities agency, and any other appropriate agency serving individuals who may be in subminimum wage

employment to identify and refer individuals considering, or currently in, subminimum wage employment to the DSU. This suggestion aligned with other commenters who advocated a more expansive and proactive strategy by the DSU to identify all individuals who are contemplating or are currently in subminimum wage, which one commenter described as similar to “child find” under the IDEA. One commenter urged that a subsection be added to final 34 CFR 361.29(a)(1)(i) and (b) requiring the comprehensive statewide assessment under the VR program include information about individuals who are working in segregated and subminimum wage jobs for employers using section 14(c) certificates.

One commenter asked whether the DSU was required to track an individual working in a sheltered workshop setting who contacted the agency for independent living services.

Another commenter asked whether proposed §397.40 establishes an affirmative requirement or expectation that DSUs or their contractors seek out individuals in subminimum wage employment, noting the potential issue of confidentiality between the individual and the employer.

A commenter suggested adding language that would require that any entity holding a section 14(c) certificate

failing to refer an individual to the DSU have its section 14(c) certificate suspended until it has been documented that all employees working at subminimum wage have been referred to the DSU.

Some commenters suggested that coordination and guidance from the Federal Departments on the identification issues would be helpful.

Discussion: The use of the phrase “who are known” in several sections of these regulations highlights that the DSU must be aware that an individual with a disability is employed at the subminimum wage level in order to provide the services required by section 511 of the Act and final part 397, including the services and activities required by final §397.40. Such awareness may be made through the self-identification by the individual with a disability, the vocational rehabilitation process, cooperative or coordinated activities with other agencies, or referral to the DSU, including referral by employing entities. Otherwise, there is no mandate in section 511 of the Act for the DSUs to seek out or solicit these individuals. To impose such a requirement in these final regulations would be extremely burdensome on the DSUs because of the thousands of entities holding special wage certificates

under section 14(c) of the FLSA. It would not be practical or reasonable to expect or require the DSU to take on the role of seeking out individuals with disabilities who are employed at subminimum wage. Moreover, confidentiality laws and regulations would prohibit the automatic release of personal information about the individual with a disability to the DSU without the written consent of the individual.

Furthermore, there is no statutory mandate for entities holding section 14(c) certificates to refer to the DSU employees or individuals with disabilities seeking to enter subminimum wage employment.

We considered using the words “who are referred” instead of “who are known,” but that phrase implied an active referral process required by other entities, all of whom are outside of the Department’s purview. The phrase “who are known” allows for any method of identifying individuals to the DSU and clarifies there is no mandate that the DSU seek out or solicit individuals with disabilities employed at subminimum wage. In final §397.40(a)(2), we are including “self-referred” in the list detailing examples of how the DSU knows of an individual. The Secretary has also added a paragraph in final

§397.40(c)(3)(ii) to clarify when an individual with a disability becomes “known” to the DSU.

While we agree that there is benefit in identifying individuals with disabilities in subminimum wage employment or those potentially seeking such employment, through interagency agreements with other State agencies such as the State educational agency, the State intellectual and developmental disabilities agency, and any other appropriate agency, we cannot require other agencies to make these referrals because section 511 does not impose any requirements on most of the agencies suggested by the commenters. State and local educational agencies will be providing, in effect, a referral when they transmit documentation to the DSU demonstrating the completion of transition and other services by students with disabilities. As stated in an earlier section of this preamble, we have encouraged DSUs and various other State and local agencies with whom they have relationships for cooperation and coordination of services, to include provisions in their interagency agreements related to the referral of individuals employed at subminimum wage. We do not believe it is appropriate to amend these final regulations to require such provisions because these

matters are best left to the States to determine what meets their unique needs and circumstances. We expect that DSUs will use the opportunity as they develop relationships and agreements through the coordination and cooperative agreements set out in final 34 CFR 361.24 to seek cross-agency referrals.

With regard to entities holding 14(c) certificates under the FLSA, all authority to impose requirements (e.g., consequences for failure to comply including suspension or revocation of the special wage certificate) rests with the Department of Labor and are beyond the scope of these final regulations.

We appreciate the question from the commenter who asked whether the DSU is required to track an individual who is employed in a sheltered workshop setting at subminimum wage, and who contacted the agency for independent living services. While such is not specifically required by statute, section 511 of the Act requires the DSU to provide certain services and/or documentation to individuals with disabilities, including youth with disabilities, who are seeking (for purposes of youth with disabilities only) or maintaining subminimum wage employment (for individuals with disabilities of any

age). The Secretary has interpreted, for purposes of final part 397, and stated throughout this preamble, that the DSU must provide these required services or documentation to any individual with a disability whom it knows is seeking or maintaining employment at subminimum wage, not only individuals who have participated in the VR program or been referred by the CAP. As stated above, the DSU can know of these individuals in a variety of ways, including through the programs it administers, such as the VR program or the independent living programs. Therefore, if the DSU knows of an individual through the independent living program and knows that individual is seeking or maintaining subminimum wage employment, the DSU must provide the services and documentation required by section 511 of the Act and final part 397, including the requirements of final §397.40.

We address the comment that we add requirements to the comprehensive statewide assessment to include information about individuals who are working in segregated and subminimum wage jobs for employers using section 14(c) certificates in the Analysis of Comments and Changes section for 34 CFR part 361, under the discussion of 34 CFR 361.29, earlier in this preamble.

It is anticipated that joint guidance from the Departments of Education and Labor is forthcoming and will address, among other aspects of WIOA, the limitations on use of subminimum wage if the required services and documentation have not been provided. In the meantime, the expectation is that, at every opportunity, DSUs will identify individuals with disabilities seeking employment or who are currently employed at a subminimum wage.

Changes: We revised final §397.40(a)(2) to include "self-referral" and added a paragraph in final §397.40(c)(3)(ii) to clarify when an individual with a disability becomes "known" to the DSU.

Financial Interest

Comments: With regard to self-advocacy, self-determination, and peer mentoring training opportunities, several commenters requested clarification related to "financial interest" and what entities may not provide these services. One commenter proposed language that specifically includes the entity that employs the individual at subminimum wages among those entities deemed to have a financial interest for the purpose of this section. Some commenters asked that we clarify that an entity providing subminimum wage employment to an

individual may not provide self-advocacy, self-determination, and peer mentoring training opportunities to the individual.

A few commenters recommended that the Department further clarify that an entity that holds a section 14(c) certificate, but does not have a financial interest in the outcome of the individual, may provide the services required under §511(c)(1). Some of those commenters expressed concern that an overly restrictive interpretation would have a detrimental impact on rural areas with few providers.

Several commenters regarded section 14(c) certificate holders as clearly having a “financial interest” and therefore, should be precluded from providing services required under this section. Although these entities may not have an immediate financial interest in the employment outcome of the individual, some commenters viewed them as having a definite interest in encouraging the individual to apply for vocational rehabilitation services in anticipation of being selected at a later time to provide employment or supported employment services.

Several commenters suggested that if the DSU contracts with public and private service providers to provide the

services required for individuals who are currently in subminimum wage employment, rather than provide the services directly, language be added to proposed §397.40 in the final regulations that explicitly and specifically prohibits section 14(c) certificate holders from providing these services, to avoid what the commenters perceived as a clear conflict of interest for these entities. In this scenario, commenters emphasized that employers would have a financial interest in the outcome of these services and would not be positioned to provide adequate or objective career counseling.

Discussion: With regard to self-advocacy, self-determination, and peer mentoring training opportunities, several commenters requested clarification of "financial interest" and what entities may not provide these services. Based upon the comments and our assessment, we have determined that all entities holding special wage certificates under section 14(c), irrespective of whether any employ the individual receiving the services, have a financial interest or a potential future financial interest in providing these services. Therefore, these entities may not be used to provide these services. The Secretary believes that many organizations and providers are

available and are already providing self-advocacy, self-determination, and peer mentoring training services, such as the centers for independent living (CILs) in each State. Although some commenters have expressed concern about the potentially detrimental impact on rural areas with few providers, the Secretary believes that virtual and electronic technology allows access to these services even if the provider is not physically located in a particular rural area.

We agree with the several commenters who suggested that if the DSU contracts with public and private service providers to provide the services required for individuals who are currently in subminimum wage employment, rather than provide the services directly itself, then the services may be provided, so long as the service providers are not section 14(c) certificate holders. We have added language in final §397.40, therefore, that prohibits section 14(c) certificate holders from providing these services.

Changes: We inserted language in final §397.40(e) stating that a contractor providing the services on behalf of the DSU may not be an entity holding a special wage certificate

under section 14(c) of the FLSA as defined in final §397.5(d).

Time Frames and Documentation Requirements

Comments: One commenter recommended that the Department set a time frame for providing documentation of the completion of activities under proposed §397.40 to individuals with disabilities in subminimum wage employment, suggesting that this would circumvent resource-intensive disputes and inconsistencies in the interpretation of timeliness.

Discussion: Upon the suggestion of commenters, we include a specific time period for providing documentation of the completion of activities under final §397.40 to individuals with disabilities in subminimum wage employment. This time frame is consistent with that in §397.10 for the provision of documentation to youth with disabilities, thereby ensuring consistency between all provisions in final part 397 related to documentation. Similarly, the Secretary has revised final §397.40 to set minimal content requirements for the documentation that must be provided to the individual demonstrating completion of the career counseling and information and referral services. Again,

this new regulatory text is consistent with that contained in final §397.10 and §397.30.

Changes: We have included a time frame in final §397.40(d) of no later than 45 calendar days after completion of the required activities or services for the DSU to provide documentation of activities in this section to individuals with disabilities; however, where extenuating circumstances exist, the DSU can have up to 90 calendar days after completion of the required activities or services. We also added final §397.40(d)(1)(ii) to provide a time frame of 10 calendar days for DSUs to provide this documentation to an individual who has refused to participate in a required activity. We also added final §397.40(d)(2) and (3) to specify minimum content requirements for the documentation DSUs must provide to individuals, including individuals who refuse to participate in a required activity. We added final §397.40(d)(4) requiring DSUs to retain a copy of all documentation required by part 397, in a manner consistent with 2 CFR 200.333.

Clarifications

Comments: One commenter asked for an explanation as to why the DSU is only required to provide individuals in subminimum wage employment with self-advocacy, self-

determination, and peer mentoring training opportunities, all of which are fundamental to achieving independence and self-sufficiency, if the employer holding a section 14(c) certificate has fifteen or fewer employees.

Clarification was sought by a few commenters regarding how proposed part 397 would impact clients of the DSU who are being paid subminimum wages in a community rehabilitation program as part of their training under an individualized plan for employment. Additionally, a commenter asked if the DSU may contract with businesses to perform a service in a workshop, for a limited time, as part of the individual's individualized plan for employment.

Discussion: The requirement that the DSU must provide individuals in subminimum wage employment with self-advocacy, self-determination, and peer mentoring training opportunities only when the employer holding a section 14(c) certificate has fifteen or fewer employees is consistent with the requirement of section 511(c)(3) of the Act. Employers holding a section 14(c) certificate that have more than fifteen employees are responsible for ensuring that individuals in subminimum wage employment are provided self-advocacy, self-determination, and peer

mentoring training opportunities in accordance with section 511(c)(1)(B) of the Act. This provision removes the burden that would otherwise be experienced by small businesses as a result of these requirements by having the DSU provide the services instead.

The Secretary does not believe that final part 397 would impact clients of the DSU who receive a training stipend that is below minimum wage for work performed in a community rehabilitation program as part of their training under an individualized plan for employment. That being said, we encourage that all training and assessment take place in an integrated setting to the maximum extent possible to reinforce the expectation under the Act that all individuals with disabilities, given the proper training and supports, can achieve competitive integrated employment. However, neither section 511 of the Act nor final part 397 prohibits a DSU from entering into a contract with a business in which clients in training receive a training stipend that is below minimum wage. Unlike the prohibition against these contracts for State and local educational agencies, such a prohibition for DSUs would go beyond the scope of section 511 of the Act and these final regulations. We wish to emphasize, however,

that section 511(b)(2) of the Act and final §397.31 address contracting prohibitions for State and local educational agencies entering into contracts with entities holding section 14(c) certificates for the purpose of operating a program for youth in which work is compensated at a subminimum wage. In this case, work associated with a work experience, work adjustment training and extended employment, or other activities for which work is compensated must be at or above the minimum wage.

Changes: None.

Review of Documentation (§397.50)

Comments: One commenter on proposed §397.50 recommended that we clarify the review process and the necessary documentation required.

Most commenters responding to proposed §397.50 regarding the role of the DSU in the review of individual documentation maintained by entities, as defined in proposed §397.5(d) under this part, stated that the proposed regulation did not include sufficient language to provide for any enforcement mechanism, should the DSU discover that documentation does not exist or is not sufficient. Some commenters asked that an enforcement mechanism be included, reflecting, at a minimum, the

requirement that the DSU report documentation deficiencies to the Department of Labor for action, or to the CAP. Some commenters suggested that, although the proposed regulation establishes a much needed opportunity to review individual documentation, it does not indicate what actions, including authorized corrective actions or revocation of section 14(c) certificates, may be taken if deficiencies are identified by the DSU or its contractor.

Several commenters recommended that we remove the proposed language that allows a contractor working for the DSU to conduct documentation reviews of section 14(c) certificate holders, viewing this as conflicting with section 511. They suggested that if the final regulations continue to allow contractors to conduct documentation reviews, that additional language be added that specifies parameters for such contractors, including a prohibition of the use of organizations that are section 14(c) certificate holders to conduct such reviews.

Several commenters requested that specified timelines for the review of documentation be added to enhance enforcement, and that language be added to specify that the CAP and protection and advocacy system have jurisdiction in reviewing compliance with Section 511 requirements.

A few commenters requested that we clarify whether the review of documentation by the DSU is a requirement, and if so, noted that the DSUs do not have the resources or expertise to conduct such reviews, suggesting that the reviews are best conducted by the agency responsible for the administration of the special wage certificate.

Another commenter shared concerns about the record-keeping responsibilities and the supporting documentation for monitoring purposes. Other commenters had questions and concerns pertaining to whether the DSU can make a blanket documentation of an entity, or if requests to review documentation must be made on an individual basis. Commenters recommended that the final regulations task the Department of Labor with the responsibility for documentation reviews based upon its experience with reviewing and monitoring entities for compliance with section 14(c) of the FLSA.

Discussion: We appreciate the comments regarding the need to review documentation of individuals who are employed at subminimum wage, consistent with the requirements in section 511. The commenters raise many important issues that necessitate clarification. As we discussed in an earlier section of the preamble for final part 397, neither

section 511(e)(2)(B) of the Act nor final §397.50 requires either the DSU or the Department of Labor to review documentation maintained by entities holding special wage certificates. Rather, both section 511(e)(2)(B) of the Act and final §397.50 subject those entities to a review of documentation should the DSU or the Department of Labor conduct such reviews. We appreciate the concerns expressed by commenters about the strategies, responsibilities, resources, and expertise required to conduct documentation reviews. However, there is no statutory basis to task the Department of Labor, Wage and Hour Division, with this exclusive responsibility even though it has more experience in conducting reviews of entities involving documentation of compliance with section 14(c) under the FLSA. As noted previously, section 511(e)(2)(B) of the Act and final §§397.50 specify that both the DSU and the Department of Labor have authority to conduct these reviews. Therefore, to task only the Department of Labor with this responsibility in these final regulations would be inconsistent with the statute. While we understand the concerns about lack of resources, we disagree that the DSUs do not have sufficient expertise to conduct the reviews. In fact, much of the documentation to be reviewed would be

that generated by the DSU itself and, therefore, would be familiar to the DSU. Moreover, we do not believe it is necessary to revise final §397.50 to identify the documentation to be reviewed during a review under this section because the documentation that must be reviewed is set out in these regulations in final §§397.10, 397.20, 397.30, and 397.40. Given the intent of section 511 to limit the use of subminimum wage, the Secretary believes that DSUs, in conjunction with the Department of Labor may have an impact on the degree to which youth and other individuals with disabilities seek or maintain employment at subminimum wage through the documentation review process and the requirements set out elsewhere in this section. Because there is no requirement that these reviews be done, neither the statute nor these final regulations establish a time frame for the reviews. Section 511(e)(B) of the Act provides that the reviews are to be done “at such a time” as may be necessary to fulfill the intent of section 511. Therefore, the timing of any such reviews must be determined by the DSU or the Department of Labor as either deems necessary.

We disagree with commenters that the DSU should report violations discovered during a review of documentation to

the CAP. As previously discussed, the applicability of final part 397 to CAPs and protection and advocacy systems must be consistent with their responsibilities under their respective authorizing statutes and regulations. Monitoring and oversight activities are beyond the scope of the CAP's authority under section 112 of the Act. Therefore, we do not believe it is appropriate to include any specific language regarding their authority or jurisdiction in these final regulations.

We also appreciate the many comments and suggested regulatory language submitted by a variety of commenters related to the DSU's role in the review of documentation. We agree that enforcement measures and consequences for non-compliance are important; however, section 511 of the Act does not include specific enforcement authority for DSUs and to include such measures in the final regulations would be inconsistent with the Act. Enforcement of section 14(c) of the Fair Labor Standards Act rests with the Department of Labor, Wage and Hour Division. Additionally, consequences for non-compliance with the requirements for documentation prior to hiring youth with disabilities or continuing to employ individuals with disabilities of any age and the retention of documentation records by entities

under section 511 also rests with the Department of Labor, Wage and Hour Division. Although section 511 does not require DSUs to report documentation deficiencies to the Department of Labor, Wage and Hour Division for action, the Secretary agrees with commenters that such reporting would be consistent with the purpose of final part 397. Similarly, if a parent or an individual with a disability brings an instance of non-compliance with the documentation or other requirements of section 511 to the attention of the DSU, we would encourage the DSU to report this to the Department of Labor, Wage and Hour Division as well. Therefore, the Secretary has revised final §397.50 by adding a new paragraph (b) to specify that DSUs should report deficiencies to the Department of Labor's Wage and Hour Division. The Secretary has intentionally used "should" rather than "must" because there is no requirement that the DSUs conduct reviews and, there is no mechanism for enforcement for failing to report deficiencies. We also want to emphasize that the Secretary purposely used "should" rather than "may" to signal that the Department strongly encourages DSUs to report such deficiencies whenever they are found.

We disagree with commenters that the use of a contractor working for the DSU to conduct documentation reviews of section 14(c) certificate holders is inconsistent with section 511. In fact, section 511(e)(2)(B) refers to “representatives working directly for” the DSU or Department of Labor. If the authority to conduct reviews were limited to DSU or Department of labor personnel, the statute would have used such wording. Use of the words “representative working directly for” the DSU or Department of labor implies that it could be agency staff or contractors for those agencies. We agree, however, that if a contractor is working on behalf of the DSU to review documentation, the contractor may not be an entity holding a special wage certificate under section 14(c) of the FLSA. We believe that this is consistent with the intent of section 511 of the Act and, therefore, we include this language in final §397.50(a).

Changes: We have revised final §397.50 by adding a new paragraph (b) and redesignating the proposed language as paragraph (a). We have inserted additional language in final §397.50(a) stating that the contractor may not be an entity holding a special wage certificate under section 14(c) of the FLSA. Final §397.50(b) states that DSUs

should report deficiencies noted during documentation reviews to the Department of Labor's Wage and Hour Division.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles stated in the Executive order.

This regulatory action is a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental,

public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

We have assessed the potential costs and benefits of this regulatory action. The potential costs associated with the regulations are those resulting from statutory requirements and those we have determined as necessary for administering these programs effectively and efficiently. Elsewhere in this section under the Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

In assessing the potential costs and benefits--both quantitative and qualitative--of these final regulations, we have determined that the benefits would justify the costs.

Need for Regulatory Action

Executive Order 12866 emphasizes that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." The Department's goal in regulating is to incorporate the provisions of the Act, as amended by WIOA, into the Department's regulations governing the VR program and Supported Employment program

in parts 361 and 363, respectively, as well as to clarify, update, and improve these final regulations. This final regulatory action is also necessary to establish a new part 397 to implement specific provisions of section 511 of the Act, as added by WIOA, which fall under the purview of the Secretary. Section 511 of the Act, in general, places limitations on the use of subminimum wages for individuals with disabilities.

Response to Comments on Reporting Burden Estimates

VR Services Portion of the Unified or Combined State Plan

Time Estimated for Submission

Comments: One commenter stated that the time estimated for compiling the VR services portion of the Unified or Combined State plan is not accurate, given all the new requirements under the Act, as amended by WIOA, for collaboration with other entities, providing training and technical assistance to employers, providing pre-employment transition services to students with disabilities, changes to CSPD requirements, and the new requirements in section 511 of the Act.

Discussion: We appreciate the concerns expressed by the commenter regarding the estimated burden associated with developing and submitting the VR services portion of the

Unified or Combined State plan. The estimated additional burden represents the hours needed by a DSU to compile and submit information as part of the VR services portion of the Unified or Combined State plan describing how the DSU is implementing new VR program requirements under WIOA, not the time the DSU engages in the actual implementation of the various activities described in the plan. Consequently, we believe the estimated burden is accurate.

Changes: None.

Reports; Standards and Indicators

The Department received numerous comments on the burden associated with new data collection and reporting requirements under this rule and the joint rule implementing the performance accountability system for the core programs under section 116 of WIOA. Most of these commenters stated that we underestimated the costs of new data collection and reporting requirements in the Summary of Potential Costs and Benefits section of the Regulatory Impact Analysis for these rules. In particular, commenters raised concerns about estimates of the amount of time needed for the collection of new data and the quarterly reporting of individual data on open and closed service

records, as well as the cost of changes to State management information systems.

Data collection

Comments: In the NPRM, the Department estimated that it would take 15 minutes per vocational rehabilitation counselor to collect the new data required under WIOA. Several commenters stated that we underestimated the burden for collecting new data. One commenter asserted that this estimate did not allow adequate time for counselors to collect the new data. Another commenter suggested that a more accurate estimate of the time required is 15 minutes per open service record and not per counselor. Several commenters indicated the burden for data collection should be based upon varying estimates for the total amount of minutes to collect this data, based on an individual service record basis, including 15, 30, 60, and 120 minutes per service record.

Discussion: Upon further review, we have determined that time per data element provides a better estimate of the additional burden associated with the collection of new data required under WIOA, including the requirements in §361.40 of these final regulations. As a result of this change in methodology the estimated annual burden for the

collection of new data elements has increased significantly from the estimate in the NPRM. Specifically, we now estimate the burden for the collection of new data elements to be reported in the Individual Service Report (RSA-911) at one minute per data element. Additional information on the calculation of this burden estimate is provided in the Summary of Potential Costs and Benefits section of this Regulatory Impact Analysis under the subheading Reports; Standards and Indicators.

Changes: The estimated burden associated with the collection of new data in the RSA-911 Service Report discussed under the Summary of Potential Costs and Benefits of this final regulation (see Reports; Standards and Indicators) is calculated based on an average of one minute per data element.

Data Reporting

Comments: In the NPRM, the Department estimated that it would take an additional 50 hours per year per DSU to submit the RSA-911 data file due to the need to report all open service record data quarterly rather than closed service records annually. Several commenters stated that we underestimated the burden related to the change in reporting for the RSA-911, including our estimate of the

number of hours it currently takes to prepare the current annual submission of the RSA-911 report. One commenter suggested that if it currently takes an average of 50 hours to submit the RSA-911 data file annually, it should take 200 hours to produce the four required quarterly reports because the staff time required to generate and verify the data is the same as it is for an annual report. However, another commenter stated that it will take 150 hours per quarter for an annual total of 600 hours to report RSA-911 data. Still another commenter said that due to the increase in complexity of the RSA-911 reporting, it would be appropriate to recalculate the quarterly burden for submitting the RSA-911 report as 400 hours, instead of 50 hours. One commenter claimed that its staff spent approximately 1,000 staff hours preparing the current annual RSA-911 report.

Discussion: We disagree that the hours needed to submit the RSA-911 file of data open records on a quarterly basis will require at least four times as many hours as the previous annual submission of data on closed records. DSUs spend an extensive amount of time each year analyzing and revising their closed record data prior to reporting. However, under these regulations, DSUs are expected to

report a quarterly “snapshot” of their open case data, a process that will be much less labor intensive for each submission. States are expected to maintain accurate and timely data in their case management systems. These data should be quickly and efficiently exported via reporting software to generate the RSA-911 report each quarter. However, we recognize that States may incur some additional burden in ensuring the quality of the new data to be reported and thus have increased the estimated quarterly RSA-911 data submission burden.

Changes: The estimated annual burden for the submission of the RSA-911 data file on a quarterly basis has been increased from an average of 100 hours (25 hours per quarter), as estimated in the NPRM, to 120 hours (30 hours per quarter) per DSU.

Changes to State DSU Information Systems

Comments: Several commenters stated that the Department underestimated the burden associated with updating and modifying agency case management systems. One commenter stated that its cost estimate for making the required changes to the agency’s case management system to collect new data and report open service record data on a quarterly basis vastly exceeds the Department’s estimate of $31,000.

Another commenter noted that the burden estimates omit any mention of the costs to train staff and monitor data quality during implementation, and to build or change data collection instruments and processes that may be needed to collect information directly from participants post-exit. Three commenters specifically provided cost estimates for modifying their information systems to collect and report the additional data required by WIOA of $200,000 to $500,000, $1,000,000 to $2,000,000, and $6,311,040. One commenter indicated there will be additional costs to update the agency's data collection software, which includes interfacing with a centralized data collection database at the State level, as well as several State and Federal databases. Three commenters indicated that DSUs will incur additional costs to modify, develop and maintain information technology systems to capture the required data. Another commenter cited costs for modifying systems to capture new or modified data elements and building automation to link vocational rehabilitation service records to Unemployment Insurance wage data for the reporting of employment or earnings.

Discussion: In response to the comments regarding the burden associated with the reporting of data in accordance

with final §361.40 and as a result of further Departmental review, we have increased the burden estimate for modifying and maintaining agency information systems to collect and report the required new data. We recognize that modifications to agency case management systems necessitated by the redesigned RSA-911 will vary widely because agencies themselves range in size, the sophistication of their information technology systems, and how the system is supported. We are also aware that in addition to modifying their systems, agencies will incur increased labor and contractual costs to maintain their systems. The Department has taken these factors into consideration in calculating burden estimates for this final regulation and the joint final regulations. Additional information on the calculation of these burden estimates is provided in the Summary of Potential Costs and Benefits section of this Regulatory Impact Analysis under the subheading Reports; Standards and Indicators.

Changes: The Department has expanded its analysis and revised its burden estimates associated with modifying and maintaining agency information systems under the Summary of Potential Costs and Benefits of these final regulations

(see subheading Reports; Standards and Indicators) to reflect State variation.

Proration of Burden

Comments: None.

Discussion: DSUs will report data required by section 101(a)(10)(C) of the Act, as amended by WIOA, under these final regulations and by section 116 of WIOA under the joint final regulations through the RSA-911. To more appropriately reflect the costs attributable to these two rules, we have prorated the burden based on an analysis of all new WIOA data elements to be reported through the RSA-911. Using this methodology, the Department estimates that approximately 64 percent of the increase in burden is related to these final regulations, while 36 percent is related to the joint final regulations.

Changes: Estimates of the total increase in burden for the collection and reporting of new data are prorated to reflect the 64 percent of burden attributed to requirements under these final regulations.

Summary of Potential Costs and Benefits

The Secretary believes the changes made by WIOA implemented through these final regulations will improve the programs covered in this final regulatory action and

will yield substantial benefits in terms of program management, efficiency, and effectiveness. The Secretary believes that the final regulations represent the least burdensome way to implement the amendments to the Act made by WIOA. Due to the number of regulatory changes, our analysis focuses solely on new requirements imposed by WIOA, organized in the following manner. First, we discuss the potential costs and benefits related to implementing changes to the VR program under section A that specifically relate to: competitive integrated employment and employment outcomes, pre-employment transition services and transition services, and additional VR program provisions. Second, we discuss the potential costs and benefits related to implementing changes to the Supported Employment program under section B. Finally, we discuss the costs and benefits pertaining to implementing requirements of section 511 of the Act that fall under the purview of the Department under section C.

Where possible, the Department derived estimates by comparing the costs and benefits incurred under existing program regulations against the benefits and costs associated with implementing requirements contained in these final regulations. The Department also made an

effort, when feasible, to quantify and monetize the benefits and costs of the final regulations. When unable to quantify benefits and costs--for example, due to data limitations--we describe them qualitatively. In accordance with the regulatory analysis guidance contained in OMB Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences (benefits and costs that accrue to individuals with disabilities) of these final regulations. In this analysis, the Department also considers the transfer of benefits from one group to another that do not affect total resources available to the VR program and Supported Employment program. However, in a number of instances, the Department is unable to quantify these transfers due to limitations of the data it currently collects.

This Regulatory Impact Analysis presents the Department's estimate of the additional labor and other costs and benefits associated with the implementation of the provisions in these final regulations. In estimating DSU labor costs for this analysis, we use Bureau of Labor Statistics (BLS) data on mean hourly wage rate for State employees, as well as data on employer compensation costs

to calculate loaded wage factors.[1] [2] Loaded wage factors account for non-wage factors such as health and retirement benefits. We then multiplied the loaded wage factor by each occupational category's wage rate to calculate an hourly compensation rate used throughout this analysis to estimate the labor costs for each provision. For DSU personnel, we used a loaded wage factor of 1.57, which represents the ratio of average total compensation to average wages.[3]

For Federal employees we use wage rates from the Office of Personnel Management's (OPM) Salary Table for the 2015 General Schedule for Federal employees.[4] For Federal

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[1] Bureau of Labor Statistics. (20142015). May 20142015 national industry-specific occupational employment and wage estimates: NAICS 999200 – State government, excluding schools and hospitals (OES designation). Retrieved from: http://www.bls.gov/oes/current/naics4_999200.htm.

[2] Bureau of Labor Statistics. (2016). 2015). 2014 Employer Costs for Employee Compensation. Retrieved from: http://www.bls.gov/schedule/archives/ecec_nr.htm.
The Department calculated this value using data from Table 3. "Employer Costs per Hour Worked for Employee Compensation and Costs as a Percent of Total Compensation: State and Local Government Workers, by Major Occupational and Industry Group." Wages and salaries for all workers. Average Series ID CMU3020000000000D, CMU3020000000000P. To calculate the average wage and salary in 20142015 of $21.2228.41, we averaged the wage and salaries for all workers provided in March, June, September, and December releases.

[3] The State and local loaded wage factor was applied to all non-Federal employees. Discerning the number of State and local-sector employees and private-sector employees at the local level is difficult; therefore, the Departments used the State and local-sector loaded wage factor (1.5657) instead of the private-sector wage factor (1.43) for all non-Federal employees to avoid underestimating the costs.

[4] The wage rate for Federal employees is based on Step 5 of the General Schedule (source: OPM, 20142015, "Salary Table for the 20142015 General

employees, we used a loaded wage factor of 1.63 based on internal data from DOL.

A. Vocational Rehabilitation Program

Competitive Integrated Employment and Employment Outcomes

The Act, as amended by WIOA, emphasizes the achievement of competitive integrated employment by individuals with disabilities, including those with the most significant disabilities. Congress added a new term and accompanying definition to the Act--"competitive integrated employment," which represents, in general, a consolidation of two existing regulatory terms and their definitions--"competitive employment" and "integrated setting." In implementing the new term and its definition in these final regulations, we replaced the existing regulatory term and definition of "competitive employment" with the new term "competitive integrated employment," by mirroring the statute and incorporating relevant critical criteria from the existing regulatory definition of "integrated setting." Because this change is more

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Schedule"). Retrieved from: https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2014/GS_h.pdf.

[5] Bureau of Labor Statistics. (2015) May 2015 national industry-specific occupational employment and wage estimates: NAICS 999200 – State government, excluding schools and hospitals (OES designation). Retrieved from: http://www.bls.gov/oes/current/oes211093.htm

technical than substantive, and given that the substance of the definition already existed in two separate definitions, we believe this particular change will have no significant impact on the VR program, thereby resulting in no added cost burden to DSUs.

In addition to implementing the new term and definition of “competitive integrated employment” in these final regulations, we also have revised the regulatory definition of “employment outcome.” While the Act, as amended by WIOA, made only technical changes to the statutory definition of “employment outcome,” the Secretary believes a regulatory change is necessary in light of other amendments made by WIOA throughout the Act that emphasize the achievement of competitive integrated employment under the VR program and Supported Employment program. Consequently, the Secretary defines “employment outcome” in these final regulations as an outcome in competitive integrated employment or supported employment, thereby eliminating uncompensated employment (e.g., homemakers and unpaid family workers), which had been permitted to date as a matter of the Secretary’s discretion, from the scope of employment outcomes for purposes of the VR program. The Secretary believes the regulatory definition of “employment

outcome” in final §361.5(c)(15) is consistent with all amendments to the Act made by WIOA, from the purpose of the Act to the addition of section 511. With the change to the definition of “employment outcome,” individuals with disabilities requiring homemaker or other unpaid family worker services will need to obtain those services, more appropriately, from independent living and other programs serving individuals with disabilities, not the VR program. It is difficult to quantify the extent to which the change to the definition of “employment outcome” in these final regulations, which has the effect of eliminating homemakers and unpaid family workers from its scope, will affect VR program costs nationally due to a number of highly variable factors. For example, it is not known whether individuals who previously had achieved homemaker outcomes or would seek such outcomes will choose to pursue competitive integrated employment through the VR program in the future, or seek services from other resources, such as those available from independent living, aging, or other programs serving individuals with disabilities. Based on data reported by DSUs through the RSA-911 for the period beginning in fiscal year (FY) 1980 and ending in FY 2015, the percentage of individuals exiting the VR program as

homemakers nationally declined significantly from 15 percent of all individuals achieving an employment outcome in FY 1980 to 1.7 percent in FY 2015 (representing 3,257 of the 186,209 total employment outcomes that year). While the national percentage of homemaker outcomes compared to all employment outcomes is small, some DSUs have a greater percentage of homemaker outcomes than others, particularly those serving only individuals who are blind and visually impaired. In FY 2015, the 24 DSUs that only provided services to individuals who are blind and visually impaired reported that 885 of the 6,442 employment outcomes in that year, or about 13.7 percent, were homemaker outcomes. DSUs that serve individuals with disabilities other than those with blindness and visual impairments reported 480 homemaker outcomes in that year, or 0.5 percent of the 96,404 employment outcomes. In addition, the 32 DSUs that serve individuals with all disabilities reported 1,892 homemaker outcomes in FY 2015, representing 2.3 percent of their total 83,362 employment outcomes.

The average cost per employment outcome, including the average cost per homemaker outcome, can be calculated based on data reported by DSUs in the RSA-911 on the cost of purchased services for individuals exiting the VR program

with an employment outcome. In FY 2015, the average cost per homemaker outcome for the VR program was $6,574, while the comparable average cost per employment outcome for all individuals exiting the VR program with an employment outcome that year was $5,627. It is possible that this higher average cost is because individuals obtaining a homemaker outcome generally require more intensive services or costly equipment because the nature or severity of their disabilities have prevented them from pursuing competitive integrated employment. However, there may be other factors that increase the average cost of these outcomes. For example, it may be that some of these individuals originally had a goal of competitive employment, but after receiving services for an intensive or long period of time without obtaining such an outcome, they may have chosen to change their goal. Further analysis is needed to identify the factors that contribute to the average higher cost of homemaker closures.

Given current information reported to the Department by DSUs, we are not able to predict how many individuals who would have possibly had a homemaker outcome might now choose to seek competitive integrated employment. However, for the purpose of providing a gross estimate of these

costs, we assume that approximately one-fourth (814) of the number of individuals who exited the VR program with a homemaker outcome will choose a goal of competitive integrated employment and continue to seek services through the VR program. We also assume that obtaining competitive integrated employment for these individuals may be more expensive than the current cost for obtaining a homemaker outcome, but also assume it is unlikely that the average costs for providing services to these individuals would exceed more than 150 percent of their current costs (or approximately 175 percent of the average cost per employment outcome for all agencies in FY 2015). As such, we estimate that the additional cost to DSUs to provide VR services to those individuals who previously would have exited the program with homemaker outcomes will not exceed $3,287 per outcome, or about $2,675,618 per year for all DSUs. Alternatively, assuming that about 75 percent of the number of individuals who would have otherwise attained a homemaker outcome will no longer seek services from DSUs (2,443), at an average cost of $6,574, there will be a savings of $16,060,282 to the VR program. Based on these assumptions, we estimate an overall net savings to the VR program of approximately $13,384,664.

We recognize that the change in the definition of "employment outcome" could potentially increase the demand for services from independent living and other programs, such as the Independent Living Services for Older Individuals Who Are Blind (OIB) program and other programs for aging individuals or persons with disabilities, that can provide services similar to those that such individuals would have previously sought from the VR program. We also recognize that meeting this potential increase in demand may result in a cost transfer to other Federal, State, and local programs. However, without additional information, such as the likelihood of how many consumers would access which programs, we cannot provide sound quantifiable estimates of potential cost transfers at this time.

For illustrative purposes we provide a quantitative description of the potential cost transfer to the OIB program resulting from the change in the definition of "employment outcome" in these final regulations. RSA-911 data show that 75.6 percent of individuals with a homemaker outcome in FY 2015 were individuals with blindness and visual impairments. In addition, 49 percent (1,208) of such individuals with a homemaker outcome were age 55 or older at application. We expect many of the individuals in

the upper age range of this subgroup will be referred to and receive services through the OIB program. However, considering the differences in the focus of the VR and OIB programs and that a number of individuals with homemaker outcomes may have received employment-related services for a long period of time without obtaining a competitive integrated employment outcome, we expect the average cost per individual served for this population under the OIB program will be significantly lower than the average cost under the VR program. Assuming 75 percent of such individuals were to receive services from the OIB program at an average annual cost of $1,500 per individual, the annual cost transfer would be approximately $1.4 million. To assist States in meeting the increased demand for OIB services, including assistance in reducing the impact of the change in the definition of "employment outcome" in these final regulations for those States that have typically reported higher numbers of homemaker outcomes, the Administration's FY 2017 Budget Request includes a $2 million increase for the OIB program.

Pre-Employment Transition Services and Transition Services

The Act, as amended by WIOA, places heightened emphasis on the provision of pre-employment transition

services and other transition services to students and youth with disabilities, as applicable. As a result, the Secretary makes numerous amendments in these final VR program regulations to implement new statutory requirements. A few of those changes are relevant to this discussion.

Final §361.65(a)(3) requires DSUs to reserve at least 15 percent of the State's VR allotment for the provision of pre-employment transition services to students with disabilities who are eligible or potentially eligible for vocational rehabilitation services. Based on a total of $3.024 billion in VR grant funds awarded to States from FY 2015 appropriations, the total amount of funds required to be reserved for pre-employment transition services is $453.6 million. Overall, this reservation of funds will decrease the amounts available to support other authorized activities that State agencies provide through the VR program and result in a transfer of benefits from the VR eligible individuals a State agency may have historically served to students with disabilities in need of pre-employment transition services. Additionally, under final §361.65(a)(3)(ii)(B), States may not include administrative costs associated with the provision of pre-employment

transition services in the calculation or use of that reserved amount. We are unable to estimate the potential increase in DSU administrative costs that may arise from implementation of new section 113 of the Act or the required reservation of funds at this time. However, to implement these requirements, DSUs will need to dedicate resources to: (1) ensure that the 15 percent minimum is reserved from the State's VR program allotment; (2) track the provision of pre-employment transition services to ensure the reserved funds were spent solely on allowable services specified in section 113 of the Act, as added by WIOA, and its implementing regulation in final §361.48(a) and not on administrative costs; and (3) provide for administrative costs related to pre-employment transition services with non-reserved VR program funds.

Second, section 113 of the Act, as added by WIOA, requires DSUs to provide pre-employment transition services to students with disabilities who are eligible or potentially eligible for vocational rehabilitation services. In final §361.48(a), "potentially eligible" means all students with disabilities who satisfy the definition in final §361.5(c)(51), regardless of whether they have applied, and been determined eligible, for the VR

program. The Secretary believes this interpretation is consistent with congressional intent and the stated desires of some DSUs and other stakeholders expressed through comments.

Although pre-employment transition services are a new category of services identified in the Act, many of these services historically were provided under the broader category of transition services. Therefore, the provision of these services is not new to DSUs. However, until the enactment of WIOA, all such services were provided only to those students with disabilities who had been determined eligible for the VR program. Consequently, providing pre-employment transition services to all students with disabilities under final §361.48(a) will likely increase staff time and resources spent on the provision of these services.

We are unable to provide a quantitative estimate of the impact of this requirement on DSUs at this time because we do not currently have data on the number of students with disabilities that will be referred for such services or adequate data on the cost of providing pre-employment transition services. In the future, information provided by the State in the VR services portion of the Unified or

Combined State plan and RSA data collections, such as the revised RSA-911, should assist the Department in assessing the impact of the pre-employment transition service requirements.

In general, the extent of the impact of the reservation on a particular State will likely depend on the extent to which it has been providing transition services that are now specified under section 113 as pre-employment transition services to students with disabilities. DSUs that have provided extensive transition services to students with disabilities, including services that would meet the definition of pre-employment transition services, are likely to see less transfer of benefits among individuals served. For State agencies that have not provided these services or have only provided these services to a small extent, there may be more extensive transfers of services and benefits of the VR program among individuals (i.e., to students with disabilities and away from other individuals who otherwise would have been served). We are extremely limited in our ability to estimate the annual amount that State agencies have spent in providing similar services to eligible individuals prior to the implementation of section 113 of the Act that would

have met the definition of a student with a disability because we do not collect the necessary annual data under the currently approved RSA-911 report.

Under the current RSA-911, DSUs report individual level data in the year in which the service record is closed and the information reported on services and service costs are cumulative over the duration of the service record. In addition, while DSUs may directly provide many of the pre-employment transition services with VR staff, only the cost of services purchased by the agency on behalf of an individual are reported under the current RSA-911. Further, the pre-employment transition services that States are required to provide to students with disabilities are not specifically reported in the service categories of the currently approved RSA-911.

However, for illustrative purposes, FY 2015 data on closed service records reported in the RSA-911 (the most recent year for which full data are available) for youth who were between the ages of 16 and 21 at the time of application do provide some limited insight into the amount spent on purchased services for the service categories that DSUs would have most likely reported the receipt of services similar to pre-employment transition services.

Although, the reservation requirement went into effect in FY 2015, we believe that it is still an appropriate base year since youth whose service records were closed in that year were not likely to have been affected by the new requirement.

DSUs reported service record closures in the FY 2015 RSA-911 for 98,454 youth who were between the ages of 16 and 21 at application and total purchase service costs of about $526.5 million (including about $11.6 million in title VI Supported Employment funds) for such youth. Because reporting is limited to closed cases, we are unable to determine the amount of the purchased services actually expended in FY 2015. However, at least 85 percent of these purchases were for categories of service that would not include pre-employment transition services as defined in final §361.5(c)(42) (e.g., postsecondary education, assessment, diagnosis and treatment, and on-the-job supports). Similarly, for the subset of youth whose service records were closed in FY 2015 that were in secondary education and had an IEP or were receiving services under section 504 at the time of application to the VR program (53,734 students), about 82 percent of the $245 million in reported purchased services for this group

were for categories of service that would not meet the statutory definition of pre-employment transition services.

While it is important to note that RSA data show significant variation in the number and amount of funds spent for this age group among State agencies, available information indicates that many State agencies will experience challenges in meeting the new reservation requirement and will need to develop and implement aggressive strategies in order to expend these funds in the initial years of implementation.

Further, we recognize that the FY 2015 data include only those students with disabilities who had applied and been determined eligible for VR services and that under these final regulations DSUs will provide pre-employment transition services to students with disabilities who may not have applied or been determined eligible for the VR program. These final regulations also clarify that, in addition to secondary education, the term “students with disabilities” includes students in postsecondary or other recognized education programs that meet the age and other requirements contained in final §361.5(c)(51).

Therefore, we anticipate that many DSUs will need to serve a larger number of students with disabilities in

order to expend the reserved funds than they had prior to the passage of WIOA, thereby increasing the potential total value of the benefits transferred as a result of final §361.48(a).

Fiscal reports submitted by DSUs appear to confirm the early challenges DSUs are having in spending these funds. FY 2015 fourth quarter Federal Financial (SF-425) reports document that in total, DSUs expended 33.6 percent of the $453.6 million that were required to be reserved for pre-employment transition services based on final FY 2015 State VR grant awards. Provided that States matched their Federal VR grant funds, the remaining amount of the required reservation would have been carried over for obligation and liquidation in FY 2016.

Despite these challenges, we are optimistic that as States implement the strategies described in the VR services portion of their Unified or Combined State plans to address the needs of students with disabilities for pre-employment transition services consistent with §361.29 (a)(4) (e.g., working with employers to provide opportunities for work-based learning experiences (including internships, short-term employment, apprenticeships, and fellowships), as required under final

§361.32(b), and coordinating with schools to ensure the provision of pre-employment transition services for students with disabilities as required under final §361.48(a)(4)), they will adopt policies and practices that enable them to effectively spend the funds reserved for this purpose to improve employment outcomes for students with disabilities.

Third, section 103(b)(7) of the Act, as added by WIOA, and in its implementing regulation in final §361.49(a)(7) permit DSUs to provide transition services to groups of youth and students with disabilities regardless of whether they have applied, and been determined eligible, for the VR program. Such services to groups were not permitted prior to the passage of WIOA. The regulation benefits DSUs in two significant ways by: (1) giving them the ability to serve groups of youth and students with disabilities simultaneously, who may need only basic generalized services (i.e., group tours of universities and vocational training programs, employer or business site visits to learn about career opportunities, career fairs coordinated with workforce development and employers to facilitate mock interviews and resume writing, and other general services), thereby reducing the amount of funds expended per

individual; and (2) reducing administrative burden on the DSUs, as well as the burden on students or youth with disabilities and their families, by not having to engage in processes for determining eligibility, conducting assessments, and developing individualized plans for employment. However, we are unable to quantify the impact of this regulatory provision due to the variability in the number of individuals who may seek out these services nationally, the degree to which individuals will require these services within each State, and the services that will be provided in each State.

Additional Vocational Rehabilitation Program Provisions

VR Services Portion of the Unified or Combined State Plan

Section 101(a)(1) of the Act, as amended by WIOA, requires the VR State plan, which has been a stand-alone State plan, to be submitted as a VR services portion of a Unified or Combined State plan for all six core programs of the workforce development system, including the VR program. Requirements related to the submission of Unified or Combined State plans take effect in July 2016. Discussion of the burden associated with new Unified or Combined State plan requirements affecting all core programs, including the VR program, will be addressed in the Regulatory Impact

Analysis for the joint final regulations published elsewhere in this issue of the Federal Register. This Regulatory Impact Analysis focuses solely on the impact of new requirements affecting the VR services portion of the Unified or Combined State plan and not any plan requirement that affects all core programs.

In preparing for the transition to the submission of Unified or Combined State plans every four years, with modifications submitted every two years of the four-year plan, the final regulations no longer require DSUs to submit particular reports and updates annually, but, rather, at such time and in such manner as determined by the Secretary as required in final §361.29. This flexibility allows for VR program-specific reporting to be done in a manner consistent with those for the Unified or Combined State plan under section 102 or 103 of WIOA, thus avoiding additional burden or costs to DSUs through the submission of separate reports annually or whenever updates are made.

Section 101(a) of the Act, as amended by WIOA, requires DSUs to include additional descriptive information in the VR services portion of the Unified or Combined State plan. Therefore, final §361.29 requires DSUs to describe

in the VR services portion of the Unified or Combined State plan: (1) the results of the comprehensive statewide needs assessment with respect to the needs of students and youth with disabilities for pre-employment transition services and other transition services, as appropriate; (2) goals and priorities to address these needs; and (3) strategies for the achievement of these goals. Final §361.24(c) also requires that the VR services portion of the Unified or Combined State plan include a description of how the DSU will work with employers to identify competitive integrated employment and career exploration opportunities, in order to facilitate the provision of VR services, including pre-employment transition services and transition services for youth and students with disabilities, as applicable. Final §361.24(g) further requires that the VR services portion of the Unified or Combined State plan contain a description of collaboration with the State agency responsible for administering the State Medicaid plan under title XIX of the Social Security Act, the State agency responsible for providing services for individuals with developmental disabilities, and the State agency responsible for providing mental health services, to develop opportunities for community-based employment in integrated settings, to

the greatest extent practicable. As a result, DSUs will be required to expend additional effort in the development of these descriptions in the VR services portion of the Unified or Combined State plan beyond the 25 hours previously estimated for the development and submission of the entire stand-alone VR State plan, now the VR services portion of the Unified or Combined State plan. We estimate that DSUs will require an additional five hours for the development of these descriptions, for a total of 30 hours (25 hours previous burden plus 5 hours new additional burden) per DSU, or 2,400 hours for all 80 DSUs. The average hourly compensation rate of $54.21--based on data obtained from the Bureau of Labor Statistics for State social and community service managers (e.g., field services manager or other program manager responsible for development of the VR services portion of the Unified or Combined State plan) and the loaded wage factor --is more consistent with State rates of pay than the $22.00 per hour wage rate used to calculate costs from the most recent State plan information collection extension. At an hourly compensation rate of $54.21, each DSU would expend $271 in additional costs for the five hours needed to develop the new descriptions required for the VR services portion of

the Unified or Combined State plan, resulting in a total of $21,684 and 400 additional hours for all 80 DSUs. Despite the additional costs incurred by all 80 DSUs in the development and submission of the State plan, we believe that the additional burden is more accurate and outweighed by the benefit to the public through a more comprehensive understanding of the activities DSUs engage in to assist individuals with disabilities to obtain the skills necessary to achieve competitive integrated employment in job-driven careers.

Order of Selection

Final §361.36(a)(3)(v) implements section 101(a)(5) of the Act, as amended by WIOA, by permitting DSUs, at their discretion, to serve eligible individuals who require specific services or equipment to maintain employment, regardless of whether they are receiving VR services under an order of selection. DSUs implementing an order of selection are not required to use this authority; rather, they may choose to do so based on agency policy, or the availability of financial and staff resources. Under final §361.36(a)(3)(v), DSUs implementing an order of selection must state in the VR services portion of the Unified or Combined State plan that they have elected to exercise this

discretion, thereby signaling a decision to serve eligible individuals who otherwise might have been placed on a waiting list under the State's order of selection, and who are at risk of losing their employment. This change will increase flexibility for a State managing its resources. While a State that elects to implement this authority could prevent an individual from losing employment by avoiding a delay in services, DSUs doing so would potentially need to reallocate resources to cover expenditures for services or equipment for individuals who meet the qualifications of this provision and fall outside an open priority category of the DSU's order of selection.

For FY 2015, the VR State plans of 35 of the 80 DSUs (44 percent) documented that the agency had established an order of selection, one agency more than in FY 2014. This total includes two of the 24 DSUs serving only individuals who are blind and visually impaired and 33 of the 56 other DSUs. Based on data reported through the RSA-911 in FY 2015, nationwide, 20.4 percent of the individuals whose service records were closed and who received services were employed at application, with an average cost of purchased services of $4,617. In addition, according to data reported through the VR program Cumulative Caseload (RSA-

113) report, 30,311 individuals nationwide were on a waiting list for VR services at the beginning of FY 2015 due to the implementation of an order of selection. Assuming that 20.4 percent of the 30,311 individuals on the waiting list could potentially benefit from the provision of services and equipment to maintain employment (which assumes individuals on a waiting list are just as likely to be employed at the time of application as individuals whose records were closed and received services), a possible 6,183 individuals could benefit from this regulatory change, for a total cost of $28,546,911 across all 80 DSUs. This figure represents the potential reallocation of resources to cover the cost of services for individuals who, prior to enactment of WIOA, may not have received them, and away from eligible individuals who would have received services based on a DSU's order of selection policy.

However, the implementation of an order of selection by a DSU may differ from year to year, as well as within a given fiscal year. In fact, not all DSUs that indicate they have established order of selections as part of their State plans actually implement those orders or report that they had individuals on waiting lists during the year. For

example, 63 percent of such agencies (22 of 35) reported that they had individuals on a waiting list in FY 2015. In addition, we are unable to predict which DSUs that have implemented an order of selection will choose this option. The degree to which individuals will be referred for this service could vary widely among DSUs, as could the level of services or equipment that an individual may need to maintain employment.

Reports; Standards and Indicators

Final §361.40 implements changes to reporting requirements in section 116(b) in title I of WIOA and section 101(a)(10) of the Act, as amended by WIOA. Final §361.40 does not list the actual data to be reported, rather, it requires the collection and reporting of the information specified in sections 13, 14, and 101(a)(10) of the Act. New requirements under section 101(a)(10) include the reporting of data on the number of: individuals with open service records and the types of services these individuals are receiving (including supported employment services); students with disabilities receiving pre-employment transition services; and individuals referred to the State VR program by one-stop operators and individuals referred to such one-stop operators by DSUs. The RSA-911

is revised as described in the information collection published for a 30-day public comment period at FR Document 2016-09713 consistent with the requirements in final §361.40.

Final §361.40 also requires States to report the data necessary to assess DSU performance on the standards and indicators subject to the performance accountability provisions described in section 116 of WIOA. The common performance accountability measures apply to all core programs of the workforce development system, including the VR program, and are implemented in part 677 of the joint regulations and set forth in subpart E of part 361. The impact and analysis of the joint regulations governing the common performance accountability system are addressed in the regulatory action for the joint regulations published elsewhere in this issue of the Federal Register.

In response to the comments regarding the burden associated with the collection of data under final §361.40, described in the Comments section of this Regulatory Impact Analysis, and as a result of further Departmental review, we have adjusted the burden estimates as described here.

We have increased the estimated burden for the collection of the new data required by section 101(a)(10),

including data required to assess State agency performance under section 106 of the Act by recalculating the estimates using the time DSUs will spend collecting these additional data elements. We estimate that on average it will take DSU staff one minute per data element to collect the new required data.

For the first year of data collection, DSUs will incur greater data collection burden than in subsequent years. As required by statute, the WIOA performance accountability system goes into effect July 1, 2016. All participants who are still receiving services (have not exited) by the start of program year (PY) 2016 become WIOA participants and will be counted and tracked in accordance with the WIOA performance requirements set forth in section 116 of WIOA. The final RSA-911 Information Collection Request (ICR) will include new and/or revised data elements and definitions as necessary to provide alignment with the WIOA Participant Individual Record Layout (PIRL) and comply with new requirements under the Act as amended by WIOA.

In order to meet the requirements in final §361.40, DSUs will need to collect additional information for new applicants and VR consumers as well as current eligible individuals who, as of the effective date of section 116 of

title I (July 1, 2016), met the definition of "participant," as that term is defined under the joint final regulations implementing the jointly administered performance accountability system requirements of section 116 of title I of WIOA published elsewhere in this issue of the Federal Register.

DSUs are at varying stages of revising their case management systems consistent with the new joint data specifications described in the PIRL and the new elements required under title I of the Act as proposed in the ICR, published in the Federal Register on April 27, 2016 (81 FR 24888).

Based on data reported by DSUs through the Quarterly Caseload Report (RSA 113) for FYs 2014 and 2015, we estimate that in the first year of data collection DSUs will in total incur a minimum of about 800,000 hours of additional burden to collect new data for VR consumers (an average of 10,000 to 11,250 per DSU), including participants and reportable individuals in the VR system at the beginning of FY 2016, individuals who will be determined eligible during the first year of data collection, students with disabilities who are receiving pre-employment transition services and data needed for

subminimum wage determinations under section 511 of the Act.

Based on data reported through the RSA-113 for FY 2015 and the proportion of new VR-specific data elements to all new data elements required by WIOA (64 percent), we estimate that DSUs will spend a total of approximately 512,000 hours collecting the new VR-specific data elements, or an average of 6,400 hours per DSU in the first year of data collection. We further estimate that vocational rehabilitation counselors will complete 50 percent of data collection activities for new VR-specific data elements, and that vocational rehabilitation technicians or similar personnel will complete the remaining 50 percent.

Using an hourly compensation rate of $36.66 for vocational rehabilitation counselors (wage rate based on State-employed rehabilitation counselors), the estimated cost for 50 percent of the data collection burden (256,000 hours) is $9,384,960. Using an hourly compensation rate of $28.29 for vocational rehabilitation assistants or equivalent positions (wage rate based on State-employed

social and human service assistants[5] plus the loaded wage factor), the estimated cost for the remaining 50 percent of the data collection burden is $7,242,240. Consequently, we estimate that the total additional cost for all 80 DSUs to collect the new VR program-specific data elements is $16,627,200, or an average of $207,840 per DSU for the initial year of data collection.

For the second and subsequent years of data collection under these final regulations, we estimate that in total DSUs will incur about 200,000 hours of additional burden per year under WIOA. For new VR-specific data elements, we estimate 128,000 hours, or an average of 1,600 hours of additional annual burden per DSU, in the second and subsequent years of data collection. Using the same strategy to calculate the costs for the first year of data collection, we estimate that the total additional annual cost for all 80 DSUs to collect the new VR program-specific data elements is $4,156,800, or an average of $51,960 per DSU for the second and subsequent years of data collection. The remaining portion of the burden for new data collection

[5] Bureau of Labor Statistics. (2015) May 2015 national industry-specific occupational employment and wage estimates: NAICS 999200 – State government, excluding schools and hospitals (OES designation). Retrieved from: http://www.bls.gov/oes/current/oes211093.htm

attributed to the performance accountability requirements in section 116 of title I of WIOA ($10,558,080 or $131,976 per DSU) is included in the Regulatory Impact Analysis for the final joint regulations, published elsewhere in this issue of the Federal Register.

As described in the discussion of comments on this Regulatory Impact Analysis, we estimate an average of 70 additional burden hours per year, or a total of 120 hours per year (30 hours per quarter), for each DSU to submit the RSA-911 data file of open case service records on a quarterly basis. As a result, the estimated total number of hours needed for the submission of the data file for 80 agencies will increase from 4,000 to 9,600 hours, resulting in an increase of 5,600 hours. Using an average hourly compensation rate of $57.02 (wages based on State-employed database administrators), the estimated additional cost for all 80 DSUs to submit the RSA-911 data file of open service records on a quarterly basis is $319,312. The estimated additional cost per DSU is $3,991.

The total additional VR-specific burden hours for both collection and submission of required data will be 6,470 hours per DSU (6,400 data collection hours and 70 data submission hours), or a total of 517,600 hours for all 80

DSUs. The estimated total additional VR program-specific cost for both collection and submission per DSU is $211,831, with a total additional burden cost of $16,946,512 for all 80 DSUs.

DSUs will also incur additional costs related to programming and modifications of their case management systems to collect and report new VR program-specific data required under section 101(a)(10) of the Act. Additional burden related to the programming of case management systems as a result of the redesigned RSA-911 will vary widely because DSUs range in size and the sophistication of their information technology systems.

Upon further Departmental review since the publication of the NPRM, including the review of comments summarized in the Comments section of this Regulatory Impact Analysis, we have adjusted the estimates associated with the modification of DSU data systems. The adjusted estimates are based on: the apportionment of the data elements in the RSA-911 necessitated by the requirements of section 116 of WIOA and section 101(a)(10) of the Act, as amended by WIOA; adjustments to the wage rates for DSU personnel; and updated information regarding the variation in the level of

effort required by DSUs to modify and maintain their data systems.

Although we estimate that each DSU will require computer systems analysts for this one-time task, the related burden for changing a State's case management system has been broken down to reflect the variation among the 80 DSUs with respect to their size and updated information regarding the number of DSUs that modify and maintain their case management and reporting systems and those that contract for these services. Roughly 30 of the 80 DSUs use case management and reporting systems purchased from software providers who are responsible for maintaining and updating the software. We estimate these 30 DSUs will require two computer systems analysts to spend 150 hours integrating the software changes into their own State systems, resulting in 300 hours per DSU, or a total of 9,000 hours in additional burden for all 30 DSUs. Of the remaining 50 DSUs that do not have agreements with a software provider to maintain and update software, five of these agencies are categorized as large agencies (more than 5,000 employment outcomes) and 45 of these agencies are categorized as small to medium-sized agencies (less than 1,000 employment outcomes, and between 1,000 and 5,000

employment outcomes, respectively). We estimate the five large agencies will require five computer systems analysts to spend 1,000 hours each to maintain and update agency software (for a total of 5,000 hours per agency), while the 45 small to medium-sized agencies will require two staff members to spend 1,000 hours each to maintain and update the software (for a total of 2,000 hours per agency) in order to make the necessary software changes. As a result, we estimate that the large agencies will need a total of 25,000 total hours and the small to medium-size agencies will need 90,000 hours, for a total of 115,000 hours for the 50 agencies to maintain and update computer software. Combining these estimates with the 9,000 hours for the 30 agencies that we believe will only have to integrate the software changes their providers are contracted to make, the total burden estimate for all 80 agencies is 124,000 hours. The VR program-specific burden (prorated at 64 percent of total burden) is estimated at 79,360 hours. We estimate that the cost burden for all 80 agencies to maintain and update their computer software based on a total of 79,360 VR-specific hours and an hourly compensation rate of $56.17 for State-employed computer systems analysts, will be $4,457,651. The balance of the

burden in modifying agency data systems associated with the common data reporting requirements under title I of WIOA (36 percent) is included in the Regulatory Impact Analysis of the joint final regulations published elsewhere in this issue of the Federal Register.

In addition to maintaining and updating software, 48 agencies that utilize vendor supplied case management software will incur additional software licensing or user fees. Our discussions with case management software vendors informed our revised estimate of the average cost of $700.00 per user annually for software licensing or user fees, which will include a 20 percent increase due to new WIOA requirements, resulting in $140 of additional costs per user. Information obtained in discussions with case management software vendors also resulted in an estimate of approximately 6,600 users in States served by vendor systems. We estimate an additional total software licensing or user costs related to new WIOA requirements of $924,000. After adjusting this cost to reflect only the VR program-specific burden (64 percent), we estimate that the 48 States will incur an additional $591,360 in licensing or user fees, or $12,320 per agency.

Finally, the 80 DSUs will be required to train vocational rehabilitation counselors regarding the new data reporting requirements. To estimate this labor cost, we assume an average of 62 vocational rehabilitation counselors per agency and 8 hours of training per counselor. Using an hourly compensation rate of $36.66 per vocational rehabilitation counselor, the estimated labor costs for vocational rehabilitation counselors to receive training on collecting the new data is $1,454,669 for all 80 agencies, or $18,183 per agency. We estimate that development of the training materials and methodologies will require 1 staff trainer 8 hours per agency. Using the social and community service manager hourly compensation rate ($54.21) as a proxy for the staff trainer, the total cost for development of the training is $34,694, or $434 per agency. The total cost for development of the training and vocational rehabilitation counselor participation in the training is $1,489,363. Since we are estimating that approximately 64 percent of the burden related to performance accountability is VR-specific burden, the estimated cost will be $953,192 for all 80 agencies, or $11,915 per agency.

Including all of the associated costs with the maintenance and updating of software ($4,457,651), licensing fees ($591,360), and agency staff training ($953,192), the estimated aggregate VR program-specific burden for all 80 agencies is $6,002,203, which does not include the additional initial year combined RSA-911 data collection and submission burden of $16,946,512 because that burden estimate was described separately above.

At the Federal level, RSA will develop its performance accountability and data analysis capacity using new staff positions. We estimate that it will take two full-time data management specialist positions, one at a GS-13 Step 5 and one at a GS-14 Step 5, to complete the necessary database programming requirements. With an hourly compensation rate of $64.71 for the GS-13 position and $76.48 for the GS-14 position, the total cost for software development is $293,675. Since we are estimating that approximately 64 percent of the burden related to performance accountability is VR-specific burden, the estimated cost will be $187,952.

We believe that these data collection and reporting costs are outweighed by the benefits to the VR program because the new information to be reported and having

access to more timely information on individuals currently participating in the VR program will better enable the Department and its Federal partners to assess the performance of the program and monitor the implementation of WIOA, particularly as it relates to key policy changes, such as the provision of pre-employment transition services and the integration of the VR program in the workforce development system.

Extended Evaluation

Final §§361.41 and 361.42 remove requirements related to extended evaluation because the Act, as amended by WIOA, no longer includes references to such evaluations. Instead, a DSU must use trial work experiences when conducting an exploration of an individual with a significant disability's abilities, capabilities, and capacity to perform in work situations. These revisions streamline the eligibility determination process for all applicants whose ability to benefit from VR services is in question.

VR program data collected by the Department do not distinguish between individuals who had a trial work experience and those that had an extended evaluation. However, RSA-911 data show that 4,924 individuals exited

from the VR program during or after trial work experiences or extended evaluations in FY 2015. DSUs expended a total of $4,126,785 on the provision of services to these individuals for an average cost of $838 per individual. Because we are unable to estimate how many of the 4,924 individuals were in extended evaluation, as opposed to trial work experiences, we cannot quantify either the current costs or the potential change in costs for this specific group of individuals. Based on the monitoring of DSUs, we note that the use of these services varies among DSUs, mainly due to variations in opportunities for individuals to participate in trial work experiences, and the extent to which DSUs historically utilized extended evaluation. We believe that the benefits of streamlining the eligibility determination process for applicants whose ability to benefit from VR services is in question and ensuring that ineligibility determinations are based on a full assessment of the capacity of an applicant to perform in realistic work settings outweighs the costs of removing the limited exception to trial work experiences.

Time Frame for Completing the Individualized Plan for Employment

Final §361.45 implements section 102(b) of the Act, as amended by WIOA, by requiring DSUs to develop individualized plans for employment as soon as possible, but not later than 90 days after the date of determination of eligibility, unless the DSU and the eligible individual agree to the extension of that deadline to a specific date by which the individualized plan for employment must be completed. Due to variations in current DSU timelines for the development of the individualized plan for employment, the establishment of a 90-day timeframe by WIOA will ensure consistency across the VR program nationally and the timely delivery of services, thereby improving DSU performance and the achievement of successful employment outcomes by individuals with disabilities.

We are unable to quantify potential additional costs to DSUs to develop individualized plans for employment within 90 days of an eligibility determination due to the variance in timelines currently in place. It is likely that DSUs that have had prolonged timelines beyond 90 days prior to the enactment of WIOA could experience a change in annual expenditure patterns. For example, if larger numbers of individuals, with approved individualized plans for employment, begin to receive VR services at an earlier

time than had historically been the case, an agency will expend its funds at a faster rate. However, while the overall cost per individual served is not likely to be affected by this provision, the average time before some DSUs incur expenses related to the development of, and provision of VR services under, individualized plans for employment could be shortened, resulting in a shift in the outlay of program funds for services sooner than in previous years. Therefore, in any given fiscal year, the outlay of program funds for these DSUs could be higher. While costs over the life of the service record should not be affected, some DSUs could find it necessary to implement an order of selection due to the transfer of costs that would have been incurred in a subsequent fiscal year to the current fiscal year. As always, DSUs are encouraged to conduct planning that incorporates programmatic and fiscal elements to make projections and assessments of VR program resources and the number of individuals served, using management tools including order of selection, as appropriate.

The Establishment, Development, or Improvement of Assistive Technology Demonstration, Loan, Reutilization, or Financing Programs

Section 103(b)(8) of the Act, as added by WIOA, permits a DSU to establish, develop, or improve assistive technology demonstration, loan, reutilization, or financing programs. Thus, final §361.49(a)(8) permits DSUs to establish, develop, or improve these assistive technology programs in coordination with activities authorized under the Assistive Technology Act of 1998, to promote access to assistive technology for individuals with disabilities and employers. This regulation reflects the integral role assistive technology plays in the vocational rehabilitation and employment of individuals with disabilities. We are not able to quantify additional costs associated with this provision due to the variable nature of the specific assistive technology needs of individuals with disabilities, and the availability of assistive technology demonstration, loan, reutilization, or financing programs within each State.

Maintenance of Effort Requirements

Section 111(a) of the Act, as amended by WIOA, and final §361.62(a) require the Secretary to reduce a State's annual VR program award to satisfy a maintenance of effort (MOE) deficit in any prior year. Before the enactment of WIOA, the Secretary could only reduce the subsequent year's

grant to satisfy an MOE deficit from the preceding fiscal year. If an MOE deficit was discovered after it was too late to reduce the succeeding year's grant, the Secretary was required to seek recovery through an audit disallowance, whereby the State repaid the deficit amount with non-Federal funds.

Because the Secretary is now able to reduce any subsequent year's VR program grant for any prior year's MOE deficit, DSUs benefit as they are no longer required to repay MOE shortfalls with non-Federal funds, thereby increasing the availability of non-Federal funds, in those instances, for obligation as match under the VR program. Since FY 2010, two States were required to pay a total of $791,342 in non-Federal funds for MOE penalties because their MOE shortfall was not known prior to the awarding of Federal funds in the year after the MOE deficit. Consequently, these funds were unavailable to be used as matching funds for the VR program in the year they were paid. On the other hand, the new authority could have resulted in the deduction of the $791,342 MOE penalties from a Federal award that was not limited to the year immediately following the year with the MOE deficit.

B. The Supported Employment Program

Services to Youth with the Most Significant Disabilities in Supported Employment

Section 603(d) of the Act, as amended by WIOA, and final §363.22 require DSUs to reserve 50 percent of their State Supported Employment Services Program grant allotment to provide supported employment services, including extended services, to youth with the most significant disabilities. This new requirement is consistent with the heightened emphasis throughout the Act on the provision of services to youth with disabilities, especially those with the most significant disabilities, and is consistent with the final VR program regulations in part 361, since the Supported Employment program is supplemental to that program.

In addition, section 606(b) of the Act, as amended by WIOA, and final §363.23 require States to provide a 10 percent match for the 50 percent of the Supported Employment allotment reserved for the provision of supported employment services, including extended services, to youth with the most significant disabilities. Prior to the enactment of WIOA, there was no match requirement under the Supported Employment program.

Finally, section 604 of the Act, as amended by WIOA, and final §363.4(b) permit DSUs to provide extended services, for a period not to exceed four years, to youth with the most significant disabilities. DSUs may use the reserved funds to provide these extended services, as well as supported employment services, to youth with the most significant disabilities. Prior to the enactment of WIOA, DSUs were not permitted to provide extended services to any individual, including youth with the most significant disabilities.

After setting aside funds to assist in carrying out section 21 of the Act, the FY 2015 Federal appropriation provided $27,272,520 for distribution to DSUs under the Supported Employment State Grants program. Assuming States were able to provide the required 10 percent non-Federal match for the available Supported Employment formula grant funds in FY 2015, the 50 percent reservation would result in the dedication of $13,636,260 for supported employment services, including extended services, to youth with the most significant disabilities. Conversely, the reserved funds would not be available for the provision of supported employment services to individuals who are not youth with the most significant disabilities, and may be viewed as a

transfer of title VI funds from these individuals to youth with the most significant disabilities. The 10 percent match requirement would generate $1,515,140 in non-Federal funds for supported employment services, including extended services, for youth with the most significant disabilities. The match requirement represents additional non-Federal funds that States must expend in order to obligate and expend the Federal funds reserved for youth with the most significant disabilities. If the appropriation increases in future years, the match requirement would result in additional supported employment resources for youth with the most significant disabilities. However, States will have to identify additional non-Federal resources in order to match the Federal funds reserved for this purpose.

Finally, as stated above, DSUs may provide extended services to youth with the most significant disabilities, whereas prior to the enactment of WIOA such services were not permitted for individuals of any age. Under the Act, as amended by WIOA, DSUs still may not provide extended services to individuals with the most significant disabilities who are not also youth with the most significant disabilities. Since extended services have not previously been an authorized activity with the use of VR

program or supported employment program funds, this change could have a significant impact on States by creating a funding source for these services that previously was not available. However, because this is not a service that was previously permitted under either the VR program or the Supported Employment program, the Department has no data on which to quantify the impact this new requirement will have on States.

Extension of Time for the Provision of Supported Employment Services

Section 7(39) of the Act, as amended by WIOA, and final §361.5(c)(54) amend the definition of "supported employment" to permit the provision of supported employment services for a period up to 24 months, rather than the previous 18 months. Although contained in part 361, the definition of supported employment services applies to both the VR program and Supported Employment program. DSUs have the authority to exceed this time period under special circumstances if jointly agreed to by the individual and the vocational rehabilitation counselor.

The change will benefit individuals with the most significant disabilities who require ongoing support services for a longer period of time to achieve stability

in the employment setting, prior to full transition to extended services. This provision could result in DSUs using more resources under both the VR program and Supported Employment program to provide ongoing services.

DSUs typically have not provided ongoing support services for a full 18 months for a majority of their consumers. In FY 2015, 13,652 individuals achieved supported employment outcomes within 21 months following the development of the individualized plans for employment, which period we assume could include the provision of supported employment services for a full 18 months and a minimum period of 90 days prior to program closure. Of these individuals, 9,592, or approximately 70.2 percent, achieved supported employment outcomes within 12 months. While we anticipate that most individuals may not need supported employment services for the full 24 months, in FY 2015, 1,783 individuals achieved supported employment outcomes within a period ranging from 21 months to 27 months of the development of the individualized plan for employment. DSUs in total expended $13,237,902 on purchased services for these individuals, or an average of $7,425 per individual. Assuming this period includes the provision of supported employment services for a full 24

months and a minimum period of 90 days prior to program closure, we estimate that an approximate number of individuals would benefit from the provision of supported employment services for an additional six months and that DSUs would incur similar costs for the provision of these services as a result of the regulatory change.

Limitations on Supported Employment Administrative Costs

Section 603(c) of the Act, as amended by WIOA, and final §363.51(b) reduce the maximum amount of a State's grant allotment under the Supported Employment program that can be used for administrative costs from 5 percent of the State's grant allotment to 2.5 percent. As a result, a larger portion of Federal Supported Employment funds must be spent on the provision of supported employment services, including extended services to youth with the most significant disabilities, rather than administrative costs. However, any administrative costs incurred beyond the 2.5 percent limit on the use of Supported Employment funds may be paid for with VR program funds.

Based upon the $27,272,520 allotted to States under the Supported Employment program in FY 2015, the total allowable amount of these Federal funds that could be used to support administrative costs would be reduced by half,

from $1,363,626 to $681,813. Thus, for those DSUs that have typically used more than 2.5 percent of their Supported Employment program allotment to cover administrative costs, the change would provide a small increase in the amount of funds available for the provision of services to individuals with the most significant disabilities pursuing a supported employment outcome. DSUs may shift these excess costs to the VR program since it does not have a cap on the amount of funds that can be spent on administrative costs under that program. We cannot estimate the impact of this shift on the VR program because DSUs do not report data showing the amount of VR program funds spent on administrative costs for the Supported Employment program.

C. Limitations on the Use of Subminimum Wage

Section 511 of the Act, as added by WIOA, imposes limitations on the payment of subminimum wages by employers who hold special wage certificates under the Fair Labor Standards Act. These statutory requirements take effect on July 22, 2016.

Pursuant to section 511 of the Act, as added by WIOA, final §397.10 requires the DSU, in consultation with the State educational agency, to develop a process, or utilize

an existing process, that ensures individuals with disabilities, including youth with disabilities, receive documentation demonstrating completion of the various activities required by section 511. Final §§397.20 and 397.30 establish the documentation that the DSUs and local educational agencies, as appropriate, must provide to demonstrate an individual's completion of the various activities required by section 511(a)(2) of the Act. These include completing pre-employment transition services under final §361.48(a) and the determination under an application for VR services under final §§361.42 and 361.43. Final §397.40 establishes the documentation that the DSUs must provide to individuals with disabilities upon the completion of certain information and career counseling-related services, as required by section 511(c) of the Act. We are not able to quantify the costs to the DSUs related to the provision of this required documentation because the number of youth and other individuals who potentially could receive services under part 397 will vary widely from State to State. In addition, there exists no reliable national data on which to base a calculation of costs. However, DSUs generate documentation throughout the vocational rehabilitation process that may meet the requirements of

final §§397.20 and 397.30, including written notification of a consumer's eligibility or ineligibility, copies of individualized plans for employment and subsequent amendments, and written notification when the consumer's record is closed. As a result, the use of this documentation to meet section 511 requirements should not result in significant additional burden to DSUs.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require the public to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control numbers assigned to collections of information in these final regulations are: 1205-0522 (Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act), 1820-0013 (Cumulative Case Report), 1820-0017 (Annual Vocational Rehabilitation Program/Cost Report), 1820-0508 (VR Case Service Report), 1820-0563 (Annual Report of Appeals), 1820-0693 (Program Improvement Plan), and 1820-0694 (VR Program Corrective Action Plan). WIOA made several significant changes that affect the VR program collections of information. These substantive changes will be submitted to OMB with the final

regulations.

Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act (1205-0522)

Section 101(a) of the Act, as amended by WIOA, adds new content requirements to the State plan, which is now submitted as the VR services portion of the Unified or Combined State Plan under section 102 or 103 of title I of WIOA. As a result, these information collection requirements are contained in the Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications, and we will discontinue the VR State Plan (OMB 1820-0500). In the NPRM, we described the substantive changes to the content of the VR State Plan, now collected under the VR services portion and supported employment supplement of the Unified or Combined State Plan (OMB control number 1205-0522), caused by final §§361.10, 361.18, 361.24, 361.29, and 361.36, along with final §§363.10 and 363.11. In addition, the form includes previously approved information collection requirements related to a number of regulations that remained unchanged as a result of the amendments to the Act, including §§361.12, 361.13, 361.15, 361.16, 361.17, 361.19, 361.20,

361.21, 361.22, 361.23, 361.25, 361.26, 361.27, 361.30, 361.31, 361.34, 361.35, 361.37, 361.40, 361.46, 361.51, 361.52, 361.53, and 361.55. We have made no changes in the content of the VR services portion of the Unified or Combined State Plan and supported employment supplement since publication of the NPRM.

In the NPRM, we increased the estimated time for each DSU to prepare and submit the VR services portion of the Unified or Combined State Plan and its supported employment supplement from 25 to 30 hours annually.

In addition, the total cost of this data collection increased due to the proposed adjustment to the average hourly wage rate of State personnel used to estimate the annual burden for this data collection from $22.00 to $39.78, so that wage rates are consistent with data reported by the Bureau of Labor Statistics. As a result of these changes, we estimated in the NPRM a total annual burden of 2,400 hours (30 hours for each of the 80 respondents), at $39.78 per hour, for a total annual cost of $95,472.00. Since publication of the NPRM, we have adjusted the total annual estimated cost burden for submission of the VR services portion of the Unified or Combined State Plan due to further adjustments in the

average hourly wage rate for State personnel responsible for the submission of the form of $54.21 based on data from the Bureau of Labor Statistics, for a total of $130,104 for all 80 agencies.

VR Case Service Report (1820-0508)

The VR Case Service Report is used to collect annual individual level data on the individuals that have exited the VR program, including individuals receiving services with funds provided under the Supported Employment program. Sections 101(a)(10) and 607 of the Act contain data reporting requirements under the VR program and Supported Employment program, respectively. WIOA amends these sections to require States to report additional data describing the individuals served and the services provided through these programs. In addition, WIOA amends section 106 of the Act by requiring that the standards and indicators used to assess the performance of the VR program be consistent with the performance accountability measures for the core programs of the workforce development system established under section 116 of WIOA. We described in the NPRM the substantive changes made to final §§361.40 and 363.52 that cause substantive changes to the active and OMB-approved data collection under 1820-0508--the VR Case

Service Report (RSA-911). Since publication of the NPRM, we have made no substantive changes to the RSA-911 as a result of changes in these final regulations or the joint final regulations governing the performance accountability system published elsewhere in this issue of the Federal Register. However, since the NPRM, we have modified the RSA-911 TO incorporate changes in the data collected through the joint ICR. In addition, we have revised the layout of the form in response to comments to better align the collection of specific data elements with the VR process and to clarify the data needed to track the provision of pre-employment transition services and the achievement of supported employment outcomes.

In the NPRM, we increased the estimated burden for the submission of the RSA-911 caused by the reporting of the data for both open and closed cases on a quarterly basis. We estimated the total annual reporting burden to be 8,000 hours at $33.63 per hour (a rate more consistent with the rate reported through the Bureau of Labor Statistics for State-employed database administrators), for a total annual cost of $269,040.

As described in the Regulatory Impact Analysis section of these final regulations, we have increased the estimated

burden associated with the RSA-911 since publication of the NPRM for several reasons. We now include in the estimated burden the time needed for both collection and submission of the data. Previous burden estimates were based only on the time needed to prepare and submit the RSA-911. In addition, we have changed the method used to estimate the time needed to collect the data from a total of 15 minutes per vocational rehabilitation counselor to one minute for each new data element in the form. We also have revised the estimated hours associated with the submission of the data on a quarterly basis from a total of 100 per year to a total of 120 hours (30 hours per quarter). Finally, we now estimate that 64 percent of the new data elements are required by substantive changes to the VR program-specific requirements in section 101(a)(10 of the Act and the remaining 36 percent are required by section 116 of WIOA. We have prorated the estimated burden for the collection of the new data elements based on these percentages. As a result of these changes, the total additional VR-specific burden hours for both collection and submission of required data is 6,470 hours per VR agency (6,400 data collection hours and 70 data submission hours), or a total of 517,600 hours for all 80 VR agencies. The estimated total

additional VR program-specific cost for both collection and submission per VR agency is $211,831, with a total additional burden cost of $16,946,512 for all 80 VR agencies.

Intergovernmental Review

These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for these programs.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available. We received no comments.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in

the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. In the NPRM we stated that parts 361, 363, and 397 may have federalism implications and encouraged State and local elected officials to review and provide comments on the proposed regulations. In the Public Comment section of this preamble, we discuss any comments we received on this subject.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the person listed under FOR FURTHER INFORMATION CONTACT.

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(Catalog of Federal Domestic Assistance Numbers: 84.126A State Vocational Rehabilitation Services program; and 84.187 State Supported Employment Services program)

List of Subjects

34 CFR Part 361

Administrative practice and procedure, Grant programs-education, Grant programs-social programs, Reporting and recordkeeping requirements, Vocational rehabilitation

34 CFR Part 363

Grant programs-education, Grant programs-social programs, Manpower training programs, Reporting and recordkeeping requirements, and Vocational rehabilitation

Dated:

John B. King, Jr.
Secretary of Education

The Secretary of Education amends title 34 of the Code of Federal Regulations as follows:

PART 361—STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

Part 361 is revised to read as follows:

PART 361—STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

Subpart A—General

Sec.

361.1 Purpose.

361.2 Eligibility for a grant.

361.3 Authorized activities.

361.4 Applicable regulations.

361.5 Applicable definitions.

Subpart B—State Plan and Other Requirements for Vocational Rehabilitation Services

361.10 Submission, approval, and disapproval of the State plan.

361.11 Withholding of funds.

ADMINISTRATION

361.12 Methods of administration.

361.13 State agency for administration.

361.14 Substitute State agency.

361.15 Local administration.

361.16 Establishment of an independent commission or a State Rehabilitation Council.

361.17 Requirements for a State Rehabilitation Council.

361.18 Comprehensive system of personnel development.

361.19 Affirmative action for individuals with disabilities.

361.20 Public participation requirements.

361.21 Consultations regarding the administration of the vocational rehabilitation services portion of the Unified or Combined State Plan.

361.22 Coordination with education officials.

361.23 Requirements related to the statewide workforce development system.

361.24 Cooperation and coordination with other entities.

361.25 Statewideness.

361.26 Waiver of statewideness.

361.27 Shared funding and administration of joint programs.

361.28 Third-party cooperative arrangements involving funds from other public agencies.

361.29 Statewide assessment; annual estimates; annual State goals and priorities; strategies; and progress reports.

361.30 Services to American Indians.

361.31 Cooperative agreements with private nonprofit organizations.

361.32 Provision of training and services for employers.

361.33 [Reserved]

361.34 Supported employment State plan supplement.

361.35 Innovation and expansion activities.

361.36 Ability to serve all eligible individuals; order of selection for services.

361.37 Information and referral programs.

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PROVISION AND SCOPE OF SERVICES

361.41 Processing referrals and applications.

361.42 Assessment for determining eligibility and priority for services.

361.43 Procedures for ineligibility determination.

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361.50 Written policies governing the provision of services for individuals with disabilities.
361.51 Standards for facilities and providers of services.
361.52 Informed choice.
361.53 Comparable services and benefits.
361.54 Participation of individuals in cost of services based on financial need.
361.55 Semi-annual and annual review of individuals in extended employment and other employment under special certificate provisions of the Fair Labor Standards Act.
361.56 Requirements for closing the record of services of an individual who has achieved an employment outcome.
361.57 Review of determinations made by designated State unit personnel.
Subpart C—Financing of State Vocational Rehabilitation Programs
361.60 Matching requirements.

361.61 Limitation on use of funds for construction expenditures.

361.62 Maintenance of effort requirements.

361.63 Program income.

361.64 Obligation of Federal funds.

361.65 Allotment and payment of Federal funds for vocational rehabilitation services.

Subpart D [Reserved]

Subpart E [Reserved]

Subpart F [Reserved]

AUTHORITY: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), unless otherwise noted.

Subpart A—General

§361.1 Purpose.

Under the State Vocational Rehabilitation Services Program, the Secretary provides grants to assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable vocational rehabilitation programs, each of which is—

(a) An integral part of a statewide workforce development system; and

(b) Designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with

disabilities, consistent with their unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice so that they may prepare for and engage in competitive integrated employment and achieve economic self-sufficiency.

(Authority: Sections 12(c) and 100(a) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 720(a))

§361.2 Eligibility for a grant.

Any State that submits to the Secretary a vocational rehabilitation services portion of the Unified or Combined State Plan that meets the requirements of section 101(a) of the Act and this part is eligible for a grant under this program.

(Authority: Section 101(a) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a))

§361.3 Authorized activities.

The Secretary makes payments to a State to assist in—

(a) The costs of providing vocational rehabilitation services under the vocational rehabilitation services portion of the Unified or Combined State Plan; and

(b) Administrative costs under the vocational rehabilitation services portion of the Unified or Combined State Plan, including one-stop infrastructure costs.

(Authority: Sections 12(c) and 111(a)(1) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 731(a)(1))

§361.4 Applicable regulations.

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 76 (State-Administered Programs).

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(b) The regulations in this part 361.

(c) 2 CFR part 190 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)) as adopted in 2 CFR part 3485.

(d) 2 CFR part 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards) as adopted in 2 CFR part 3474, except the requirements to accept third-party in-kind contributions to meet cost-sharing or matching requirements, as otherwise authorized under §200.306(b).

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

§361.5 Applicable definitions.

The following definitions apply to this part:

(a) Definitions in EDGAR 77.1.

(b) Definitions in 2 CFR part 200, subpart A.

(c) The following definitions:

(1) Act means the Rehabilitation Act of 1973, as amended (29 U.S.C. 701 et seq.).

(2) Administrative costs under the vocational rehabilitation services portion of the Unified or Combined State Plan means expenditures incurred in the performance of administrative functions under the vocational rehabilitation program carried out under this part, including expenses related to program planning, development, monitoring, and evaluation, including, but not limited to, expenses for—

(i) Quality assurance;

(ii) Budgeting, accounting, financial management, information systems, and related data processing;

(iii) Providing information about the program to the public;

(iv) Technical assistance and support services to other State agencies, private nonprofit organizations, and businesses and industries, except for technical assistance and support services described in §361.49(a)(4);

(v) The State Rehabilitation Council and other advisory committees;

(vi) Professional organization membership dues for designated State unit employees;

(vii) The removal of architectural barriers in State vocational rehabilitation agency offices and State-operated rehabilitation facilities;

(viii) Operating and maintaining designated State unit facilities, equipment, and grounds, as well as the infrastructure of the one-stop system;

(ix) Supplies;

(x) Administration of the comprehensive system of personnel development described in §361.18, including

personnel administration, administration of affirmative action plans, and training and staff development;

(xi) Administrative salaries, including clerical and other support staff salaries, in support of these administrative functions;

(xii) Travel costs related to carrying out the program, other than travel costs related to the provision of services;

(xiii) Costs incurred in conducting reviews of determinations made by personnel of the designated State unit, including costs associated with mediation and impartial due process hearings under §361.57; and

(xiv) Legal expenses required in the administration of the program.

(Authority: Sections 7(1) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(1) and 709(c))

(3) Applicant means an individual who submits an application for vocational rehabilitation services in accordance with §361.41(b)(2).

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

(4) Appropriate modes of communication means specialized aids and supports that enable an individual

with a disability to comprehend and respond to information that is being communicated. Appropriate modes of communication include, but are not limited to, the use of interpreters, open and closed captioned videos, specialized telecommunications services and audio recordings, Brailled and large print materials, materials in electronic formats, augmentative communication devices, graphic presentations, and simple language materials.

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

(5) Assessment for determining eligibility and vocational rehabilitation needs means, as appropriate in each case—

(i)(A) A review of existing data—

(1) To determine if an individual is eligible for vocational rehabilitation services; and

(2) To assign priority for an order of selection described in §361.36 in the States that use an order of selection; and

(B) To the extent necessary, the provision of appropriate assessment activities to obtain necessary additional data to make the eligibility determination and assignment;

(ii) To the extent additional data are necessary to make a determination of the employment outcomes and the nature and scope of vocational rehabilitation services to be included in the individualized plan for employment of an eligible individual, a comprehensive assessment to determine the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment, of the eligible individual. This comprehensive assessment—

(A) Is limited to information that is necessary to identify the rehabilitation needs of the individual and to develop the individualized plan for employment of the eligible individual;

(B) Uses as a primary source of information, to the maximum extent possible and appropriate and in accordance with confidentiality requirements—

(1) Existing information obtained for the purposes of determining the eligibility of the individual and assigning priority for an order of selection described in §361.36 for the individual; and

(2) Information that can be provided by the individual and, if appropriate, by the family of the individual;

(C) May include, to the degree needed to make such a determination, an assessment of the personality, interests, interpersonal skills, intelligence and related functional capacities, educational achievements, work experience, vocational aptitudes, personal and social adjustments, and employment opportunities of the individual and the medical, psychiatric, psychological, and other pertinent vocational, educational, cultural, social, recreational, and environmental factors that affect the employment and rehabilitation needs of the individual;

(D) May include, to the degree needed, an appraisal of the patterns of work behavior of the individual and services needed for the individual to acquire occupational skills and to develop work attitudes, work habits, work tolerance, and social and behavior patterns necessary for successful job performance, including the use of work in real job situations to assess and develop the capacities of the individual to perform adequately in a work environment; and

(E) To the maximum extent possible, relies on information obtained from experiences in integrated employment settings in the community and in other integrated community settings;

(iii) Referral, for the provision of rehabilitation technology services to the individual, to assess and develop the capacities of the individual to perform in a work environment; and

(iv) An exploration of the individual's abilities, capabilities, and capacity to perform in work situations, which must be assessed periodically during trial work experiences, including experiences in which the individual is provided appropriate supports and training.

(Authority: Sections 7(2) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(2) and 709(c))

(6) Assistive technology terms.

(i) Assistive technology has the meaning given such term in section 3 of the Assistive Technology Act of 1998 (29 U.S.C. 3002).

(ii) Assistive technology device has the meaning given such term in section 3 of the Assistive Technology Act of 1998, except that the reference in such section to the term individuals with disabilities will be deemed to mean more than one individual with a disability as defined in paragraph (20)(A) of the Act.

(iii) Assistive technology service has the meaning given such term in section 3 of the Assistive Technology

Act of 1998, except that the reference in such section to the term—

(A) Individual with a disability will be deemed to mean an individual with a disability, as defined in paragraph (20)(A) of the Act; and

(B) Individuals with disabilities will be deemed to mean more than one such individual.

(Authority: Sections 7(3) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(3) and 709(c))

(7) Community rehabilitation program (i) Community rehabilitation program means a program that provides directly or facilitates the provision of one or more of the following vocational rehabilitation services to individuals with disabilities to enable those individuals to maximize their opportunities for employment, including career advancement:

(A) Medical, psychiatric, psychological, social, and vocational services that are provided under one management.

(B) Testing, fitting, or training in the use of prosthetic and orthotic devices.

(C) Recreational therapy.

(D) Physical and occupational therapy.

(E) Speech, language, and hearing therapy.

(F) Psychiatric, psychological, and social services, including positive behavior management.

(G) Assessment for determining eligibility and vocational rehabilitation needs.

(H) Rehabilitation technology.

(I) Job development, placement, and retention services.

(J) Evaluation or control of specific disabilities.

(K) Orientation and mobility services for individuals who are blind.

(L) Extended employment.

(M) Psychosocial rehabilitation services.

(N) Supported employment services and extended services.

(O) Customized employment.

(P) Services to family members if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(Q) Personal assistance services.

(R) Services similar to the services described in paragraphs (A) through (Q) of this definition.

(ii) For the purposes of this definition, program means an agency, organization, or institution, or unit of

an agency, organization, or institution, that provides directly or facilitates the provision of vocational rehabilitation services as one of its major functions. (Authority: Section 7(4) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(4))

(8) Comparable services and benefits. (i) Comparable services and benefits means services and benefits, including accommodations and auxiliary aids and services, that are—

(A) Provided or paid for, in whole or in part, by other Federal, State, or local public agencies, by health insurance, or by employee benefits;

(B) Available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's individualized plan for employment in accordance with §361.53; and

(C) Commensurate to the services that the individual would otherwise receive from the designated State vocational rehabilitation agency.

(ii) For the purposes of this definition, comparable services and benefits do not include awards and scholarships based on merit.

(Authority: Sections 12(c) and 101(a)(8) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(8))

(9) Competitive integrated employment means work that—

(i) Is performed on a full-time or part-time basis (including self-employment) and for which an individual is compensated at a rate that–

(A) Is not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the rate required under the applicable State or local minimum wage law for the place of employment;

(B) Is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; and

(C) In the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities and who are self-employed in similar

occupations or on similar tasks and who have similar training, experience, and skills; and

(D) Is eligible for the level of benefits provided to other employees; and

(ii) Is at a location--

(A) Typically found in the community; and

(B) Where the employee with a disability interacts for the purpose of performing the duties of the position with other employees within the particular work unit and the entire work site, and, as appropriate to the work performed, other persons (e.g., customers and vendors), who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons; and

(iii) Presents, as appropriate, opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions.

(Authority: Sections 7(5) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(5) and 709(c))

(10) Construction of a facility for a public or nonprofit community rehabilitation program means—

(i) The acquisition of land in connection with the construction of a new building for a community rehabilitation program;

(ii) The construction of new buildings;

(iii) The acquisition of existing buildings;

(iv) The expansion, remodeling, alteration, or renovation of existing buildings;

(v) Architect's fees, site surveys, and soil investigation, if necessary, in connection with the acquisition of land or existing buildings, or the construction, expansion, remodeling, or alteration of community rehabilitation facilities;

(vi) The acquisition of initial fixed or movable equipment of any new, newly acquired, newly expanded, newly remodeled, newly altered, or newly renovated buildings that are to be used for community rehabilitation program purposes; and

(vii) Other direct expenditures appropriate to the construction project, except costs of off-site improvements.

(Authority: Sections 7(6) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(6) and 709(c))

(11) Customized employment means competitive integrated employment, for an individual with a significant disability, that is—

(i) Based on an individualized determination of the unique strengths, needs, and interests of the individual with a significant disability;

(ii) Designed to meet the specific abilities of the individual with a significant disability and the business needs of the employer; and

(iii) Carried out through flexible strategies, such as—

(A) Job exploration by the individual; and

(B) Working with an employer to facilitate placement, including—

(1) Customizing a job description based on current employer needs or on previously unidentified and unmet employer needs;

(2) Developing a set of job duties, a work schedule and job arrangement, and specifics of supervision (including performance evaluation and review), and determining a job location;

(3) Using a professional representative chosen by the individual, or if elected self-representation, to work with an employer to facilitate placement; and

(4) Providing services and supports at the job location.

(Authority: Section 7(7) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(7) and 709(c))

(12) Designated State agency or State agency means the sole State agency, designated, in accordance with §361.13(a), to administer, or supervise the local administration of, the vocational rehabilitation services portion of the Unified or Combined State Plan. The term includes the State agency for individuals who are blind, if designated as the sole State agency with respect to that part of the Unified or Combined State Plan relating to the vocational rehabilitation of individuals who are blind.

(Authority: Sections 7(8)(A) and 101(a)(2)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(8)(A) and 721(a)(2)(A))

(13) Designated State unit or State unit means either—

(i) The State vocational rehabilitation bureau, division, or other organizational unit that is primarily

concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and that is responsible for the administration of the vocational rehabilitation program of the State agency, as required under §361.13(b); or

(ii) The State agency that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities.

(Authority: Sections 7(8)(B) and 101(a)(2)(B) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(8)(B) and 721(a)(2)(B))

(14) Eligible individual means an applicant for vocational rehabilitation services who meets the eligibility requirements of §361.42(a).

(Authority: Sections 7(20)(A) and 102(a)(1) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(20)(A) and 722(a)(1))

(15) Employment outcome means, with respect to an individual, entering, advancing in, or retaining full-time or, if appropriate, part-time competitive integrated employment, as defined in §361.5(c)(9) (including customized employment, self-employment, telecommuting, or business ownership), or supported employment as defined in

§361.5(c)(53), that is consistent with an individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

Note: A designated State unit may continue services to individuals with uncompensated employment goals on their approved individualized plans for employment prior to the effective date of the final regulations until June 30, 2017, unless a longer period of time is required based on the needs of the individual with the disability, as documented in the individual's service record.

(Authority: Sections 7(11), 12(c), 100(a)(2), and 102(b)(4)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(11), 709(c), 720(a)(2), and 722(b)(4)(A))

(16) Establishment, development, or improvement of a public or nonprofit community rehabilitation program means—

(i) The establishment of a facility for a public or nonprofit community rehabilitation program, as defined in paragraph (c)(17) of this section, to provide vocational rehabilitation services to applicants or eligible individuals;

(ii) Staffing, if necessary to establish, develop, or improve a public or nonprofit community rehabilitation program for the purpose of providing vocational

rehabilitation services to applicants or eligible individuals, for a maximum period of four years, with Federal financial participation available at the applicable matching rate for the following levels of staffing costs:

(A) 100 percent of staffing costs for the first year;

(B) 75 percent of staffing costs for the second year;

(C) 60 percent of staffing costs for the third year; and

(D) 45 percent of staffing costs for the fourth year; and

(iii) Other expenditures and activities related to the establishment, development, or improvement of a public or nonprofit community rehabilitation program that are necessary to make the program functional or increase its effectiveness in providing vocational rehabilitation services to applicants or eligible individuals, but are not ongoing operating expenses of the program.

(Authority: Sections 7(12) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(12) and 709(c))

(17) <u>Establishment of a facility for a public or nonprofit community rehabilitation program</u> means—

(i) The acquisition of an existing building and, if necessary, the land in connection with the acquisition, if

the building has been completed in all respects for at least one year prior to the date of acquisition and the Federal share of the cost of acquisition is not more than $300,000;

(ii) The remodeling or alteration of an existing building, provided the estimated cost of remodeling or alteration does not exceed the appraised value of the existing building;

(iii) The expansion of an existing building, provided that—

(A) The existing building is complete in all respects;

(B) The total size in square footage of the expanded building, notwithstanding the number of expansions, is not greater than twice the size of the existing building;

(C) The expansion is joined structurally to the existing building and does not constitute a separate building; and

(D) The costs of the expansion do not exceed the appraised value of the existing building;

(iv) Architect's fees, site survey, and soil investigation, if necessary in connection with the

acquisition, remodeling, alteration, or expansion of an existing building; and

(v) The acquisition of fixed or movable equipment, including the costs of installation of the equipment, if necessary to establish, develop, or improve a community rehabilitation program.

(Authority: Sections 7(12) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(12) and 709(c))

(18) Extended employment means work in a non-integrated or sheltered setting for a public or private nonprofit agency or organization that provides compensation in accordance with the Fair Labor Standards Act.

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

(19) Extended services means ongoing support services and other appropriate services that are--

(i) Needed to support and maintain an individual with a most significant disability including a youth with a most significant disability, in supported employment;

(ii) Organized or made available, singly or in combination, in such a way as to assist an eligible individual in maintaining supported employment;

(iii) Based on the needs of an eligible individual, as specified in an individualized plan for employment;

(iv) Provided by a State agency, a private nonprofit organization, employer, or any other appropriate resource, after an individual has made the transition from support from the designated State unit; and

(v) Provided to a youth with a most significant disability by the designated State unit in accordance with requirements set forth in this part and part 363 for a period not to exceed four years, or at such time that a youth reaches age 25 and no longer meets the definition of a youth with a disability under 34 CFR 361.5(c)(58), whichever occurs first. The designated State unit may not provide extended services to an individual with a most significant disability who is not a youth with a most significant disability.

(Authority: Sections 7(13), 12(c), and 604(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(13), 709(c), and 795i(b))

(20) Extreme medical risk means a probability of substantially increasing functional impairment or death if medical services, including mental health services, are not provided expeditiously.

(Authority: Sections 12(c) and 101(a)(8)(A)(i)(III) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(8)(A)(i)(III))

(21) Fair hearing board means a committee, body, or group of persons established by a State prior to January 1, 1985, that—

(i) Is authorized under State law to review determinations made by personnel of the designated State unit that affect the provision of vocational rehabilitation services; and

(ii) Carries out the responsibilities of the impartial hearing officer in accordance with the requirements in §361.57(j).

(Authority: Sections 12(c) and 102(c)(6) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 722(c)(6))

(22) Family member, for purposes of receiving vocational rehabilitation services in accordance with §361.48(b)(9), means an individual—

(i) Who either—

(A) Is a relative or guardian of an applicant or eligible individual; or

(B) Lives in the same household as an applicant or eligible individual;

(ii) Who has a substantial interest in the well-being of that individual; and

(iii) Whose receipt of vocational rehabilitation services is necessary to enable the applicant or eligible individual to achieve an employment outcome.

(Authority: Sections 12(c) and 103(a)(19) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 723(a)(19))

(23) Governor means a chief executive officer of a State.

(Authority: Section 7(15) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(15))

(24) Impartial hearing officer. (i) Impartial hearing officer means an individual who—

(A) Is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(B) Is not a member of the State Rehabilitation Council for the designated State unit;

(C) Has not been involved previously in the vocational rehabilitation of the applicant or recipient of services;

(D) Has knowledge of the delivery of vocational rehabilitation services, the vocational rehabilitation services portion of the Unified or Combined State Plan, and the Federal and State regulations governing the provision of services;

(E) Has received training with respect to the performance of official duties; and

(F) Has no personal, professional, or financial interest that could affect the objectivity of the individual.

(ii) An individual is not considered to be an employee of a public agency for the purposes of this definition solely because the individual is paid by the agency to serve as a hearing officer.

(Authority: Sections 7(16) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(16) and 709(c))

(25) Indian; American Indian; Indian American; Indian Tribe.

(i) In general. The terms “Indian”, “American Indian”, and “Indian American” mean an individual who is a

member of an Indian tribe and include a Native and a descendant of a Native, as such terms are defined in subsections (b) and (r) of section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

(ii) Indian tribe. The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act) and a tribal organization (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(b)(l)).

(Authority: Section 7(19) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(19))

(26) Individual who is blind means a person who is blind within the meaning of applicable State law.

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

(27) Individual with a disability, except as provided in paragraph (c)(28)of this section, means an individual—

(i) Who has a physical or mental impairment;

(ii) Whose impairment constitutes or results in a substantial impediment to employment; and

(iii) Who can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

(Authority: Section 7(20)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(20)(A))

(28) Individual with a disability, for purposes of §§361.5(c)(13), 361.13(a), 361.13(b)(1), 361.17(a), (b), (c), and (j), 361.18(b), 361.19, 361.20, 361.23(b)(2), 361.29(a) and (d)(8), and 361.51(b), means an individual—

(i) Who has a physical or mental impairment that substantially limits one or more major life activities;

(ii) Who has a record of such an impairment; or

(iii) Who is regarded as having such an impairment.

(Authority: Section 7(20)(B) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(20)(B))

(29) Individual with a most significant disability means an individual with a significant disability who meets the designated State unit's criteria for an individual with a most significant disability. These criteria must be consistent with the requirements in §361.36(d)(1) and (2).

(Authority: Sections 7(21)(E) and 101(a)(5)(C) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(21)(E) and 721(a)(5)(C))

(30) Individual with a significant disability means an individual with a disability—

(i) Who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome;

(ii) Whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(iii) Who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, intellectual disability, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation

needs to cause comparable substantial functional limitation.

(Authority: Section 7(21)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(21)(A))

(31) Individual's representative means any representative chosen by an applicant or eligible individual, as appropriate, including a parent, guardian, other family member, or advocate, unless a representative has been appointed by a court to represent the individual, in which case the court-appointed representative is the individual's representative.

(Authority: Sections 7(22) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(22) and 709(c))

(32) Integrated setting means--

(i) With respect to the provision of services, a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals other than non-disabled individuals who are providing services to those applicants or eligible individuals; and

(ii) With respect to an employment outcome, means a setting—

(A) Typically found in the community; and

(B) Where the employee with a disability interacts, for the purpose of performing the duties of the position, with other employees within the particular work unit and the entire work site, and, as appropriate to the work performed, other persons (e.g., customers and vendors) who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons.

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

(33) Local workforce development board means a local board, as defined in section 3 of the Workforce Innovation and Opportunity Act.

(Authority: Section 7(25) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(25))

(34) Maintenance means monetary support provided to an individual for expenses, such as food, shelter, and clothing, that are in excess of the normal expenses of the individual and that are necessitated by the individual's participation in an assessment for determining eligibility and vocational rehabilitation needs or the individual's

receipt of vocational rehabilitation services under an individualized plan for employment.

(Authority: Sections 12(c) and 103(a)(7) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 723(a)(7))

(i) Examples: The following are examples of expenses that would meet the definition of maintenance. The examples are illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgment.

Example 1: The cost of a uniform or other suitable clothing that is required for an individual's job placement or job-seeking activities.

Example 2: The cost of short-term shelter that is required in order for an individual to participate in assessment activities or vocational training at a site that is not within commuting distance of an individual's home.

Example 3: The initial one-time costs, such as a security deposit or charges for the initiation of utilities, that are required in order for an individual to relocate for a job placement.

(ii) [Reserved]

(35) Mediation means the act or process of using an independent third party to act as a mediator, intermediary, or conciliator to assist persons or parties in settling differences or disputes prior to pursuing formal administrative or other legal remedies. Mediation under the program must be conducted in accordance with the requirements in §361.57(d) by a qualified and impartial mediator as defined in §361.5(c)(43).

(Authority: Sections 12(c) and 102(c)(4) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 722(c)(4))

(36) Nonprofit, with respect to a community rehabilitation program, means a community rehabilitation program carried out by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual and the income of which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986.

(Authority: Section 7(26) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(26))

(37) Ongoing support services, as used in the definition of supported employment, means services that-—

(i) Are needed to support and maintain an individual with a most significant disability, including a youth with a most significant disability, in supported employment;

(ii) Are identified based on a determination by the designated State unit of the individual's need as specified in an individualized plan for employment;

(iii) Are furnished by the designated State unit from the time of job placement until transition to extended services, unless post-employment services are provided following transition, and thereafter by one or more extended services providers throughout the individual's term of employment in a particular job placement;

(iv) Include an assessment of employment stability and provision of specific services or the coordination of services at or away from the worksite that are needed to maintain stability based on—

(A) At a minimum, twice-monthly monitoring at the worksite of each individual in supported employment; or

(B) If under specific circumstances, especially at the request of the individual, the individualized plan for employment provides for off-site monitoring, twice monthly meetings with the individual;

(v) Consist of—

(A) Any particularized assessment supplementary to the comprehensive assessment of rehabilitation needs described in paragraph (c)(5)(ii) of this section;

(B) The provision of skilled job trainers who accompany the individual for intensive job skill training at the work site;

(C) Job development and training;

(D) Social skills training;

(E) Regular observation or supervision of the individual;

(F) Follow-up services including regular contact with the employers, the individuals, the parents, family members, guardians, advocates or authorized representatives of the individuals, and other suitable professional and informed advisors, in order to reinforce and stabilize the job placement;

(G) Facilitation of natural supports at the worksite;

(H) Any other service identified in the scope of vocational rehabilitation services for individuals, described in §361.48(b); or

(I) Any service similar to the foregoing services. (Authority: Sections 7(27) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(27) and 709(c))

(38) Personal assistance services means a range of services, including, among other things, training in managing, supervising, and directing personal assistance services, provided by one or more persons, that are--

(i) Designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform without assistance if the individual did not have a disability;

(ii) Designed to increase the individual's control in life and ability to perform everyday activities on or off the job;

(iii) Necessary to the achievement of an employment outcome; and

(iv) Provided only while the individual is receiving other vocational rehabilitation services. The services may include training in managing, supervising, and directing personal assistance services.

(Authority: Sections 7(28), 12(c), 102(b)(4)(B)(i)(I)(bb), and 103(a)(9) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(28), 709(c), 722(b)(4)(B)(i)(I)(bb), and 723(a)(9))

(39) Physical and mental restoration services means—

(i) Corrective surgery or therapeutic treatment that is likely, within a reasonable period of time, to correct or modify substantially a stable or slowly progressive physical or mental impairment that constitutes a substantial impediment to employment;

(ii) Diagnosis of and treatment for mental or emotional disorders by qualified personnel in accordance with State licensure laws;

(iii) Dentistry;

(iv) Nursing services;

(v) Necessary hospitalization (either inpatient or outpatient care) in connection with surgery or treatment and clinic services;

(vi) Drugs and supplies;

(vii) Prosthetic and orthotic devices;

(viii) Eyeglasses and visual services, including visual training, and the examination and services necessary for the prescription and provision of eyeglasses, contact lenses, microscopic lenses, telescopic lenses, and other special visual aids prescribed by personnel who are qualified in accordance with State licensure laws;

(ix) Podiatry;

(x) Physical therapy;

(xi) Occupational therapy;

(xii) Speech or hearing therapy;

(xiii) Mental health services;

(xiv) Treatment of either acute or chronic medical complications and emergencies that are associated with or arise out of the provision of physical and mental restoration services, or that are inherent in the condition under treatment;

(xv) Special services for the treatment of individuals with end-stage renal disease, including transplantation, dialysis, artificial kidneys, and supplies; and

(xvi) Other medical or medically related rehabilitation services.

(Authority: Sections 12(c) and 103(a)(6) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 723(a)(6))

(40) Physical or mental impairment means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory (including

speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (Authority: Sections 7(20)(A) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(20)(A) and 709(c))

(41) Post-employment services means one or more of the services identified in §361.48(b) that are provided subsequent to the achievement of an employment outcome and that are necessary for an individual to maintain, regain, or advance in employment, consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. (Authority: Sections 12(c) and 103(a)(20) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 723(a)(20))

Note to paragraph (c)(41): Post-employment services are intended to ensure that the employment outcome remains consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. These services are

available to meet rehabilitation needs that do not require a complex and comprehensive provision of services and, thus, should be limited in scope and duration. If more comprehensive services are required, then a new rehabilitation effort should be considered. Post-employment services are to be provided under an amended individualized plan for employment; thus, a re-determination of eligibility is not required. The provision of post-employment services is subject to the same requirements in this part as the provision of any other vocational rehabilitation service. Post-employment services are available to assist an individual to maintain employment, e.g., the individual's employment is jeopardized because of conflicts with supervisors or co-workers, and the individual needs mental health services and counseling to maintain the employment, or the individual requires assistive technology to maintain the employment; to regain employment, e.g., the individual's job is eliminated through reorganization and new placement services are needed; and to advance in employment, e.g., the employment is no longer consistent with the individual's unique strengths, resources, priorities,

concerns, abilities, capabilities, interests, and informed choice.

(42) Pre-employment transition services means the required activities and authorized activities specified in §361.48(a)(2) and (3).

(Authority: Sections 7(30) and 113(b) and (c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(30) and 733(b) and (c))

(43) Qualified and impartial mediator. (i) Qualified and impartial mediator means an individual who—

(A) Is not an employee of a public agency (other than an administrative law judge, hearing examiner, employee of a State office of mediators, or employee of an institution of higher education);

(B) Is not a member of the State Rehabilitation Council for the designated State unit;

(C) Has not been involved previously in the vocational rehabilitation of the applicant or recipient of services;

(D) Is knowledgeable of the vocational rehabilitation program and the applicable Federal and State laws, regulations, and policies governing the provision of vocational rehabilitation services;

(E) Has been trained in effective mediation techniques consistent with any State-approved or -recognized certification, licensing, registration, or other requirements; and

(F) Has no personal, professional, or financial interest that could affect the individual's objectivity during the mediation proceedings.

(ii) An individual is not considered to be an employee of the designated State agency or designated State unit for the purposes of this definition solely because the individual is paid by the designated State agency or designated State unit to serve as a mediator.

(Authority: Sections 12(c) and 102(c)(4) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 722(c)(4))

(44) Rehabilitation engineering means the systematic application of engineering sciences to design, develop, adapt, test, evaluate, apply, and distribute technological solutions to problems confronted by individuals with disabilities in functional areas, such as mobility, communications, hearing, vision, and cognition, and in activities associated with employment, independent living, education, and integration into the community.

(Authority: Sections 7(32) and (12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(32) and 709(c))

(45) Rehabilitation technology means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of, and address the barriers confronted by, individuals with disabilities in areas that include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services. (Authority: Section 7(32) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(32))

(46) Reservation means a Federal or State Indian reservation, a public domain Indian allotment, a former Indian reservation in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.); or a defined area of land recognized by a State or the Federal Government where there is a concentration of tribal members and on which the tribal government is providing structured activities and services.

(Authority: Section 121(e) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 741(e))

(47) Sole local agency means a unit or combination of units of general local government or one or more Indian tribes that has the sole responsibility under an agreement with, and the supervision of, the State agency to conduct a local or tribal vocational rehabilitation program, in accordance with the vocational rehabilitation services portion of the Unified or Combined State Plan.
(Authority: Section 7(24) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(24))

(48) State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.
(Authority: Section 7(34) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(34))

(49) State workforce development board means a State workforce development board, as defined in section 3 of the Workforce Innovation and Opportunity Act (29 U.S.C. 3102).
(Authority: Section 7(35) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(35))

(50) Statewide workforce development system means a workforce development system, as defined in section 3 of the Workforce Innovation and Opportunity Act (29 U.S.C. 3102).

(Authority: Section 7(36) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(36))

(51) Student with a disability. (i) Student with a disability means, in general, an individual with a disability in a secondary, postsecondary, or other recognized education program who--

(A)(1) Is not younger than the earliest age for the provision of transition services under section 614(d)(1)(A)(i)(VIII) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(1)(A)(i)(VIII)); or

(2) If the State involved elects to use a lower minimum age for receipt of pre-employment transition services under this Act, is not younger than that minimum age; and

(B)(1) Is not older than 21 years of age; or

(2) If the State law for the State provides for a higher maximum age for receipt of services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), is not older than that maximum age; and

(C)(1) Is eligible for, and receiving, special education or related services under Part B of the Individuals with Disabilities Education Act (20 U.S.C. 1411 et seq.); or

(2) Is a student who is an individual with a disability, for purposes of section 504.

(ii) Students with disabilities means more than one student with a disability.

(Authority: Sections 7(37) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(37) and 709(c))

(52) Substantial impediment to employment means that a physical or mental impairment (in light of attendant medical, psychological, vocational, educational, communication, and other related factors) hinders an individual from preparing for, entering into, engaging in, advancing in, or retaining employment consistent with the individual's abilities and capabilities.

(Authority: Sections 7(20)(A) and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(20)(A) and 709(c))

(53) Supported employment. (i) Supported employment means competitive integrated employment, including customized employment, or employment in an integrated work

setting in which an individual with a most significant disability, including a youth with a most significant disability, is working on a short-term basis toward competitive integrated employment that is individualized, and customized, consistent with the unique strengths, abilities, interests, and informed choice of the individual, including with ongoing support services for individuals with the most significant disabilities—

(A) For whom competitive integrated employment has not historically occurred, or for whom competitive integrated employment has been interrupted or intermittent as a result of a significant disability; and

(B) Who, because of the nature and severity of their disabilities, need intensive supported employment services and extended services after the transition from support provided by the designated State unit, in order to perform this work.

(ii) For purposes of this part, an individual with a most significant disability, whose supported employment in an integrated setting does not satisfy the criteria of competitive integrated employment, as defined in paragraph (c)(9) of this section is considered to be working on a short-term basis toward competitive integrated employment

so long as the individual can reasonably anticipate achieving competitive integrated employment—

(A) Within six months of achieving a supported employment outcome; or

(B) In limited circumstances, within a period not to exceed 12 months from the achievement of the supported employment outcome, if a longer period is necessary based on the needs of the individual, and the individual has demonstrated progress toward competitive earnings based on information contained in the service record.

(Authority: Sections 7(38), 12(c), and 602 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(38), 709(c), and 795g)

(54) Supported employment services means ongoing support services, including customized employment, and other appropriate services needed to support and maintain an individual with a most significant disability, including a youth with a most significant disability, in supported employment that are—

(i) Organized and made available, singly or in combination, in such a way as to assist an eligible individual to achieve competitive integrated employment;

(ii) Based on a determination of the needs of an eligible individual, as specified in an individualized plan for employment;

(iii) Provided by the designated State unit for a period of time not to exceed 24 months, unless under special circumstances the eligible individual and the rehabilitation counselor jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment; and

(iv) Following transition, as post-employment services that are unavailable from an extended services provider and that are necessary to maintain or regain the job placement or advance in employment.

(Authority: Sections 7(39), 12(c), and 103(a)(16) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(39), 709(c), and 723(a)(16))

(55) Transition services means a coordinated set of activities for a student or youth with a disability—

(i) Designed within an outcome-oriented process that promotes movement from school to post-school activities, including postsecondary education, vocational training, competitive integrated employment, supported employment,

continuing and adult education, adult services, independent living, or community participation;

(ii) Based upon the individual student's or youth’s needs, taking into account the student's or youth’s preferences and interests;

(iii) That includes instruction, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation;

(iv) That promotes or facilitates the achievement of the employment outcome identified in the student's or youth’s individualized plan for employment; and

(v) That includes outreach to and engagement of the parents, or, as appropriate, the representative of such a student or youth with a disability.

(Authority: Sections 12(c) and 103(a)(15) and (b)(7) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 723(a)(15) and (b)(7))

(56) Transportation means travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a vocational rehabilitation

service, including expenses for training in the use of public transportation vehicles and systems. (Authority: Sections 12(c) and 103(a)(8) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 723(a)(8))

(i) Examples. The following are examples of expenses that would meet the definition of transportation. The examples are purely illustrative, do not address all possible circumstances, and are not intended as substitutes for individual counselor judgment.

Example 1: Travel and related expenses for a personal care attendant or aide if the services of that person are necessary to enable the applicant or eligible individual to travel to participate in any vocational rehabilitation service.

Example 2: The purchase and repair of vehicles, including vans, but not the modification of these vehicles, as modification would be considered a rehabilitation technology service.

Example 3: Relocation expenses incurred by an eligible individual in connection with a job placement that is a significant distance from the eligible individual's current residence.

(ii) [Reserved]

(57) Vocational rehabilitation services—

(i) If provided to an individual, means those services listed in §361.48; and

(ii) If provided for the benefit of groups of individuals, means those services listed in §361.49.

(Authority: Sections 7(40) and 103 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(40) and 723)

(58) Youth with a disability. (i) Youth with a disability means an individual with a disability who is not—

(A) Younger than 14 years of age; and

(B) Older than 24 years of age.

(ii) Youth with disabilities means more than one youth with a disability.

(Authority: Section 7(42) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(42))

Subpart B—State Plan and Other Requirements for Vocational Rehabilitation Services

§361.10 Submission, approval, and disapproval of the State plan.

(a) Purpose. (1) To be eligible to receive funds under this part for a fiscal year, a State must submit, and

have approved, a vocational rehabilitation services portion of a Unified or Combined State Plan in accordance with section 102 or 103 of the Workforce Innovation and Opportunity Act.

(2) The vocational rehabilitation services portion of the Unified or Combined State Plan must satisfy all requirements set forth in this part.

(b) Separate part relating to the vocational rehabilitation of individuals who are blind. If a separate State agency administers or supervises the administration of a separate part of the vocational rehabilitation services portion of the Unified or Combined State Plan relating to the vocational rehabilitation of individuals who are blind, that part of the vocational rehabilitation services portion of the Unified or Combined State Plan must separately conform to all applicable requirements under this part.

(c) Public participation. Prior to the adoption of any substantive policies or procedures specific to the provision of vocational rehabilitation services under the vocational rehabilitation services portion of the Unified or Combined State Plan, including making any substantive amendment to those policies and procedures, the designated

State agency must conduct public meetings throughout the State, in accordance with the requirements of §361.20.

(d) Submission, approval, disapproval, and duration. All requirements regarding the submission, approval, disapproval, and duration of the vocational rehabilitation services portion of the Unified or Combined State Plan are governed by joint regulations set forth in subpart D of this part.

(e) Submission of policies and procedures. The State is not required to submit policies, procedures, or descriptions required under this part that have been previously submitted to the Secretary and that demonstrate that the State meets the requirements of this part, including any policies, procedures, or descriptions submitted under this part that are in effect on July 22, 2014.

(f) Due process. If the Secretary disapproves the vocational rehabilitation services portion of the Unified or Combined State Plan, the Secretary will follow these procedures:

(1) Informal resolution. Prior to disapproving the vocational rehabilitation services portion of the Unified

or Combined State Plan, the Secretary attempts to resolve disputes informally with State officials.

(2) Notice. If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to disapprove the vocational rehabilitation services portion of the Unified or Combined State Plan and of the opportunity for a hearing.

(3) State plan hearing. If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing in accordance with the provisions of 34 CFR part 81, subpart A.

(4) Initial decision. The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(5) Petition for review of an initial decision. The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR part 81.

(6) Review by the Secretary. The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(7) Final decision of the Department. The final decision of the Department is made in accordance with 34 CFR 81.44.

(8) Judicial review. A State may appeal the Secretary's decision to disapprove the vocational rehabilitation services portion of the Unified or Combined State Plan by filing a petition for review with the United States Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 101(a) and (b) and 107(d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a) and (b) and 727(d); and 20 U.S.C. 1231g(a))

§361.11 Withholding of funds.

(a) Basis for withholding. The Secretary may withhold or limit payments under section 111 or 603(a) of the Act, as provided by section 107(c) of the Act, if the Secretary determines that—

(1) The vocational rehabilitation services portion of the Unified or Combined State Plan, including the supported employment supplement, has been so changed that it no

longer conforms with the requirements of this part or part 363; or

(2) In the administration of the vocational rehabilitation services portion of the Unified or Combined State Plan there is a failure to comply substantially with any provision of such plan or with an evaluation standard or performance indicator established under section 106 of the Act.

(b) Informal resolution. Prior to withholding or limiting payments in accordance with this section, the Secretary attempts to resolve disputed issues informally with State officials.

(c) Notice. If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to withhold or limit payments and of the opportunity for a hearing.

(d) Withholding hearing. If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing in accordance with the provisions of 34 CFR part 81, subpart A.

(e) Initial decision. The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(f) Petition for review of an initial decision. The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR 81.42.

(g) Review by the Secretary. The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(h) Final decision of the Department. The final decision of the Department is made in accordance with 34 CFR 81.44.

(i) Judicial review. A State may appeal the Secretary's decision to withhold or limit payments by filing a petition for review with the United States Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Authority: Sections 12(c), 101(b), and 107(c) and (d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(b), and 727(c) and (d))

ADMINISTRATION

§361.12 Methods of administration.

The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State agency, and the designated State unit if applicable,

employs methods of administration found necessary by the Secretary for the proper and efficient administration of the plan and for carrying out all functions for which the State is responsible under the plan and this part. These methods must include procedures to ensure accurate data collection and financial accountability.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c) and 101(a)(6) and (a)(10)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(6) and (a)(10)(A))

§361.13 State agency for administration.

(a) Designation of State agency. The vocational rehabilitation services portion of the Unified or Combined State Plan must designate a State agency as the sole State agency to administer the vocational rehabilitation services portion of the Unified or Combined State Plan, or to supervise its administration in a political subdivision of the State by a sole local agency, in accordance with the following requirements:

(1) General. Except as provided in paragraphs (a)(2) and (a)(3) of this section, the vocational rehabilitation services portion of the Unified or Combined State Plan must

provide that the designated State agency is one of the following types of agencies:

(i) A State agency that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities; or

(ii) A State agency that includes a vocational rehabilitation unit as provided in paragraph (b) of this section.

(2) American Samoa. In the case of American Samoa, the vocational rehabilitation services portion of the Unified or Combined State Plan must designate the Governor.

(3) Designated State agency for individuals who are blind. If a State commission or other agency that provides assistance or services to individuals who are blind is authorized under State law to provide vocational rehabilitation services to individuals who are blind, and this commission or agency is primarily concerned with vocational rehabilitation or includes a vocational rehabilitation unit as provided in paragraph (b) of this section, the vocational rehabilitation services portion of the Unified or Combined State Plan may designate that agency as the sole State agency to administer the part of the plan under which vocational rehabilitation services are

provided for individuals who are blind or to supervise its administration in a political subdivision of the State by a sole local agency.

(b) Designation of State unit. (1) General. If the designated State agency is not of the type specified in paragraph (a)(1)(i) of this section or if the designated State agency specified in paragraph (a)(3) of this section is not primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities, the vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the agency (or each agency if two agencies are designated) includes a vocational rehabilitation bureau, division, or unit that—

(i) Is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and is responsible for the administration of the State agency's vocational rehabilitation program under the vocational rehabilitation services portion of the Unified or Combined State Plan;

(ii) Has a full-time director who is responsible for the day-to-day operations of the vocational rehabilitation program;

(iii) Has a staff, at least 90 percent of whom are employed full time on the rehabilitation work of the organizational unit;

(iv) Is located at an organizational level and has an organizational status within the State agency comparable to that of other major organizational units of the agency; and

(v) Has the sole authority and responsibility described within the designated State agency in paragraph (a) of this section to expend funds made available under the Act in a manner that is consistent with the purpose of the Act.

(2) In the case of a State that has not designated a separate State agency for individuals who are blind, as provided for in paragraph (a)(3) of this section, the State may assign responsibility for the part of the vocational rehabilitation services portion of the Unified or Combined State Plan under which vocational rehabilitation services are provided to individuals who are blind to one organizational unit of the designated State agency and may assign responsibility for the rest of the plan to another organizational unit of the designated State agency, with the provisions of paragraph (b)(1) of this section applying separately to each of these units.

(c) Responsibility for administration. (1) Required activities. At a minimum, the following activities are the responsibility of the designated State unit or the sole local agency under the supervision of the State unit:

(i) All decisions affecting eligibility for vocational rehabilitation services, the nature and scope of available services, and the provision of these services.

(ii) The determination to close the record of services of an individual who has achieved an employment outcome in accordance with §361.56.

(iii) Policy formulation and implementation.

(iv) The allocation and expenditure of vocational rehabilitation funds.

(v) Participation as a partner in the one-stop service delivery system established under title I of the Workforce Investment Act of 1998, in accordance with 20 CFR part 662.

(2) Non-delegable responsibility. The responsibility for the functions described in paragraph (c)(1) of this section may not be delegated to any other agency or individual.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(2) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(2))

§361.14 Substitute State agency.

(a) General provisions. (1) If the Secretary has withheld all funding from a State under §361.11, the State may designate another agency to substitute for the designated State agency in carrying out the State's program of vocational rehabilitation services.

(2) Any public or nonprofit private organization or agency within the State or any political subdivision of the State is eligible to be a substitute agency.

(3) The substitute agency must submit a vocational rehabilitation services portion of the Unified or Combined State Plan that meets the requirements of this part.

(4) The Secretary makes no grant to a substitute agency until the Secretary approves its plan.

(b) Substitute agency matching share. The Secretary does not make any payment to a substitute agency unless it has provided assurances that it will contribute the same matching share as the State would have been required to contribute if the State agency were carrying out the vocational rehabilitation program.

(Authority: Section 107(c)(3) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 727(c)(3))

§361.15 Local administration.

(a) If the vocational rehabilitation services portion of the Unified or Combined State Plan provides for the administration of the plan by a local agency, the designated State agency must—

(1) Ensure that each local agency is under the supervision of the designated State unit and is the sole local agency as defined in §361.5(c)(47) that is responsible for the administration of the program within the political subdivision that it serves; and

(2) Develop methods that each local agency will use to administer the vocational rehabilitation program, in accordance with the vocational rehabilitation services portion of the Unified or Combined State Plan.

(b) A separate local agency serving individuals who are blind may administer that part of the plan relating to vocational rehabilitation of individuals who are blind, under the supervision of the designated State unit for individuals who are blind.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 7(24) and 101(a)(2)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(24) and 721(a)(2)(A))

§361.16 Establishment of an independent commission or a State Rehabilitation Council.

(a) General requirement. Except as provided in paragraph (b) of this section, the vocational rehabilitation services portion of the Unified or Combined State Plan must contain one of the following two assurances:

(1) An assurance that the designated State agency is an independent State commission that—

(i) Is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State and is primarily concerned with vocational rehabilitation or vocational and other rehabilitation services, in accordance with §361.13(a)(1)(i);

(ii) Is consumer-controlled by persons who—

(A) Are individuals with physical or mental impairments that substantially limit major life activities; and

(B) Represent individuals with a broad range of disabilities, unless the designated State unit under the direction of the commission is the State agency for individuals who are blind;

(iii) Includes family members, advocates, or other representatives of individuals with mental impairments; and

(iv) Conducts the functions identified in §361.17(h)(4).

(2) An assurance that—

(i) The State has established a State Rehabilitation Council (Council) that meets the requirements of §361.17;

(ii) The designated State unit, in accordance with §361.29, jointly develops, agrees to, and reviews annually State goals and priorities and jointly submits to the Secretary annual reports of progress with the Council;

(iii) The designated State unit regularly consults with the Council regarding the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services;

(iv) The designated State unit transmits to the Council—

(A) All plans, reports, and other information required under this part to be submitted to the Secretary;

(B) All policies and information on all practices and procedures of general applicability provided to or used by rehabilitation personnel providing vocational rehabilitation services under this part; and

(C) Copies of due process hearing decisions issued under this part and transmitted in a manner to ensure that the identity of the participants in the hearings is kept confidential; and

(v) The vocational rehabilitation services portion of the Unified or Combined State Plan, and any revision to the vocational rehabilitation services portion of the Unified or Combined State Plan, includes a summary of input provided by the Council, including recommendations from the annual report of the Council, the review and analysis of consumer satisfaction described in §361.17(h)(4), and other reports prepared by the Council, and the designated State unit's response to the input and recommendations, including its reasons for rejecting any input or recommendation of the Council.

(b) Exception for separate State agency for individuals who are blind. In the case of a State that designates a separate State agency under §361.13(a)(3) to administer the part of the vocational rehabilitation services portion of the Unified or Combined State Plan under which vocational rehabilitation services are provided to individuals who are blind, the State must either establish a separate State Rehabilitation Council for each agency that does not meet the requirements in paragraph (a)(1) of this section or establish one State Rehabilitation Council for both agencies if neither agency meets the requirements of paragraph (a)(1) of this section.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 101(a)(21) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(21))

§361.17 Requirements for a State Rehabilitation Council.

If the State has established a Council under §361.16(a)(2) or (b), the Council must meet the following requirements:

(a) Appointment. (1) The members of the Council must be appointed by the Governor or, in the case of a State that, under State law, vests authority for the

administration of the activities carried out under this part in an entity other than the Governor (such as one or more houses of the State legislature or an independent board), the chief officer of that entity.

(2) The appointing authority must select members of the Council after soliciting recommendations from representatives of organizations representing a broad range of individuals with disabilities and organizations interested in individuals with disabilities. In selecting members, the appointing authority must consider, to the greatest extent practicable, the extent to which minority populations are represented on the Council.

(b) Composition. (1) General. Except as provided in paragraph (b)(3) of this section, the Council must be composed of at least 15 members, including—

(i) At least one representative of the Statewide Independent Living Council, who must be the chairperson or other designee of the Statewide Independent Living Council;

(ii) At least one representative of a parent training and information center established pursuant to section 682(a) of the Individuals with Disabilities Education Act;

(iii) At least one representative of the Client Assistance Program established under part 370 of this

chapter, who must be the director of or other individual recommended by the Client Assistance Program;

(iv) At least one qualified vocational rehabilitation counselor with knowledge of and experience with vocational rehabilitation programs who serves as an ex officio, nonvoting member of the Council if employed by the designated State agency;

(v) At least one representative of community rehabilitation program service providers;

(vi) Four representatives of business, industry, and labor;

(vii) Representatives of disability groups that include a cross section of—

(A) Individuals with physical, cognitive, sensory, and mental disabilities; and

(B) Representatives of individuals with disabilities who have difficulty representing themselves or are unable due to their disabilities to represent themselves;

(viii) Current or former applicants for, or recipients of, vocational rehabilitation services;

(ix) In a State in which one or more projects are funded under section 121 of the Act (American Indian Vocational Rehabilitation Services), at least one

representative of the directors of the projects in such State;

(x) At least one representative of the State educational agency responsible for the public education of students with disabilities who are eligible to receive services under this part and part B of the Individuals with Disabilities Education Act;

(xi) At least one representative of the State workforce development board; and

(xii) The director of the designated State unit as an ex officio, nonvoting member of the Council.

(2) Employees of the designated State agency. Employees of the designated State agency may serve only as nonvoting members of the Council. This provision does not apply to the representative appointed pursuant to paragraph (b)(1)(iii) of this section.

(3) Composition of a separate Council for a separate State agency for individuals who are blind. Except as provided in paragraph (b)(4) of this section, if the State establishes a separate Council for a separate State agency for individuals who are blind, that Council must—

(i) Conform with all of the composition requirements for a Council under paragraph (b)(1) of this section,

except the requirements in paragraph (b)(1)(vii), unless the exception in paragraph (b)(4) of this section applies; and

(ii) Include—

(A) At least one representative of a disability advocacy group representing individuals who are blind; and

(B) At least one representative of an individual who is blind, has multiple disabilities, and has difficulty representing himself or herself or is unable due to disabilities to represent himself or herself.

(4) Exception. If State law in effect on October 29, 1992 requires a separate Council under paragraph (b)(3) of this section to have fewer than 15 members, the separate Council is in compliance with the composition requirements in paragraphs (b)(1)(vi) and (b)(1)(viii) of this section if it includes at least one representative who meets the requirements for each of those paragraphs.

(c) Majority. (1) A majority of the Council members must be individuals with disabilities who meet the requirements of §361.5(c)(28) and are not employed by the designated State unit.

(2) In the case of a separate Council established under §361.16(b), a majority of the Council members must be

individuals who are blind and are not employed by the designated State unit.

(d) Chairperson. (1) The chairperson must be selected by the members of the Council from among the voting members of the Council, subject to the veto power of the Governor; or

(2) In States in which the Governor does not have veto power pursuant to State law, the appointing authority described in paragraph (a)(1) of this section must designate a member of the Council to serve as the chairperson of the Council or must require the Council to designate a member to serve as chairperson.

(e) Terms of appointment. (1) Each member of the Council must be appointed for a term of no more than three years, and each member of the Council, other than a representative identified in paragraph (b)(1)(iii) or (ix) of this section, may serve for no more than two consecutive full terms.

(2) A member appointed to fill a vacancy occurring prior to the end of the term for which the predecessor was appointed must be appointed for the remainder of the predecessor's term.

(3) The terms of service of the members initially appointed must be, as specified by the appointing authority as described in paragraph (a)(1) of this section, for varied numbers of years to ensure that terms expire on a staggered basis.

(f) Vacancies. (1) A vacancy in the membership of the Council must be filled in the same manner as the original appointment, except the appointing authority as described in paragraph (a)(1) of this section may delegate the authority to fill that vacancy to the remaining members of the Council after making the original appointment.

(2) No vacancy affects the power of the remaining members to execute the duties of the Council.

(g) Conflict of interest. No member of the Council may cast a vote on any matter that would provide direct financial benefit to the member or the member's organization or otherwise give the appearance of a conflict of interest under State law.

(h) Functions. The Council must, after consulting with the State workforce development board—

(1) Review, analyze, and advise the designated State unit regarding the performance of the State unit's

responsibilities under this part, particularly responsibilities related to—

(i) Eligibility, including order of selection;

(ii) The extent, scope, and effectiveness of services provided; and

(iii) Functions performed by State agencies that affect or potentially affect the ability of individuals with disabilities in achieving employment outcomes under this part;

(2) In partnership with the designated State unit—

(i) Develop, agree to, and review State goals and priorities in accordance with §361.29(c); and

(ii) Evaluate the effectiveness of the vocational rehabilitation program and submit reports of progress to the Secretary in accordance with §361.29(e);

(3) Advise the designated State agency and the designated State unit regarding activities carried out under this part and assist in the preparation of the vocational rehabilitation services portion of the Unified or Combined State Plan and amendments to the plan, applications, reports, needs assessments, and evaluations required by this part;

(4) To the extent feasible, conduct a review and analysis of the effectiveness of, and consumer satisfaction with—

(i) The functions performed by the designated State agency;

(ii) The vocational rehabilitation services provided by State agencies and other public and private entities responsible for providing vocational rehabilitation services to individuals with disabilities under the Act; and

(iii) The employment outcomes achieved by eligible individuals receiving services under this part, including the availability of health and other employment benefits in connection with those employment outcomes;

(5) Prepare and submit to the Governor and to the Secretary no later than 90 days after the end of the Federal fiscal year an annual report on the status of vocational rehabilitation programs operated within the State and make the report available to the public through appropriate modes of communication;

(6) To avoid duplication of efforts and enhance the number of individuals served, coordinate activities with the activities of other councils within the State,

including the Statewide Independent Living Council established under chapter 1, title VII of the Act, the advisory panel established under section 612(a)(21) of the Individuals with Disabilities Education Act, the State Developmental Disabilities Planning Council described in section 124 of the Developmental Disabilities Assistance and Bill of Rights Act, the State mental health planning council established under section 1914(a) of the Public Health Service Act, and the State workforce development board, and with the activities of entities carrying out programs under the Assistive Technology Act of 1998;

(7) Provide for coordination and the establishment of working relationships between the designated State agency and the Statewide Independent Living Council and centers for independent living within the State; and

(8) Perform other comparable functions, consistent with the purpose of this part, as the Council determines to be appropriate, that are comparable to the other functions performed by the Council.

(i) Resources. (1) The Council, in conjunction with the designated State unit, must prepare a plan for the provision of resources, including staff and other

personnel, that may be necessary and sufficient for the Council to carry out its functions under this part.

(2) The resource plan must, to the maximum extent possible, rely on the use of resources in existence during the period of implementation of the plan.

(3) Any disagreements between the designated State unit and the Council regarding the amount of resources necessary to carry out the functions of the Council must be resolved by the Governor, consistent with paragraphs (i)(1) and (2) of this section.

(4) The Council must, consistent with State law, supervise and evaluate the staff and personnel that are necessary to carry out its functions.

(5) Those staff and personnel that are assisting the Council in carrying out its functions may not be assigned duties by the designated State unit or any other agency or office of the State that would create a conflict of interest.

(j) Meetings. The Council must—

(1) Convene at least four meetings a year in locations determined by the Council to be necessary to conduct Council business. The meetings must be publicly announced, open, and accessible to the general public,

including individuals with disabilities, unless there is a valid reason for an executive session; and

(2) Conduct forums or hearings, as appropriate, that are publicly announced, open, and accessible to the public, including individuals with disabilities.

(k) Compensation. Funds appropriated under title I of the Act, except funds to carry out sections 112 and 121 of the Act, may be used to compensate and reimburse the expenses of Council members in accordance with section 105(g) of the Act.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 105 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 725)

§361.18 Comprehensive system of personnel development.

The vocational rehabilitation services portion of the Unified or Combined State Plan must describe the procedures and activities the State agency will undertake to establish and maintain a comprehensive system of personnel development designed to ensure an adequate supply of qualified rehabilitation personnel, including professionals and paraprofessionals, for the designated State unit. If the State agency has a State Rehabilitation Council, this

description must, at a minimum, specify that the Council has an opportunity to review and comment on the development of plans, policies, and procedures necessary to meet the requirements of paragraphs (b) through (d) of this section. This description must also conform with the following requirements:

(a) Personnel and personnel development data system. The vocational rehabilitation services portion of the Unified or Combined State Plan must describe the development and maintenance of a system by the State agency for collecting and analyzing on an annual basis data on qualified personnel needs and personnel development, in accordance with the following requirements:

(1) Data on qualified personnel needs must include—

(i) The number of personnel who are employed by the State agency in the provision of vocational rehabilitation services in relation to the number of individuals served, broken down by personnel category;

(ii) The number of personnel currently needed by the State agency to provide vocational rehabilitation services, broken down by personnel category; and

(iii) Projections of the number of personnel, broken down by personnel category, who will be needed by the State

agency to provide vocational rehabilitation services in the State in five years based on projections of the number of individuals to be served, including individuals with significant disabilities, the number of personnel expected to retire or leave the field, and other relevant factors.

(2) Data on personnel development must include—

(i) A list of the institutions of higher education in the State that are preparing vocational rehabilitation professionals, by type of program;

(ii) The number of students enrolled at each of those institutions, broken down by type of program; and

(iii) The number of students who graduated during the prior year from each of those institutions with certification or licensure, or with the credentials for certification or licensure, broken down by the personnel category for which they have received, or have the credentials to receive, certification or licensure.

(b) Plan for recruitment, preparation, and retention of qualified personnel. The vocational rehabilitation services portion of the Unified or Combined State Plan must describe the development, updating, and implementation of a plan to address the current and projected needs for personnel who are qualified in accordance with paragraph

(c) of this section. The plan must identify the personnel needs based on the data collection and analysis system described in paragraph (a) of this section and must provide for the coordination and facilitation of efforts between the designated State unit and institutions of higher education and professional associations to recruit, prepare, and retain personnel who are qualified in accordance with paragraph (c) of this section, including personnel from minority backgrounds and personnel who are individuals with disabilities.

(c) Personnel standards. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must include the State agency's policies and describe—

(i) Standards that are consistent with any national or State-approved or recognized certification, licensing, or registration requirements, or, in the absence of these requirements, other comparable requirements (including State personnel requirements) that apply to the profession or discipline in which that category of personnel is providing vocational rehabilitation services; and

(ii) The establishment and maintenance of education and experience requirements, to ensure that the personnel

have a 21st-century understanding of the evolving labor force and the needs of individuals with disabilities, including requirements for—

(A)(1) Attainment of a baccalaureate degree in a field of study reasonably related to vocational rehabilitation, to indicate a level of competency and skill demonstrating basic preparation in a field of study such as vocational rehabilitation counseling, social work, psychology, disability studies, business administration, human resources, special education, supported employment, customized employment, economics, or another field that reasonably prepares individuals to work with consumers and employers; and

(2) Demonstrated paid or unpaid experience, for not less than one year, consisting of—

(i) Direct work with individuals with disabilities in a setting such as an independent living center;

(ii) Direct service or advocacy activities that provide such individual with experience and skills in working with individuals with disabilities; or

(iii) Direct experience in competitive integrated employment environments as an employer, as a small business owner or operator, or in self-employment, or other

experience in human resources or recruitment, or experience in supervising employees, training, or other activities; or

(B) Attainment of a master's or doctoral degree in a field of study such as vocational rehabilitation counseling, law, social work, psychology, disability studies, business administration, human resources, special education, management, public administration, or another field that reasonably provides competence in the employment sector, in a disability field, or in both business-related and rehabilitation-related fields; and

(2) As used in this section—

(i) Profession or discipline means a specific occupational category, including any paraprofessional occupational category, that—

(A) Provides rehabilitation services to individuals with disabilities;

(B) Has been established or designated by the State unit; and

(C) Has a specified scope of responsibility.

(ii) Ensuring that personnel have a 21st-century understanding of the evolving labor force and the needs of individuals with disabilities means that personnel have specialized training and experience that enables them to

work effectively with individuals with disabilities to assist them to achieve competitive integrated employment and with employers who hire such individuals. Relevant personnel skills include, but are not limited to—

(A) Understanding the functional limitations of various disabilities and the vocational implications of functional limitations on employment, especially with regard to individuals whose disabilities may require specialized services or groups of individuals with disabilities who comprise an increasing proportion of the State VR caseloads, such as individuals with traumatic brain injury, post-traumatic stress syndrome, mental illnesses, autism, blindness or deaf-blindness;

(B) Vocational assessment tools and strategies and the interpretation of vocational assessment results, including, when appropriate, situational and work-based assessments and analysis of transferrable work skills;

(C) Counseling and guidance skills, including individual and group counseling and career guidance;

(D) Effective use of practices leading to competitive integrated employment, such as supported employment, customized employment, internships, apprenticeships, paid work experiences, etc.;

(E) Case management and employment services planning, including familiarity and use of the broad range of disability, employment, and social services programs in the state and local area, such as independent living programs, Social Security work incentives, and the Social Security Administration‘s Ticket-to-Work program;

(F) Caseload management, including familiarity with effective caseload management practices and the use of any available automated or information technology resources;

(G) In-depth knowledge of labor market trends, occupational requirements, and other labor market information that provides information about employers, business practices, and employer personnel needs, such as data provided by the Bureau of Labor Statistics and the Department of Labor’s O*NET occupational system;

(H) The use of labor market information for vocational rehabilitation counseling, vocational planning, and the provision of information to consumers for the purposes of making informed choices, business engagement and business relationships, and job development and job placement;

(I) The use of labor market information to support building and maintaining relationships with employers and

to inform delivery of job development and job placement activities that respond to today’s labor market;

(J) Understanding the effective utilization of rehabilitation technology and job accommodations;

(K) Training in understanding the provisions of the Americans with Disabilities Act and other employment discrimination and employment-related laws;

(L) Advocacy skills to modify attitudinal and environmental barriers to employment for individuals with disabilities, including those with the most significant disabilities;

(M) Skills to address cultural diversity among consumers, particularly affecting workplace settings, including racial and ethnic diversity and generational differences; and

(N) Understanding confidentiality and ethical standards and practices, especially related to new challenges in use of social media, new partnerships, and data sharing.

(d) Staff development. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must include the State agency's policies and describe the procedures and activities the State agency will undertake

to ensure that all personnel employed by the State unit receive appropriate and adequate training, including a description of—

(i) A system of staff development for rehabilitation professionals and paraprofessionals within the State unit, particularly with respect to assessment, vocational counseling, job placement, and rehabilitation technology, including training implemented in coordination with entities carrying out State programs under section 4 of the Assistive Technology Act of 1998 (29 U.S.C. 3003);

(ii) Procedures for acquiring and disseminating to rehabilitation professionals and paraprofessionals within the designated State unit significant knowledge from research and other sources; and

(iii) Policies and procedures relating to the establishment and maintenance of standards to ensure that personnel, including rehabilitation professionals and paraprofessionals, needed within the designated State unit to carry out this part are appropriately and adequately prepared and trained.

(2) The specific training areas for staff development must be based on the needs of each State unit and may include, but are not limited to—

(i) Training regarding the Workforce Innovation and Opportunity Act and the amendments it made to the Rehabilitation Act of 1973;

(ii) Training with respect to the requirements of the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and Social Security work incentive programs, including programs under the Ticket to Work and Work Incentives Improvement Act of 1999, training to facilitate informed choice under this program, and training to improve the provision of services to culturally diverse populations; and

(iii) Activities related to—

(A) Recruitment and retention of qualified rehabilitation personnel;

(B) Succession planning; and

(C) Leadership development and capacity building.

(e) Personnel to address individual communication needs. The vocational rehabilitation services portion of the Unified or Combined State Plan must describe how the designated State unit includes among its personnel, or obtains the services of--

(1) Individuals able to communicate in the native languages of applicants, recipients of services, and

eligible individuals who have limited English proficiency; and

(2) Individuals able to communicate with applicants, recipients of services, and eligible individuals in appropriate modes of communication.

(f) Coordination with personnel development under the Individuals with Disabilities Education Act. The vocational rehabilitation services portion of the Unified or Combined State Plan must describe the procedures and activities the State agency will undertake to coordinate its comprehensive system of personnel development under the Act with personnel development under the Individuals with Disabilities Education Act.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c) and 101(a)(7) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(7))

§361.19 Affirmative action for individuals with disabilities.

The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State agency takes affirmative action to employ and advance in

employment qualified individuals with disabilities covered under and on the same terms and conditions as stated in section 503 of the Act.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(6)(B) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(6)(B))

§361.20 Public participation requirements.

(a) Conduct of public meetings. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the Unified or Combined State Plan, the designated State agency conducts public meetings throughout the State to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures.

(2) For purposes of this section, substantive changes to the policies or procedures governing the provision of vocational rehabilitation services that would require the conduct of public meetings are those that directly impact the nature and scope of the services provided to individuals with disabilities, or the manner in which

individuals interact with the designated State agency or in matters related to the delivery of vocational rehabilitation services. Examples of substantive changes include, but are not limited to—

(i) Any changes to policies or procedures that fundamentally alter the rights and responsibilities of individuals with disabilities in the vocational rehabilitation process;

(ii) Organizational changes to the designated State agency or unit that would likely affect the manner in which services are delivered;

(iii) Any changes that affect the nature and scope of vocational rehabilitation services provided by the designated State agency or unit;

(iv) Changes in formal or informal dispute procedures;

(v) The adoption or amendment of policies instituting an order of selection; and

(vi) Changes to policies and procedures regarding the financial participation of eligible individuals.

(3) Non-substantive, e.g., administrative changes that would not require the need for public hearings include:

(i) Internal procedures that do not directly affect individuals receiving vocational rehabilitation services, such as payment processing or personnel procedures;

(ii) Changes to the case management system that only affect vocational rehabilitation personnel;

(iii) Changes in indirect cost allocations, internal fiscal review procedures, or routine reporting requirements;

(iv) Minor revisions to vocational rehabilitation procedures or policies to correct production errors, such as typographical and grammatical mistakes; and

(v) Changes to contract procedures that do not affect the delivery of vocational rehabilitation services.

(b) Notice requirements. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the designated State agency, prior to conducting the public meetings, provides appropriate and sufficient notice throughout the State of the meetings in accordance with—

(1) State law governing public meetings; or

(2) In the absence of State law governing public meetings, procedures developed by the designated State

agency in consultation with the State Rehabilitation Council.

(c) Summary of input of the State Rehabilitation Council. The vocational rehabilitation services portion of the Unified or Combined State Plan must provide a summary of the input of the State Rehabilitation Council, if the State agency has a Council, into the vocational rehabilitation services portion of the Unified or Combined State Plan and any amendment to that portion of the plan, in accordance with §361.16(a)(2)(v).

(d) Special consultation requirements. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State agency actively consults with the director of the Client Assistance Program, the State Rehabilitation Council, if the State agency has a Council, and, as appropriate, Indian tribes, tribal organizations, and native Hawaiian organizations on its policies and procedures governing the provision of vocational rehabilitation services under the vocational rehabilitation services portion of the Unified or Combined State Plan.

(e) Appropriate modes of communication. The State unit must provide to the public, through appropriate modes

of communication, notices of the public meetings, any materials furnished prior to or during the public meetings, and the policies and procedures governing the provision of vocational rehabilitation services under the vocational rehabilitation services portion of the Unified or Combined State Plan.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c), 101(a)(16)(A), and 105(c)(3) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(a)(16)(A), and 725(c)(3))

<u>§361.21 Consultations regarding the administration of the vocational rehabilitation services portion of the Unified or Combined State plan.</u>

The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that, in connection with matters of general policy arising in the administration of the vocational rehabilitation services portion of the Unified or Combined State Plan, the designated State agency takes into account the views of—

(a) Individuals and groups of individuals who are recipients of vocational rehabilitation services or, as appropriate, the individuals' representatives;

(b) Personnel working in programs that provide vocational rehabilitation services to individuals with disabilities;

(c) Providers of vocational rehabilitation services to individuals with disabilities;

(d) The director of the Client Assistance Program; and

(e) The State Rehabilitation Council, if the State has a Council.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 101(a)(16)(B) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(16)(B))

§361.22 Coordination with education officials.

(a) Plans, policies, and procedures. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must contain plans, policies, and procedures for coordination between the designated State agency and education officials responsible for the public education of students with disabilities that are designed to facilitate the transition of students with disabilities from the receipt of educational services, including pre-employment transition services, in school to the receipt of

vocational rehabilitation services under the responsibility of the designated State agency.

(2) These plans, policies, and procedures in paragraph (a)(1) of this section must provide for the development and approval of an individualized plan for employment in accordance with §361.45 as early as possible during the transition planning process and not later than the time a student with a disability determined to be eligible for vocational rehabilitation services leaves the school setting or, if the designated State unit is operating under an order of selection, before each eligible student with a disability able to be served under the order leaves the school setting.

(b) Formal interagency agreement. The vocational rehabilitation services portion of the Unified or Combined State Plan must include information on a formal interagency agreement with the State educational agency that, at a minimum, provides for—

(1) Consultation and technical assistance, which may be provided using alternative means for meeting participation (such as video conferences and conference calls), to assist educational agencies in planning for the transition of students with disabilities from school to

post-school activities, including pre-employment transition services and other vocational rehabilitation services;

(2) Transition planning by personnel of the designated State agency and educational agency personnel for students with disabilities that facilitates the development and implementation of their individualized education programs (IEPs) under section 614(d) of the Individuals with Disabilities Education Act;

(3) The roles and responsibilities, including financial responsibilities, of each agency, including provisions for determining State lead agencies and qualified personnel responsible for transition services and pre-employment transition services;

(4) Procedures for outreach to and identification of students with disabilities who are in need of transition services and pre-employment transition services. Outreach to these students should occur as early as possible during the transition planning process and must include, at a minimum, a description of the purpose of the vocational rehabilitation program, eligibility requirements, application procedures, and scope of services that may be provided to eligible individuals;

(5) Coordination necessary to satisfy documentation requirements set forth in 34 CFR part 397 with regard to students and youth with disabilities who are seeking subminimum wage employment; and

(6) Assurance that, in accordance with 34 CFR 397.31, neither the State educational agency nor the local educational agency will enter into a contract or other arrangement with an entity, as defined in 34 CFR 397.5(d), for the purpose of operating a program under which a youth with a disability is engaged in work compensated at a subminimum wage.

(c) Construction. Nothing in this part will be construed to reduce the obligation under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) of a local educational agency or any other agency to provide or pay for any transition services that are also considered special education or related services and that are necessary for ensuring a free appropriate public education to children with disabilities within the State involved. (Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c), 101(a)(11)(D), 101(c), and 511 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(a)(11)(D), 721(c), and 794g)

§361.23 Requirements related to the statewide workforce development system.

As a required partner in the one-stop service delivery system (which is part of the statewide workforce development system under title I of the Workforce Innovation and Opportunity Act), the designated State unit must satisfy all requirements set forth in joint regulations in subpart F of this part.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(11)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(11)(A); Section 121 (b)(1)(B)(iv) of the Workforce Innovation and Opportunity Act; 29 U.S.C. 3151)

§361.24 Cooperation and coordination with other entities.

(a) Interagency cooperation. The vocational rehabilitation services portion of the Unified or Combined State Plan must describe the designated State agency's cooperation with and use of the services and facilities of Federal, State, and local agencies and programs, including

the State programs carried out under section 4 of the Assistive Technology Act of 1998 (29 U.S.C. 3003), programs carried out by the Under Secretary for Rural Development of the Department of Agriculture, noneducational agencies serving out-of-school youth, and State use contracting programs, to the extent that such Federal, State, and local agencies and programs are not carrying out activities through the statewide workforce development system.

(b) Coordination with the Statewide Independent Living Council and independent living centers. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the designated State unit, the Statewide Independent Living Council established under title VII, chapter 1, part B of the Act, and the independent living centers established under title VII, Chapter 1, Part C of the Act have developed working relationships and coordinate their activities.

(c) Coordination with Employers. The vocational rehabilitation services portion of the Unified or Combined State Plan must describe how the designated State unit will work with employers to identify competitive integrated employment opportunities and career exploration opportunities, in order to facilitate the provision of-

(1) Vocational rehabilitation services; and

(2) Transition services for youth with disabilities and students with disabilities, such as pre-employment transition services.

(d) Cooperative agreement with recipients of grants for services to American Indians. (1) General. In applicable cases, the vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the designated State agency has entered into a formal cooperative agreement with each grant recipient in the State that receives funds under part C of the Act (American Indian Vocational Rehabilitation Services).

(2) Contents of formal cooperative agreement. The agreement required under paragraph (d)(1) of this section must describe strategies for collaboration and coordination in providing vocational rehabilitation services to American Indians who are individuals with disabilities, including—

(i) Strategies for interagency referral and information sharing that will assist in eligibility determinations and the development of individualized plans for employment;

(ii) Procedures for ensuring that American Indians who are individuals with disabilities and are living on or

near a reservation or tribal service area are provided vocational rehabilitation services;

(iii) Strategies for the provision of transition planning by personnel of the designated State unit, the State educational agency, and the recipient of funds under part C of the Act, that will facilitate the development and approval of the individualized plan for employment under §361.45; and

(iv) Provisions for sharing resources in cooperative studies and assessments, joint training activities, and other collaborative activities designed to improve the provision of services to American Indians who are individuals with disabilities.

(e) Reciprocal referral services between two designated State units in the same State. If there is a separate designated State unit for individuals who are blind, the two designated State units must establish reciprocal referral services, use each other's services and facilities to the extent feasible, jointly plan activities to improve services in the State for individuals with multiple impairments, including visual impairments, and otherwise cooperate to provide more effective services,

including, if appropriate, entering into a written cooperative agreement.

(f) Cooperative agreement regarding individuals eligible for home and community-based waiver programs. The vocational rehabilitation services portion of the Unified or Combined State Plan must include an assurance that the designated State unit has entered into a formal cooperative agreement with the State agency responsible for administering the State Medicaid plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) and the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities, with respect to the delivery of vocational rehabilitation services, including extended services, for individuals with the most significant disabilities who have been determined to be eligible for home and community-based services under a Medicaid waiver, Medicaid State plan amendment, or other authority related to a State Medicaid program.

(g) Interagency cooperation. The vocational rehabilitation services portion of the Unified or Combined State Plan shall describe how the designated State agency

will collaborate with the State agency responsible for administering the State Medicaid plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), the State agency responsible for providing services for individuals with developmental disabilities, and the State agency responsible for providing mental health services, to develop opportunities for community-based employment in integrated settings, to the greatest extent practicable.

(h) Coordination with assistive technology programs. The vocational rehabilitation services portion of the Unified or Combined State Plan must include an assurance that the designated State unit, and the lead agency and implementing entity (if any) designated by the Governor of the State under section 4 of the Assistive Technology Act of 1998 (29 U.S.C. 3003), have developed working relationships and will enter into agreements for the coordination of their activities, including the referral of individuals with disabilities to programs and activities described in that section.

(i) Coordination with ticket to work and self-sufficiency program. The vocational rehabilitation services portion of the Unified or Combined State Plan must include an assurance that the designated State unit will

coordinate activities with any other State agency that is functioning as an employment network under the Ticket to Work and Self-Sufficiency Program established under section 1148 of the Social Security Act (42 U.S.C. 1320b-19).

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c) and 101(a)(11) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(11))

§361.25 Statewideness.

The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that services provided under the vocational rehabilitation services portion of the Unified or Combined State Plan will be available in all political subdivisions of the State, unless a waiver of statewideness is requested and approved in accordance with §361.26.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(4) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(4))

§361.26 Waiver of statewideness.

(a) Availability. The State unit may provide services in one or more political subdivisions of the State that increase services or expand the scope of services that are available statewide under the vocational rehabilitation services portion of the Unified or Combined State Plan if—

(1) The non-Federal share of the cost of these services is met from funds provided by a local public agency, including funds contributed to a local public agency by a private agency, organization, or individual;

(2) The services are likely to promote the vocational rehabilitation of substantially larger numbers of individuals with disabilities or of individuals with disabilities with particular types of impairments; and

(3) For purposes other than those specified in §361.60(b)(3)(i) and consistent with the requirements in §361.60(b)(3)(ii), the State includes in its vocational rehabilitation services portion of the Unified or Combined State Plan, and the Secretary approves, a waiver of the statewideness requirement, in accordance with the requirements of paragraph (b) of this section.

(b) Request for waiver. The request for a waiver of statewideness must—

(1) Identify the types of services to be provided;

(2) Contain a written assurance from the local public agency that it will make available to the State unit the non-Federal share of funds;

(3) Contain a written assurance that State unit approval will be obtained for each proposed service before it is put into effect; and

(4) Contain a written assurance that all other requirements of the vocational rehabilitation services portion of the Unified or Combined State Plan, including a State's order of selection requirements, will apply to all services approved under the waiver.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(4) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(4))

<u>§361.27 Shared funding and administration of joint programs.</u>

(a) If the vocational rehabilitation services portion of the Unified or Combined State Plan provides for the designated State agency to share funding and administrative responsibility with another State agency or local public agency to carry out a joint program to provide services to individuals with disabilities, the State must submit to the

Secretary for approval a plan that describes its shared funding and administrative arrangement.

(b) The plan under paragraph (a) of this section must include—

(1) A description of the nature and scope of the joint program;

(2) The services to be provided under the joint program;

(3) The respective roles of each participating agency in the administration and provision of services; and

(4) The share of the costs to be assumed by each agency.

(c) If a proposed joint program does not comply with the statewideness requirement in §361.25, the State unit must obtain a waiver of statewideness, in accordance with §361.26.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(2)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(2)(A))

<u>§361.28 Third-party cooperative arrangements involving funds from other public agencies.</u>

(a) The designated State unit may enter into a third-party cooperative arrangement for providing or contracting for the provision of vocational rehabilitation services with another State agency or a local public agency that is providing part or all of the non-Federal share in accordance with paragraph (c) of this section, if the designated State unit ensures that—

(1) The services provided by the cooperating agency are not the customary or typical services provided by that agency but are new services that have a vocational rehabilitation focus or existing services that have been modified, adapted, expanded, or reconfigured to have a vocational rehabilitation focus;

(2) The services provided by the cooperating agency are only available to applicants for, or recipients of, services from the designated State unit;

(3) Program expenditures and staff providing services under the cooperative arrangement are under the administrative supervision of the designated State unit; and

(4) All requirements of the vocational rehabilitation services portion of the Unified or Combined State Plan,

including a State's order of selection, will apply to all services provided under the cooperative arrangement.

(b) If a third party cooperative arrangement does not comply with the statewideness requirement in §361.25, the State unit must obtain a waiver of statewideness, in accordance with §361.26.

(c) The cooperating agency’s contribution toward the non-Federal share required under the arrangement, as set forth in paragraph (a) of this section, may be made through:

(1) Cash transfers to the designated State unit;

(2) Certified personnel expenditures for the time cooperating agency staff spent providing direct vocational rehabilitation services pursuant to a third-party cooperative arrangement that meets the requirements of this section. Certified personnel expenditures may include the allocable portion of staff salary and fringe benefits based upon the amount of time cooperating agency staff directly spent providing services under the arrangement; and

(3) other direct expenditures incurred by the cooperating agency for the sole purpose of providing services under this section pursuant to a third-party cooperative arrangement that–

(i) meets the requirements of this section;

(ii) are verifiable as being incurred under the third-party cooperative arrangement; and

(iii) do not meet the definition of third-party in-kind contributions under 2 CFR 200.96.

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

§361.29 Statewide assessment; annual estimates; annual State goals and priorities; strategies; and progress reports.

(a) Comprehensive statewide assessment. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must include—

(i) The results of a comprehensive, statewide assessment, jointly conducted by the designated State unit and the State Rehabilitation Council (if the State unit has a Council) every three years. Results of the assessment are to be included in the vocational rehabilitation portion of the Unified or Combined State Plan, submitted in accordance with the requirements of §361.10(a) and the joint regulations of this part. The comprehensive needs assessment must describe the rehabilitation needs of individuals with disabilities residing within the State,

particularly the vocational rehabilitation services needs of—

(A) Individuals with the most significant disabilities, including their need for supported employment services;

(B) Individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program carried out under this part;

(C) Individuals with disabilities served through other components of the statewide workforce development system as identified by those individuals and personnel assisting those individuals through the components of the system; and

(D) Youth with disabilities, and students with disabilities, including

(1) Their need for pre-employment transition services or other transition services; and

(2) An assessment of the needs of individuals with disabilities for transition services and pre-employment transition services, and the extent to which such services provided under this part are coordinated with transition services provided under the Individuals with Disabilities

Education Act (20 U.S.C. 1400 et seq.) in order to meet the needs of individuals with disabilities.

(ii) An assessment of the need to establish, develop, or improve community rehabilitation programs within the State.

(2) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State will submit to the Secretary a report containing information regarding updates to the assessments under paragraph (a) of this section for any year in which the State updates the assessments at such time and in such manner as the Secretary determines appropriate.

(b) Annual estimates. The vocational rehabilitation services portion of the Unified or Combined State Plan must include, and must assure that the State will submit a report to the Secretary (at such time and in such manner determined appropriate by the Secretary) that includes, State estimates of—

(1) The number of individuals in the State who are eligible for services under this part;

(2) The number of eligible individuals who will receive services provided with funds provided under this part and under part §363, including, if the designated

State agency uses an order of selection in accordance with §361.36, estimates of the number of individuals to be served under each priority category within the order;

(3) The number of individuals who are eligible for services under paragraph (b)(1) of this section, but are not receiving such services due to an order of selection; and

(4) The costs of the services described in paragraph (b)(2) of this section, including, if the designated State agency uses an order of selection, the service costs for each priority category within the order.

(c) Goals and priorities. (1) In general. The vocational rehabilitation services portion of the Unified or Combined State Plan must identify the goals and priorities of the State in carrying out the program.

(2) Council. The goals and priorities must be jointly developed, agreed to, reviewed annually, and, as necessary, revised by the designated State unit and the State Rehabilitation Council, if the State unit has a Council.

(3) Submission. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State will submit to the Secretary a report

containing information regarding revisions in the goals and priorities for any year in which the State revises the goals and priorities at such time and in such manner as determined appropriate by the Secretary.

(4) Basis for goals and priorities. The State goals and priorities must be based on an analysis of—

(i) The comprehensive statewide assessment described in paragraph (a) of this section, including any updates to the assessment;

(ii) The performance of the State on the standards and indicators established under section 106 of the Act; and

(iii) Other available information on the operation and the effectiveness of the vocational rehabilitation program carried out in the State, including any reports received from the State Rehabilitation Council under §361.17(h) and the findings and recommendations from monitoring activities conducted under section 107 of the Act.

(5) Service and outcome goals for categories in order of selection. If the designated State agency uses an order of selection in accordance with §361.36, the vocational rehabilitation services portion of the Unified or Combined

State Plan must identify the State's service and outcome goals and the time within which these goals may be achieved for individuals in each priority category within the order.

(d) Strategies. The vocational rehabilitation services portion of the Unified or Combined State Plan must describe the strategies the State will use to address the needs identified in the assessment conducted under paragraph (a) of this section and achieve the goals and priorities identified in paragraph (c) of this section, including—

(1) The methods to be used to expand and improve services to individuals with disabilities, including how a broad range of assistive technology services and assistive technology devices will be provided to those individuals at each stage of the rehabilitation process and how those services and devices will be provided to individuals with disabilities on a statewide basis;

(2) The methods to be used to improve and expand vocational rehabilitation services for students with disabilities, including the coordination of services designed to facilitate the transition of such students from the receipt of educational services in school to postsecondary life, including the receipt of vocational

rehabilitation services under the Act, postsecondary education, employment, and pre-employment transition services;

(3) Strategies developed and implemented by the State to address the needs of students and youth with disabilities identified in the assessments described in paragraph (a) of this section and strategies to achieve the goals and priorities identified by the State to improve and expand vocational rehabilitation services for students and youth with disabilities on a statewide basis;

(4) Strategies to provide pre-employment transition services;

(5) Outreach procedures to identify and serve individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program;

(6) As applicable, the plan of the State for establishing, developing, or improving community rehabilitation programs;

(7) Strategies to improve the performance of the State with respect to the evaluation standards and performance indicators established pursuant to section 106

of the Act and section 116 of Workforce Innovation and Opportunity Act; and

(8) Strategies for assisting other components of the statewide workforce development system in assisting individuals with disabilities.

(e) Evaluation and reports of progress. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must include—

(i) The results of an evaluation of the effectiveness of the vocational rehabilitation program; and

(ii) A joint report by the designated State unit and the State Rehabilitation Council, if the State unit has a Council, to the Secretary on the progress made in improving the effectiveness of the program from the previous year. This evaluation and joint report must include—

(A) An evaluation of the extent to which the goals and priorities identified in paragraph (c) of this section were achieved;

(B) A description of the strategies that contributed to the achievement of the goals and priorities;

(C) To the extent to which the goals and priorities were not achieved, a description of the factors that impeded that achievement; and

(D) An assessment of the performance of the State on the standards and indicators established pursuant to section 106 of the Act.

(2) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the designated State unit and the State Rehabilitation Council, if the State unit has a Council, will jointly submit to the Secretary a report that contains the information described in paragraph (e)(1) of this section at such time and in such manner the Secretary determines appropriate.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(15) and (25) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(15) and (25))

§361.30 Services to American Indians.

The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the designated State agency provides vocational rehabilitation services to American Indians who are individuals with disabilities residing in the State to the same extent as the designated State agency provides vocational

rehabilitation services to other significant populations of individuals with disabilities residing in the State.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 101(a)(13) and 121(b)(3) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(13) and 741(b)(3))

§361.31 Cooperative agreements with private nonprofit organizations.

The vocational rehabilitation services portion of the Unified or Combined State Plan must describe the manner in which cooperative agreements with private nonprofit vocational rehabilitation service providers will be established.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 101(a)(24)(B) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(24)(B))

§361.32 Provision of training and services for employers.

The designated State unit may expend payments received under this part to educate and provide services to employers who have hired or are interested in hiring

individuals with disabilities under the vocational rehabilitation program, including—

(a) Providing training and technical assistance to employers regarding the employment of individuals with disabilities, including disability awareness, and the requirements of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) and other employment-related laws;

(b) Working with employers to—

(1) Provide opportunities for work-based learning experiences (including internships, short-term employment, apprenticeships, and fellowships);

(2) Provide opportunities for pre-employment transition services, in accordance with the requirements under §361.48(a);

(3) Recruit qualified applicants who are individuals with disabilities;

(4) Train employees who are individuals with disabilities; and

(5) Promote awareness of disability-related obstacles to continued employment.

(c) Providing consultation, technical assistance, and support to employers on workplace accommodations, assistive

technology, and facilities and workplace access through collaboration with community partners and employers, across States and nationally, to enable the employers to recruit, job match, hire, and retain qualified individuals with disabilities who are recipients of vocational rehabilitation services under this part, or who are applicants for such services; and

(d) Assisting employers with utilizing available financial support for hiring or accommodating individuals with disabilities.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 109 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 728A)

§361.33 [Reserved]

§361.34 Supported employment State plan supplement.

(a) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State has an acceptable plan under part 363 of this chapter that provides for the use of funds under that part to supplement funds under this part for the cost of services leading to supported employment.

(b) The supported employment plan, including any needed revisions, must be submitted as a supplement to the vocational rehabilitation services portion of the Unified or Combined State Plan submitted under this part.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 101(a)(22) and 606 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(22) and 795k)

§361.35 Innovation and expansion activities.

(a) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State will reserve and use a portion of the funds allotted to the State under section 110 of the Act—

(1) For the development and implementation of innovative approaches to expand and improve the provision of vocational rehabilitation services to individuals with disabilities, particularly individuals with the most significant disabilities, including transition services for students and youth with disabilities and pre-employment transition services for students with disabilities, consistent with the findings of the comprehensive statewide assessment of the rehabilitation needs of individuals with

disabilities under §361.29(a) and the State's goals and priorities under §361.29(c);

(2) To support the funding of the State Rehabilitation Council, if the State has a Council, consistent with the resource plan identified in §361.17(i); and

(3) To support the funding of the Statewide Independent Living Council, consistent with the Statewide Independent Living Council resource plan prepared under Section 705(e)(1) of the Act.

(b) The vocational rehabilitation services portion of the Unified or Combined State Plan must—

(1) Describe how the reserved funds will be used; and

(2) Include a report describing how the reserved funds were used.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c) and 101(a)(18) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a) (18))

<u>§361.36 Ability to serve all eligible individuals; order of selection for services.</u>

(a) General provisions. (1) The designated State unit either must be able to provide the full range of services listed in section 103(a) of the Act and §361.48, as appropriate, to all eligible individuals or, in the event that vocational rehabilitation services cannot be provided to all eligible individuals in the State who apply for the services, include in the vocational rehabilitation services portion of the Unified or Combined State Plan the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services.

(2) The ability of the designated State unit to provide the full range of vocational rehabilitation services to all eligible individuals must be supported by a determination that satisfies the requirements of paragraph (b) or (c) of this section and a determination that, on the basis of the designated State unit's projected fiscal and personnel resources and its assessment of the rehabilitation needs of individuals with significant disabilities within the State, it can—

(i) Continue to provide services to all individuals currently receiving services;

(ii) Provide assessment services to all individuals expected to apply for services in the next fiscal year;

(iii) Provide services to all individuals who are expected to be determined eligible in the next fiscal year; and

(iv) Meet all program requirements.

(3) If the designated State unit is unable to provide the full range of vocational rehabilitation services to all eligible individuals in the State who apply for the services, the vocational rehabilitation services portion of the Unified or Combined State Plan must—

(i) Show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;

(ii) Provide a justification for the order of selection;

(iii) Identify service and outcome goals and the time within which the goals may be achieved for individuals in each priority category within the order, as required under §361.29(c)(5);

(iv) Assure that—

(A) In accordance with criteria established by the State for the order of selection, individuals with the most significant disabilities will be selected first for the provision of vocational rehabilitation services; and

(B) Individuals who do not meet the order of selection criteria will have access to services provided through the information and referral system established under §361.37; and

(v) State whether the designated State unit will elect to serve, in its discretion, eligible individuals (whether or not the individuals are receiving vocational rehabilitation services under the order of selection) who require specific services or equipment to maintain employment, notwithstanding the assurance provided pursuant to paragraph (3)(iv)(A) of this section.

(b) Basis for assurance that services can be provided to all eligible individuals. (1) For a designated State unit that determined, for the current fiscal year and the preceding fiscal year, that it is able to provide the full range of services, as appropriate, to all eligible individuals, the State unit, during the current fiscal and preceding fiscal year, must have in fact—

(i) Provided assessment services to all applicants and the full range of services, as appropriate, to all eligible individuals;

(ii) Made referral forms widely available throughout the State;

(iii) Conducted outreach efforts to identify and serve individuals with disabilities who have been unserved or underserved by the vocational rehabilitation system; and

(iv) Not delayed, through waiting lists or other means, determinations of eligibility, the development of individualized plans for employment for individuals determined eligible for vocational rehabilitation services, or the provision of services for eligible individuals for whom individualized plans for employment have been developed.

(2) For a designated State unit that was unable to provide the full range of services to all eligible individuals during the current or preceding fiscal year or that has not met the requirements in paragraph (b)(1) of this section, the determination that the designated State unit is able to provide the full range of vocational rehabilitation services to all eligible individuals in the next fiscal year must be based on—

(i) A demonstration that circumstances have changed that will allow the designated State unit to meet the requirements of paragraph (a)(2) of this section in the next fiscal year, including—

(A) An estimate of the number of and projected costs of serving, in the next fiscal year, individuals with existing individualized plans for employment;

(B) The projected number of individuals with disabilities who will apply for services and will be determined eligible in the next fiscal year and the projected costs of serving those individuals;

(C) The projected costs of administering the program in the next fiscal year, including, but not limited to, costs of staff salaries and benefits, outreach activities, and required statewide studies; and

(D) The projected revenues and projected number of qualified personnel for the program in the next fiscal year.

(ii) Comparable data, as relevant, for the current or preceding fiscal year, or for both years, of the costs listed in paragraphs (b)(2)(i)(A) through (C) of this section and the resources identified in paragraph (b)(2)(i)(D) of this section and an explanation of any projected increases or decreases in these costs and resources; and

(iii) A determination that the projected revenues and the projected number of qualified personnel for the program

in the next fiscal year are adequate to cover the costs identified in paragraphs (b)(2)(i)(A) through (C) of this section to ensure the provision of the full range of services, as appropriate, to all eligible individuals.

(c) Determining need for establishing and implementing an order of selection. (1) The designated State unit must determine, prior to the beginning of each fiscal year, whether to establish and implement an order of selection.

(2) If the designated State unit determines that it does not need to establish an order of selection, it must reevaluate this determination whenever changed circumstances during the course of a fiscal year, such as a decrease in its fiscal or personnel resources or an increase in its program costs, indicate that it may no longer be able to provide the full range of services, as appropriate, to all eligible individuals, as described in paragraph (a)(2) of this section.

(3) If a designated State unit establishes an order of selection, but determines that it does not need to implement that order at the beginning of the fiscal year, it must continue to meet the requirements of paragraph

(a)(2) of this section, or it must implement the order of selection by closing one or more priority categories.

(d) Establishing an order of selection. (1) Basis for order of selection. An order of selection must be based on a refinement of the three criteria in the definition of individual with a significant disability in section 7(21)(A) of the Act and §361.5(c)(30).

(2) Factors that cannot be used in determining order of selection of eligible individuals. An order of selection may not be based on any other factors, including—

(i) Any duration of residency requirement, provided the individual is present in the State;

(ii) Type of disability;

(iii) Age, sex, race, color, or national origin;

(iv) Source of referral;

(v) Type of expected employment outcome;

(vi) The need for specific services except those services provided in accordance with 361.36(a)(3)(v), or anticipated cost of services required by an individual; or

(vii) The income level of an individual or an individual's family.

(e) Administrative requirements. In administering the order of selection, the designated State unit must—

(1) Implement the order of selection on a statewide basis;

(2) Notify all eligible individuals of the priority categories in a State's order of selection, their assignment to a particular category, and their right to appeal their category assignment;

(3) Continue to provide services to any recipient who has begun to receive services irrespective of the severity of the individual's disability as follows--

(A) The designated State unit must continue to provide pre-employment transition services to students with disabilities who were receiving such services prior to being determined eligible for vocational rehabilitation services; and

(B) The designated State unit must continue to provide to an eligible individual all needed services listed on the individualized plan for employment if the individual had begun receiving such services prior to the effective date of the State’s order of selection; and

(4) Ensure that its funding arrangements for providing services under the vocational rehabilitation services portion of the Unified or Combined State Plan, including third-party arrangements and awards under the

establishment authority, are consistent with the order of selection. If any funding arrangements are inconsistent with the order of selection, the designated State unit must renegotiate these funding arrangements so that they are consistent with the order of selection.

(f) State Rehabilitation Council. The designated State unit must consult with the State Rehabilitation Council, if the State unit has a Council, regarding the—

(1) Need to establish an order of selection, including any reevaluation of the need under paragraph (c)(2) of this section;

(2) Priority categories of the particular order of selection;

(3) Criteria for determining individuals with the most significant disabilities; and

(4) Administration of the order of selection.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(d); 101(a)(5); 101(a)(12); 101(a)(15)(A), (B) and (C); 101(a)(21)(A)(ii); and 504(a) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(d), 721(a)(5), 721(a)(12), 721(a)(15)(A), (B) and (C); 721(a)(21)(A)(ii), and 794(a))

§361.37 Information and referral programs.

(a) General provisions. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that—

(1) The designated State agency will implement an information and referral system adequate to ensure that individuals with disabilities, including eligible individuals who do not meet the agency's order of selection criteria for receiving vocational rehabilitation services if the agency is operating on an order of selection, are provided accurate vocational rehabilitation information and guidance (which may include counseling and referral for job placement) using appropriate modes of communication to assist them in preparing for, securing, retaining, advancing in, or regaining employment; and

(2) The designated State agency will refer individuals with disabilities to other appropriate Federal and State programs, including other components of the statewide workforce development system.

(b) The designated State unit must refer to appropriate programs and service providers best suited to address the specific rehabilitation, independent living and employment needs of an individual with a disability who

makes an informed choice not to pursue an employment outcome under the vocational rehabilitation program, as defined in §361.5(c)(15). Before making the referral required by this paragraph, the State unit must—

(1) Consistent with §361.42(a)(4)(i), explain to the individual that the purpose of the vocational rehabilitation program is to assist individuals to achieve an employment outcome as defined in §361.5(c)(15);

(2) Consistent with §361.52, provide the individual with information concerning the availability of employment options, and of vocational rehabilitation services, to assist the individual to achieve an appropriate employment outcome;

(3) Inform the individual that services under the vocational rehabilitation program can be provided to eligible individuals in an extended employment setting if necessary for purposes of training or otherwise preparing for employment in an integrated setting;

(4) Inform the individual that, if he or she initially chooses not to pursue an employment outcome as defined in §361.5(c)(15), he or she can seek services from the designated State unit at a later date if, at that time, he or she chooses to pursue an employment outcome; and

(5) Refer the individual, as appropriate, to the Social Security Administration in order to obtain information concerning the ability of individuals with disabilities to work while receiving benefits from the Social Security Administration.

(c) Criteria for appropriate referrals. In making the referrals identified in paragraph (a)(2) of this section, the designated State unit must—

(1) Refer the individual to Federal or State programs, including programs carried out by other components of the statewide workforce development system, best suited to address the specific employment needs of an individual with a disability; and

(2) Provide the individual who is being referred—

(i) A notice of the referral by the designated State agency to the agency carrying out the program;

(ii) Information identifying a specific point of contact within the agency to which the individual is being referred; and

(iii) Information and advice regarding the most suitable services to assist the individual to prepare for, secure, retain, or regain employment.

(d) Order of selection. In providing the information and referral services under this section to eligible individuals who are not in the priority category or categories to receive vocational rehabilitation services under the State's order of selection, the State unit must identify, as part of its reporting under section 101(a)(10) of the Act and §361.40, the number of eligible individuals who did not meet the agency's order of selection criteria for receiving vocational rehabilitation services and did receive information and referral services under this section.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 7(11), 12(c), 101(a)(5)(E), 101(a)(10)(C)(ii), and 101(a)(20) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(11), 709(c), 721(a)(5)(E), 721(a)(10)(C)(ii), and 721(a)(20))

§361.38 Protection, use, and release of personal information.

(a) General provisions. (1) The State agency and the State unit must adopt and implement written policies and procedures to safeguard the confidentiality of all

personal information, including photographs and lists of names. These policies and procedures must ensure that—

(i) Specific safeguards are established to protect current and stored personal information, including a requirement that data only be released when governed by a written agreement between the designated State unit and receiving entity under paragraphs (d) and (e)(1) of this section, which addresses the requirements in this section;

(ii) All applicants and recipients of services and, as appropriate, those individuals' representatives, service providers, cooperating agencies, and interested persons are informed through appropriate modes of communication of the confidentiality of personal information and the conditions for accessing and releasing this information;

(iii) All applicants and recipients of services or their representatives are informed about the State unit's need to collect personal information and the policies governing its use, including—

(A) Identification of the authority under which information is collected;

(B) Explanation of the principal purposes for which the State unit intends to use or release the information;

(C) Explanation of whether providing requested information to the State unit is mandatory or voluntary and the effects of not providing requested information;

(D) Identification of those situations in which the State unit requires or does not require informed written consent of the individual before information may be released; and

(E) Identification of other agencies to which information is routinely released;

(iv) An explanation of State policies and procedures affecting personal information will be provided to each individual in that individual's native language or through the appropriate mode of communication; and

(v) These policies and procedures provide no fewer protections for individuals than State laws and regulations.

(2) The State unit may establish reasonable fees to cover extraordinary costs of duplicating records or making extensive searches and must establish policies and procedures governing access to records.

(b) State program use. All personal information in the possession of the State agency or the designated State unit must be used only for the purposes directly connected

with the administration of the vocational rehabilitation program. Information containing identifiable personal information may not be shared with advisory or other bodies that do not have official responsibility for administration of the program. In the administration of the program, the State unit may obtain personal information from service providers and cooperating agencies under assurances that the information may not be further divulged, except as provided under paragraphs (c), (d), and (e) of this section.

(c) Release to applicants and recipients of services. (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, if requested in writing by an applicant or recipient of services, the State unit must make all requested information in that individual's record of services accessible to and must release the information to the individual or the individual's representative in a timely manner.

(2) Medical, psychological, or other information that the State unit determines may be harmful to the individual may not be released directly to the individual, but must be provided to the individual through a third party chosen by the individual, which may include, among others, an

advocate, a family member, or a qualified medical or mental health professional, unless a representative has been appointed by a court to represent the individual, in which case the information must be released to the court-appointed representative.

(3) If personal information has been obtained from another agency or organization, it may be released only by, or under the conditions established by, the other agency or organization.

(4) An applicant or recipient of services who believes that information in the individual's record of services is inaccurate or misleading may request that the designated State unit amend the information. If the information is not amended, the request for an amendment must be documented in the record of services, consistent with §361.47(a)(12).

(d) Release for audit, evaluation, and research. Personal information may be released to an organization, agency, or individual engaged in audit, evaluation, or research only for purposes directly connected with the administration of the vocational rehabilitation program or for purposes that would significantly improve the quality of life for applicants and recipients of services and only

if, in accordance with a written agreement, the organization, agency, or individual assures that—

(1) The information will be used only for the purposes for which it is being provided;

(2) The information will be released only to persons officially connected with the audit, evaluation, or research;

(3) The information will not be released to the involved individual;

(4) The information will be managed in a manner to safeguard confidentiality; and

(5) The final product will not reveal any personal identifying information without the informed written consent of the involved individual or the individual's representative.

(e) Release to other programs or authorities. (1) Upon receiving the informed written consent of the individual or, if appropriate, the individual's representative, the State unit may release personal information to another agency or organization, in accordance with a written agreement, for its program purposes only to the extent that the information may be released to the involved individual or the individual's

representative and only to the extent that the other agency or organization demonstrates that the information requested is necessary for its program.

(2) Medical or psychological information that the State unit determines may be harmful to the individual may be released if the other agency or organization assures the State unit that the information will be used only for the purpose for which it is being provided and will not be further released to the individual.

(3) The State unit must release personal information if required by Federal law or regulations.

(4) The State unit must release personal information in response to investigations in connection with law enforcement, fraud, or abuse, unless expressly prohibited by Federal or State laws or regulations, and in response to an order issued by a judge, magistrate, or other authorized judicial officer.

(5) The State unit also may release personal information in order to protect the individual or others if the individual poses a threat to his or her safety or to the safety of others.

(Authority: Sections 12(c) and 101(a)(6)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(6)(A))

§361.39 State-imposed requirements.

The designated State unit must, upon request, identify those regulations and policies relating to the administration or operation of its vocational rehabilitation program that are State-imposed, including any regulations or policy based on State interpretation of any Federal law, regulation, or guideline.

(Authority: Section 17 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 714)

§361.40 Reports; Evaluation standards and performance indicators.

(a) Reports. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the designated State agency will submit reports, including reports required under sections 13, 14, and 101(a)(10) of the Act—

(i) In the form and level of detail and at the time required by the Secretary regarding applicants for and eligible individuals receiving services, including students

receiving pre-employment transition services in accordance with §361.48(a); and

(ii) In a manner that provides a complete count (other than the information obtained through sampling consistent with section 101(a)(10)(E) of the Act) of the applicants and eligible individuals to—

(A) Permit the greatest possible cross-classification of data; and

(B) Protect the confidentiality of the identity of each individual.

(2) The designated State agency must comply with any requirements necessary to ensure the accuracy and verification of those reports.

(b) Evaluation standards and performance indicators.

(1) Standards and indicators. The evaluation standards and performance indicators for the vocational rehabilitation program carried out under this part are subject to the performance accountability provisions described in section 116(b) of the Workforce Innovation and Opportunity Act and implemented in joint regulations set forth in subpart E of this part.

(2) Compliance. A State’s compliance with common performance measures and any necessary corrective actions

will be determined in accordance with joint regulations set forth in subpart E of this part.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c), 101(a)(10)(A) and (F), and 106 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c),721(a)(10)(A) and (F), and 726)

Provision and Scope of Services

§361.41 Processing referrals and applications.

(a) Referrals. The designated State unit must establish and implement standards for the prompt and equitable handling of referrals of individuals for vocational rehabilitation services, including referrals of individuals made through the one-stop service delivery systems under section 121 of the Workforce Innovation and Opportunity Act. The standards must include timelines for making good faith efforts to inform these individuals of application requirements and to gather information necessary to initiate an assessment for determining eligibility and priority for services.

(b) Applications. (1) Once an individual has submitted an application for vocational rehabilitation services, including applications made through common intake

procedures in one-stop centers under section 121 of the Workforce Innovation and Opportunity Act, an eligibility determination must be made within 60 days, unless—

(i) Exceptional and unforeseen circumstances beyond the control of the designated State unit preclude making an eligibility determination within 60 days and the designated State unit and the individual agree to a specific extension of time; or

(ii) An exploration of the individual's abilities, capabilities, and capacity to perform in work situations is carried out in accordance with §361.42(e).

(2) An individual is considered to have submitted an application when the individual or the individual's representative, as appropriate—

(i)(A) Has completed and signed an agency application form;

(B) Has completed a common intake application form in a one-stop center requesting vocational rehabilitation services; or

(C) Has otherwise requested services from the designated State unit;

(ii) Has provided to the designated State unit information necessary to initiate an assessment to determine eligibility and priority for services; and

(iii) Is available to complete the assessment process.

(3) The designated State unit must ensure that its application forms are widely available throughout the State, particularly in the one-stop centers under section 121 of the Workforce Innovation and Opportunity Act. (Authority: Sections 12(c), 101(a)(6)(A), and 102(a)(6) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(a)(6)(A), and 722(a)(6))

§361.42 Assessment for determining eligibility and priority for services.

In order to determine whether an individual is eligible for vocational rehabilitation services and the individual's priority under an order of selection for services (if the State is operating under an order of selection), the designated State unit must conduct an assessment for determining eligibility and priority for services. The assessment must be conducted in the most integrated setting possible, consistent with the

individual's needs and informed choice, and in accordance with the following provisions:

(a) Eligibility requirements. (1) Basic requirements. The designated State unit's determination of an applicant's eligibility for vocational rehabilitation services must be based only on the following requirements:

(i) A determination by qualified personnel that the applicant has a physical or mental impairment;

(ii) A determination by qualified personnel that the applicant's physical or mental impairment constitutes or results in a substantial impediment to employment for the applicant; and

(iii) A determination by a qualified vocational rehabilitation counselor employed by the designated State unit that the applicant requires vocational rehabilitation services to prepare for, secure, retain, advance in, or regain employment that is consistent with the individual’s unique strengths, resources, priorities, concerns, abilities, capabilities, interest, and informed choice. For purposes of an assessment for determining eligibility and vocational rehabilitation needs under this part, an individual is presumed to have a goal of an employment outcome.

(2) Presumption of benefit. The designated State unit must presume that an applicant who meets the eligibility requirements in paragraphs (a)(1)(i) and (ii) of this section can benefit in terms of an employment outcome.

(3) Presumption of eligibility for Social Security recipients and beneficiaries. (i) Any applicant who has been determined eligible for Social Security benefits under title II or title XVI of the Social Security Act is—

(A) Presumed eligible for vocational rehabilitation services under paragraphs (a)(1) and (2) of this section; and

(B) Considered an individual with a significant disability as defined in §361.5(c)(29).

(ii) If an applicant for vocational rehabilitation services asserts that he or she is eligible for Social Security benefits under title II or title XVI of the Social Security Act (and, therefore, is presumed eligible for vocational rehabilitation services under paragraph (a)(3)(i)(A) of this section), but is unable to provide appropriate evidence, such as an award letter, to support that assertion, the State unit must verify the applicant's eligibility under title II or title XVI of the Social

Security Act by contacting the Social Security Administration. This verification must be made within a reasonable period of time that enables the State unit to determine the applicant's eligibility for vocational rehabilitation services within 60 days of the individual submitting an application for services in accordance with §361.41(b)(2).

(4) Achievement of an employment outcome. Any eligible individual, including an individual whose eligibility for vocational rehabilitation services is based on the individual being eligible for Social Security benefits under title II or title XVI of the Social Security Act, must intend to achieve an employment outcome that is consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(i) The State unit is responsible for informing individuals, through its application process for vocational rehabilitation services, that individuals who receive services under the program must intend to achieve an employment outcome.

(ii) The applicant's completion of the application process for vocational rehabilitation services is

sufficient evidence of the individual's intent to achieve an employment outcome, and no additional demonstration on the part of the applicant is required for purposes of satisfying paragraph (a)(4) of this section.

(5) Interpretation. Nothing in this section, including paragraph (a)(3)(i), is to be construed to create an entitlement to any vocational rehabilitation service.

(b) Interim determination of eligibility. (1) The designated State unit may initiate the provision of vocational rehabilitation services for an applicant on the basis of an interim determination of eligibility prior to the 60-day period described in §361.41(b)(2).

(2) If a State chooses to make interim determinations of eligibility, the designated State unit must—

(i) Establish criteria and conditions for making those determinations;

(ii) Develop and implement procedures for making the determinations; and

(iii) Determine the scope of services that may be provided pending the final determination of eligibility.

(3) If a State elects to use an interim eligibility determination, the designated State unit must make a final determination of eligibility within 60 days of the

individual submitting an application for services in accordance with §361.41(b)(2).

(c) Prohibited factors. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the State unit will not impose, as part of determining eligibility under this section, a duration of residence requirement that excludes from services any applicant who is present in the State. The designated State unit may not require the applicant to demonstrate a presence in the State through the production of any documentation that under State or local law, or practical circumstances, results in a de facto duration of residence requirement.

(2) In making a determination of eligibility under this section, the designated State unit also must ensure that—

(i) No applicant or group of applicants is excluded or found ineligible solely on the basis of the type of disability; and

(ii) The eligibility requirements are applied without regard to the—

(A) Age, sex, race, color, or national origin of the applicant;

(B) Type of expected employment outcome;

(C) Source of referral for vocational rehabilitation services;

(D) Particular service needs or anticipated cost of services required by an applicant or the income level of an applicant or applicant's family;

(E) Applicants' employment history or current employment status; and

(F) Applicants' educational status or current educational credential.

(d) Review and assessment of data for eligibility determination. Except as provided in paragraph (e) of this section, the designated State unit—

(1) Must base its determination of each of the basic eligibility requirements in paragraph (a) of this section on—

(i) A review and assessment of existing data, including counselor observations, education records, information provided by the individual or the individual's family, particularly information used by education officials, and determinations made by officials of other agencies; and

(ii) To the extent existing data do not describe the current functioning of the individual or are unavailable, insufficient, or inappropriate to make an eligibility determination, an assessment of additional data resulting from the provision of vocational rehabilitation services, including trial work experiences, assistive technology devices and services, personal assistance services, and any other support services that are necessary to determine whether an individual is eligible; and

(2) Must base its presumption under paragraph (a)(3)(i) of this section that an applicant who has been determined eligible for Social Security benefits under title II or title XVI of the Social Security Act satisfies each of the basic eligibility requirements in paragraph (a) of this section on determinations made by the Social Security Administration.

(e) Trial work experiences for individuals with significant disabilities. (1) Prior to any determination that an individual with a disability is unable to benefit from vocational rehabilitation services in terms of an employment outcome because of the severity of that individual's disability or that the individual is ineligible for vocational rehabilitation services, the

designated State unit must conduct an exploration of the individual's abilities, capabilities, and capacity to perform in realistic work situations.

(2)(i) The designated State unit must develop a written plan to assess periodically the individual's abilities, capabilities, and capacity to perform in competitive integrated work situations through the use of trial work experiences, which must be provided in competitive integrated employment settings to the maximum extent possible, consistent with the informed choice and rehabilitation needs of the individual.

(ii) Trial work experiences include supported employment, on-the-job training, and other experiences using realistic integrated work settings.

(iii) Trial work experiences must be of sufficient variety and over a sufficient period of time for the designated State unit to determine that --

(A) There is sufficient evidence to conclude that the individual can benefit from the provision of vocational rehabilitation services in terms of an employment outcome; or

(B) There is clear and convincing evidence that due to the severity of the individual’s disability, the

individual is incapable of benefitting from the provision of vocational rehabilitation services in terms of an employment outcome; and

(iv) The designated State unit must provide appropriate supports, including, but not limited to, assistive technology devices and services and personal assistance services, to accommodate the rehabilitation needs of the individual during the trial work experiences.

(f) Data for determination of priority for services under an order of selection. If the designated State unit is operating under an order of selection for services, as provided in §361.36, the State unit must base its priority assignments on—

(1) A review of the data that was developed under paragraphs (d) and (e) of this section to make the eligibility determination; and

(2) An assessment of additional data, to the extent necessary.

(Authority: Sections 7(2), 12(c), 101(a)(12), 102(a), 103(a)(1), 103(a)(9), 103(a)(10), and 103(a)(14) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(2), 709(c), 721(a)(12), 722(a), 723(a)(1), 723(a)(9), 723(a)(10), and 723(a)(14))

Note to §361.42: Clear and convincing evidence means that the designated State unit has a high degree of certainty before it can conclude that an individual is incapable of benefiting from services in terms of an employment outcome. The clear and convincing standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case-by-case basis. The term clear means unequivocal. For example, the use of an intelligence test result alone would not constitute clear and convincing evidence. Clear and convincing evidence might include a description of assessments, including situational assessments and supported employment assessments, from service providers who have concluded that they would be unable to meet the individual's needs due to the severity of the individual's disability. The demonstration of “clear and convincing evidence” must include, if appropriate, a functional assessment of skill development activities, with any necessary supports (including assistive technology), in real life settings. (S. Rep. No. 357, 102d Cong., 2d. Sess. 37-38 (1992))

§361.43 Procedures for ineligibility determination.

If the State unit determines that an applicant is ineligible for vocational rehabilitation services or determines that an individual receiving services under an individualized plan for employment is no longer eligible for services, the State unit must—

(a) Make the determination only after providing an opportunity for full consultation with the individual or, as appropriate, with the individual's representative;

(b) Inform the individual in writing, supplemented as necessary by other appropriate modes of communication consistent with the informed choice of the individual, of the ineligibility determination, including the reasons for that determination, the requirements under this section, and the means by which the individual may express and seek remedy for any dissatisfaction, including the procedures for review of State unit personnel determinations in accordance with §361.57;

(c) Provide the individual with a description of services available from a client assistance program established under 34 CFR part 370 and information on how to contact that program;

(d) Refer the individual—

(1) To other programs that are part of the one-stop service delivery system under the Workforce Investment Act that can address the individual's training or employment-related needs; or

(2) To Federal, State, or local programs or service providers, including, as appropriate, independent living programs and extended employment providers, best suited to meet their rehabilitation needs, if the ineligibility determination is based on a finding that the individual has chosen not to pursue, or is incapable of achieving, an employment outcome as defined in §361.5(c)(15).

(e) Review within 12 months and annually thereafter if requested by the individual or, if appropriate, by the individual's representative any ineligibility determination that is based on a finding that the individual is incapable of achieving an employment outcome. This review need not be conducted in situations in which the individual has refused it, the individual is no longer present in the State, the individual's whereabouts are unknown, or the individual's medical condition is rapidly progressive or terminal.

(Authority: Sections 12(c) and 102(a)(5) and (c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 722(a)(5)and (c))

§361.44 Closure without eligibility determination.

The designated State unit may not close an applicant's record of services prior to making an eligibility determination unless the applicant declines to participate in, or is unavailable to complete, an assessment for determining eligibility and priority for services, and the State unit has made a reasonable number of attempts to contact the applicant or, if appropriate, the applicant's representative to encourage the applicant's participation. (Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

§361.45 Development of the individualized plan for employment.

(a) General requirements. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that—

(1) An individualized plan for employment meeting the requirements of this section and §361.46 is developed and implemented in a timely manner for each individual determined to be eligible for vocational rehabilitation

services or, if the designated State unit is operating under an order of selection in accordance with §361.36, for each eligible individual to whom the State unit is able to provide services; and

(2) Services will be provided in accordance with the provisions of the individualized plan for employment.

(b) Purpose. (1) The designated State unit must conduct an assessment for determining vocational rehabilitation needs, if appropriate, for each eligible individual or, if the State is operating under an order of selection, for each eligible individual to whom the State is able to provide services. The purpose of this assessment is to determine the employment outcome, and the nature and scope of vocational rehabilitation services to be included in the individualized plan for employment.

(2) The individualized plan for employment must be designed to achieve a specific employment outcome, as defined in §361.5(c)(15), that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(c) Required information. The State unit must provide the following information to each eligible

individual or, as appropriate, the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or the individual's representative:

(1) Options for developing an individualized plan for employment. Information on the available options for developing the individualized plan for employment, including the option that an eligible individual or, as appropriate, the individual's representative may develop all or part of the individualized plan for employment—

(i) Without assistance from the State unit or other entity; or

(ii) With assistance from—

(A) A qualified vocational rehabilitation counselor employed by the State unit;

(B) A qualified vocational rehabilitation counselor who is not employed by the State unit;

(C) A disability advocacy organization; or

(D) Resources other than those in paragraph (c)(1)(ii)(A) through (C) of this section.

(2) Additional information. Additional information to assist the eligible individual or, as appropriate, the

individual's representative in developing the individualized plan for employment, including—

(i) Information describing the full range of components that must be included in an individualized plan for employment;

(ii) As appropriate to each eligible individual—

(A) An explanation of agency guidelines and criteria for determining an eligible individual's financial commitments under an individualized plan for employment;

(B) Information on the availability of assistance in completing State unit forms required as part of the individualized plan for employment; and

(C) Additional information that the eligible individual requests or the State unit determines to be necessary to the development of the individualized plan for employment;

(iii) A description of the rights and remedies available to the individual, including, if appropriate, recourse to the processes described in §361.57; and

(iv) A description of the availability of a client assistance program established under part 370 of this chapter and information on how to contact the client assistance program.

(3) Individuals entitled to benefits under title II or XVI of the Social Security Act. For individuals entitled to benefits under title II or XVI of the Social Security Act on the basis of a disability or blindness, the State unit must provide to the individual general information on additional supports and assistance for individuals with disabilities desiring to enter the workforce, including assistance with benefits planning.

(d) Mandatory procedures. The designated State unit must ensure that—

(1) The individualized plan for employment is a written document prepared on forms provided by the State unit;

(2) The individualized plan for employment is developed and implemented in a manner that gives eligible individuals the opportunity to exercise informed choice, consistent with §361.52, in selecting—

(i) The employment outcome, including the employment setting;

(ii) The specific vocational rehabilitation services needed to achieve the employment outcome, including the settings in which services will be provided;

(iii) The entity or entities that will provide the vocational rehabilitation services; and

(iv) The methods available for procuring the services;

(3) The individualized plan for employment is—

(i) Agreed to and signed by the eligible individual or, as appropriate, the individual's representative; and

(ii) Approved and signed by a qualified vocational rehabilitation counselor employed by the designated State unit;

(4) A copy of the individualized plan for employment and a copy of any amendments to the individualized plan for employment are provided to the eligible individual or, as appropriate, to the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or, as appropriate, the individual's representative;

(5) The individualized plan for employment is reviewed at least annually by a qualified vocational rehabilitation counselor and the eligible individual or, as appropriate, the individual's representative to assess the eligible individual's progress in achieving the identified employment outcome;

(6) The individualized plan for employment is amended, as necessary, by the individual or, as appropriate, the individual's representative, in collaboration with a representative of the State unit or a qualified vocational rehabilitation counselor (to the extent determined to be appropriate by the individual), if there are substantive changes in the employment outcome, the vocational rehabilitation services to be provided, or the providers of the vocational rehabilitation services;

(7) Amendments to the individualized plan for employment do not take effect until agreed to and signed by the eligible individual or, as appropriate, the individual's representative and by a qualified vocational rehabilitation counselor employed by the designated State unit;

(8) The individualized plan for employment is amended, as necessary, to include the postemployment services and service providers that are necessary for the individual to maintain, advance in or regain employment, consistent with the individual’s unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice; and

(9) An individualized plan for employment for a student with a disability is developed—

(i) In consideration of the student's individualized education program or 504 services, as applicable; and

(ii) In accordance with the plans, policies, procedures, and terms of the interagency agreement required under §361.22.

(e) Standards for developing the individualized plan for employment. The individualized plan for employment must be developed as soon as possible, but not later than 90 days after the date of determination of eligibility, unless the State unit and the eligible individual agree to the extension of that deadline to a specific date by which the individualized plan for employment must be completed.

(f) Data for preparing the individualized plan for employment. (1) Preparation without comprehensive assessment. To the extent possible, the employment outcome and the nature and scope of rehabilitation services to be included in the individual's individualized plan for employment must be determined based on the data used for the assessment of eligibility and priority for services under §361.42.

(2) Preparation based on comprehensive assessment.

(i) If additional data are necessary to determine the employment outcome and the nature and scope of services to be included in the individualized plan for employment of an eligible individual, the State unit must conduct a comprehensive assessment of the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment services, of the eligible individual, in the most integrated setting possible, consistent with the informed choice of the individual in accordance with the provisions of §361.5(c)(5)(ii).

(ii) In preparing the comprehensive assessment, the State unit must use, to the maximum extent possible and appropriate and in accordance with confidentiality requirements, existing information that is current as of the date of the development of the individualized plan for employment, including information—

(A) Available from other programs and providers, particularly information used by education officials and the Social Security Administration;

(B) Provided by the individual and the individual's family; and

(C) Obtained under the assessment for determining the individual's eligibility and vocational rehabilitation needs.

(Authority: Sections 7(2)(B), 101(a)(9), 102(b), and 103(a)(1) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(2)(B), 721(a)(9), 722(b), and 723(a)(1))

§361.46 Content of the individualized plan for employment.

(a) Mandatory components. Regardless of the approach in §361.45(c)(1) that an eligible individual selects for purposes of developing the individualized plan for employment, each individualized plan for employment must--

(1) Include a description of the specific employment outcome, as defined in §361.5(c)(15), that is chosen by the eligible individual and is consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interests, and informed choice consistent with the general goal of competitive integrated employment (except that in the case of an eligible individual who is a student or a youth with a disability, the description may be a description of the individual’s projected post-school employment outcome);

(2) Include a description under §361.48 of--

(i) These specific rehabilitation services needed to achieve the employment outcome, including, as appropriate, the provision of assistive technology devices, assistive technology services, and personal assistance services, including training in the management of those services; and

(ii) In the case of a plan for an eligible individual that is a student or youth with a disability, the specific transition services and supports needed to achieve the individual’s employment outcome or projected post-school employment outcome.

(3) Provide for services in the most integrated setting that is appropriate for the services involved and is consistent with the informed choice of the eligible individual;

(4) Include timelines for the achievement of the employment outcome and for the initiation of services;

(5) Include a description of the entity or entities chosen by the eligible individual or, as appropriate, the individual's representative that will provide the vocational rehabilitation services and the methods used to procure those services;

(6) Include a description of the criteria that will be used to evaluate progress toward achievement of the employment outcome; and

(7) Include the terms and conditions of the individualized plan for employment, including, as appropriate, information describing—

(i) The responsibilities of the designated State unit;

(ii) The responsibilities of the eligible individual, including—

(A) The responsibilities the individual will assume in relation to achieving the employment outcome;

(B) If applicable, the extent of the individual's participation in paying for the cost of services; and

(C) The responsibility of the individual with regard to applying for and securing comparable services and benefits as described in §361.53; and

(iii) The responsibilities of other entities as the result of arrangements made pursuant to the comparable services or benefits requirements in §361.53.

(b) Supported employment requirements. An individualized plan for employment for an individual with a most significant disability for whom an employment outcome

in a supported employment setting has been determined to be appropriate must—

(1) Specify the supported employment services to be provided by the designated State unit;

(2) Specify the expected extended services needed, which may include natural supports;

(3) Identify the source of extended services or, to the extent that it is not possible to identify the source of extended services at the time the individualized plan for employment is developed, include a description of the basis for concluding that there is a reasonable expectation that those sources will become available;

(4) Provide for periodic monitoring to ensure that the individual is making satisfactory progress toward meeting the weekly work requirement established in the individualized plan for employment by the time of transition to extended services;

(5) Provide for the coordination of services provided under an individualized plan for employment with services provided under other individualized plans established under other Federal or State programs;

(6) To the extent that job skills training is provided, identify that the training will be provided on site; and

(7) Include placement in an integrated setting for the maximum number of hours possible based on the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of individuals with the most significant disabilities.

(c) Post-employment services. The individualized plan for employment for each individual must contain, as determined to be necessary, statements concerning—

(1) The expected need for post-employment services prior to closing the record of services of an individual who has achieved an employment outcome;

(2) A description of the terms and conditions for the provision of any post-employment services; and

(3) If appropriate, a statement of how post-employment services will be provided or arranged through other entities as the result of arrangements made pursuant to the comparable services or benefits requirements in §361.53.

(d) Coordination of services for students with disabilities. The individualized plan for employment for a

student with a disability must be coordinated with the individualized education program or 504 services, as applicable, for that individual in terms of the goals, objectives, and services identified in the education program.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 101(a)(8), 101(a)(9), and 102(b)(4) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(8), 721(a)(9), and 722(b)(4))

§361.47 Record of services.

(a) The designated State unit must maintain for each applicant and eligible individual a record of services that includes, to the extent pertinent, the following documentation:

(1) If an applicant has been determined to be an eligible individual, documentation supporting that determination in accordance with the requirements under §361.42.

(2) If an applicant or eligible individual receiving services under an individualized plan for employment has been determined to be ineligible, documentation supporting

that determination in accordance with the requirements under §361.43.

(3) Documentation that describes the justification for closing an applicant's or eligible individual's record of services if that closure is based on reasons other than ineligibility, including, as appropriate, documentation indicating that the State unit has satisfied the requirements in §361.44.

(4) If an individual has been determined to be an individual with a significant disability or an individual with a most significant disability, documentation supporting that determination.

(5) If an individual with a significant disability requires an exploration of abilities, capabilities, and capacity to perform in realistic work situations through the use of trial work experiences to determine whether the individual is an eligible individual, documentation supporting the need for, and the plan relating to, that exploration and documentation regarding the periodic assessments carried out during the trial work experiences in accordance with the requirements under §361.42(e).

(6) The individualized plan for employment, and any amendments to the individualized plan for employment, consistent with the requirements under §361.46.

(7) Documentation describing the extent to which the applicant or eligible individual exercised informed choice regarding the provision of assessment services and the extent to which the eligible individual exercised informed choice in the development of the individualized plan for employment with respect to the selection of the specific employment outcome, the specific vocational rehabilitation services needed to achieve the employment outcome, the entity to provide the services, the employment setting, the settings in which the services will be provided, and the methods to procure the services.

(8) In the event that an individual's individualized plan for employment provides for vocational rehabilitation services in a non-integrated setting, a justification to support the need for the non-integrated setting.

(9) In the event that an individual obtains competitive employment, verification that the individual is compensated at or above the minimum wage and that the individual's wage and level of benefits are not less than that customarily paid by the employer for the same or

similar work performed by non-disabled individuals in accordance with §361.5(c)(9)(i).

(10) In the event an individual achieves an employment outcome in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act or the designated State unit closes the record of services of an individual in extended employment on the basis that the individual is unable to achieve an employment outcome consistent with §361.5(c)(15) or that an eligible individual through informed choice chooses to remain in extended employment, documentation of the results of the semi-annual and annual reviews required under §361.55, of the individual's input into those reviews, and of the individual's or, if appropriate, the individual's representative's acknowledgment that those reviews were conducted.

(11) Documentation concerning any action or decision resulting from a request by an individual under §361.57 for a review of determinations made by designated State unit personnel.

(12) In the event that an applicant or eligible individual requests under §361.38(c)(4) that documentation

in the record of services be amended and the documentation is not amended, documentation of the request.

(13) In the event an individual is referred to another program through the State unit's information and referral system under §361.37, including other components of the statewide workforce development system, documentation on the nature and scope of services provided by the designated State unit to the individual and on the referral itself, consistent with the requirements of §361.37.

(14) In the event an individual's record of service is closed under §361.56, documentation that demonstrates the services provided under the individual's individualized plan for employment contributed to the achievement of the employment outcome.

(15) In the event an individual's record of service is closed under §361.56, documentation verifying that the provisions of §361.56 have been satisfied.

(b) The State unit, in consultation with the State Rehabilitation Council if the State has a Council, must determine the type of documentation that the State unit must maintain for each applicant and eligible individual in

order to meet the requirements in paragraph (a) of this section.

(Authority: Sections 12(c), 101(a)(6), (9), (14), and (20) and 102(a), (b), and (d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(a)(6), (9), (14), and (20), and 722(a), (b), and (d))

§361.48 Scope of vocational rehabilitation services for individuals with disabilities.

(a) Pre-employment transition services. Each State must ensure that the designated State unit, in collaboration with the local educational agencies involved, provide, or arrange for the provision of, pre-employment transition services for all students with disabilities, as defined in §361.5(c)(51), in need of such services, without regard to the type of disability, from Federal funds reserved in accordance with §361.65, and any funds made available from State, local, or private funding sources. Funds reserved and made available may be used for the required, authorized, and pre-employment transition coordination activities under paragraphs (2), (3) and (4) of this section.

(1) Availability of services. Pre-employment transition services must be made available Statewide to all

students with disabilities, regardless of whether the student has applied or been determined eligible for vocational rehabilitation services.

(2) Required activities. The designated State unit must provide the following pre-employment transition services:

(i) Job exploration counseling;

(ii) Work-based learning experiences, which may include in-school or after school opportunities, or experience outside the traditional school setting (including internships), that is provided in an integrated environment in the community to the maximum extent possible;

(iii) Counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education;

(iv) Workplace readiness training to develop social skills and independent living; and

(v) Instruction in self-advocacy (including instruction in person-centered planning), which may include peer mentoring (including peer mentoring from individuals with disabilities working in competitive integrated employment).

(3) Authorized activities. Funds available and remaining after the provision of the required activities described in paragraph (a)(2) of this section may be used to improve the transition of students with disabilities from school to postsecondary education or an employment outcome by—

(i) Implementing effective strategies to increase the likelihood of independent living and inclusion in communities and competitive integrated workplaces;

(ii) Developing and improving strategies for individuals with intellectual disabilities and individuals with significant disabilities to live independently; participate in postsecondary education experiences; and obtain, advance in and retain competitive integrated employment;

(iii) Providing instruction to vocational rehabilitation counselors, school transition personnel, and other persons supporting students with disabilities;

(iv) Disseminating information about innovative, effective, and efficient approaches to achieve the goals of this section;

(v) Coordinating activities with transition services provided by local educational agencies under the

Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.);

(vi) Applying evidence-based findings to improve policy, procedure, practice, and the preparation of personnel, in order to better achieve the goals of this section;

(vii) Developing model transition demonstration projects;

(viii) Establishing or supporting multistate or regional partnerships involving States, local educational agencies, designated State units, developmental disability agencies, private businesses, or other participants to achieve the goals of this section; and

(ix) Disseminating information and strategies to improve the transition to postsecondary activities of individuals who are members of traditionally unserved and underserved populations.

(4) Pre-employment transition coordination. Each local office of a designated State unit must carry out responsibilities consisting of—

(i) Attending individualized education program meetings for students with disabilities, when invited;

(ii) Working with the local workforce development boards, one-stop centers, and employers to develop work opportunities for students with disabilities, including internships, summer employment and other employment opportunities available throughout the school year, and apprenticeships;

(iii) Working with schools, including those carrying out activities under section 614(d) of the IDEA, to coordinate and ensure the provision of pre-employment transition services under this section;

(iv) When invited, attending person-centered planning meetings for individuals receiving services under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.); and

(b) Services for individuals who have applied for or been determined eligible for vocational rehabilitation services. As appropriate to the vocational rehabilitation needs of each individual and consistent with each individual's individualized plan for employment, the designated State unit must ensure that the following vocational rehabilitation services are available to assist the individual with a disability in preparing for, securing, retaining, advancing in or regaining an employment outcome that is consistent with the individual's

unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice:

(1) Assessment for determining eligibility and priority for services by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology, in accordance with §361.42.

(2) Assessment for determining vocational rehabilitation needs by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology, in accordance with §361.45.

(3) Vocational rehabilitation counseling and guidance, including information and support services to assist an individual in exercising informed choice in accordance with §361.52.

(4) Referral and other services necessary to assist applicants and eligible individuals to secure needed services from other agencies, including other components of the statewide workforce development system, in accordance with §§361.23, 361.24, and 361.37, and to advise those individuals about client assistance programs established under 34 CFR part 370.

(5) In accordance with the definition in §361.5(c)(39), physical and mental restoration services, to

the extent that financial support is not readily available from a source other than the designated State unit (such as through health insurance or a comparable service or benefit as defined in §361.5(c)(10)).

(6) Vocational and other training services, including personal and vocational adjustment training, advanced training in, but not limited to, a field of science, technology, engineering, mathematics (including computer science), medicine, law, or business); books, tools, and other training materials, except that no training or training services in an institution of higher education (universities, colleges, community or junior colleges, vocational schools, technical institutes, or hospital schools of nursing or any other postsecondary education institution) may be paid for with funds under this part unless maximum efforts have been made by the State unit and the individual to secure grant assistance in whole or in part from other sources to pay for that training.

(7) Maintenance, in accordance with the definition of that term in §361.5(c)(34).

(8) Transportation in connection with the provision of any vocational rehabilitation service and in accordance with the definition of that term in §361.5(c)(57).

(9) Vocational rehabilitation services to family members, as defined in §361.5(c)(23), of an applicant or eligible individual if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(10) Interpreter services, including sign language and oral interpreter services, for individuals who are deaf or hard of hearing and tactile interpreting services for individuals who are deaf-blind provided by qualified personnel.

(11) Reader services, rehabilitation teaching services, and orientation and mobility services for individuals who are blind.

(12) Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services.

(13) Supported employment services in accordance with the definition of that term in §361.5(c)(54).

(14) Personal assistance services in accordance with the definition of that term in §361.5(c)(39).

(15) Post-employment services in accordance with the definition of that term in §361.5(c)(42).

(16) Occupational licenses, tools, equipment, initial stocks, and supplies.

(17) Rehabilitation technology in accordance with the definition of that term in §361.5(c)(45), including vehicular modification, telecommunications, sensory, and other technological aids and devices.

(18) Transition services for students and youth with disabilities, that facilitate the transition from school to postsecondary life, such as achievement of an employment outcome in competitive integrated employment, or pre-employment transition services for students.

(19) Technical assistance and other consultation services to conduct market analyses, develop business plans, and otherwise provide resources, to the extent those resources are authorized to be provided through the statewide workforce development system, to eligible individuals who are pursuing self-employment or telecommuting or establishing a small business operation as an employment outcome.

(20) Customized employment in accordance with the definition of that term in §361.5(c)(11).

(21) Other goods and services determined necessary for the individual with a disability to achieve an employment outcome.

(Authority: Sections 7(37), 12(c), 103(a), and 113 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(37), 709(c), 723(a), and 733)

§361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.

(a) The designated State unit may provide for the following vocational rehabilitation services for the benefit of groups of individuals with disabilities:

(1) The establishment, development, or improvement of a public or other nonprofit community rehabilitation program that is used to provide vocational rehabilitation services that promote integration into the community and prepare individuals with disabilities for competitive integrated employment, including supported employment and customized employment, and under special circumstances, the construction of a facility for a public or nonprofit community rehabilitation program as defined in §§361.5(c)(10), 361.5(c)(16) and 361.5(c)(17). Examples of special circumstances include the destruction by natural disaster of the only available center serving an area or a State determination that construction is necessary in a rural area because no other public agencies or private

nonprofit organizations are currently able to provide vocational rehabilitation services to individuals.

(2) Telecommunications systems that have the potential for substantially improving vocational rehabilitation service delivery methods and developing appropriate programming to meet the particular needs of individuals with disabilities, including telephone, television, video description services, satellite, tactile-vibratory devices, and similar systems, as appropriate.

(3) Special services to provide nonvisual access to information for individuals who are blind, including the use of telecommunications, Braille, sound recordings, or other appropriate media; captioned television, films, or video cassettes for individuals who are deaf or hard of hearing; tactile materials for individuals who are deaf-blind; and other special services that provide information through tactile, vibratory, auditory, and visual media.

(4) Technical assistance to businesses that are seeking to employ individuals with disabilities.

(5) In the case of any small business enterprise operated by individuals with significant disabilities under the supervision of the designated State unit, including enterprises established under the Randolph-Sheppard

program, management services and supervision provided by the State unit along with the acquisition by the State unit of vending facilities or other equipment, initial stocks and supplies, and initial operating expenses, in accordance with the following requirements:

(i) Management services and supervision includes inspection, quality control, consultation, accounting, regulating, in-service training, and related services provided on a systematic basis to support and improve small business enterprises operated by individuals with significant disabilities. Management services and supervision may be provided throughout the operation of the small business enterprise.

(ii) Initial stocks and supplies includes those items necessary to the establishment of a new business enterprise during the initial establishment period, which may not exceed six months.

(iii) Costs of establishing a small business enterprise may include operational costs during the initial establishment period, which may not exceed six months.

(iv) If the designated State unit provides for these services, it must ensure that only individuals with

significant disabilities will be selected to participate in this supervised program.

(v) If the designated State unit provides for these services and chooses to set aside funds from the proceeds of the operation of the small business enterprises, the State unit must maintain a description of the methods used in setting aside funds and the purposes for which funds are set aside. Funds may be used only for small business enterprises purposes, and benefits that are provided to operators from set-aside funds must be provided on an equitable basis.

(6) Consultation and technical assistance services to assist State educational agencies and local educational agencies in planning for the transition of students and youth with disabilities from school to postsecondary life, including employment.

(7) Transition services to youth with disabilities and students with disabilities who may not have yet applied or been determined eligible for vocational rehabilitation services, for which a vocational rehabilitation counselor works in concert with educational agencies, providers of job training programs, providers of services under the Medicaid program under title XIX of the Social Security Act

(42 U.S.C. 1396 et seq.), entities designated by the State to provide services for individuals with developmental disabilities, centers for independent living (as defined in section 702 of the Act), housing and transportation authorities, workforce development systems, and businesses and employers. These specific transition services are to benefit a group of students with disabilities or youth with disabilities and are not individualized services directly related to an individualized plan for employment goal. Services may include, but are not limited to, group tours of universities and vocational training programs, employer or business site visits to learn about career opportunities, career fairs coordinated with workforce development and employers to facilitate mock interviews and resume writing, and other general services applicable to groups of students with disabilities and youth with disabilities.

(8) The establishment, development, or improvement of assistive technology demonstration, loan, reutilization, or financing programs in coordination with activities authorized under the Assistive Technology Act of 1998 (29 U.S.C. 3001 et seq.) to promote access to assistive technology for individuals with disabilities and employers.

(9) Support (including, as appropriate, tuition) for advanced training in a field of science, technology, engineering, or mathematics (including computer science), medicine, law, or business, provided after an individual eligible to receive services under this title demonstrates—

(i) Such eligibility;

(ii) Previous completion of a bachelor’s degree program at an institution of higher education or scheduled completion of such a degree program prior to matriculating in the program for which the individual proposes to use the support; and

(iii) Acceptance by a program at an institution of higher education in the United States that confers a master’s degree in a field of science, technology, engineering, or mathematics (including computer science), a juris doctor degree, a master of business administration degree, or a doctor of medicine degree, except that--

(A) No training provided at an institution of higher education may be paid for with funds under this program unless maximum efforts have been made by the designated State unit to secure grant assistance, in whole or in part, from other sources to pay for such training; and

(B) Nothing in this paragraph prevents any designated State unit from providing similar support to individuals with disabilities within the State who are eligible to receive support under this title and who are not served under this section.

(b) If the designated State unit provides for vocational rehabilitation services for groups of individuals, it must—

(1) Develop and maintain written policies covering the nature and scope of each of the vocational rehabilitation services it provides and the criteria under which each service is provided; and

(2) Maintain information to ensure the proper and efficient administration of those services in the form and detail and at the time required by the Secretary, including the types of services provided, the costs of those services, and, to the extent feasible, estimates of the numbers of individuals benefiting from those services.

(Authority: Sections 12(c), 101(a)(6)(A), and 103(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(a)(6), and 723(b))

<u>§361.50 Written policies governing the provision of services for individuals with disabilities.</u>

(a) Policies. The State unit must develop and maintain written policies covering the nature and scope of each of the vocational rehabilitation services specified in §361.48 and the criteria under which each service is provided. The policies must ensure that the provision of services is based on the rehabilitation needs of each individual as identified in that individual's individualized plan for employment and is consistent with the individual's informed choice. The written policies may not establish any arbitrary limits on the nature and scope of vocational rehabilitation services to be provided to the individual to achieve an employment outcome. The policies must be developed in accordance with the following provisions:

(b) Out-of-State services. (1) The State unit may establish a preference for in-State services, provided that the preference does not effectively deny an individual a necessary service. If the individual chooses an out-of-State service at a higher cost than an in-State service, if either service would meet the individual's rehabilitation needs, the designated State unit is not responsible for those costs in excess of the cost of the in-State service.

(2) The State unit may not establish policies that effectively prohibit the provision of out-of-State services.

(c) Payment for services. (1) The State unit must establish and maintain written policies to govern the rates of payment for all purchased vocational rehabilitation services.

(2) The State unit may establish a fee schedule designed to ensure a reasonable cost to the program for each service, if the schedule is—

(i) Not so low as to effectively deny an individual a necessary service; and

(ii) Not absolute and permits exceptions so that individual needs can be addressed.

(3) The State unit may not place absolute dollar limits on specific service categories or on the total services provided to an individual.

(d) Duration of services. (1) The State unit may establish reasonable time periods for the provision of services provided that the time periods are—

(i) Not so short as to effectively deny an individual a necessary service; and

(ii) Not absolute and permit exceptions so that individual needs can be addressed.

(2) The State unit may not establish absolute time limits on the provision of specific services or on the provision of services to an individual. The duration of each service needed by an individual must be determined on an individual basis and reflected in that individual's individualized plan for employment.

(e) Authorization of services. The State unit must establish policies related to the timely authorization of services, including any conditions under which verbal authorization can be given.

(Authority: Sections 12(c) and 101(a)(6) of the Rehabilitation Act of 1973, as amended and 29 U.S.C. 709(c) and 721(a)(6))

§361.51 Standards for facilities and providers of services.

(a) Accessibility of facilities. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that any facility used in connection with the delivery of vocational rehabilitation services under this part meets program accessibility requirements consistent with the requirements, as applicable, of the

Architectural Barriers Act of 1968, the Americans with Disabilities Act of 1990, section 504 of the Act, and the regulations implementing these laws.

(b) Affirmative action. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that community rehabilitation programs that receive assistance under part B of title I of the Act take affirmative action to employ and advance in employment qualified individuals with disabilities covered under and on the same terms and conditions as in section 503 of the Act.

(c) Special communication needs personnel. The designated State unit must ensure that providers of vocational rehabilitation services are able to communicate—

(1) In the native language of applicants and eligible individuals who have limited English proficiency; and

(2) By using appropriate modes of communication used by applicants and eligible individuals.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c) and 101(a)(6)(B) and (C) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(6)(B) and (C))

§361.52 Informed choice.

(a) General provision. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that applicants and recipients of services or, as appropriate, their representatives are provided information and support services to assist applicants and recipients of services in exercising informed choice throughout the rehabilitation process consistent with the provisions of section 102(d) of the Act and the requirements of this section.

(b) Written policies and procedures. The designated State unit, in consultation with its State Rehabilitation Council, if it has a Council, must develop and implement written policies and procedures that enable an applicant or recipient of services to exercise informed choice throughout the vocational rehabilitation process. These policies and procedures must provide for—

(1) Informing each applicant and recipient of services (including students with disabilities who are making the transition from programs under the responsibility of an educational agency to programs under the responsibility of the designated State unit and including youth with disabilities), through appropriate

modes of communication, about the availability of and opportunities to exercise informed choice, including the availability of support services for individuals with cognitive or other disabilities who require assistance in exercising informed choice throughout the vocational rehabilitation process;

(2) Assisting applicants and recipients of services in exercising informed choice in decisions related to the provision of assessment services;

(3) Developing and implementing flexible procurement policies and methods that facilitate the provision of vocational rehabilitation services and that afford recipients of services meaningful choices among the methods used to procure vocational rehabilitation services;

(4) Assisting eligible individuals or, as appropriate, the individuals' representatives, in acquiring information that enables them to exercise informed choice in the development of their individualized plans for employment with respect to the selection of the—

(i) Employment outcome;

(ii) Specific vocational rehabilitation services needed to achieve the employment outcome;

(iii) Entity that will provide the services;

(iv) Employment setting and the settings in which the services will be provided; and

(v) Methods available for procuring the services; and

(5) Ensuring that the availability and scope of informed choice is consistent with the obligations of the designated State agency under this part.

(c) Information and assistance in the selection of vocational rehabilitation services and service providers. In assisting an applicant and eligible individual in exercising informed choice during the assessment for determining eligibility and vocational rehabilitation needs and during development of the individualized plan for employment, the designated State unit must provide the individual or the individual's representative, or assist the individual or the individual's representative in acquiring, information necessary to make an informed choice about the specific vocational rehabilitation services, including the providers of those services, that are needed to achieve the individual's employment outcome. This information must include, at a minimum, information relating to the—

(1) Cost, accessibility, and duration of potential services;

(2) Consumer satisfaction with those services to the extent that information relating to consumer satisfaction is available;

(3) Qualifications of potential service providers;

(4) Types of services offered by the potential providers;

(5) Degree to which services are provided in integrated settings; and

(6) Outcomes achieved by individuals working with service providers, to the extent that such information is available.

(d) Methods or sources of information. In providing or assisting the individual or the individual's representative in acquiring the information required under paragraph (c) of this section, the State unit may use, but is not limited to, the following methods or sources of information:

(1) Lists of services and service providers.

(2) Periodic consumer satisfaction surveys and reports.

(3) Referrals to other consumers, consumer groups, or disability advisory councils qualified to discuss the services or service providers.

(4) Relevant accreditation, certification, or other information relating to the qualifications of service providers.

(5) Opportunities for individuals to visit or experience various work and service provider settings. (Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c), 101(a)(19), 102(b)(2)(B), and 102(d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(a)(19), 722(b)(2)(B), and 722(d))

§361.53 Comparable services and benefits.

(a) Determination of availability. The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that prior to providing an accommodation or auxiliary aid or service or any vocational rehabilitation services, except those services listed in paragraph (b) of this section, to an eligible individual or to members of the individual's family, the State unit must determine whether comparable services and benefits, as defined in §361.5(c)(8), exist under any other program and whether those services and benefits are available to the individual unless such a determination would interrupt or delay—

(1) The progress of the individual toward achieving the employment outcome identified in the individualized plan for employment;

(2) An immediate job placement; or

(3) The provision of vocational rehabilitation services to any individual who is determined to be at extreme medical risk, based on medical evidence provided by an appropriate qualified medical professional.

(b) Exempt services. The following vocational rehabilitation services described in §361.48(b) are exempt from a determination of the availability of comparable services and benefits under paragraph (a) of this section:

(1) Assessment for determining eligibility and vocational rehabilitation needs.

(2) Counseling and guidance, including information and support services to assist an individual in exercising informed choice.

(3) Referral and other services to secure needed services from other agencies, including other components of the statewide workforce development system, if those services are not available under this part.

(4) Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services.

(5) Rehabilitation technology, including telecommunications, sensory, and other technological aids and devices.

(6) Post-employment services consisting of the services listed under paragraphs (b)(1) through (5) of this section.

(c) Provision of services. (1) If comparable services or benefits exist under any other program and are available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's individualized plan for employment, the designated State unit must use those comparable services or benefits to meet, in whole or part, the costs of the vocational rehabilitation services.

(2) If comparable services or benefits exist under any other program, but are not available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome specified in the individualized plan for employment, the designated State

unit must provide vocational rehabilitation services until those comparable services and benefits become available.

(d) Interagency coordination. (1) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the Governor, in consultation with the entity in the State responsible for the vocational rehabilitation program and other appropriate agencies, will ensure that an interagency agreement or other mechanism for interagency coordination takes effect between the designated State vocational rehabilitation unit and any appropriate public entity, including the State entity responsible for administering the State Medicaid program, a public institution of higher education, and a component of the statewide workforce development system, to ensure the provision of vocational rehabilitation services, and, if appropriate, accommodations or auxiliary aids and services, (other than those services listed in paragraph (b) of this section) that are included in the individualized plan for employment of an eligible individual, including the provision of those vocational rehabilitation services (including, if appropriate, accommodations or auxiliary aids and services) during the pendency of any interagency

dispute in accordance with the provisions of paragraph (d)(3)(iii) of this section.

(2) The Governor may meet the requirements of paragraph (d)(1) of this section through—

(i) A State statute or regulation;

(ii) A signed agreement between the respective officials of the public entities that clearly identifies the responsibilities of each public entity for the provision of the services; or

(iii) Another appropriate mechanism as determined by the designated State vocational rehabilitation unit.

(3) The interagency agreement or other mechanism for interagency coordination must include the following:

(i) Agency financial responsibility. An identification of, or description of a method for defining, the financial responsibility of the designated State unit and other public entities for the provision of vocational rehabilitation services, and, if appropriate, accommodations or auxiliary aids and services other than those listed in paragraph (b) of this section and a provision stating the financial responsibility of the public entity for providing those services.

(ii) Conditions, terms, and procedures of reimbursement. Information specifying the conditions, terms, and procedures under which the designated State unit must be reimbursed by the other public entities for providing vocational rehabilitation services, and accommodations or auxiliary aids and services based on the terms of the interagency agreement or other mechanism for interagency coordination.

(iii) Interagency disputes. Information specifying procedures for resolving interagency disputes under the interagency agreement or other mechanism for interagency coordination, including procedures under which the designated State unit may initiate proceedings to secure reimbursement from other public entities or otherwise implement the provisions of the agreement or mechanism.

(iv) Procedures for coordination of services. Information specifying policies and procedures for public entities to determine and identify interagency coordination responsibilities of each public entity to promote the coordination and timely delivery of vocational rehabilitation services, and accommodations or auxiliary aids and services, other than those listed in paragraph (b) of this section.

(e) Responsibilities under other law. (1) If a public entity (other than the designated State unit) is obligated under Federal law (such as the Americans with Disabilities Act, section 504 of the Act, or section 188 of the Workforce Innovation and Opportunity Act) or State law, or assigned responsibility under State policy or an interagency agreement established under this section, to provide or pay for any services considered to be vocational rehabilitation services (e.g., interpreter services under §361.48(j)), and, if appropriate, accommodations or auxiliary aids and services other than those services listed in paragraph (b) of this section, the public entity must fulfill that obligation or responsibility through—

(i) The terms of the interagency agreement or other requirements of this section;

(ii) Providing or paying for the service directly or by contract; or

(iii) Other arrangement.

(2) If a public entity other than the designated State unit fails to provide or pay for vocational rehabilitation services, and, if appropriate, accommodations or auxiliary aids and services for an eligible individual as established under this section, the

designated State unit must provide or pay for those services to the individual and may claim reimbursement for the services from the public entity that failed to provide or pay for those services. The public entity must reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in paragraph (d) of this section in accordance with the procedures established in the agreement or mechanism pursuant to paragraph (d)(3)(ii) of this section.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c) and 101(a)(8) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(8))

§361.54 Participation of individuals in cost of services based on financial need.

(a) No Federal requirement. There is no Federal requirement that the financial need of individuals be considered in the provision of vocational rehabilitation services.

(b) State unit requirements. (1) The State unit may choose to consider the financial need of eligible individuals or individuals who are receiving services

through trial work experiences under §361.42(e) for purposes of determining the extent of their participation in the costs of vocational rehabilitation services, other than those services identified in paragraph (b)(3) of this section.

(2) If the State unit chooses to consider financial need—

(i) It must maintain written policies—

(A) Explaining the method for determining the financial need of an eligible individual; and

(B) Specifying the types of vocational rehabilitation services for which the unit has established a financial needs test;

(ii) The policies must be applied uniformly to all individuals in similar circumstances;

(iii) The policies may require different levels of need for different geographic regions in the State, but must be applied uniformly to all individuals within each geographic region; and

(iv) The policies must ensure that the level of an individual's participation in the cost of vocational rehabilitation services is—

(A) Reasonable;

(B) Based on the individual's financial need, including consideration of any disability-related expenses paid by the individual; and

(C) Not so high as to effectively deny the individual a necessary service.

(3) The designated State unit may not apply a financial needs test, or require the financial participation of the individual—

(i) As a condition for furnishing the following vocational rehabilitation services:

(A) Assessment for determining eligibility and priority for services under §361.48(b)(1), except those non-assessment services that are provided to an individual with a significant disability during either an exploration of the individual's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences under §361.42(e).

(B) Assessment for determining vocational rehabilitation needs under §361.48(b)(2).

(C) Vocational rehabilitation counseling and guidance under §361.48(b)(3).

(D) Referral and other services under §361.48(b)(4).

(E) Job-related services under §361.48(b)(12).

(F) Personal assistance services under §361.48(b)(14).

(G) Any auxiliary aid or service (e.g., interpreter services under §361.48(b)(10), reader services under §361.48(b)(11)) that an individual with a disability requires under section 504 of the Act (29 U.S.C. 794) or the Americans with Disabilities Act (42 U.S.C. 12101, et seq.), or regulations implementing those laws, in order for the individual to participate in the vocational rehabilitation program as authorized under this part; or

(ii) As a condition for furnishing any vocational rehabilitation service if the individual in need of the service has been determined eligible for Social Security benefits under titles II or XVI of the Social Security Act. (Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

<u>§361.55 Semi-annual and annual review of individuals in extended employment and other employment under special certificate provisions of the Fair Labor Standards Act</u>.

(a) The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that the designated State unit conducts a semi-annual review and reevaluation for the first two years of such employment and

annually thereafter, in accordance with the requirements in paragraph (b) of this section for an individual with a disability served under this part—

(1) Who has a record of service, as described in §361.47, as either an applicant or eligible individual under the vocational rehabilitation program; and

(2)(i) Who has achieved employment in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act; or

(ii) Who is in extended employment, including those individuals whose record of service is closed while the individual is in extended employment on the basis that the individual is unable to achieve an employment outcome consistent with §361.5(c)(15) or that the individual made an informed choice to remain in extended employment.

(b) For each individual with a disability who meets the criteria in paragraph (a) of this section, the designated State unit must—

(1) Semi-annually review and reevaluate the status of each individual for two years after the individual's record of services is closed (and annually thereafter) to determine the interests, priorities, and needs of the individual with respect to competitive integrated

employment or training for competitive integrated employment;

(2) Enable the individual or, if appropriate, the individual's representative to provide input into the review and reevaluation and must document that input in the record of services, consistent with §361.47(a)(10), with the individual's or, as appropriate, the individual's representative's signed acknowledgment that the review and reevaluation have been conducted; and

(3) Make maximum efforts, including identifying and providing vocational rehabilitation services, reasonable accommodations, and other necessary support services, to assist the individual in engaging in competitive integrated employment as defined in §361.5(c)(9).

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Sections 12(c) and 101(a)(14) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 721(a)(14))

<u>§361.56 Requirements for closing the record of services of an individual who has achieved an employment outcome</u>.

The record of services of an individual who has achieved an employment outcome may be closed only if all of the following requirements are met:

(a) Employment outcome achieved. The individual has achieved the employment outcome that is described in the individual's individualized plan for employment in accordance with §361.46(a)(1) and is consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(b) Employment outcome maintained. The individual has maintained the employment outcome for an appropriate period of time, but not less than 90 days, necessary to ensure the stability of the employment outcome, and the individual no longer needs vocational rehabilitation services.

(c) Satisfactory outcome. At the end of the appropriate period under paragraph (b) of this section, the individual and the qualified rehabilitation counselor employed by the designated State unit consider the employment outcome to be satisfactory and agree that the individual is performing well in the employment.

(d) Post-employment services. The individual is informed through appropriate modes of communication of the availability of post-employment services.

(Authority: Sections 12(c), 101(a)(6), and 106(a)(2) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 721(a)(6), and 726(a)(2))

§361.57 Review of determinations made by designated State unit personnel.

(a) Procedures. The designated State unit must develop and implement procedures to ensure that an applicant or recipient of services who is dissatisfied with any determination made by personnel of the designated State unit that affects the provision of vocational rehabilitation services may request, or, if appropriate, may request through the individual's representative, a timely review of that determination. The procedures must be in accordance with paragraphs (b) through (k) of this section:

(b) General requirements. (1) Notification. Procedures established by the State unit under this section must provide an applicant or recipient or, as appropriate, the individual's representative notice of—

(i) The right to obtain review of State unit determinations that affect the provision of vocational rehabilitation services through an impartial due process hearing under paragraph (e) of this section;

(ii) The right to pursue mediation under paragraph (d) of this section with respect to determinations made by designated State unit personnel that affect the provision of vocational rehabilitation services to an applicant or recipient;

(iii) The names and addresses of individuals with whom requests for mediation or due process hearings may be filed;

(iv) The manner in which a mediator or impartial hearing officer may be selected consistent with the requirements of paragraphs (d) and (f) of this section; and

(v) The availability of the client assistance program, established under 34 CFR part 370, to assist the applicant or recipient during mediation sessions or impartial due process hearings.

(2) Timing. Notice described in paragraph (b)(1) of this section must be provided in writing—

(i) At the time the individual applies for vocational rehabilitation services under this part;

(ii) At the time the individual is assigned to a category in the State's order of selection, if the State has established an order of selection under §361.36;

(iii) At the time the individualized plan for employment is developed; and

(iv) Whenever vocational rehabilitation services for an individual are reduced, suspended, or terminated.

(3) Evidence and representation. Procedures established under this section must—

(i) Provide an applicant or recipient or, as appropriate, the individual's representative with an opportunity to submit during mediation sessions or due process hearings evidence and other information that supports the applicant's or recipient's position; and

(ii) Allow an applicant or recipient to be represented during mediation sessions or due process hearings by counsel or other advocate selected by the applicant or recipient.

(4) Impact on provision of services. The State unit may not institute a suspension, reduction, or termination of vocational rehabilitation services being provided to an applicant or recipient, including evaluation and assessment services and individualized plan for employment

development, pending a resolution through mediation, pending a decision by a hearing officer or reviewing official, or pending informal resolution under this section unless—

(i) The individual or, in appropriate cases, the individual's representative requests a suspension, reduction, or termination of services; or

(ii) The State agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual or the individual's representative.

(5) Ineligibility. Applicants who are found ineligible for vocational rehabilitation services and previously eligible individuals who are determined to be no longer eligible for vocational rehabilitation services pursuant to §361.43 are permitted to challenge the determinations of ineligibility under the procedures described in this section.

(c) Informal dispute resolution. The State unit may develop an informal process for resolving a request for review without conducting mediation or a formal hearing. A State's informal process must not be used to deny the right of an applicant or recipient to a hearing under paragraph

(e) of this section or any other right provided under this part, including the right to pursue mediation under paragraph (d) of this section. If informal resolution under this paragraph or mediation under paragraph (d) of this section is not successful in resolving the dispute within the time period established under paragraph (e)(1) of this section, a formal hearing must be conducted within that same time period, unless the parties agree to a specific extension of time.

(d) Mediation. (1) The State must establish and implement procedures, as required under paragraph (b)(1)(ii) of this section, to allow an applicant or recipient and the State unit to resolve disputes involving State unit determinations that affect the provision of vocational rehabilitation services through a mediation process that must be made available, at a minimum, whenever an applicant or recipient or, as appropriate, the individual's representative requests an impartial due process hearing under this section.

(2) Mediation procedures established by the State unit under paragraph (d) of this section must ensure that—

(i) Participation in the mediation process is voluntary on the part of the applicant or recipient, as appropriate, and on the part of the State unit;

(ii) Use of the mediation process is not used to deny or delay the applicant's or recipient's right to pursue resolution of the dispute through an impartial hearing held within the time period specified in paragraph (e)(1) of this section or any other rights provided under this part. At any point during the mediation process, either party or the mediator may elect to terminate the mediation. In the event mediation is terminated, either party may pursue resolution through an impartial hearing;

(iii) The mediation process is conducted by a qualified and impartial mediator, as defined in §361.5(c)(43), who must be selected from a list of qualified and impartial mediators maintained by the State—

(A) On a random basis;

(B) By agreement between the director of the designated State unit and the applicant or recipient or, as appropriate, the recipient's representative; or

(C) In accordance with a procedure established in the State for assigning mediators, provided this procedure ensures the neutrality of the mediator assigned; and

(iv) Mediation sessions are scheduled and conducted in a timely manner and are held in a location and manner that is convenient to the parties to the dispute.

(3) Discussions that occur during the mediation process must be kept confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings, and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(4) An agreement reached by the parties to the dispute in the mediation process must be described in a written mediation agreement that is developed by the parties with the assistance of the qualified and impartial mediator and signed by both parties. Copies of the agreement must be sent to both parties.

(5) The costs of the mediation process must be paid by the State. The State is not required to pay for any costs related to the representation of an applicant or recipient authorized under paragraph (b)(3)(ii) of this section.

(e) Impartial due process hearings. The State unit must establish and implement formal review procedures, as

required under paragraph (b)(1)(i) of this section, that provide that—

(1) Hearing conducted by an impartial hearing officer, selected in accordance with paragraph (f) of this section, must be held within 60 days of an applicant's or recipient 's request for review of a determination made by personnel of the State unit that affects the provision of vocational rehabilitation services to the individual, unless informal resolution or a mediation agreement is achieved prior to the 60th day or the parties agree to a specific extension of time;

(2) In addition to the rights described in paragraph (b)(3) of this section, the applicant or recipient or, if appropriate, the individual's representative must be given the opportunity to present witnesses during the hearing and to examine all witnesses and other relevant sources of information and evidence;

(3) The impartial hearing officer must—

(i) Make a decision based on the provisions of the approved vocational rehabilitation services portion of the Unified or Combined State Plan, the Act, Federal vocational rehabilitation regulations, and State regulations and policies that are consistent with Federal requirements; and

(ii) Provide to the individual or, if appropriate, the individual's representative and to the State unit a full written report of the findings and grounds for the decision within 30 days of the completion of the hearing; and

(4) The hearing officer's decision is final, except that a party may request an impartial review under paragraph (g)(1) of this section if the State has established procedures for that review, and a party involved in a hearing may bring a civil action under paragraph (i) of this section.

(f) Selection of impartial hearing officers. The impartial hearing officer for a particular case must be selected—

(1) From a list of qualified impartial hearing officers maintained by the State unit. Impartial hearing officers included on the list must be—

(i) Identified by the State unit if the State unit is an independent commission; or

(ii) Jointly identified by the State unit and the State Rehabilitation Council if the State has a Council; and

(2)(i) On a random basis; or

(ii) By agreement between the director of the designated State unit and the applicant or recipient or, as appropriate, the individual's representative.

(g) Administrative review of hearing officer's decision. The State may establish procedures to enable a party who is dissatisfied with the decision of the impartial hearing officer to seek an impartial administrative review of the decision under paragraph (e)(3) of this section in accordance with the following requirements:

(1) A request for administrative review under paragraph (g) of this section must be made within 20 days of the mailing of the impartial hearing officer's decision.

(2) Administrative review of the hearing officer's decision must be conducted by—

(i) The chief official of the designated State agency if the State has established both a designated State agency and a designated State unit under §361.13(b); or

(ii) An official from the office of the Governor.

(3) The reviewing official described in paragraph (g)(2)(i) of this section—

(i) Provides both parties with an opportunity to submit additional evidence and information relevant to a final decision concerning the matter under review;

(ii) May not overturn or modify the hearing officer's decision, or any part of that decision, that supports the position of the applicant or recipient unless the reviewing official concludes, based on clear and convincing evidence, that the decision of the impartial hearing officer is clearly erroneous on the basis of being contrary to the approved vocational rehabilitation services portion of the Unified or Combined State Plan, the Act, Federal vocational rehabilitation regulations, or State regulations and policies that are consistent with Federal requirements;

(iii) Makes an independent, final decision following a review of the entire hearing record and provides the decision in writing, including a full report of the findings and the statutory, regulatory, or policy grounds for the decision, to the applicant or recipient or, as appropriate, the individual's representative and to the State unit within 30 days of the request for administrative review under paragraph (g)(1) of this section; and

(iv) May not delegate the responsibility for making the final decision under paragraph (g) of this section to any officer or employee of the designated State unit.

(4) The reviewing official's decision under paragraph (g) of this section is final unless either party brings a civil action under paragraph (i) of this section.

(h) Implementation of final decisions. If a party brings a civil action under paragraph (h) of this section to challenge the final decision of a hearing officer under paragraph (e) of this section or to challenge the final decision of a State reviewing official under paragraph (g) of this section, the final decision of the hearing officer or State reviewing official must be implemented pending review by the court.

(i) Civil action. (1) Any party who disagrees with the findings and decision of an impartial hearing officer under paragraph (e) of this section in a State that has not established administrative review procedures under paragraph (g) of this section and any party who disagrees with the findings and decision under paragraph (g)(3)(iii) of this section have a right to bring a civil action with respect to the matter in dispute. The action may be brought in any State court of competent jurisdiction or in a

district court of the United States of competent jurisdiction without regard to the amount in controversy.

(2) In any action brought under paragraph (i) of this section, the court—

(i) Receives the records related to the impartial due process hearing and the records related to the administrative review process, if applicable;

(ii) Hears additional evidence at the request of a party; and

(iii) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(j) State fair hearing board. A fair hearing board as defined in §361.5(c)(21) is authorized to carry out the responsibilities of the impartial hearing officer under paragraph (e) of this section in accordance with the following criteria:

(1) The fair hearing board may conduct due process hearings either collectively or by assigning responsibility for conducting the hearing to one or more members of the fair hearing board.

(2) The final decision issued by the fair hearing board following a hearing under paragraph (j)(1) of this

section must be made collectively by, or by a majority vote of, the fair hearing board.

(3) The provisions of paragraphs (b)(1), (2), and (3) of this section that relate to due process hearings and of paragraphs (e), (f), (g), and (h) of this section do not apply to fair hearing boards under this paragraph (j).

(k) Data collection. (1) The director of the designated State unit must collect and submit, at a minimum, the following data to the Secretary for inclusion each year in the annual report to Congress under section 13 of the Act:

(i) A copy of the standards used by State reviewing officials for reviewing decisions made by impartial hearing officers under this section.

(ii) The number of mediations held, including the number of mediation agreements reached.

(iii) The number of hearings and reviews sought from impartial hearing officers and State reviewing officials, including the type of complaints and the issues involved.

(iv) The number of hearing officer decisions that were not reviewed by administrative reviewing officials.

(v) The number of hearing decisions that were reviewed by State reviewing officials and, based on these reviews, the number of hearing decisions that were—

(A) Sustained in favor of an applicant or recipient;

(B) Sustained in favor of the designated State unit;

(C) Reversed in whole or in part in favor of the applicant or recipient; and

(D) Reversed in whole or in part in favor of the State unit.

(2) The State unit director also must collect and submit to the Secretary copies of all final decisions issued by impartial hearing officers under paragraph (e) of this section and by State review officials under paragraph (g) of this section.

(3) The confidentiality of records of applicants and recipients maintained by the State unit may not preclude the access of the Secretary to those records for the purposes described in this section.

(Authority: Sections 12(c) and 102(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 722(c))

Subpart C—Financing of State Vocational Rehabilitation Programs

§361.60 Matching requirements.

(a) Federal share. (1) General. Except as provided in paragraph (a)(2) of this section, the Federal share for expenditures made by the State under the vocational rehabilitation services portion of the Unified or Combined State Plan, including expenditures for the provision of vocational rehabilitation services and the administration of the vocational rehabilitation services portion of the Unified or Combined State Plan, is 78.7 percent.

(2) Construction projects. The Federal share for expenditures made for the construction of a facility for community rehabilitation program purposes may not be more than 50 percent of the total cost of the project.

(b) Non-Federal share. (1) General. Except as provided in paragraph (b)(2) and (b)(3) of this section, expenditures made under the vocational rehabilitation services portion of the Unified or Combined State Plan to meet the non-Federal share under this section must be consistent with the provisions of 2 CFR 200.306(b).

(2) Third party in-kind contributions. Third party in-kind contributions specified in 2 CFR 200.306(b) may not be used to meet the non-Federal share under this section.

(3) Contributions by private entities. Expenditures made from those cash contributions provided by private organizations, agencies, or individuals and that are deposited in the State agency’s account or, if applicable, sole local agency’s account, in accordance with State law prior to their expenditure and that are earmarked, under a condition imposed by the contributor, may be used as part of the non-Federal share under this section if the funds are earmarked for—

(i) Meeting in whole or in part the State's share for establishing a community rehabilitation program or constructing a particular facility for community rehabilitation program purposes;

(ii) Particular geographic areas within the State for any purpose under the vocational rehabilitation services portion of the Unified or Combined State Plan, other than those described in paragraph (b)(3)(i) of this section, in accordance with the following criteria:

(A) Before funds that are earmarked for a particular geographic area may be used as part of the non-Federal share, the State must notify the Secretary that the State cannot provide the full non-Federal share without using these funds.

(B) Funds that are earmarked for a particular geographic area may be used as part of the non-Federal share without requesting a waiver of statewideness under §361.26.

(C) Except as provided in paragraph (b)(3)(i) of this section, all Federal funds must be used on a statewide basis consistent with §361.25, unless a waiver of statewideness is obtained under §361.26; and

(iii) Any other purpose under the vocational rehabilitation services portion of the Unified or Combined State Plan, provided the expenditures do not benefit in any way the donor, employee, officer, or agent, any member of his or her immediate family, his or her partner, an individual with whom the donor has a close personal relationship, or an individual, entity, or organization with whom the donor shares a financial or other interest. The Secretary does not consider a donor's receipt from the State unit of a subaward or contract with funds allotted under this part to be a benefit for the purposes of this paragraph if the subaward or contract is awarded under the State's regular competitive procedures.

(Authority: Sections 7(14), 12(c), 101(a)(3), 101(a)(4), and 104 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(14), 709(c), 721(a)(3), 721(a)(4), and 724))

Example for paragraph (b)(3): Contributions may be earmarked in accordance with §361.60(b)(3)(iii) for providing particular services (e.g., rehabilitation technology services); serving individuals with certain types of disabilities (e.g., individuals who are blind), consistent with the State's order of selection, if applicable; providing services to special groups that State or Federal law permits to be targeted for services (e.g., students with disabilities who are receiving special education services), consistent with the State's order of selection, if applicable; or carrying out particular types of administrative activities permissible under State law. Contributions also may be restricted to particular geographic areas to increase services or expand the scope of services that are available statewide under the vocational rehabilitation services portion of the Unified or Combined State Plan in accordance with the requirements in §361.60(b)(3)(ii).

§361.61 Limitation on use of funds for construction expenditures.

No more than 10 percent of a State's allotment for any fiscal year under section 110 of the Act may be spent on the construction of facilities for community rehabilitation program purposes.

(Authority: Section 101(a)(17)(A) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(17)(A))

§361.62 Maintenance of effort requirements.

(a) General requirements. The Secretary reduces the amount otherwise payable to a State for any fiscal year by the amount by which the total expenditures from non-Federal sources under the vocational rehabilitation services portion of the Unified or Combined State Plan for any previous fiscal year were less than the total of those expenditures for the fiscal year two years prior to that previous fiscal year.

(b) Specific requirements for construction of facilities. If the State provides for the construction of a facility for community rehabilitation program purposes, the amount of the State's share of expenditures for vocational rehabilitation services under the plan, other than for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation purposes, must be at

least equal to the expenditures for those services for the second prior fiscal year.

(c) Separate State agency for vocational rehabilitation services for individuals who are blind. If there is a separate part of the vocational rehabilitation services portion of the Unified or Combined State Plan administered by a separate State agency to provide vocational rehabilitation services for individuals who are blind—

(1) Satisfaction of the maintenance of effort requirements under paragraphs (a) and (b) of this section is determined based on the total amount of a State's non-Federal expenditures under both parts of the vocational rehabilitation services portion of the Unified or Combined State Plan; and

(2) If a State fails to meet any maintenance of effort requirement, the Secretary reduces the amount otherwise payable to the State for a fiscal year under each part of the plan in direct proportion to the amount by which non-Federal expenditures under each part of the plan in any previous fiscal year were less than they were for that part of the plan for the fiscal year 2 years prior to that previous fiscal year.

(d) Waiver or modification. (1) The Secretary may waive or modify the maintenance of effort requirement in paragraph (a) of this section if the Secretary determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural disaster or a serious economic downturn, that—

(i) Cause significant unanticipated expenditures or reductions in revenue that result in a general reduction of programs within the State; or

(ii) Require the State to make substantial expenditures in the vocational rehabilitation program for long-term purposes due to the one-time costs associated with the construction of a facility for community rehabilitation program purposes, the establishment of a facility for community rehabilitation program purposes, or the acquisition of equipment.

(2) The Secretary may waive or modify the maintenance of effort requirement in paragraph (b) of this section or the 10 percent allotment limitation in §361.61 if the Secretary determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural

disaster, that result in significant destruction of existing facilities and require the State to make substantial expenditures for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation program purposes in order to provide vocational rehabilitation services.

(3) A written request for waiver or modification, including supporting justification, must be submitted to the Secretary for consideration as soon as the State has determined that it has failed to satisfy its maintenance of effort requirement due to an exceptional or uncontrollable circumstance, as described in paragraphs (d)(1) and (2) of this section.

(Authority: Sections 101(a)(17) and 111(a)(2) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 721(a)(17) and 731(a)(2))

§361.63 Program income.

(a) Definition. For purposes of this section, program income means gross income received by the State that is directly generated by a supported activity under this part or earned as a result of the Federal award during the period of performance, as defined in 2 CFR 200.80.

(b) Sources. Sources of program income include, but are not limited to: payments from the Social Security Administration for assisting Social Security beneficiaries and recipients to achieve employment outcomes; payments received from workers' compensation funds; payments received by the State agency from insurers, consumers, or others for services to defray part or all of the costs of services provided to particular individuals; and income generated by a State-operated community rehabilitation program for activities authorized under this part.

(c) Use of program income. (1) Except as provided in paragraph (c)(2) of this section, program income, whenever earned, must be used for the provision of vocational rehabilitation services and the administration of the vocational rehabilitation services portion of the Unified or Combined State Plan. Program income—

(i) Is considered earned in the fiscal year in which it is received; and

(ii) Must be disbursed during the period of performance of the award.

(2) Payments provided to a State from the Social Security Administration for assisting Social Security beneficiaries and recipients to achieve employment outcomes

may also be used to carry out programs under part B of title I of the Act (client assistance), title VI of the Act (supported employment), and title VII of the Act (independent living).

(3)(i) The State must use program income to supplement Federal funds that support program activities that are subject to this part. See, for example, 2 CFR 200.307(e)(2).

(ii) Notwithstanding 2 CFR 200.305(a) and to the extent that program income funds are available, a State must disburse those funds (including repayments to a revolving fund), rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional funds from the Department.

(4) Program income cannot be used to meet the non-Federal share requirement under §361.60.

(Authority: Sections 12(c) and 108 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 728; 2 CFR part 200)

§361.64 Obligation of Federal funds.

(a) Except as provided in paragraph (b) of this section, any Federal award funds, including reallotted funds, that are appropriated for a fiscal year to carry out

a program under this part that are not obligated by the State by the beginning of the succeeding fiscal year remain available for obligation by the State during that succeeding fiscal year.

(b) Federal funds appropriated for a fiscal year remain available for obligation in the succeeding fiscal year only to the extent that the State met the matching requirement for those Federal funds by obligating, in accordance with 34 CFR 76.707, the non-Federal share in the fiscal year for which the funds were appropriated.

(Authority: Section 19 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 716)

§361.65 Allotment and payment of Federal funds for vocational rehabilitation services.

(a) Allotment. (1) The allotment of Federal funds for vocational rehabilitation services for each State is computed in accordance with the requirements of section 110 of the Act, and payments are made to the State on a quarterly basis, unless some other period is established by the Secretary.

(2) If the vocational rehabilitation services portion of the Unified or Combined State Plan designates one State agency to administer, or supervise the administration of,

the part of the plan under which vocational rehabilitation services are provided for individuals who are blind and another State agency to administer the rest of the plan, the division of the State's allotment is a matter for State determination.

(3) Reservation for pre-employment transition services. (i) Pursuant to section 110(d) of the Act, the State must reserve at least 15 percent of the State’s allotment, received in accordance with section 110(a) of the Act for the provision of pre-employment transition services, as described in §361.48(a) of this part.

(ii) The funds reserved in accordance with paragraph (3)(i) of this section--

(A) Must only be used for pre-employment transition services specified in §361.48(a); and

(B) Must not be used to pay for administrative costs, (as defined in §361.5(c)(2)) associated with the provision of such services or any other vocational rehabilitation services.

(b) Reallotment. (1) The Secretary determines not later than 45 days before the end of a fiscal year which States, if any, will not use their full allotment.

(2) As soon as possible, but not later than the end of the fiscal year, the Secretary reallots these funds to other States that can use those additional funds during the period of performance of the award, provided the State can meet the matching requirement by obligating the non-Federal share of any reallotted funds in the fiscal year for which the funds were appropriated.

(3) In the event more funds are requested by agencies than are available, the Secretary will determine the process for allocating funds available for reallotment.

(4) Funds reallotted to another State are considered to be an increase in the recipient State's allotment for the fiscal year for which the funds were appropriated.

(Authority: Sections 12(c), 110, and 111 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 730, and 731)

Part 363--THE STATE SUPPORTED EMPLOYMENT SERVICES PROGRAM

Part 363 is revised to read as follows:

PART 363—THE STATE SUPPORTED EMPLOYMENT SERVICES PROGRAM

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Sec.

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363.50 What collaborative agreements must the State develop?

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363.56 What notice requirements apply to this program?

AUTHORITY: Sections 602-608 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 795g-795m, unless otherwise noted.

Subpart A—General

§363.1 What is the State Supported Employment Services Program?

(a) Under the State supported employment services program, the Secretary provides grants to assist States in

developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most significant disabilities, including youth with the most significant disabilities, to enable them to achieve an employment outcome of supported employment in competitive integrated employment. Grants made under the State supported employment services program supplement a State's vocational rehabilitation program grants under 34 CFR part 361.

(b) For purposes of this part and 34 CFR part 361, "supported employment" means competitive integrated employment, including customized employment, or employment in an integrated work setting in which an individual with a most significant disability, including a youth with a most significant disability, is working on a short-term basis toward competitive integrated employment, that is individualized and customized, consistent with the unique strengths, abilities, interests, and informed choice of the individual, including with ongoing support services for individuals with the most significant disabilities--

(1)(i) For whom competitive integrated employment has not historically occurred; or

(ii) For whom competitive integrated employment has been interrupted or intermittent as a result of a significant disability; and

(2) Who, because of the nature and severity of the disability, need intensive supported employment services, and extended services after the transition from support provided by the designated State unit in order to perform the work.

(c) Short-term Basis. For purposes of this part, an individual with a most significant disability, whose supported employment in an integrated setting does not satisfy the criteria of competitive integrated employment, as defined in 34 CFR 361.5(c)(9), is considered to be working on a short-term basis toward competitive integrated employment so long as the individual can reasonably anticipate achieving competitive integrated employment—

(1) Within six months of achieving a supported employment outcome; or,

(2) In limited circumstances, within a period not to exceed 12 months from the achievement of the supported employment outcome, if a longer period is necessary based on the needs of the individual, and the individual has demonstrated progress toward competitive earnings based on

information contained in the service record.

(Authority: Sections 7(38), 7(39), 12(c), and 602 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(38) 705(39), 709(c), and 795g)

§363.2 Who is eligible for an award?

Any State that submits the documentation required by §363.10, as part of the vocational rehabilitation services portion of the Unified or Combined State Plan under 34 CFR part 361, is eligible for an award under this part.

(Authority: Section 606(a) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 795k(a))

§363.3 Who is eligible for services?

A State may provide services under this part to any individual, including a youth with a disability, if—

(a) The individual has been determined to be—

(1) Eligible for vocational rehabilitation services in accordance with 34 CFR 361.42; and

(2) An individual with a most significant disability;

(b) For purposes of activities carried out under §363.4(a)(2) of this part, the individual is a youth with a disability, as defined in 34 CFR 361.5(c)(59), who satisfies the requirements of this section; and

(c) Supported employment has been identified as the appropriate employment outcome for the individual on the basis of a comprehensive assessment of rehabilitation needs, as defined in 34 CFR 361.5(c)(5), including an evaluation of rehabilitation, career, and job needs.

(Authority: Section 605 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 795j)

§363.4 What are the authorized activities under the State Supported Employment Services program?

(a) The State may use funds allotted under this part to—

(1) Provide supported employment services, as defined in 34 CFR 361.5(c)(54);

(2) Provide extended services, as defined in 34 CFR 361.5(c)(19), to youth with the most significant disabilities, in accordance with §363.11(f), for a period of time not to exceed four years, or until such time that a youth reaches the age of 25 and no longer meets the definition of a youth with a disability under 34 CFR 361.5(c)(58), whichever occurs first; and

(3) With funds reserved, in accordance with §363.22 for the provision of supported employment services to youth with the most significant disabilities, leverage other

public and private funds to increase resources for extended services and expand supported employment opportunities.

(b) Except as provided in paragraph (a)(2) of this section, a State may not use funds under this part to provide extended services to individuals with the most significant disabilities.

(c) Nothing in this part will be construed to prohibit a State from providing—

(1) Supported employment services in accordance with the vocational rehabilitation services portion of the Unified or Combined State Plan submitted under 34 CFR part 361 by using funds made available through a State allotment under that part.

(2) Discrete postemployment services in accordance with 34 CFR 361.48(b) by using funds made available under 34 CFR part 361 to an individual who is eligible under this part.

(d) A State must coordinate with the entities described in §363.50(a) regarding the services provided to individuals with the most significant disabilities, including youth with the most significant disabilities, under this part and under 34 CFR part 361 to ensure that the services are complementary and not duplicative.

(Authority: Sections 7(39), 12(c), 604, 606(b)(6), and 608 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(39), 709(c), 795i, 795k(b)(6), and 795m)

§363.5 What regulations apply?

The following regulations apply to the State supported employment services program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 76 (State-Administered Programs).

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(b) The regulations in this part 363.

(c) The following regulations in 34 CFR part 361 (The State Vocational Rehabilitation Services Program): §§361.5, 361.31, 361.32, 361.34, 361.35, 361.39, 361.40, 361.41, 361.42, 361.47(a), 361.48, 361.49, and 361.53.

(d) 2 CFR part 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards), as adopted in 2 CFR part 3474.

(e) 2 CFR part 180 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)), as adopted in 2 CFR part 3485.

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

§363.6 What definitions apply?

The following definitions apply to this part:

(a) Definitions in 34 CFR part 361.

(b) Definitions in 34 CFR part 77.

(c) Definitions in 2 CFR part 200, Subpart A.

(Authority: Sections 7 and 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705 and 709(c))

Subpart B—How Does a State Apply for a Grant?

§363.10 What documents must a State submit to receive a grant?

(a) To be eligible to receive a grant under this part, a State must submit to the Secretary, as part of the vocational rehabilitation services portion of the Unified or Combined State Plan under 34 CFR part 361, a State plan supplement that meets the requirements of §363.11.

(b) A State must submit revisions to the vocational rehabilitation services portion of the Unified or Combined State Plan supplement submitted under this part as may be necessary.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 606(a) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 795k(a))

§363.11 What are the vocational rehabilitation services portion of the Unified or Combined State Plan supplement requirements?

Each State plan supplement, submitted in accordance with §363.10, must--

(a) Designate a designated State unit or, as applicable, units, as defined in 34 CFR 361.5(c)(13), as the State agency or agencies to administer the Supported Employment program under this part;

(b) Summarize the results of the needs assessment of individuals with most significant disabilities, including youth with the most significant disabilities, conducted under 34 CFR 361.29(a), with respect to the rehabilitation and career needs of individuals with most significant disabilities and their need for supported employment

services. The results of the needs assessment must also address needs relating to coordination;

(c) Describe the quality, scope, and extent of supported employment services to be provided to eligible individuals with the most significant disabilities under this part, including youth with the most significant disabilities;

(d) Describe the State's goals and plans with respect to the distribution of funds received under §363.20;

(e) Demonstrate evidence of the designated State unit’s efforts to identify and make arrangements, including entering into cooperative agreements, with—

(1) Other State agencies and other appropriate entities to assist in the provision of supported employment services; and

(2) Other public or non-profit agencies or organizations within the State, employers, natural supports, and other entities with respect to the provision of extended services;

(f) Describe the activities to be conducted for youth with the most significant disabilities with the funds reserved in accordance with §363.22, including–

(1) The provision of extended services to youth with the most significant disabilities for a period not to exceed four years, in accordance with §363.4(a)(2); and

(2) How the State will use supported employment funds reserved under §363.22 to leverage other public and private funds to increase resources for extended services and expand supported employment opportunities for youth with the most significant disabilities;

(g) Assure that—

(1) Funds made available under this part will only be used to provide authorized supported employment services to individuals who are eligible under this part to receive such services;

(2) The comprehensive assessments of individuals with significant disabilities, including youth with the most significant disabilities, conducted under 34 CFR part 361 will include consideration of supported employment as an appropriate employment outcome;

(3) An individualized plan for employment, as described in 34 CFR 361.45 and 361.46, will be developed and updated, using funds received under 34 CFR part 361, in order to—

(i) Specify the supported employment services to be provided, including, as appropriate, transition services and pre-employment transition services to be provided for youth with the most significant disabilities;

(ii) Specify the expected extended services needed, including the extended services that may be provided under this part to youth with the most significant disabilities in accordance with an approved individualized plan for employment for a period not to exceed four years; and

(iii) Identify, as appropriate, the source of extended services, which may include natural supports, programs, or other entities, or an indication that it is not possible to identify the source of extended services at the time the individualized plan for employment is developed;

(4) The State will use funds provided under this part only to supplement, and not supplant, the funds received under 34 CFR part 361, in providing supported employment services specified in the individualized plan for employment;

(5) Services provided under an individualized plan for employment will be coordinated with services provided

under other individualized plans established under other Federal or State programs;

(6) To the extent job skills training is provided, the training will be provided onsite;

(7) Supported employment services will include placement in an integrated setting based on the unique strengths, resources, interests, concerns, abilities, and capabilities of individuals with the most significant disabilities, including youth with the most significant disabilities;

(8) The designated State agency or agencies, as described in paragraph (a) of this section, will expend no more than 2.5 percent of the State's allotment under this part for administrative costs of carrying out this program; and

(9) The designated State agency or agencies will provide, directly or indirectly through public or private entities, non-Federal contributions in an amount that is not less than 10 percent of the costs of carrying out supported employment services provided to youth with the most significant disabilities with the funds reserved for such purpose under §363.22; and

(h) Contain any other information and be submitted in the form and in accordance with the procedures that the Secretary may require.

(Approved by the Office of Management and Budget under control number 1205-0522)

(Authority: Section 606 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 795k)

Subpart C—How Are State Supported Employment Services Programs Financed?

§363.20 How does the Secretary allot funds?

(a) States. The Secretary will allot the sums appropriated for each fiscal year to carry out the activities of this part among the States on the basis of relative population of each State, except that—

(1) No State will receive less than $250,000, or 1/3 of 1 percent of the sums appropriated for the fiscal year for which the allotment is made, whichever amount is greater; and

(2) If the sums appropriated to carry out this part for the fiscal year exceed the sums appropriated to carry out this part (as in effect on September 30, 1992) in fiscal year 1992 by $1,000,000 or more, no State will receive less than $300,000, or 1/3 of 1 percent of the sums

appropriated for the fiscal year for which the allotment is made, whichever amount is greater.

(b) Certain Territories. (1) For the purposes of this section, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands are not considered to be States.

(2) Each jurisdiction described in paragraph (b)(1) of this section will be allotted not less than 1/8 of 1 percent of the amounts appropriated for the fiscal year for which the allotment is made.

(Authority: Section 603(a) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 795h(a))

§363.21 How does the Secretary reallot funds?

(a) Whenever the Secretary determines that any amount of an allotment to a State under §363.20 for any fiscal year will not be expended by such State for carrying out the provisions of this part, the Secretary will make such amount available for carrying out the provisions of this part to one or more of the States that the Secretary determines will be able to use additional amounts during such year for carrying out such provisions.

(b) Any amount made available to a State for any fiscal year in accordance with paragraph (a) will be

regarded as an increase in the State's allotment under this part for such year.

(Authority: Section 603(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 795h(b))

§363.22 How are funds reserved for youth with the most significant disabilities?

A State that receives an allotment under this part must reserve and expend 50 percent of such allotment for the provision of supported employment services, including extended services, to youth with the most significant disabilities in order to assist those youth in achieving an employment outcome in supported employment.

(Authority: Sections 12(c) and 603(d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 795h(d))

§363.23 What are the matching requirements?

(a) Non-Federal Share. (1) For funds allotted under §363.20 and not reserved under §363.22 for the provision of supported employment services to youth with the most significant disabilities, there is no non-Federal share requirement.

(2)(i) For funds allotted under §363.20 and reserved under §363.22 for the provision of supported employment

services to youth with the most significant disabilities, a designated State agency must provide non-Federal expenditures in an amount that is not less than 10 percent of the total expenditures, including the Federal reserved funds and the non-Federal share, incurred for the provision of supported employment services to youth with the most significant disabilities, including extended services.

(ii) In the event that a designated State agency uses more than 50 percent of its allotment under this part to provide supported employment services to youth with the most significant disabilities as required by §363.22, there is no requirement that a designated State agency provide non-Federal expenditures to match the excess Federal funds spent for this purpose.

(3) Except as provided under paragraphs (b) and (c) of this section, non-Federal expenditures made under the vocational rehabilitation services portion of the Unified or Combined State Plan supplement to meet the non-Federal share requirement under this section must be consistent with the provision of 2 CFR 200.306.

(b) Third-party in-kind contributions. Third-party in-kind contributions, as described in 2 CFR 200.306(b),

may not be used to meet the non-Federal share under this section.

(c)(1) Contributions by private entities. Expenditures made from contributions by private organizations, agencies, or individuals that are deposited into the sole account of the State agency, in accordance with State law may be used as part of the non-Federal share under this section, provided the expenditures under the vocational rehabilitation services portion of the Unified or Combined State Plan supplement, as described in §363.11, do not benefit in any way the donor, an individual to whom the donor is related by blood or marriage or with whom the donor shares a financial interest.

(2) The Secretary does not consider a donor's receipt from the State unit of a contract or subaward with funds allotted under this part to be a benefit for the purpose of this paragraph if the contract or subaward is awarded under the State's regular competitive procedures.

(Authority: Sections 12(c) and 606(b)(7)(I) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 795k(b)(7)(I))

§363.24 What is program income and how may it be used?

(a) Definition. (1) Program income means gross income earned by the State that is directly generated by authorized activities supported under this part or earned as a result of the Federal award during the period of performance.

(2) Program income received through the transfer of Social Security Administration payments from the State Vocational Rehabilitation Services program, in accordance with 34 CFR 361.63(c)(2), will be treated as program income received under this part.

(b) Use of program income. (1) Program income must be used for the provision of services authorized under §363.4. Program income earned or received during the fiscal year must be disbursed during the period of performance of the award, prior to requesting additional cash payments.

(2) States are authorized to treat program income as an addition to the grant funds to be used for additional allowable program expenditures, in accordance with 2 CFR 200.307(e)(2).

(3) Program income cannot be used to meet the non-Federal share requirement under §363.23.

(Authority: Sections 12(c) and 108 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 728)

§363.25 What is the period of availability of funds?

(a) Except as provided in paragraph (b) of this section, any Federal award funds, including reallotted funds, that are appropriated for a fiscal year to carry out a program under this part that are not obligated by the State by the beginning of the succeeding fiscal year, and any program income received during a fiscal year that is not obligated or expended by the State prior to the beginning of the succeeding fiscal year in which the program income was received, remain available for obligation by the State during that succeeding fiscal year.

(b) Federal funds appropriated for a fiscal year and reserved for the provision of supported employment services to youth with the most significant disabilities, in accordance with §363.22 of this part, remain available for obligation in the succeeding fiscal year only to the extent that the State met the matching requirement, as described in §363.23, for those Federal funds by obligating, in accordance with 34 CFR 76.707, the non-Federal share in the fiscal year for which the funds were appropriated. Any reserved funds carried over may only be obligated and

expended in that succeeding Federal fiscal year for the provision of supported employment services to youth with the most significant disabilities.

(Authority: Sections 12(c) and 19 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 716)

Subpart D [Reserved]

Subpart E [Reserved]

Subpart F—What Post-Award Conditions Must Be Met by a State?

§363.50 What collaborative agreements must the State develop?

(a) A designated State unit must enter into one or more written collaborative agreements, memoranda of understanding, or other appropriate mechanisms with other public agencies, private nonprofit organizations, and other available funding sources, including employers and other natural supports, as appropriate, to assist with the provision of supported employment services and extended services to individuals with the most significant disabilities in the State, including youth with the most significant disabilities, to enable them to achieve an employment outcome of supported employment in competitive integrated employment.

(b) These agreements provide the mechanism for collaboration at the State level that is necessary to ensure the smooth transition from supported employment services to extended services, the transition of which is inherent to the definition of “supported employment” in §363.1(b). The agreement may contain information regarding the–

(1) Supported employment services to be provided, for a period not to exceed 24 months, by the designated State unit with funds received under this part;

(2) Extended services to be provided to youth with the most significant disabilities, for a period not to exceed four years, by the designated State unit with the funds reserved under §363.22 of this part;

(3) Extended services to be provided by other public agencies, private nonprofit organizations, or other sources, including employers and other natural supports, following the provision of authorized supported employment services, or extended services as appropriate for youth with the most significant disabilities, under this part; and

(4) Collaborative efforts that will be undertaken by all relevant entities to increase opportunities for

competitive integrated employment in the State for individuals with the most significant disabilities, especially youth with the most significant disabilities.

(Authority: Sections 7(38), 7(39), 12(c), 602, and 606(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(38), 705(39), 709(c), 795g, and 795k(b))

§363.51 What are the allowable administrative costs?

(a) A State may use funds under this part to pay for expenditures incurred in the administration of activities carried out under this part, consistent with the definition of administrative costs in 34 CFR 361.5(c)(2).

(b) A designated State agency may not expend more than 2.5 percent of a State's allotment under this part for administrative costs for carrying out the State supported employment program.

(Authority: Sections 7(1), 12(c), and 603(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(1), 709(c), and 795h(c))

§363.52 What are the information collection and reporting requirements?

Each State agency designated in §363.11(a) of this part must collect and report separately the information required under 34 CFR 361.40 for—

(a) Eligible individuals receiving supported employment services under this part;

(b) Eligible individuals receiving supported employment services under 34 CFR part 361;

(c) Eligible youth receiving supported employment services and extended services under this part; and

(d) Eligible youth receiving supported employment services under 34 CFR part 361 and extended services.

(Authority: Sections 13 and 607 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 710 and 795l)

§363.53 What requirements must a designated State unit meet for the transition of an individual to extended services?

(a) A designated State unit must provide for the transition of an individual with a most significant disability, including a youth with a most significant disability, to extended services, as defined in 34 CFR 361.5(c)(19), no later than 24 months after the individual enters supported employment, unless a longer period is established in the individualized plan for employment.

(b) Prior to assisting the individual in transitioning from supported employment services to extended services, the designated State unit must ensure--

(1) The counselor and individual have considered extending the provision of supported employment services beyond 24 months, as appropriate, and have determined that no further supported employment services are necessary to support and maintain the individual in supported employment before the individual transitions to extended services; and

(2) The source of extended services for the individual has been identified in order to ensure there will be no interruption of services. The providers of extended services may include—

(i) A State agency, a private nonprofit organization, employer, or any other appropriate resource, after an individual has made the transition from support from the designated State unit; or,

(ii) The designated State unit, in the case of a youth with a most significant disability, in accordance with requirements set forth in 34 CFR 361.5(c)(19) and this part for a period not to exceed four years, or at such time that a youth reaches the age of 25 and no longer meets the definition of a youth with a disability under 34 CFR 361.5(c)(58), whichever occurs first. For youth who still require extended services after they can no longer receive them from the designated State unit, the designated State

unit must identify another source of extended services for those youth in order to ensure there will be no interruption of services. The designated State unit may not provide extended services to individuals with the most significant disabilities who are not youth with the most significant disabilities.

(Authority: Sections 7(13), 12(c), and 604(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(13), 709(c) and 795i)

§363.54 When will an individual be considered to have achieved an employment outcome in supported employment?

An individual with a most significant disability, including a youth with a most significant disability, who is employed in competitive integrated employment or who is employed in an integrated setting working on a short-term basis to achieve competitive integrated employment will be considered to have achieved an employment outcome, including customized employment, in supported employment when—

(a) The individual has completed supported employment services provided under this part and 34 CFR part 361, except for any other vocational rehabilitation services listed on the individualized plan for employment provided

to individuals who are working on a short-term basis toward the achievement of competitive integrated employment in supported employment. An individual has completed supported employment services when—

(1) The individual has received up to 24 months of supported employment services; or

(2) The counselor and individual have determined that an extension of time to provide supported employment services beyond 24 months is necessary to support and maintain the individual in supported employment before the individual transitions to extended services and that extension of time has concluded; and

(b) The individual has transitioned to extended services provided by either the designated State unit for youth with the most significant disabilities, or another provider, consistent with the provisions of §§363.4(a)(2) and 363.22; and

(c) The individual has maintained employment and achieved stability in the work setting for at least 90 days after transitioning to extended services; and

(d) The employment is individualized and customized consistent with the strengths, abilities, interests, and informed choice of the individual.

(Authority: Sections 7(11), 7(13), 7(38), 7(39), 7(40), 12(c), 602, and 606(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(11), 705(13), 705(38), 705(39), 705(40), 709(c), 795g, and 795k(b))

§363.55 When will the service record of an individual who has achieved an employment outcome in supported employment be closed?

(a) The service record of an individual with a most significant disability, including a youth with a most significant disability, who has achieved an employment outcome in supported employment in competitive integrated employment will be closed concurrently with the achievement of the employment outcome in supported employment when the individual—

(1) Satisfies requirements for case closure, as set forth in 34 CFR 361.56; and

(2) Is not receiving extended services or any other vocational rehabilitation service provided by the designated State unit with funds under this part or 34 CFR part 361.

(b) The service record of an individual with a most significant disability, including a youth with a most significant disability who is working toward competitive

integrated employment on a short-term basis and is receiving extended services from funds other than those allotted under this part and 34 CFR part 361 will be closed when the individual—

(1) Achieves competitive integrated employment within the short-term basis period established pursuant to §363.1(c); and the individual—

(i) Satisfies requirements for case closure, as set forth in 34 CFR 361.56; and

(ii) Is no longer receiving vocational rehabilitation services provided by the designated State unit with funds under 34 CFR part 361; or

(2) Does not achieve competitive integrated employment within the short-term basis period established pursuant to §363.1(c).

(c) The service record of a youth with a most significant disability who is receiving extended services provided by the designated State unit from funds under this part or 34 CFR part 361 will be closed when—

(1) The youth with a most significant disability achieves an employment outcome in supported employment in competitive integrated employment without entering the short-term basis period; and

(i) Is no longer eligible to receive extended services provided by the designated State unit with funds allotted under this part and 34 CFR part 361 because the individual—

(A) No longer meets age requirements established in the definition of a youth with a disability pursuant to 34 CFR 361.5(c)(58); or

(B) Has received extended services for a period of four years; or

(C) Has transitioned to extended services provided with funds other than those allotted under this part or part 361 prior to meeting the age or time restrictions established under paragraphs (A) and (B) of this section, respectively; and

(ii) Satisfies requirements for case closure, as set forth in 34 CFR 361.56; and

(iii) The individual is no longer receiving any other vocational rehabilitation service from the designated State unit provided with funds under 34 CFR part 361; or

(2) The youth with a most significant disability who is working toward competitive integrated employment on a short-term basis—

(i) Achieves competitive integrated employment within the short-term basis period established pursuant to §363.1(c);

(ii) Is no longer eligible to receive extended services provided by the designated State unit with funds allotted under this part and 34 CFR part 361 because the individual—

(A) No longer meets age requirements established in the definition of a youth with a disability pursuant to 34 CFR 361.5(c)(58); or

(B) Has received extended services for a period of four years; or

(C) Has transitioned to extended services provided with funds other than those allotted under this part or 34 CFR part 361 prior to meeting the age or time restrictions established under paragraphs (A) and (B) of this section, respectively; and

(iii) Satisfies requirements for case closure, as set forth in 34 CFR 361.56; or

(3) The youth with a most significant disability working toward competitive integrated employment on a short-term basis does not achieve competitive integrated

employment within the short-term basis period established pursuant to §363.1(c).

(Authority: Sections 7(11), 7(13), 7(38), 7(39), 7(40), 7(42), 12(c), 602, and 606(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(11), 705(13), 705(38), 705(39), 705(40), 705(42), 709 (c), 795g, and 795k(b))

§363.56 What notice requirements apply to this program?

Each grantee must advise applicants for or recipients of services under this part, or as appropriate, the parents, family members, guardians, advocates, or authorized representatives of those individuals, including youth with the most significant disabilities, of the availability and purposes of the Client Assistance Program, including information on seeking assistance from that program.

(Authority: Section 20 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 717)

Part 397-LIMITATIONS ON USE OF SUBMINIMUM WAGE

Part 397 is added to read as follows:

Part 397--LIMITATIONS ON USE OF SUBMINIMUM WAGE

Subpart A–General Provisions

Sec.

397.1 Purpose.

397.2 What is the Department of Education’s jurisdiction under this part?

397.3 What rules of construction apply to this part?

397.4 What regulations apply?

397.5 What definitions apply?

Subpart B–Coordinated Documentation Procedures Related to Youth with Disabilities

397.10 What documentation process must the designated State unit develop?

Subpart C–Designated State Unit Responsibilities Prior to Youth with Disabilities Starting Subminimum Wage Employment

397.20 What are the responsibilities of a designated State unit to youth with disabilities who are known to be seeking subminimum wage employment?

Subpart D–Local Educational Agency Responsibilities Prior to Youth with Disabilities Starting Subminimum Wage Employment

397.30 What are the responsibilities of a local educational agency to youth with disabilities who are known to be seeking subminimum wage employment?

397.31 What are the contracting limitations on educational agencies under this part?

Subpart E–Designated State Unit Responsibilities to Individuals with Disabilities During Subminimum Wage Employment

397.40 What are the responsibilities of a designated State unit for individuals with disabilities, regardless of age, who are employed at subminimum wage?

Subpart F–Review of Documentation

397.50 What is the role of the designated State unit in the review of documentation under this part?

AUTHORITY: Section 511 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 794g, unless otherwise noted

Subpart A–General Provisions

§397.1 Purpose.

(a) The purpose of this part is to set forth requirements the designated State units and State and local educational agencies must satisfy to ensure that individuals with disabilities, especially youth with disabilities, have a meaningful opportunity to prepare for, obtain, maintain, advance in, or regain competitive integrated employment, including supported or customized employment.

(b) This part requires—

(1) A designated State unit to provide youth with disabilities documentation demonstrating that they have completed certain requirements, as described in this part, prior to starting subminimum wage employment with entities (as defined in 397.5(d)) holding special wage certificates under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c));

(2) A designated State unit to provide, at certain prescribed intervals for the duration of such employment, career counseling and information and referral services, designed to promote opportunities for competitive integrated employment, to individuals with disabilities, regardless of age, who are known to be employed at subminimum wage; and

(3) A designated State unit, in consultation with the State educational agency, to develop a process or utilize an existing process, to document completion of required activities under this part by a youth with a disability known to be seeking employment at subminimum wage.

(c) This part authorizes a designated State unit, or a representative of a designated State unit, to review individual documentation required to be maintained by these entities under this part.

(d) The provisions in this part work in concert with requirements in 34 CFR parts 300, 361, and 363, and do not alter any requirements under those parts.

(Authority: Sections 12(c) and 511 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g)

§397.2 What is the Department of Education's jurisdiction under this part?

(a) The Department of Education has jurisdiction under this part to implement guidelines for–

(1) Documentation requirements imposed on designated State units and local educational agencies, including the documentation process that the designated State unit must develop in consultation with the State educational agency;

(2) Requirements related to the services that designated State units must provide to individuals regardless of age who are employed at subminimum wage; and

(3) Requirements under §397.31 of this part.

(b) Nothing in this part will be construed to grant to the Department of Education, or its grantees, jurisdiction over requirements set forth in the Fair Labor Standards Act, including those imposed on entities holding special wage certificates under section 14(c) of that Act, which is administered by the Department of Labor.

(Authority: Sections 12(c), 511(b)(3), 511(c), and 511(d) of the Rehabilitation Act of 1973, as amended; 709(c), 794g(b)(3), 794g(c), and 794g(d))

§397.3 What rules of construction apply to this part?

Nothing in this part will be construed to—

(a) Change the purpose of the Rehabilitation Act, which is to empower individuals with disabilities to maximize opportunities for achieving competitive integrated employment;

(b) Promote subminimum wage employment as a vocational rehabilitation strategy or employment outcome, as defined in 34 CFR 361.5(c)(15); or

(c) Be inconsistent with the provisions of the Fair Labor Standards Act, as amended before or after July 22, 2014.

(Authority: Sections 12(c) and 511(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(b))

§397.4 What regulations apply?

(a) The regulations in 34 CFR part 300 governing the definition of transition services, and the Individualized Education Program requirements related to the development

of postsecondary goals and the transition services needed to assist the eligible child in reaching those goals (§§300.320(b), 300.321(b), 300.324(c), and 300.43).

(b) The regulations in 34 CFR part 361 governing the vocational rehabilitation program, especially those regarding protection and use of personal information in 34 CFR 361.38; eligibility determinations in 34 CFR 361.42; individualized plans for employment in 34 CFR 361.45 and 34 CFR 361.46; provision of vocational rehabilitation services, including pre-employment transition services, transition services, and supported employment services in 34 CFR 361.48; ineligibility determinations in 34 CFR 361.43; informed choice in 34 CFR 361.52; and case closures in 34 CFR 361.56.

(c) The regulations in 29 CFR part 525 governing the employment of individuals with disabilities at subminimum wage rates pursuant to a certificate issued by the Secretary of Labor.

(d) The regulations in this part 397.

(Authority: Sections 12(c), 102(a) and (b), 103(a), and 113 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 722(a) and (b), 723(a), and 733; sections 601(34) and 614(d)(1)(A)(i)(VIII) of the Individuals with

Disabilities Education Act (20 U.S.C. 1401(34) and 1414(d)); and section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c))

§397.5 What definitions apply?

(a) The following terms have the meanings given to them in 34 CFR §361.5(c):

(1) Act;

(2) Competitive integrated employment;

(3) Customized employment;

(4) Designated State unit;

(5) Extended services;

(6) Individual with a disability;

(7) Individual with a most significant disability;

(8) Individual's representative;

(9) Individualized plan for employment;

(10) Pre-employment transition services;

(11) Student with a disability;

(12) Supported employment;

(13) Vocational rehabilitation services; and

(14) Youth with a disability.

(b) The following terms have the meanings given to them in 34 CFR part 300:

(1) Local educational agency (§300.28);

(2) State educational agency (§300.41); and

(3) Transition services (§300.43).

(c) The following terms have the meanings given to them in 29 CFR 525.3 and section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)):

(1) Federal minimum wage has the meaning given to that term in section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)); and

(2) Special wage certificate means a certificate issued to an employer under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) and 29 CFR part 525 that authorizes payment of subminimum wages, wages less than the statutory minimum wage.

(d) Entity means an employer, or a contractor or subcontractor of that employer, that holds a special wage certificate described in section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)).

(Authority: Sections 7, 12(c), and 511(a) and (f) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705, 709(c), and 794g(a) and (f); sections 601 and 614(d) of the Individuals with Disabilities Education Act, 20 U.S.C. 1401 and 1414(d); section 901 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 7801; and sections 6(a)(1)

and 14(c) of the Fair Labor Standards Act, 29 U.S.C. 206(a)(1) and 29 U.S.C. 214(c))

Subpart B–Coordinated Documentation Procedures Related to Youth with Disabilities

§397.10 What documentation process must the designated State unit develop?

(a) The designated State unit, in consultation with the State educational agency, must develop a new process, or utilize an existing process, to document the completion of the actions described in §397.20 and §397.30 by a youth with a disability, as well as a process for the transmittal of that documentation from the educational agency to the designated State unit, consistent with confidentiality requirements of the Family Education Rights and Privacy Act (20 U.S.C. 1232g(b) and 34 CFR 99.30 and 99.31) and the Individuals with Disabilities Education Act (20 U.S.C. 1417(c) and 34 CFR 300.622).

(1) Such documentation must, at a minimum, contain the—

(i) Youth’s name;

(ii) Determination made, including a summary of the reason for the determination, or description of the service or activity completed;

(iii) Name of the individual making the determination or the provider of the required service or activity;

(iv) Date determination made or required service or activity completed;

(v) Signature of the designated State unit or educational personnel making the determination or documenting completion of the required services or activity;

(vi) Date of signature described in paragraph (a)(1)(v) of this section;

(vii) Signature of designated State unit personnel transmitting documentation to the youth with a disability; and

(vii) Date and method (e.g., hand-delivered, faxed, mailed, e-mailed, etc.) by which document was transmitted to the youth.

(2) In the event a youth with a disability or, as applicable, the youth’s parent or guardian, refuses, through informed choice, to participate in the activities required by this part, such documentation must, at a minimum, contain the–

(i) Youth’s name;

(ii) Description of the refusal and the reason for such refusal;

(iii) Signature of the youth or, as applicable, the youth's parent or guardian;

(iv) Signature of the designated State unit or educational personnel documenting the youth's refusal;

(v) Date of signatures; and

(vi) Date and method (e.g., hand-delivered, faxed, mailed, e-mailed, etc.) by which documentation was transmitted to the youth.

(3) The documentation process must include procedures for the designated State unit to retain a copy of all documentation required by this part in a manner consistent with the designated State unit's case management system and the requirements of 2 CFR 200.333.

(b) The documentation process must ensure that—

(1) A designated State unit provides, in the case of a student with a disability, documentation of completion of appropriate pre-employment transition services, in accordance with §361.48(a) and as required by §397.20(a)(1);

(2) In the case of a student with a disability, for actions described in §397.30—

(i) The appropriate school official, responsible for the provision of transition services, must provide the designated State unit documentation of completion of appropriate transition services under the Individuals with Disabilities Education Act, including those provided under section 614(d)(1)(A)(i)(VIII) (20 U.S.C.1414(d)(1)(A)(i)(VIII));

(ii) The designated State unit must provide documentation of completion of the transition services, as documented and provided by the appropriate school official in accordance with paragraph (b)(2) of this section, to the youth with a disability.

(c) The designated State unit must provide—

(1) Documentation required by this part in a form and manner consistent with this part and in an accessible format for the youth; and

(2) (i) Documentation required by paragraph (a)(1) of this section to a youth as soon as possible upon the completion of each of the required actions, but no later than–

(A) 45 calendar days after the determination or completion of the required activity or service; or

(B) 90 calendar days, if additional time is necessary due to extenuating circumstances, after the determination or completion of each of the required actions in §397.20 and §397.30(a). Extenuating circumstances should be interpreted narrowly to include circumstances such as the unexpected lengthy absence of the educational or designated State unit personnel necessary for the production of the documentation or the transmittal of that documentation due to illness or family emergency, or a natural disaster.

(ii) Documentation required by paragraph (a)(2) of this section, when a youth has refused to participate in an action required by this part, must be provided to the youth within 10 calendar days of the youth's refusal to participate.

(3) When transmitting documentation of the final determination or activity completed, as required by §397.20 and §397.30(a), the designated State unit must provide a coversheet that itemizes each of the documents that have been provided to the youth.

(Authority: Sections 12(c) and 511(d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(d))

Subpart C–Designated State Unit Responsibilities Prior to Youth with Disabilities Starting Subminimum Wage Employment

§397.20 What are the responsibilities of a designated State unit to youth with disabilities who are known to be seeking subminimum wage employment?

(a) A designated State unit must provide youth with disabilities documentation upon the completion of the following actions:

(1)(i) Pre-employment transition services that are available to a student with a disability under 34 CFR §361.48; or

(ii) Transition services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), such as transition services available to the individual under section 614(d) of that Act (20 U.S.C. 1414(d));

(2) Application for vocational rehabilitation services, in accordance with 34 CFR §361.41(b), with the result that the individual was determined—

(i) Ineligible for vocational rehabilitation services, in accordance with 34 CFR §361.43; or

(ii) Eligible for vocational rehabilitation services, in accordance with 34 CFR §361.42; and

(A) The youth with a disability had an approved individualized plan for employment, in accordance with 34 CFR 361.46;

(B) The youth with a disability was unable to achieve the employment outcome specified in the individualized plan for employment, as described in 34 CFR 361.5(c)(15) and 361.46, despite working toward the employment outcome with reasonable accommodations and appropriate supports and services, including supported employment services and customized employment services, for a reasonable period of time; and

(C) The youth with a disability's case record, which meets all of the requirements of 34 CFR 361.47, is closed.

(3)(i) Regardless of the determination made under paragraph (a)(2) of this section, the youth with a disability has received career counseling, and information and referrals from the designated State unit to Federal and State programs and other resources in the individual's geographic area that offer employment-related services and supports designed to enable the individual to explore, discover, experience, and attain competitive integrated employment.

(ii) The career counseling and information and referral services provided in accordance with paragraph (a)(3)(i) of this section must–

(A) Be provided by the designated State unit in a manner that facilitates informed choice and decision-making by the youth, or the youth's representative as appropriate;

(B) Not be for subminimum wage employment by an entity defined in §397.5(d), and such employment-related services are not compensated at a subminimum wage and do not directly result in employment compensated at a subminimum wage provided by such an entity; and

(C) Be provided within 30 calendar days of a determination under paragraph (a)(2)(i) or (a)(2)(ii)(C) for a youth known by the designated State unit to be seeking employment at subminimum wage.

(b) The following special requirements apply—

(1) For purposes of this part, all documentation provided by a designated State unit must satisfy the requirements for such documentation, as applicable, under 34 CFR part 361.

(2) The individualized plan for employment, required in paragraph (a)(2)(ii)(A) of this section, must include a specific employment goal consistent with competitive

integrated employment, including supported or customized employment.

(3)(i) For purposes of paragraph (a)(2)(ii)(B) of this section, a determination as to what constitutes a “reasonable period of time” must be consistent with the disability-related and vocational needs of the individual, as well as the anticipated length of time required to complete the services identified in the individualized plan for employment.

(ii) For an individual whose specified employment goal is in supported employment, such reasonable period of time is up to 24 months, unless under special circumstances the individual and the rehabilitation counselor jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment.

(Authority: Sections 7(5), 7(39), 12(c), 102(a) and (b), 103(a), 113, and 511(a) and (d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(5), 705(39), 709(c), 722(a) and (b), 723(a), 733, and 794g(a) and (d))

Subpart D–Local Educational Agency Responsibilities Prior to Youth with Disabilities Starting Subminimum Wage Employment

§397.30 What are the responsibilities of a local educational agency to youth with disabilities who are known to be seeking subminimum wage employment?

(a) Of the documentation to demonstrate a youth with a disability's completion of the actions described in §397.20(a) of this part, a local educational agency, as defined in §397.5(b)(1), must provide the designated State unit with documentation that the youth has received transition services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), such as transition services available to the individual under section 614(d)of that Act (20 U.S.C. 1414(d)). The documentation must be provided to the designated State unit in a manner that complies with confidentiality requirements of the Family Education Rights and Privacy Act (20 U.S.C. 1232g(b) and 34 CFR 99.30 and 99.31) and the Individuals with Disabilities Education Act (20 U.S.C. 1417(c) and 34 CFR 300.622).

(b)(1) The documentation of completed services or activities required by paragraph (a) of this section must, at a minimum, contain the–

(i) Youth's name;

(ii) Description of the service or activity completed;

(iii) Name of the provider of the required service or activity;

(iv) Date required service or activity completed;

(v) Signature of educational personnel documenting completion of the required service or activity;

(vi) Date of signature described in paragraph (b)(1)(v) of this section; and

(vii) Signature of educational personnel transmitting documentation to the designated State unit; and

(viii) Date and method (e.g., hand-delivered, faxed, mailed, e-mailed, etc.) by which document was transmitted to the designated State unit.

(2) In the event a youth with a disability or, as applicable, the youth's parent or guardian, refuses, through informed choice, to participate in the activities required by this part, such documentation must, at a minimum, contain the–

(i) Youth's name;

(ii) Description of the refusal and the reason for such refusal;

(iii) Signature of the youth or, as applicable, the youth's parent or guardian;

(iv) Signature of the educational personnel documenting the youth’s refusal;

(v) Date of signatures required by paragraphs (b)(2)(iii) and (iv) of this section;

(vi) Signature of educational personnel transmitting documentation of the refusal to the designated State unit; and

(vii) Date and method (e.g., hand-delivered, faxed, mailed, e-mailed, etc.) by which documentation was transmitted to the designated State unit.

(c)(1)(i) The educational personnel must transmit the documentation required by paragraph (b)(1) of this section to the designated State unit as soon as possible upon the completion of each of the required actions, but no later than–

(A) 30 calendar days after the completion of the required activity or service; or

(B) 60 calendar days, if additional time is necessary due to extenuating circumstances, after the completion of each of the required actions in paragraph (a) of this section. Extenuating circumstances should be interpreted narrowly to include the unexpected lengthy absence due to illness or family emergency of the educational personnel

necessary to produce or transmit the documentation, or a natural disaster.

(ii) Documentation required by paragraph (b)(2) of this section, when a youth has refused to participate in an action required by this part, must be provided to the DSU within 5 calendar days of the youth's refusal to participate.

(2) When the educational personnel transmits the last documentation to the designated State unit regarding the services provided to the youth under paragraph (a) of this section, the educational personnel must provide a cover sheet that itemizes the documentation that has been provided to the designated State unit regarding that youth.

(d) The educational agency must retain a copy of all documentation provided to the designated State unit under this section in a manner consistent with the requirements of 2 CFR 200.333.

(Authority: Sections 12(c), 511(a)(2)(A), and 511(d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 794g(a)(2)(A), and (d))

<u>§397.31 What are the contracting limitations on educational agencies under this part</u>?

Neither a local educational agency, as defined in §397.5(b)(1), nor a State educational agency, as defined in §397.5(b)(2), may enter into a contract or other arrangement with an entity, as defined in §397.5(d), for the purpose of operating a program for a youth under which work is compensated at a subminimum wage.

(Authority: Section 511(b)(2) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 794g(b)(2))

Subpart E–Designated State Unit Responsibilities to Individuals with Disabilities During Subminimum Wage Employment

§397.40 What are the responsibilities of a designated State unit for individuals with disabilities, regardless of age, who are employed at a subminimum wage?

(a) Counseling and information services. (1) A designated State unit must provide career counseling and information and referral services, as described in §397.20(a)(3), to individuals with disabilities, regardless of age, or the individual's representative as appropriate, who are known by the designated State unit to be employed by an entity, as defined in §397.5(d), at a subminimum wage level.

(2) A designated State unit may know of an individual with a disability described in this paragraph through the vocational rehabilitation process, self-referral, or by referral from the client assistance program, another agency, or an entity, as defined in §397.5(d).

(3) The career counseling and information and referral services must be provided in a manner that–

(i) Is understandable to the individual with a disability; and

(ii) Facilitates independent decision-making and informed choice as the individual makes decisions regarding opportunities for competitive integrated employment and career advancement, particularly with respect to supported employment, including customized employment.

(4) The career counseling and information and referral services provided under this section may include benefits counseling, particularly with regard to the interplay between earned income and income-based financial, medical, and other benefits.

(b) Other services. (1) Upon a referral by an entity, as defined in 397.5(d), that has fewer than 15 employees, of an individual with a disability who is employed at a subminimum wage by that entity, a designated

State unit must also inform the individual within 30 calendar days of the referral by the entity, of self-advocacy, self-determination, and peer mentoring training opportunities available in the community.

(2) The services described in paragraph (b)(1) of this section must not be provided by an entity as defined in §397.5(d).

(c) Required intervals. (1) For individuals hired at subminimum wage on or after July 22, 2016, the services required by this section must be carried out once every six months for the first year of the individual's subminimum wage employment and annually thereafter for the duration of such employment.

(2) For individuals already employed at subminimum wage prior to July 22, 2016, the services required by this section must be carried out once by July 22, 2017, and annually thereafter for the duration of such employment.

(3)(i) With regard to the intervals required by paragraphs (c)(1) and (2) of this section for purposes of the designated State unit’s responsibilities to provide certain services to individuals employed at subminimum wage, the applicable intervals will be calculated based

upon the date the individual becomes known to the designated State unit.

(ii) An individual with a disability may become "known" to the designated State unit through self-identification by the individual with a disability, referral by a third-party (including an entity as defined in §397.5(d)), through the individual's involvement with the vocational rehabilitation process, or any other method.

(d) Documentation. (1)(i) The designated State unit must provide documentation to the individual as soon as possible, but no later than–

(A) 45 calendar days after completion of the activities required under this section; or

(B) 90 calendar days, if additional time is necessary due to extenuating circumstances, after the completion of the required actions in this section. Extenuating circumstances should be interpreted narrowly to include circumstances such as the unexpected lengthy absence of the designated State unit personnel, due to illness or other family emergency, who is responsible for producing or transmitting the documentation to the individual with a disability, or a natural disaster.

(ii) Documentation required by paragraph (d)(3) of this section, when an individual has refused to participate in an activity required by this section, must be provided to the individual within 10 calendar days of the individual’s refusal to participate.

(2) Such documentation must, at a minimum, contain the—

(i) Name of the individual;

(ii) Description of the service or activity completed;

(iii) Name of the provider of the required service or activity;

(iv) Date required service or activity completed;

(v) Signature of individual documenting completion of the required service or activity;

(vi) Date of signature described in paragraph (d)(2)(v) of this section;

(vii) Signature of designated State unit personnel (if different from that in paragraph (d)(2)(v) of this section) transmitting documentation to the individual with a disability; and

(viii) Date and method (e.g., hand-delivered, faxed, mailed, e-mailed, etc.) by which document was transmitted to the individual.

(3) In the event an individual with a disability or, as applicable, the individual's representative, refuses, through informed choice, to participate in the activities required by this section, such documentation must, at a minimum, contain the –

(i) Name of the individual;

(ii) Description of the refusal and the reason for such refusal;

(iii) Signature of the individual or, as applicable, the individual's representative;

(iv) Signature of the designated State unit personnel documenting the individual's refusal;

(v) Date of signatures; and

(vi) Date and method (e.g., hand-delivered, faxed, mailed, e-mailed, etc.) by which documentation was transmitted to the individual.

(4) The designated State unit must retain a copy of all documentation required by this part in a manner consistent with the designated State unit's case management system and the requirements of 2 CFR 200.333.

(e) Provision of services. Nothing in this section will be construed as requiring a designated State unit to provide the services required by this section directly. A designated State unit may contract with other entities, i.e., other public and private service providers, as appropriate, to fulfill the requirements of this section. The contractor providing the services on behalf of the designated State unit may not be an entity holding a special wage certificate under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) as defined in 397.5(d).

(Authority: Sections 12(c) and 511(c) and (d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(c) and (d))

Subpart F–Review of Documentation

§397.50 What is the role of the designated State unit in the review of documentation under this part?

(a) The designated State unit, or a contractor working directly for the designated State unit, is authorized to engage in the review of individual documentation required under this part that is maintained by an entity, as defined in 397.5(d), under this part. The contractor referred in this section may not be an entity

holding a special wage certificate under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)).

(b) If deficiencies are noted during a documentation review conducted under paragraph (a) of this section, the designated State unit should report the deficiency to the U.S. Department of Labor’s Wage and Hour Division.

(Authority: Sections 12(c) and 511(e)(2)(B) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(e)(2)(B))