



May 12, 2015

Workforce Innovation and Opportunity Act (WIOA) Proposed Rule
Title I: State Vocational Rehabilitation Service Program;
Title VI: State Supported Employment Services Program, and
Title V, Section 511: Limitations on Use of Subminimum Wage

Summary:

On Thursday, April 16, 2015, the Secretary of the Department of Education released proposed rulemaking on Title I of the Workforce Innovation and Opportunity Act (WIOA) to amend regulations governing State Vocational Rehabilitation Services Program (VR program) [34 CFR part 361], State Supported Employment Services program (Supported Employment program) [34 CFR part 363], and administration of the Rehabilitation Services Administration (RSA), to implement changes to the Rehabilitation Act of 1973 as mandated by WIOA (PL 113-125). The Secretary also proposes to promulgate regulations in 34 Code of Federal Regulations (CFR) part 397 that implement the limitation on the payment of subminimum wages to individuals with disabilities under §511 of WIOA.

Background:

The Workforce Innovation and Opportunity Act (WIOA) (PL 113-128), enacted July 22, 2014, made significant changes to the Rehabilitation Act of 1973. As a result, the Secretary proposes to amend parts 361 and 363 of Title 34 of the CFR. These parts, respectively, implement the State Vocational Rehabilitation (VR) Services program and the State Supported Employment Services program. In addition, WIOA added §511 to Title V of the Rehabilitation Act. Section 511 limits the payment of subminimum wages to individuals with disabilities by employers holding special wage certificates under the Fair Labor Standards Act (FLSA). Although the Department of Labor administers the FLSA, some requirements of §511 fall under the purview of the Secretary. Therefore, the Secretary proposes to add a new part 397 to Title 34 of the CFR to implement those particular provisions.

Topline Overview

Title I: State Vocational Rehabilitation Services Programs (34 CFR Part 361)

The State Vocational Rehabilitation Services (VR) program is authorized by Title I of the Rehabilitation Act, as amended by WIOA (29 U.S.C. 720 through 731, and 733), to provide support to each state to assist in operating a statewide comprehensive, coordinated, effective, efficient, and accountable state program as an integral part of a statewide workforce development system; and to assess, plan, and provide vocational rehabilitation (VR) services to individuals with disabilities so that those individuals may prepare for and engage in competitive integrated employment consistent with their unique strengths, priorities, concerns, abilities, capabilities, interests, and informed choice.

§100(a)(1)(C) of the Rehabilitation Act, as amended by WIOA, highlights competitive integrated employment as the type of employment that individuals with disabilities, including individuals with the most significant disabilities, are capable of achieving if appropriate supports and services are provided. This section, as revised, also incorporates economic self-sufficiency as a criterion to consider when providing VR services to an individual. The Secretary proposes to make three significant changes to part 361 of VR programs to improve employment outcomes for individuals with disabilities:

- First, to strengthen the alignment of the VR program with other components of the workforce development system by imposing unified strategic planning requirements, common performance accountability measures, and requirements governing the one-stop delivery system to create a seamless custom-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.
- Second, to emphasize the achievement of competitive integrated employment. The Secretary proposes, among other things, to amend the definition of employment outcome to include only those outcomes in competitive integrated employment or supported employment, thereby eliminating uncompensated employment from the scope of employment outcomes for purposes of the VR program.

WIOA makes extensive changes to Title I of the Rehabilitation Act to improve the VR services provided to, and the employment outcomes achieved by, individuals with disabilities. Included throughout the provisions of WIOA is the overriding principle that individuals with disabilities, including those with the most significant disabilities, can achieve competitive integrated employment when provided necessary skills and supports. To that end, the Secretary proposes to adopt a definition of “competitive integrated employment” in §361.5(c)(9) which combines, clarifies, and enhances the two separate definitions of “competitive employment” and “integrated setting” for the purpose of employment in current §361.5(b)(11) and (b)(33)(ii).

Additionally, the Secretary proposes to incorporate this principle throughout §361, from the statement of program purpose in proposed §361.1, to a requirement in proposed §361.46(a) that the individualized plan for employment include a specific employment goal consistent with the general goal of competitive integrated employment. Specifically, the definition of “employment outcome” in §361.5(c)(15) 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.

The Secretary proposes additional regulatory changes to ensure that individuals with disabilities are provided a full opportunity through the VR program to participate in job-driven training and pursue high-quality employment outcomes. Proposed §361.42(a)(1)(iii) would clarify that an applicant meeting all other eligibility criteria may be determined eligible if he or she requires services to advance in employment, not just obtain or maintain employment. In addition, the Secretary proposes to clarify in proposed §§361.48(b)(6) and 361.49, that VR services are available to assist individuals with disabilities to obtain graduate

level education needed for this purpose. Proposed §361.42(c)(1) establishes a prohibition against a duration of residency requirement, while proposed §361.42(c)(2) establishes those factors that cannot be considered when determining the eligibility of VR program applicants.

The Secretary proposes removing the option to use extended evaluations, as a limited exception to trial work experiences, to explore an individual's abilities, capabilities, and capacity to perform in work situations by deleting paragraph (f) from current §361.42. To enable individuals with disabilities, including students and youth with disabilities, to receive VR services in a timely manner, proposed §361.45(e) would require the individualized plan for employment of each individual to be developed within 90 days following the determination of eligibility. Finally, if a state VR agency is operating under an order of selection for services, it would have the option under proposed §361.36 to indicate in its portion of the Unified or Combined State Plan that it will serve eligible individuals with disabilities outside that order who have an immediate need for equipment or services to maintain employment.

- Third, to heighten emphasis on the provision of services to students and youth with disabilities to ensure that they have meaningful opportunities to receive the training and other services they need to achieve employment outcomes in competitive integrated employment. WIOA expands not only the population of students with disabilities who may receive services but also the kinds of services that the VR agencies may provide to youth and students with disabilities who are transitioning from school to postsecondary education and employment.

WIOA requires states to reserve 15 percent of their VR allotment to provide pre-employment transition services to students with disabilities who are eligible or potentially eligible for VR services. As a result of these changes, the VR program can be characterized as providing a continuum of VR services. While §361.22(c) clarifies 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 Act (IDEA) to provide or pay for transition services that are also considered to be special education or related services necessary for the provision of a free appropriate public education to students with disabilities.

Additionally, the Secretary proposes to implement new definitions for the terms “student with disability” and “youth with disability” as well as new requirements related to pre-employment transition services and the provision of transition services to students and youth with disabilities.

Title VI: Supported Employment Programs (34 CFR Part 363)

The Secretary proposes to make two significant changes to Supported Employment programs:

- First, to amend §363.1 to implement the revised definition of “supported employment” to make clear that supported employment outcomes must be in competitive integrated employment or, if in an integrated setting that is not competitive integrated employment, then in an integrated setting in which the individual is working on a “short-term basis” toward competitive integrated employment. The Secretary proposes to define short-term basis in this context to mean no longer than six months. *The Secretary contends that it is the intent of Congress that these revised definitions ensure that individuals with disabilities not be*

allowed to languish in subminimum wage jobs. Proposed §363.50(b)(1) would extend the time from 18 months to 24 months for the provision of supported employment services.

- Second, to amend §363.23 to implement new requirements regarding the reservation of funds and the services to be provided with those funds, to youth with the most significant disabilities. WIOA requires states to reserve at least 50 percent of their supported employment program allotment for the provision of supported employment services to youth with the most significant disabilities. With these reserved funds, states may provide extended services, for a period up to four years, to youth with the most significant disabilities; previously prohibited under either the VR program or the Supported Employment program. Additionally, states must provide a non-federal share of 10 percent of the funds reserved for the provision of supported employment services to youth with the most significant disabilities.

Title V, Section 511: Limitations on Use of Subminimum Wage (34 Part 397)

Section 511 of the Rehabilitation Act, as added by WIOA, imposes requirements on employers who hold special wage certificates under the Fair Labor Standards Act (FLSA) (29 U.S.C. 214(c)) that must be satisfied before the employers may hire youth with disabilities at subminimum wage or continue to employ individuals with disabilities of any age at the subminimum wage level. Section 511 under proposed §397 also establishes the roles and responsibilities under the designated state units (DSU) 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 the local educational agencies.

WIOA prioritizes, and places heightened emphasis upon, the provision of services that maximize opportunities for competitive integrated employment for individuals with disabilities, including those with the most significant disabilities, consistent with their unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. WIOA also places heightened emphasis on the provision of services necessary to assist youth with disabilities to achieve competitive integrated employment in the community, including supported or customized employment. To that end, amendments to the Act require DSUs to reserve specified percentages of their VR or supported employment allotments for the provision of services to students or youth with disabilities, as applicable. These amendments, along with the addition of §511, demonstrate the intent that individuals with disabilities, especially youth with disabilities, must be afforded a full opportunity to prepare for, obtain, maintain, advance in, or re-enter competitive integrated employment.

Section 511 places limitations on the payment of subminimum wages by entities (*e.g.*, employers) holding special wage certificates under the FLSA. In particular, such employers are prohibited from hiring youth with disabilities at a subminimum wage level unless the youth are afforded meaningful opportunities to access services, including transition services under the Act or IDEA, so they may achieve competitive integrated employment in the community. For the purposes of these requirements, a “youth with a disability” is anyone aged 14 to 24. This age range is consistent with the definition of a “youth with a disability” in §7(42) of the Rehabilitation Act. Additionally, employers are prohibited from continuing to employ individuals with disabilities, regardless of age, at the subminimum wage level unless other requirements are satisfied. Specifically, the individual with a disability, or the individual’s parent or guardian if applicable, must receive certain information and career counseling-related services from the DSU every six months during the first year of such employment and annually thereafter for as long as the individual receives compensation at the subminimum wage level.

In addition to the requirements imposed on employers holding special wage certificates, §511 of the Rehabilitation Act requires DSUs to provide certain career counseling services. Further, educational agencies and the DSUs must develop a process, or use an existing process, for the timely provision of documentation necessary to demonstrate completion of required activities, as appropriate, to youth seeking employment, at a subminimum wage level. Finally, DSUs must provide documentation of the provision of career counseling and information and referral services to individuals with disabilities, regardless of age, who are currently employed at a subminimum wage level.

The proposed regulations in this part focus exclusively on those requirements under the purview of the Department of Education. The Secretary proposes in §397:

- Documentation requirements that local educational agencies and DSUs would be required to satisfy; and
- Information and career counseling-related services DSUs would be required to provide. Requirements imposed on employers are under the purview of the Department of Labor, which administers the FLSA.



***Title I: State Vocational Rehabilitation Services Programs
(34 CFR Part 361)***

Detailed Analysis

Applicable Definitions (§361.5)

Administrative Costs

Statute

§7(1) of the Rehabilitation Act, defining “administrative costs” remains unchanged by WIOA.

Detail

Proposes to amend §361.5(c)(2)(viii) to clarify what constitutes Administrative Costs. For the purposes of the VR program operating and maintenance expenses do not include capital expenditures. Operating and maintenance expenses in the context of administrative costs under the VR program are those costs incurred to maintain facilities, equipment and grounds in good working order; whereas capital expenditures are those expenditures that “materially increase their value or useful life.” Further, the Secretary wishes to clarify that capital expenditures are permitted under the VR program, but not as an administrative cost.

Eligibility Assessment for Vocational Rehabilitation Needs

Statute

§7(2)(B)(v) of the Rehabilitation Act, as amended by WIOA, adds a new requirement that VR agencies must, to the maximum extent possible, rely on the information from the individual’s experiences obtained in an integrated employment setting in the community or in other integrated community settings when using existing information or conducting a comprehensive assessment for determining eligibility and the need for VR services for an individual with a disability.

Detail

While current regulation defines “assessment for determining eligibility for VR needs,” it does not include any requirement specific to the individual’s experiences in integrated settings. Therefore, proposed amended §7(2)(B) adds language to the definition of “assessment for determining eligibility and vocational rehabilitation needs” in proposed §361.5(c)(5)(ii)(E) that would make clear that a comprehensive assessment, to the maximum extent possible, relies on information obtained from the eligible individual’s experiences in integrated employment settings in the community and other integrated settings in the community.

However, DSUs are not precluded from determining an individual’s eligibility for VR services based on other information obtained through the assessment process when the individual cannot participate in integrated community-based work experiences.

Assistive Technology

Statute

§7(3) of the Rehabilitation Act, as amended by WIOA, adds a new definition of “assistive technology” and combines the previous definitions of “assistive technology device” and “assistive technology service” under the heading “assistive technology terms.”

Detail

Therefore, a new definition of “assistive technology terms” is added in proposed §361.5(c)(6), under which the previous terms and definitions would be streamlined and the meaning would correctly reference the Assistive Technology Act of 1998.

Competitive Integrated Employment

Statute

WIOA adds a new term, “competitive integrated employment,” in §7(5) of the Rehabilitation Act. While a new term, the term and its definition generally represent a consolidation of two separate definitions and their terms in current regulations – “competitive employment” and “integrated setting.” In addition, the new statutory definition incorporates a criterion related to advancement in employment that is not included in either of the two current regulatory definitions.

Detail

Under current regulations §361.1(b) only gainful employment, not competitive integrated employment is a stated outcome of VR Service programs. The Secretary proposes to expand the criterion and outcomes to include economic self-sufficiency as a consideration when providing VR services. In addition, the Secretary proposes to replace the term “gainful employment” with “competitive integrated employment” and the aforementioned economic self-sufficiency criterion to ensure that VR services provided are consistent with the individual’s unique circumstances. Other criteria mandated by WIOA for competitive integrated employment include compensation, advancement, and the integrated nature of the workplace, among other things.

The two criteria required for integrated work locations;

- 1) Proposed §361.5(c)(9)(ii)(A) clarifies that the employment location must be in “a setting typically found in the community,” and
- 2) Proposed §361.5(c)(9)(ii)(B) clarifies that the employee with a disability’s interaction with other employees and others, as appropriate (e.g. customers and vendors), who are not persons with disabilities (other than supervisors and service providers), must be to the same extent that employees without disabilities in similar positions interact with these same persons. Specifically, the interaction must occur as part of the individual’s performance of work duties and must occur both in the particular work unit and the entire work site, as applicable.

Through the regulations promulgated by WIOA, the Secretary proposes to clarify the intent of Congress regarding integrated settings. 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. Therefore, it is the determination of the Secretary that the long-standing Department policy that settings established by community rehabilitation programs specifically for the purpose of employing individuals with disabilities (e.g., sheltered workshops) do not constitute an integrated setting. Furthermore, the Secretary believes it is essential and consistent with the

current definition, that individuals with disabilities have the opportunity to interact with non-disabled co-workers during the course of performing their work duties to the same extent that their non-disabled co-workers have when performing the same work.

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 is insufficient because it does not focus on the interaction with non-disabled individuals within the workgroup or across the work unit and must be specific to the performance of duties, not social interactions.

Self-employment and telecommuting are considered to meet the criteria for an integrated location so long as the employee with the disability interacts with employees in similar positions and other persons without disabilities to the same extent that those without disabilities would; this interaction need not be face-to-face.

Individuals with disabilities hired by community rehabilitation programs to perform work under service contracts, either alone or in groups (e.g., landscaping or janitorial crews), whose interaction with persons without disabilities (other than their supervisors and service providers) is with persons working in or visiting the work locations (and not with employees of the community rehabilitation program) would not be performing work in an integrated setting.

Competitive Earnings

Proposed §361.5(c)(9)(i)(A) continues the requirement that an individual must perform full- or part-time work in which he or she earns at least the higher of the minimum wage rate established by federal or applicable state law; should state or local law mandate the minimum wage rate be higher than federal law, the state or local wage rate would prevail. Additionally, the individual with the disability must be eligible for the same level of benefits provided to employees without disabilities in similar positions. In regard to self-employment, proposed §361.5(c)(9)(i)(C) clarifies that self-employed individuals with disabilities can be considered to be receiving competitive compensation if their income is comparable to that of individuals without disabilities in similar occupations or performing similar tasks who possess the same level of training, skills, and experience.

Customized Employment

“Customized employment” means, in general, competitive integrated employment designed to meet both the specific abilities of the individual with a disability and the business needs of an employer. Customized employment is intended to provide flexibility in developing individualized and customized strategies that are specific to an individual’s unique needs, interests, and capabilities, through the use of flexible strategies.

Employment Outcome

Statute

§7(11) of the Rehabilitation Act, as amended by WIOA, revises the definition of “employment outcome” to include customized employment within its scope.

Detail

The Secretary proposes to amend the definition to require all employment outcomes achieved through VR programs be in competitive integrated employment, thereby eliminating uncompensated outcomes. Furthermore, §361.37(b) expands the scope of circumstances when the DSU must provide referrals to other programs and services for individuals who choose not to pursue an employment outcome under the VR program as well as expands the requirement for referral of individuals found ineligible for VR services or determined ineligible subsequent to the receipt of services to also include appropriate state, federal, and local programs, and community service providers better suited to meet their needs.

For VR agencies providing services to individuals with disabilities achieving an outcome of homemakers and unpaid family workers, a transition period of six months following the effective date of the final regulations will be implemented for transition.

The Secretary acknowledges that some VR agencies sometimes assist individuals to exit the program as homemakers to provide an alternate resource for the provision of independent living services that are otherwise available from the State Independent Living Services, Centers for Independent Living, and Independent Living Services for Older Individuals Who Are Blind programs. To ensure that individuals who choose to pursue homemaker and unpaid family worker outcomes, or who are determined ineligible for VR services either at the time of application or following the provision of services, are able to access independent living and other rehabilitation services, the Secretary proposes expanding the scope of §§361.37(b) and 361.43(d) so that these circumstances would be among those when DSUs must refer these individuals to public and private agencies better suited to meet their needs.

Extended Services

Statute

§604(b) of the Rehabilitation Act, as amended by WIOA, permits the expenditure of supported employment funds authorized under Title VI, and the VR funds authorized under Title I, on the provision of extended services to youth with the most significant disabilities for a period not to exceed four years.

Detail

Amends the definition in §361.5(c)(19) to make clear that extended services may be provided to youth with the most significant disabilities for a period not to exceed four years.

Local Workforce Development Board and Other Workforce Development Terms

Statute

§§7(25), 7(35) and 7(36) of the Rehabilitation Act, as amended by WIOA, define the terms “local workforce development board,” “state workforce development board,” and “statewide workforce development system,” respectively.

Detail

Amends §361 throughout, including the definitions for “local workforce development board” in §361.5(c)(33), “state workforce development board” in §361.5(c)(49), and “statewide workforce development system” in §361.5(c)(50), to substitute the word “development” for “investment.”

Supported Employment

Statute

§7(38) of the Rehabilitation Act, as amended by WIOA, revises the current definition of supported employment, to among other things, reference competitive integrated employment and customized employment, and requires that an individual who is employed in an integrated setting, but not in competitive integrated employment, must be working towards such an outcome on a short-term basis for such work to qualify as supported employment.

Detail

Amends the definition in §361.5(c)(53) to require that supported employment means competitive integrated employment, including customized employment, or employment in an integrated setting in which the individual is working on a short-term basis toward competitive integrated employment. For this purpose, to be considered working on a short-term basis means that an individual reasonably expects to achieve an employment outcome within six months.

Supported Employment Services

Statute

§7(39) of the Rehabilitation Act, as amended by WIOA, revises the definition of “supported employment services” to extend the allowable timeframe for the provision of these services from 18 months to 24 months.

Detail

Revises the definition in §361.5(c)(54) to extend the allowable timeframe for the delivery of these services from 18 months to 24 months. Additionally, the Secretary proposes to clarify the individualized and customized nature of supported employment services.

Submission, Approval and Disapproval of the State Plan

Statute

§101(a)(1) of the Rehabilitation Act, as amended by WIOA, requires that a “vocational rehabilitation services portion” be included in a state’s Unified State plan in accordance with §102, or a Combined State Plan in accordance with §103 of WIOA.

Detail

Amends §361.10(a) to require the state to submit a VR service portion of a Unified or Combined State Plan in order to be eligible to receive its VR allotment. The plan must also include all required information under §101(a) of the Rehabilitation Act and provide a cross-reference to subpart D of part 361; reserved for the joint regulations implementing requirements for the Unified and Combined State Plan proposed joint by the Departments of Education and Labor.

Requirements for a State Rehabilitation Council

Statute

§105(b)(1) of the Rehabilitation Act, as amended by WIOA, makes technical amendments to the composition requirement of the State Rehabilitation Council (SRC) related to §121 projects. WIOA also amends §105(b)(6) by requiring the SRC to include programs authorized under the Assistive Technology Act of 1998 among those agencies and organizations with which it must coordinate.

Detail

Proposes to amend §361.17(b)(1)(ix) to substitute “funded” for “carried out” in the state to mirror the statute. Additionally, clarifies §361.7(h)(3) that the SRC is only required to assist in the preparation of the VR services portion of the Unified or Combined State Plan, not the entire Unified or Combined State Plan.

Comprehensive System of Personnel Development (§361.18)

Statute

§101(a)(7) of the Rehabilitation Act, as amended by WIOA, makes changes to the comprehensive system of personnel development (CSPD) that each DSU must establish to ensure its personnel are adequately trained. In particular, it adds specific education and experiential criteria that must be met by VR personnel.

Detail

Revises §361.18(c)(1)(ii) to mirror the statute with regard to education and experience requirements for VR personnel to ensure that personnel have a 21st-century understanding of the evolving labor force and the needs of individuals with disabilities. Adds new §361.18(c)(2)(ii) which describes what is meant by a 21st-century understanding of the evolving labor force and the needs of individuals with disabilities. Additionally, amends §361.18(d)(1)(ii) to require CSPD must include training implemented in coordination with entities carrying out state programs under §4 of the Assistive Technology Act of 1998.

Example

The proposed regulations would describe education and experience, as applicable, requirements at the bachelor’s, master’s, and doctoral level, in fields related to rehabilitation that prepare the individual to work with individuals with disabilities and employers. For individuals hired at the bachelor’s level, there also would be a requirement for at least one year of paid or unpaid experience.

Public Participation Requirements (§361.20)

Statute

§101(a)(16)(A) of the Rehabilitation Act, as amended by WIOA, requires the state plan provide that the designated state agency, prior to the adoption or amendment of any policies or procedures governing the provision of VR services under the Unified or Combined State Plan resulting in substantive change, must conduct public meetings throughout the state to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures, and actively consult with agencies and organizations involved in the vocational rehabilitation of individuals with disabilities.

Detail

§361.20 defines a substantive change as one that would have a direct impact on the nature and scope of the VR services provided to individuals with disabilities or the manner in which these individuals interact with the state VR program, as opposed to any change that was strictly administrative in nature.

WIOA makes corresponding changes to Title I of the Rehabilitation Act regarding the submission, approval, and disapproval of the VR services portion of the Unified or Combined State Plan; the

standards and indicators used to assess VR program performance; and the involvement of the VR program in the one-stop delivery system.

Consequently, the Secretary proposes to amend current §361.10 to require that all assurance and descriptive information previously submitted through the VR state plan and supported employment supplement be submitted through the VR services portion of the Unified or Combined State Plan under §§102 and 103 of the Rehabilitation Act.

The Secretary proposes to implement changes specific to the content of the VR services portion of the Unified or Combined State Plan by amending current §361.29(a) to require that the comprehensive statewide needs assessment include the results of the needs of students and youth with disabilities for VR services, including pre-employment transition services. Additionally, clarifies in current §361.29 that states will 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, thereby resolving inconsistencies in reporting requirements within §101(a) of the Rehabilitation Act. Finally, proposed §361.20 clarifies when designated state agencies must conduct public hearings to obtain comment on substantive changes to policies and procedures governing the VR program.

Proposed §361.40 implements changes to §106 of the Rehabilitation Act, as made by WIOA, by replacing the current standards and indicators used to assess the performance of the VR program under current §§361.80 through 361.89 with a cross-reference to the joint regulations for the common performance accountability measures for the core programs of the workforce development system. Similarly, the Secretary proposes to provide a cross-reference in current §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.

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

Statute

§121(b)(1)(B)(iv) of the Rehabilitation Act, as amended by WIOA, includes the VR program as a core partner of the workforce development system.

Detail

Amends §361.23(a) by cross-referencing to subpart F of part 361 and removes the remainder of the sections because the substance of the requirements are contained in the *Joint NPRM: Title I: Unified or Combined State Plans, Performance Accountability and the One-Stop Delivery System*.

Cooperation and Coordination with Other Entities (§361.24)

Statute

§101(a)(11) of the Rehabilitation Act, as amended by WIOA, expands the scope of entities with which the DSU must collaborate and coordinate its activities under the VR program. The new entities include, among others, employers, non-educational agencies serving out-of-school youth, programs authorized under the Assistive Technology Act of 1998, the state agency administering the state Medicaid plan, the agency responsible for serving individuals with intellectual and/or developmental disabilities, agencies responsible for providing mental health services, and other agencies serving as employment networks under the Ticket to Work and Self-Sufficiency program.

Detail

Self-explanatory

Third-Party Cooperative Arrangement Requirements (§361.28)

Statute

None

Detail

Amends §361.28(a) by removing “administering” and “furnishing” and providing a more accurate description of the cooperating agency’s responsibilities and clarifies that the non-federal share provided by the cooperating agency must be consistent with the requirements in §361.28(c). Under the proposed §361.28(c), the DSU could utilize cash transfers or certified personnel expenditures for the time cooperating agency staff spend providing direct VR services pursuant to a third-party cooperative arrangement to meet all or part of the non-federal share. Given the prohibition in §361.60(b)(2) against using third-party in-kind contributions for match purposes under the VR program, the Department does not include certified expenditures for equipment and supplies as an allowable source of match under the VR program.

Additionally, §§361.28(a)(4) and 361.28(b) change references to “cooperative programs” and “cooperative agreements” to “cooperative arrangements” to make language consistent.

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

Statute

§101(a)(15) of the Rehabilitation Act expands the scope of estimates that the DSUs must report and the areas of focus the states must consider in triennial needs assessment. §1010(a)(23) requires DSUs to assure that the state will submit to the Secretary reports required by §1010(a)(15) at such time and in such manner as the Secretary may determine appropriate. This requirement is unchanged by WIOA.

Detail

Amends current §361.29 to include requirements listed above, and to require DSUs to report estimates of the number of individuals not receiving services because of the implementation of an order of selection. In addition, several technical and conforming changes will be made. [See related discussion of this section in the context of transition services later in this NPRM for students and youth in transition (pg 18).]

Reasoning

Because the VR services portion will be submitted with all other components of the Unified or Combined State Plan every four years with modifications submitted every two years, there would be no vehicle for the submission of these annual reports without imposing additional reporting requirements on the state separate from the state plan. This is being done by statutory authority of the Secretary to avoid any additional burden that would be imposed on DSUs through the submission of separate reports.

Provision of Training and Services for Employers (§361.32)

Statute

§109 of the Rehabilitation Act, as amended by WIOA, expands the types of training, 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. Additionally, WIOA repealed the Projects with Industry program.

Detail

Amends §361.32 in its entirety by eliminating all requirements related to the Projects with Industry program since those requirements are no longer applicable. Instead, implementing requirements regarding the types of activities DSUs may engage in with employers; including but not limited to assisting employers in providing opportunities for work-based learning experiences; training employees who are individuals with disabilities; and promoting awareness of disability-related obstacles to continued employment.

Innovation and Expansion Activities (§361.35)

Statute

§101(a)(18) of the Rehabilitation Act sets requirements regarding innovation and expansion activities for the DSU. This statute is unchanged by WIOA.

Detail

§361.35 requires the state plan to assure that the state will reserve and use a portion of its VR funds to support, among other things, the resource plans for the State Rehabilitation Council and the Statewide Independent Living Council. Under proposed §361.35, the Secretary would clarify that the state must reserve a portion of its VR program funds to support the resource plan for the Statewide Independent Living Council, but it may choose not to use these funds if the Statewide Independent Living Council and the state decide to use other available resources to fund the resource plan for the Statewide Independent Living Council.

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

Statute

§101(a)(5) of the Rehabilitation Act, as amended by WIOA, permits DSUs to serve eligible individuals who require specific services or equipment to maintain employment, regardless of whether they are currently receiving VR services. The DSUs may serve these individuals regardless of any order of selection the state has established.

Detail

Amends §361.36(a)(3) by adding a new paragraph (v) that would require DSUs implementing an order of selection to indicate in the VR services portion of the Unified or Combined State Plan if they have elected to serve eligible individuals in need of specific services or equipment for the purpose of maintaining employment, regardless of their assignment to a priority category in the states order of selection.

Reasoning

Previously, DSUs who were on an order of selection were not permitted to serve eligible individuals who did not meet the criteria of that order, which was designed to ensure that individuals with the most significant disabilities received a priority for services when resources were limited. This statutory change, as well as the proposed regulatory change creates an exemption from order of selection for eligible individuals who need a specific service or equipment in order to maintain employment. Prior to the passage of WIOA, these individuals would have been placed in the order, depending on the severity of their

disability, which could have resulted in a placement on a waiting list. With the proposed regulatory change, DSUs may, at their discretion, elect to serve these individuals outside of the order of selection criteria that are otherwise in place in order to serve these individuals who could be at risk of losing employment if such services or equipment is not received.

There are four key points to note:

- 1) Proposed §361.36(a)(3)(v) is discretionary. DSUs would have the ability to serve these individuals outside of the established order and should consider doing so if financial and staff resources are sufficient.
- 2) If a DSU elects to do so, it must, in accordance with proposed §361.36(a)(3)(v), modify its plans in the VR services portion of the Unified or Combined State Plan before implementing this authority.
- 3) The services and equipment provided under this authority must be consistent with an individual's individualized plan for employment, in the same manner as any other service or equipment provided under the VR program.
- 4) Proposed §361.36(a)(3)(v) would apply to those specific services or equipment that the individual needs to maintain employment, not to other services the individual may need for other purposes.

Reports; Evaluation Standards and Performance Indicators (§361.40)

Statute

§101(a)(10)(C) of the Rehabilitation Act, as amended by WIOA, expands the data that DSUs must report to include data about: Students with disabilities who are receiving pre-employment transition services; individuals with open service records and the types of services they are receiving; individuals referred to the VR program by one-stop operators; and individuals referred to these one-stop operators by DSUs. In addition, §106 of the Rehabilitation Act, as amended by WIOA, requires the VR program to be subject to the common performance accountability measures, established in §116 of WIOA, applicable to core programs of the workforce development system.

Detail

Reorganizes current §361.40 into two paragraphs.

Proposed paragraph (a) would retain all existing provisions in current §361.40, as well as incorporate requirements regarding new VR-specific data related to individuals with open service records and the types of services they are receiving; students with disabilities receiving pre-employment transition services; and individuals referred to the state VR program by one-stop operators and those referred to these one-stop operators by the state VR program.

In proposed paragraph (b), cross-referenced to subpart E of this part, includes the joint regulations implementing common performance measures. It is significant to note that the VR program will no longer be subject to its own set of performance standards and indicators established by the Department; §106 of the Rehabilitation Act requires that the VR program comply with the common performance accountability measures established under §116 of WIOA, which apply to all core programs of the workforce development system.

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

Eligibility Criteria

Statute

§102(a)(1) of the Rehabilitation Act, as amended by WIOA, clarifies that an individual with a disability, whose physical or mental impairment constitutes a substantial impediment to employment, may be determined eligible for VR services if he or she requires services to advance in employment.

Detail

Amends current §361.42(a)(1)(iii) to clarify that an applicant, who meets all other eligibility criteria, may be determined eligible if he or she requires VR services to advance in employment. Clarifies in current §361.42(c)(2) 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. The Department maintains its longstanding policy that the VR program is not intended solely to place individuals with disabilities in entry-level jobs, but rather to assist them to obtain employment that is appropriate given their unique strengths, resources, priorities, concerns, abilities, capabilities, and informed choice. The extent to which DSUs should assist eligible individuals to advance in their careers through the provision of VR services depends upon whether the individual has achieved employment that is consistent with this standard.

Residency

Statute

§101(a)(12) of the Rehabilitation Act requires that the state plan will include an assurance that the state will not impose a residence requirement that excludes from services provided under the plan any individual who is present in the state. This provision is unchanged by WIOA.

Detail

Amends current §361.42(c)(1) to clarify that a DSU must not require the applicant to demonstrate a presence in the state by the production of documentation that would, under state or local law, or practical circumstances, result in a duration of residency.

Extended Evaluation

Statute

WIOA amends §102(a)(2)(B) of the Rehabilitation Act by removing the limited exception to trial work experiences, whereby VR agencies made extended evaluations available to applicants, prior to determining that an individual is unable to benefit from VR services due to the severity of the individual's disability and, thus, is ineligible for VR services. Although the term extended evaluation was not referenced in the Rehabilitation Act, this is the term used in current regulation to describe the process by which the DSUs assess an individual's ability to benefit from VR services due to the severity of disability, when the individual, under limited circumstances, is unable to participate in trial work experiences.

Detail

Proposed §361.41(b)(1)(ii) removes reference to extended evaluation and only permits an exploration of the individual's abilities, capabilities, and capacity to perform in work situations carried out in accordance with current §361.42(e).

Development of the Individualized Plan for Employment

Timeframe

Statute

§102(b)(3)(F) of the Rehabilitation Act, as amended by WIOA, mandates that the individualized plan for employment be developed as soon as possible but no later than 90 days after the date of determination of eligibility, unless the DSU and the eligible individual agree to an extension of that timeframe.

Detail

Amends current §361.45(e) to require that the DSU develop the individualized plan for employment for each eligible individual as soon as possible but no later than 90 days following a determination of eligibility, unless the DSU and the individual agree to a specific extension of that timeframe.

Options for Developing the Individualized Plan for Employment

Statute

WIOA amends §102(b)(1)(A) of the Rehabilitation Act by clarifying that the DSU must provide eligible individuals with information regarding the availability of assistance in developing all or part of the individualized plan for employment from disability advocacy organizations. In addition, §102(b) is amended to require a DSU to provide to eligible individuals entitled to Social Security benefits under Titles II or XVI of the Social Security Act, general information on additional supports, such as assistance with benefits planning.

Detail

Amends current §361.45(c)(1) by requiring a DSU to provide eligible individuals information about the option of requesting assistance from a disability advocacy organization when developing the individualized plan for employment. Also amends §361.45(c)(2) by adding new paragraph (v) that would require a DSU to provide eligible individuals entitled to Social Security benefits under Titles II or XVI of the Social Security Act information on assistance on supports available to individuals desiring to enter the workforce, including benefits planning.

Reasoning

The addition of disability advocacy organizations as a resource was not previously included in the statute, and its inclusion as a specific source of assistance, as appropriate, for eligible individuals in the development of the individualized plan for employment supports, and acknowledges the important role that these groups may play in mentoring an eligible individual through the VR process and in designing the plan of services that will successfully lead to an employment outcome. In coordination with the expertise of the qualified rehabilitation counselor, the experience of advocacy groups may lend a perspective and understanding of the disability-related needs, responsibilities, and services that are required to achieve the individual's employment goal. The inclusion of advocacy groups as a resource also recognizes and emphasizes the importance of self-determination, empowerment, and self-advocacy as cornerstones in rehabilitation.

Content of the Individualized Plan for Employment (§361.46)

Statute

WIOA amends §102(b)(4) of the Rehabilitation Act to require that the description of the specific employment goal chosen by the eligible individual, required as a mandatory component of the individualized plan for employment, be consistent with the general goal of competitive integrated

employment. The plan is required to include a specific employment goal based upon the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the eligible individual.

Detail

Amends current §361.46(a)(1) to require that the vocational goal selected by the individual in accordance with this section be consistent with the general goal of competitive integrated employment.

Transition of Students and Youth with Disabilities

WIOA places heightened emphasis on the provision of services to students and youth with disabilities to ensure that they have meaningful opportunities to receive the training and other services they need to achieve employment outcomes in competitive integrated employment. To that end, the Rehabilitation Act expands not only the population of students with disabilities who may receive services but also the kinds of services that the VR agencies may provide to youth and students with disabilities who are transitioning from secondary school to postsecondary education and employment. Major changes related to the transition of students and youth with disabilities comes in amended §110(d) which proposes to require states to reserve 15 percent of their VR allotment to provide pre-employment transition services to students with disabilities who are eligible or potentially eligible for VR services. §113 of the Rehabilitation Act, as added by WIOA, outlines the services that must be provided with these reserved funds. These services are designed to be an early start at job exploration.

In addition, §103(b) permits the VR agency to provide transition services to groups of youth with disabilities, regardless of whether they have applied for or been determined eligible for services. If either a student or youth with a disability requires more intensive services, he or she would apply for VR services. Once determined eligible, an individualized plan for employment would be developed, which would outline the specific services that he or she may need in order to achieve an employment outcome. The major substantive changes relate to certain key definitions and the provision of pre-employment transition services and transition services to groups of youth with disabilities.

Transition Related Definitions

Statute

§7 of the Rehabilitation Act adds new definitions for several terms, including “pre-employment transition services” in §7(30), “student with a disability” in §7(37), and “youth with a disability” in §7(42). This section also makes modifications to the term “transition services” in §7(37); while “transition services” is being deleted from the statute, its use is pervasive in the Rehabilitation Act.

Detail

§361.5(c)(55) clarifies that “transition services” are available to both students and youth with disabilities. Specifically, “pre-employment transition services” refers to those services paid for with a percentage of funds reserved from the state’s VR allotment and are only available to those individuals who meet the definition of students with disabilities. Other transition related services, including those that could be similar to pre-employment transition services, may be provided to students or youth with disabilities and does not require a specific reservation of funds.

Students with Disabilities

Is defined as an individual with a disability in school who is (1) 16 years old, or younger, if determined appropriate under the Individuals with Disabilities Act (IDEA), unless the state elects to provide pre-employment transition services at a younger age, and no older than 21, unless the state elects to provide services to an older age; and (2) receiving transition services pursuant to IDEA, or is a student who is an individual with a disability for the purposes of §504 of the Rehabilitation Act. It is important to note that the Secretary interprets a student with a disability, under the statutory definition, as not including an individual with disability in postsecondary education.

Youth with Disabilities

Refers to individuals with disabilities up to the age of 24, who is not in school and being provided services under IDEA. From these definitions, the Secretary clarifies that all students with disabilities would meet the definition of youth with disabilities, but not all youth with disabilities would meet the definition of a student with disabilities.

Coordination with Education Officials (§361.22)

Statute

§101(a)(11)(D) of the Rehabilitation Act, as amended by WIOA, clarifies two points: (1) Interagency coordination between the DSUs and educational agencies must include coordination regarding the provision of pre-employment transition services; and (2) DSUs may provide consultation and technical assistance to education officials through alternative means, such as conference calls and video conferences. In addition, a new section, §101(c) makes clear that nothing in the Act is to be construed as reducing the responsibility of the local educational agencies or any other agencies under IDEA to provide or pay for any transition services that are also considered to be special education or related services necessary for providing a free appropriate public education to students with disabilities.

Finally, §511 imposes several requirements, particularly related to documentation of services for DSUs and state and local educational agencies with regard to youth with disabilities seeking subminimum wage employment; ***§511 does not take effect until July 22, 2016.***

§511(b)(2) prohibits a state or local educational agency from entering into a contract or other arrangement with an entity for purposes of operating a program in which youth with disabilities are employed at subminimum wage. The Secretary believes the formal interagency agreement, required by §101(a)(11)(D), and current §361.22(b), between the state educational agency and the DSU, is the appropriate mechanism whereby state and local educational agencies will assure that they will comply with the prohibition imposed by §511(b)(2) and proposed 34 CFR 397.31.

Detail

Amends current §361.22(a) to incorporate reference to pre-employment transition services as an area that must be included during inter-agency coordination of transition services. Amends §361.22(b)(1) to clarify that VR agencies may use alternative means, such as video conferences and conference calls, for providing consultation and technical assistance to education officials. Additionally, amends §361.22(b) by adding new clauses (5) and (6) to incorporate, by reference, certain requirements from §511 into the formal interagency agreement between the DSU and the state educational agency.

The Department wishes clarify proposed §361.22(c), given questions that have arisen over the years as to which entity, the local educational agency or DSU, is responsible for providing transition services to students with disabilities (who are also VR consumers) when such services fall under the purview of both entities.

Reasoning

Since the ultimate decisions related to financial responsibility for the provision of transition services must be established at the state and local level during the collaboration and coordination of transition and pre-employment transition services, a state's formal interagency agreement or other mechanism for interagency coordination can provide a foundation for addressing these issues by including criteria to be used by the VR agencies and local educational agencies when considering and assigning the financial responsibility of each agency for the provision of transition services to students with disabilities on an individualized basis.

For example, the criteria could include:

1. The purpose of the service – Is it related more to an employment or education outcome? In other words, is it considered a special education or related service (*e.g.*, rehabilitation counseling) that is necessary for the provision of a free appropriate public education?
2. Customary Services - Is the service one that the school customarily provides under IDEA part B? For example, if the school ordinarily provides job exploration counseling to its eligible students with disabilities, the mere fact that such a service is now authorized under the Rehabilitation Act as a pre-employment transition service does not mean the school should cease providing that service and refer those students to the VR program.
3. Eligibility - Is the student with a disability eligible for transition services under IDEA? As stated earlier, the definition of a student with a disability, for purposes of the VR program, is broader than that under IDEA because the definition in the Rehabilitation Act includes those students who are individuals with a disability under §504 of the Rehabilitation Act. It is possible that these students do not have an individualized education program under IDEA and, therefore, would not be eligible for or receiving special education and related services under IDEA. As a result, VR agencies are authorized to provide transition services under the VR program to a broader population than local educational agencies are authorized to provide under IDEA.

Scenario

A VR-eligible student who is blind is participating in a work-experience placement after school hours as part of her individualized education program. Because that activity takes place in a location outside of school, the student needs travel training in order to travel independently from school to work and then home.

A VR-eligible student is enrolled in an apprenticeship program in construction trades as part of his individualized education program under IDEA. The program requires the student to have special gloves, clothing, equipment, and footwear to attend the program.

A VR-eligible student is participating in a work experience activity during school hours as part of her individualized education program. The school has arranged for several IDEA-eligible students to participate in this same work activity and is providing a school bus to transport the IDEA-eligible students to and from the worksite. The VR-eligible student needs transportation to the worksite and a uniform.

Cooperation and Coordination with Other Entities (§361.24)

Statute

§101(a)(11) of the Rehabilitation Act makes several changes that highlight the importance of transition and other matters affecting students and youth with disabilities with regard to the coordination of services between VR program and other non-educational programs.

Detail

Proposed §361.24(a) would incorporate non-educational agencies serving out-of-school youth as another entity with which the VR agency must coordinate. Amends current §361.24(c) and (d), which govern coordination between the DSUs and employers and section 121 projects, respectively, to include transition services among the matters that must be included in coordination efforts.

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

Statute

§101(a)(15) of the Rehabilitation Act, as amended by WIOA, requires the comprehensive needs assessments to include: a review of the needs of youth and students, especially with regard to pre-employment transition services and the coordination of services with educational agencies; and the methods used to improve the provisions of VR services, especially transition services.

Detail

Proposed §361.29(a)(1)(i)(D) reflects the addition of the new statutory requirement for the statewide needs assessment to identify the vocational rehabilitation needs of youth and students with disabilities, including their need for pre-employment transition services as defined under proposed §361.5(c)(42) or other transition services. Proposed §361.29(a)(1)(i)(D)(2) would require that the state plan include an assessment of the needs for transition services and pre-employment transition services and the extent to which VR services are coordinated with services provided under IDEA in order to meet the needs of individuals with disabilities. The proposed §361.29(d)(4) would require that the state plan include strategies to provide pre-employment transition services.

Development and Content of the Individualized Plan for Employment (§361.45)

Statute

None

Detail

Amends current §361.45(d)(9)(i) to incorporate consideration of a student's §504 services. §102(b)(4)(A) of the Rehabilitation Act permits an individualized plan for employment to contain a specific post-school employment outcome or a more general, projected outcome. Section 102(b)(4)(B) requires the individualized plan for employment for a student with a disability to include the specific transition services needed by the student for the achievement of

the employment goal, such as amending the individualized plan for employment to reflect career exploration consistent with vocational growth and development and the resulting evolution in the student's or youth's employment goal.

Content of the Individualized Plan for Employment (§361.46)

Statute

As amended by WIOA, §102(b)(4)(A) of the Rehabilitation Act permits an individualized plan for employment to contain a specific post-school employment outcome or a more general, projected outcome. §102(b)(4)(B) requires the individualized plan for employment for a student with a disability to include the specific transition services needed by the student for the achievement of the employment goal.

Detail

Amends current §361.46(a)(1) to permit, in lieu of a specific employment goal, a description of an eligible student's or youth's projected post-school employment outcome. Proposed §361.46(a)(2)(ii) requires that the description of the specific VR services under proposed §361.48 include the specific transition services and supports needed for an eligible student with a disability or youth with a disability to achieve an employment outcome or projected employment outcome.

Scope of VR Services for Individuals with Disabilities (§361.48)

Pre-Employment Transition Services

Statute

WIOA amends the Rehabilitation Act by including a new §113 that requires VR agencies to coordinate with local educational agencies in providing or arranging for the provision of pre-employment transition services to students with disabilities who are eligible or potentially eligible for VR services and in need of such services. §110(d) requires states to reserve 15 percent of their VR allotment to provide these services.

Detail

The Secretary proposes to add regulations implementing the provision of pre-employment transition services in a new paragraph in proposed §361.48(a). The current regulations will be moved to a new paragraph (b) in §361.48. Proposed §361.48(a)(1) would permit pre-employment transition services to be provided to all students with disabilities regardless of whether they have applied for VR services and would clarify that similar transition services are available to youth with disabilities under proposed §361.48(b) when specified in an individualized plan for employment. Proposed §361.48(a)(2) would specify the required pre-employment transition services that are provided directly to students with disabilities. Proposed §361.48(a)(3) would describe the authorized activities that the state may provide, if sufficient funds are available, to improve the transition of students with disabilities from school to postsecondary education or an employment outcome. Proposed §361.48(a)(4) would describe the responsibilities for pre-employment transition coordination to be carried out by VR agencies. Finally, proposed §361.48(a)(5) would support DSUs in providing pre-employment transition services, consulting with other federal agencies, and identifying best practices of the states for the provision of transition services to students with a variety of disabilities.

Reasoning

The manner in which pre-employment transition services are delivered (e.g., either in a group setting or on an individual basis) will most likely depend on the amount of information the DSU has available regarding the student with a disability at the time services are provided. As a student progresses through the VR process by applying, and being determined eligible, for VR services, the DSU would obtain the information necessary to provide individually tailored services that address the student's particular disability-related and vocational needs. This aspect of pre-employment transition services, the fact that they can be either generalized or individualized, further highlights the continuum of services available under the VR program.

The Secretary makes clear that if a student with a disability requires services that are beyond the limited scope of pre-employment transition services, the student would have to apply for and be determined eligible for VR services and develop an individualized plan for employment for the receipt of those services as would be true for any other applicant. To that end, we encourage DSUs to work with the local educational agencies and state educational agencies to develop a process whereby individuals expressing interest in VR services are able to access the program and apply for services in a timely manner. VR agencies are encouraged to develop a referral process that is simple and engaging, especially for students with disabilities and their families who could become discouraged or disinterested in VR services by needlessly complex and prolonged procedures. An individual may initiate the application process by requesting individualized pre-employment transition services and other VR services.

Services for Individuals Who Have Applied for or Been Determined Eligible for VR Services

Statute

§103(a)(15) of the Rehabilitation Act, as amended by WIOA, adds pre-employment services among the scope of VR services that may be provided in accordance with an individual's individualized plan for employment.

Detail

Proposes to reorganize current §361.48 so that all current provisions are retained in proposed §361.48(b). The Secretary also proposes to incorporate along with those transition services already provided for, pre-employment transition services among the authorized list of individualized services a VR agency may provide under §361.48(b)(18).

Reasoning

Under the VR program, any allowable service may be provided as a transition service to an individual transitioning from secondary school to postsecondary education or employment, who has been determined eligible and for whom an individualized plan for employment has been developed and approved. Services most commonly provided as transition services to students with disabilities under an individualized plan for employment include, but are not limited to, assessments, counseling and guidance, assistive technology, job coaching, orientation and mobility training, vocational counseling and guidance, and vocational and other training services, such as personal and vocational adjustment training. It should be noted that many of the services described as pre-employment transition services in proposed §361.48(a) were previously provided as transition services, as defined in proposed §361.5(c)(55), or other individualized services, including community-based work experiences and other career exploration services.

Scope of VR Services for Groups of Individuals with Disabilities (§361.49)

Statute

§103(b)(7) of the Rehabilitation Act expands the scope of allowable services for the benefit of groups of individuals with disabilities to include transition services for youth and students with disabilities.

Detail

Amends current §361.49(a)(6) to clarify that educational agencies referenced in current regulations means state or local education agencies. In new provision §361.49(a)(6), VR agencies would be able to engage in transition activities with some entities that have not typically been involved in transition planning.

Reasoning

As a service to groups, these transition services would be provided in group settings in a manner that benefits a group of students or youth with disabilities, rather than being customized for any one individual. Examples of group transition services may include, but are not limited to, class tours of universities and vocational training programs, employer or business site visits to learn about career opportunities, career fairs coordinated with workforce development systems and employers where students and youth participate in resume writing classes and mock interviews. Additionally, these services are not limited to those individuals who are still in school.

Services for Individuals Who Have Applied for and Been Determined Eligible for VR Services (§361.48(b))

Scope of Vocational Rehabilitation Services for Individuals with Disabilities

Statute

WIOA amends §103(a) of the Rehabilitation Act by adding customized employment to the list of VR services that may be provided to eligible individuals under an individualized plan for employment. The amendments also encourage qualified individuals who are eligible for VR services to pursue advanced training in specified fields.

Detail

The Secretary proposes to reorganize current §361.48. Proposed §361.48(a) incorporates new regulations governing pre-employment transition services to students with disabilities, which are required by §113 of the Rehabilitation Act. Proposed §361.48(b) contains all of the services that are listed in current §361.48 and that are available to an eligible individual under an individualized plan for employment. Proposed §361.48(b)(6) would specify that advanced training in a field of science, technology, engineering, or mathematics (including computer science), medicine, law, or business may be provided to an eligible individual receiving vocational and other training services under an individualized plan for employment. Finally, the inclusion of customized employment as an available VR service is added in proposed §361.48(b)(20).

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

Statute

§103(b) of the Rehabilitation Act makes several changes with regard to the services to groups that VR agencies may provide, including those related to technical assistance to business, assistive technology, and advanced training in specific fields of study.

Detail

Amends current §361.49(a)(1), regarding the establishment, development, or improvement of a community rehabilitation program, to clarify that services provided under this authority must be used to promote competitive integrated employment, including customized and supported employment. §361.49(a)(4) is amended to incorporate statutory changes that expand a VR agency's authority to provide technical assistance to all businesses who are considering hiring individuals with disabilities and new §361.49(a)(8) and (9) regarding services related to assistive technology and advanced training, respectively, to reflect new statutory authorities for these services. These changes are for the benefit of a group of individuals and are not tied to the individualized plan for employment of any one individual; those assistive technology services are provided for under proposed §361.48(b)

Reasoning

The proposed rulemaking makes clear that DSUs should continue to provide any individualized advanced training support that an eligible individual requires in order to achieve an employment outcome in competitive integrated employment, and that is consistent with the individual's plan for employment, under proposed §361.48(b), not under the services to groups authority discussed here. Therefore, there would only be limited circumstances in which it would be appropriate for a DSU to provide support for advanced training under proposed §361.49(a)(9). Given that this service may be provided as either an individualized service under proposed §361.48(b) or §361.49(a)(9), DSUs would need to be mindful of the distinctions between the two different authorities to ensure proper implementation and record-keeping for reporting purposes.

Example

A DSU may, in coordination with the state's assistive technology grant program, use VR funds to support an assistive technology lending library in proportion to the benefit received by applicants and eligible individuals. Once an eligible individual needs a specific assistive technology device to participate in VR services or the employment outcome, the DSU could provide the device as an individualized service under an individualized plan for employment pursuant to proposed §361.48(b).

Comparable Services and Benefits (§361.53)

Statute

§101(a)(8) of the Rehabilitation Act clarifies that accommodations and auxiliary aids and services are included in the requirement to determine whether comparable services and benefits are available prior to the DSU providing most VR services. §101(a)(8)(B) is amended to clarify that interagency agreements for coordination of services between the DSU and other public entities in the state, including institutions of higher education, should specifically address accommodations and auxiliary aids and services among the services to be coordinated.

Detail

Adds language to §§361.53(a) and 361.53(d)(1) and (3) that would include accommodations and auxiliary aids and services among the VR services that would require the determination of the availability of comparable services and benefits prior to the provision of such services to an eligible individual. The proposed changes also would address interagency cooperation of these services.

Reasoning

Both DSUs and public institutions of higher education are required to adhere to the requirements of Title II of the Americans with Disabilities Act and §504 of the Rehabilitation Act to ensure access to their services for individuals with disabilities and private institutions of higher education must adhere to requirements of §504 of the Rehabilitation Act to ensure access to their services for individuals with disabilities. As a result, the responsibilities of each entity for the provision of accommodations and auxiliary aids and services to individuals served by each must be determined at the state level. Therefore, the interagency agreement under proposed §361.53(d) would ensure interagency coordination and describe the responsibilities of the DSU and the institutions of higher education for the provision of VR services, including accommodations and auxiliary aids and services, and would provide a vehicle for resolving interagency disputes.

Example

An interagency agreement could include a term that could require institutions of higher education to provide auxiliary aids and services (e.g., interpreters) to VR eligible individuals in the classroom and the DSUs could provide these aids and services during educational activities outside the classroom.

In states where students who are deaf or blind and attend a state university tuition-free, the interagency agreement could specify that the DSU provide auxiliary aids and services, such as reader and interpreter services, both in and out of the classroom, since the school is responsible for the full cost of tuition.

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

Statute

§101(a)(14) of the Rehabilitation Act, as amended by WIOA, increases the frequency of reviews that the DSUs must conduct when individuals with disabilities, who have been served by the VR program, obtain subminimum wage employment or extended employment. Under current regulations §361.55 requires the DSU to conduct an annual review and re-evaluation annually for the first two years after an individual obtains subminimum wage employment or extended employment.

Detail

Amends §361.55 to incorporate the new statutory requirement that these reviews be conducted semi-annually for the first two years of the individuals employment and annually thereafter.

Reasoning

The Secretary believes such changes are necessary to prevent individuals with disabilities from ‘languishing’ in subminimum wage employment or extended employment.

Matching Requirements (§361.60)

Statute

§101(a)(3) of the Rehabilitation Act requires the state to pay a non-federal share in carrying out the VR program. §7(14) of the Rehabilitation Act defines Federal share as 78.7 percent. These statutory provisions remain unchanged by WIOA.

Detail

Amends current §361.60(b)(3) to clarify that non-federal expenditures, for match purposes under the VR program, from private contributions must be made from cash contributions that have been deposited in the VR agency’s account prior to their use for this purpose. Specifically, this change clarifies that (1) Certified expenditures made by private entities or individuals may not be used by the VR agency for match purposes under the VR program; and (2) a contract, budgeted projection, or any other promise by a private entity or individual to make a contribution may not be used, on its face, by the VR agency for satisfying its match requirement. Makes conforming changes throughout current §361.60 to refer to 2 CFR part 200, as applicable and to new terms, such as the “vocational rehabilitation services portion of the Unified or Combined State Plan” and “subaward.”

Maintenance of Effort Requirements (§361.62)

Statute

§111(a)(2)(B) of the Rehabilitation Act, as amended by WIOA, requires the Secretary to reduce a grant in a fiscal year for any prior fiscal year’s Maintenance of Effort (MOE) shortfall.

Detail

Amends current §361.62(a) in four ways: (1) by amending current §361.62(a)(1) to require the Secretary to reduce a grant in any fiscal year by the amount of any prior fiscal year’s MOE shortfall; (2) by removing the example in current §361.62(a)(1) as it is no longer applicable, given statutory amendments; (3) by removing current §361.62(a)(2) since it is no longer necessary given new statutory requirements; and (4) by redesignating current §361.62(a) to reflect the removal of current §361.62(a)(2).

Amends current §361.2(b) by removing the requirement for the Secretary to recover the MOE deficit through audit disallowance process. Amends current §361.62(d)(3) to clarify that a request for a waiver or modification of the MOE requirement must be submitted as soon as the state has determined that it has failed to satisfy the requirement due to an exceptional or uncontrollable circumstance.

Reasoning

Previously, the Secretary could reduce the state’s VR award to satisfy a MOE deficit only in the fiscal year immediately following the fiscal year in which the MOE deficit occurred. In the event the MOE deficit was discovered after the next fiscal year’s grant was awarded, the Secretary was required to seek recovery for the MOE deficit pursuant to a disallowance process, whereby, the state was required to make payment for that recovery action with non-Federal funds. Under the proposed regulations the Secretary would no longer be limited to reducing only the next fiscal year’s grant, but rather could reduce any subsequent fiscal year’s grant to satisfy the MOE deficit. Therefore, in the event that a MOE shortfall is revealed after the next fiscal year’s grant has been awarded, the Secretary would reduce the Federal grant in another subsequent fiscal year.

Program Income (§361.63)

Statute

None

Detail

Amends current §361.63(a) to make the definition of program income consistent with 2 CFR 200.80. Amends current §361.63(b) by providing additional examples of common sources of program income generated by the VR program. Amends current §361.63(c)(1) to clarify that program income must be disbursed during the period of performance of the award to be consistent with 2 CFR 20077, which defines the period of performance of the award as the time during which the non-federal entity may incur new obligations to carry out the work authorized under the federal award.

Allotment and Payment of Federal Funds for VR Services (§361.65)

Statute

§110(d) of the Rehabilitation Act, as amended by WIOA, requires VR agencies to reserve not less than 15 percent of the state's VR allotment for the provision of pre-employment services, in accordance with §113 of the Rehabilitation Act. §110(d)(2) of the Rehabilitation Act prohibits the state from using these reserved funds to pay for administrative costs or any other VR service.

Detail

Amends current §361.65(a) by adding a new paragraph (3) to implement the new statutory requirement for a state to reserve not less than 15 percent of its VR allotment for the provision of pre-employment services and that such funds must be used for services authorized in §361.48(a) and may not be used to pay for administrative costs associated with the provision of such services or any other VR service. Amends current §361.65(b)(2) to revise the language clarifying the reallocation would occur in the fiscal year the funds were appropriated; however, the funds may be obligated or expended during the period of performance, provided matching requirements were met. Finally, a new paragraph (b)(3) to §361.65 gives the Secretary the authority to determine the criteria to be used to reallocate funds when the amount requested exceeds the amount of the funds relinquished.



Title VI: Supported Employment Programs (34 CFR Part 363)

Detailed Analysis

Overview:

The State Supported Employment Services (Supported Employment) program is authorized by Title VI of the Rehabilitation Act, as amended by WIOA (29 U.S.C. 795g *et seq.*), to provide grants in developing and implementing collaborative programs with appropriate entities to provide supported employment services for individuals with the most significant disabilities, including youth, affording them a full opportunity to prepare for, obtain, maintain, advance in, or re-enter competitive integrated employment, including supported or customized employment.

Competitive Integrated Employment (§363.1)

Statute

§7(38) of the Rehabilitation Act, as amended by WIOA, revises the definition of “supported employment” to mean employment with supports in competitive integrated employment, or if not in competitive integrated employment, employment in an integrated setting in which the individual is working toward competitive integrated employment on a short term basis, not to exceed six months. Also relevant in statute are §7(5), which defines competitive integrated employment; §602, which makes clear that the purpose of Supported Employment program is to enable individuals with the most significant disabilities, including youth with the most significant disabilities, to achieve supported employment in a competitive integrated setting; and finally, §604, which authorizes the services to be provided under the Supported Employment program to enable individuals to achieve supported employment in competitive integrated employment.

Detail

Amends §363.1 to reflect the revised statutory definition of “supported employment,” and that the employment be in competitive integrated employment or, if it is not, that the employment be in an integrated setting in which the individual with a most significant disability is working toward competitive integrated employment on a short-term basis.

Competitive integrated employment is employment in an integrated setting that is compensated at or above minimum wage.

The proposed definition of “supported employment” would take into account some circumstances of an individual’s employment, which must always be in an integrated setting, may not meet all of the criteria for competitive integrated employment initially. In those circumstances, an individual

with a most significant disability would be considered to have achieved an employment outcome of supported employment if he or she is working in an integrated setting, on a short-term basis.

The proposed definition of “short-term basis” in this context would mean within six months of the individual entering supported employment.

Amends current §363.50(b)(3) and (b)(4) to state that the collaborative agreements developed with other relative entities for providing supported employment services and extended services may include efforts to increase opportunities for competitive integrated employment for individuals with the most significant disabilities.

Amends the balance of §363.50 to reflect in the states’ required collaborative agreements the new scope and purpose of supported employment, as well as the new time limits for providing services.

Services to Youth with the Most Significant Disabilities (§§363.6 and 363.54)

Statute

§603(d) of the Rehabilitation Act, as amended by WIOA, requires each state to reserve and use 50 percent of its allotment under the Supported Employment program to provide supported employment services, including extended services, to youth with the most significant disabilities. Other relevant statutes include §602, which highlights services to youth with the most significant disabilities in the purpose of Title VI; §604, which authorizes services specifically for youth with the most significant disabilities; §605, which identifies youth with the most significant disabilities as eligible for supported employment services; and §606, which establishes certain state plan requirements specific for services to youth with the most significant disabilities.

Detail

Amends current §363.1 to state that a purpose of the Supported Employment program is to provide individualized supported employment services, including extended services in an integrated setting, to youth with the most significant disabilities in order to assist them in achieving supported employment in competitive integrated employment. Amends current §363.3 to clarify that youth with the most significant disabilities are eligible to receive supported employment services.

Proposed §363.4(a) and (b), would implement new statutory provisions permitting the expenditure of supported employment program funds, reserved for the provision of supported employment services to youth with the most significant disabilities on extended services to youth with the most significant disabilities for up to four years following the transition from support from the designated state unit (DSU). §363.4(c) is amended to clarify that nothing in this part is to be construed as prohibiting the VR program from providing extended services to youth with the most significant disabilities with funds allotted under part 361. Proposed §363.4(d), would set out the statutory requirement that a state must coordinate its supported employment services with its VR services provided under part 361 in order to avoid duplication.

Amends current §363.11 to incorporate supported employment services, including extended services, for youth with the most significant disabilities into the existing requirements for the VR services portion of the Unified or Combined State Plan supplement. New §363.22 would implement the new statutory requirement that a state must reserve and use half of its allotment under the supported employment program for the provision of supported employment services,

including extended services, to youth with the most significant disabilities.

Finally, throughout part 363 new statutory nomenclature is conformed, such as referring to the vocational rehabilitation services portion of the Unified or Combined State Plans in 363.10 and 363.11, instead of just the state plan, and the most significant disabilities instead of severe disabilities.

Extension of Time for the Provision of Supported Employment Services (§§363.6 and 363.54)

Statute

§7(39) of the Rehabilitation Act, as amended by WIOA, revises the definition of supported employment services to mean those on-going supports provided for a period of time not to exceed 24 months.

Detail

Amends the definition of supported employment services in part 361, which will be incorporated by reference throughout part 363. The proposed definition would extend the time allowed for the provision of supported employment services from 18 months to 24 months.

Amends current §363.53 to require that an individual must transition to extended services within 24 months of starting to receive supported employment services unless a longer time period is agreed to in the individualized plan for employment. The proposed regulation would specify conditions that must be met before a DSU assists an individual in transitioning to extended services, such as ensuring the individual is engaged in supported employment that is 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, and the employment is customized for the individual consistent with his or her strengths, abilities, interests, and informed choice. Administratively, the state unit would also have to identify the source of extended services and meet all requirements for case closure.

Match Requirements for Funds Reserved for Serving Youth with the Most Significant Disabilities (§363.23)

Statute

§606(b)(7)(I) of the Rehabilitation Act, as amended by WIOA, requires that a state provide non-federal contributions in an amount not less than 10 percent of the costs of providing supported employment services, including extended services, to youth with the most significant disabilities. States are also authorized to leverage public and private funds.

Detail

Adds new §363.23 to implement these new statutory requirements. In the event that a designated state agency uses more than 50 percent of its allotment 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. Clarifies that third-party in-kind contributions are not permitted, but contributions by private entities are permitted, for match purposes under the Supported Employment program.

Amends §363.4(a)(3) to implement the new statutory provision authorizing states to use funds reserved for youth with the most significant disabilities 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.

Amends §363.11(g)(9) to incorporate both the new match requirement and the description of the activities surrounding how the state will leverage funds reserved for youth with the most significant disabilities into the assurances that a state must submit as part of its supported employment state plan supplement.

Program Income (§363.24)

Statute

§19 of the Rehabilitation Act governs the carryover of funds, including program income, received by the Supported Employment program. In addition, §108 of the Rehabilitation Act permits the VR program to transfer payments received by the Social Security Administration under part 361 to the Supported Employment program. These provisions remain substantively unchanged by WIOA.

Detail

Creates new §363.24 that would define program income, identify its uses, and clarify that program income may be treated as either an addition or deduction to the award.

In addition, §363.25 would clarify that program income may be carried over into the succeeding fiscal year.

Carryover (§363.25)

Statute

§19 of the Rehabilitation Act permits states to carry funds over to a succeeding fiscal year to the extent the state has satisfied any applicable match requirements.

Detail

Adds new §363.25 that mirrors the carryover requirements under part 361, which governs the VR program.

Explanatory Statement

Although §19 of the Rehabilitation Act has always applied to the Supported Employment program, the amendments made by WIOA change the effect of this requirement since states, for the first time, have a match requirement under this program. Therefore, a state would be permitted to carry over the 50 percent of the allotment reserved for serving youth with the most significant disabilities only if it has met the 10 percent match for those funds in the fiscal year in which the funds were awarded. A state would be able to continue to carry over the other half of the allotment, to serve all other individuals, without having to satisfy a match requirement since the statute does not impose a match requirement on that portion of the supported employment allotment.

Limitations on Administrative Costs (§363.51)

Statute

§603(c) of the Rehabilitation Act, as amended by WIOA, reduces the limit allowed for administrative costs from 5 percent of the allotment to 2.5 percent. In addition, §606(b)(7)(H) requires the state to assure in its state plan supplement for the Supported Employment program

within the VR section of the Unified or Combined State Plan, that it will not expend more than 2.5 percent of the allotment for administrative costs.

Detail

Amends §363.51(b) to implement the reduced administrative cost limit of 2.5 percent. Also proposes to amend the state plan requirements in 363.11 accordingly.

Miscellaneous Changes for Clarity

Statute

§603 of the Rehabilitation Act, as redesignated by WIOA, sets forth the procedures for allotting and reallocating funds under the Supported Employment program. This provision remains substantively unchanged by WIOA.

Detail

Amends §§363.20 and 363.21 to mirror the statutory text regarding procedures for allocating and reallocating supported employment funds.



Title V, Section 511: Limitations on Use of Subminimum Wage (34 Part 397)

Detailed Analysis

Purpose and the Department's Jurisdiction

Statute

§511 of the Rehabilitation Act, as added by WIOA, imposes limitations 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 wage or continue to employ individuals with disabilities of any age at subminimum wage. §511 also establishes the roles and responsibilities of the designated state units (DSU) for the vocational rehabilitation (VR) program and state and local educational agencies, in assisting individuals with disabilities, including youth with disabilities, who are considering employment, or who are already employed, at a subminimum wage, to maximize opportunities to achieve competitive integrated employment through services provided by VR and the local educational agencies.

Detail

Proposed §397.1 sets forth requirements the DSUs 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. These regulations should also be read in concert with: §300, which implements requirements under part B of the Individuals with Disabilities Education Act (IDEA); §361, which implements requirements for the VR program; and §363, which implements the State Supported Employment Services program.

Coordinated Documentation Process

Statute

§511(d) of the Rehabilitation Act, as added by WIOA, requires the DSU and the state educational agency to develop a coordinated process, or use an existing process, for providing youth with disabilities documentation demonstrating completion of the various actions required by §511. Other relevant statutory provisions include §511(a), regarding the actions that a youth must complete prior to beginning subminimum wage employment, and §511(c), regarding the actions that individuals with disabilities of any age must complete in order to continue employment at subminimum wage.

Detail

Proposed §397.10 would require the DSU, in consultation with the state educational agency, to develop a process that ensures individuals with disabilities, including youth with disabilities,

receive documentation demonstrating completion of the various activities required by §511 of the Rehabilitation Act, such as, but not limited to, the receipt of transition services by eligible students with disabilities under IDEA and pre-employment transition services under §113, as appropriate.

Proposed §§397.20 and 397.30 establish the documentation that the DSUs and local educational agencies, as appropriate, must provide to demonstrate completion of the various activities, required by §511(a)(2) of the Rehabilitation Act, by a youth with a disability. These include completing pre-employment transition services under proposed §361.48(a) and the determination of eligibility or ineligibility for VR services under proposed §§361.42 and 361.43.

Proposed §397.40 would establish the documentation that the 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 §511(c).

Contracting Prohibition

Statute

§511(b)(2) of the Rehabilitation Act, as added by WIOA, prohibits a local or state educational agency (as defined in §9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801)) from entering into a contract or other arrangement with an entity which holds a special wage certificate under Section 14(c) of the FLSA for the purpose of operating a program for a youth under which work is compensated at a subminimum wage.

Detail

Proposed §397.31 would prohibit a local educational agency or a state educational agency from entering into a contract with an entity that employs individuals at subminimum wage for the purpose of operating a program under which a youth with a disability is engaged in subminimum wage employment. Although §511(b)(2) refers to youth in general, the proposed regulation is limited to youth with disabilities in order to be consistent with all other provisions of §511.

With regard to this proposed provision, the Secretary specifically seeks comments regarding the Department's role and jurisdiction with respect to these provisions.

Review of the Documentation Process

Statute

§511(e)(2)(B) of the Rehabilitation Act, as added by WIOA, permits DSUs, along with the Department of Labor, to review individual documentation held by entities holding special wage certificates under the FLSA to ensure the required documentation for individuals with disabilities, including youth with disabilities, who are employed at the subminimum wage level, is maintained.

Detail

Self explanatory