June 15, 2015

Honorable Janet LaBreck, Commissioner
Rehabilitation Services Administration
U.S. Department of Education
400 Maryland Ave. SW, Room 5086
Washington, DC 20202

To Whom It May Concern:

On behalf of the three programs funded under the Developmental Disabilities Assistance and Bill of Rights Act (DD Act), we appreciate the opportunity to submit the following comments in regards to the Notice of Proposed Rule Making for State Vocational Rehabilitation Services Program, State Supported Employment Services Program; Limitations of Subminimum Wage (Docket ID:ED-2015-OSERS-0001).

For over 50 years, the central purpose of the DD Act has been to “assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs.” The DD Act, and other federal statutes have been the driving force for people with developmental disabilities to have the opportunity to live, work, and recreate in their communities as equal and full members.

Each of the three programs funded under the DD Act have a unique role in carrying out the DD Act, the programs include:

The Councils on Developmental Disabilities work with policymakers and community partners, including people with developmental disabilities and their families, to achieve systemic changes through the creation of outstanding programs and services in all areas of community life including education, employment, health care, and recreation. The National Association of Councils on Developmental Disabilities (NACDD) is the national membership organization for the Councils on Developmental Disabilities appointed by Governors, and located in every state and territory.

The University Centers for Excellence in Developmental Disabilities (UCEDDs) provide pre-service preparation, services (including technical assistance, community education, and direct services), basic and applied research, and information dissemination. UCEDDs have played key roles in every major disability
initiative over the past four decades. Many issues, such as early intervention, health care, community-based services, inclusive and meaningful education, transition from school to work, employment, housing, assistive technology, and transportation have been directly benefited by the services, research, and training provided by UCEDDs.

The National Disability Rights Network (NDRN) is the national membership association for the Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies, the nationwide network of congressionally-mandated agencies that advocate on behalf of persons with disabilities in every state, the District of Columbia, Puerto Rico, U.S. territories (American Samoa, Guam, U.S. Virgin Islands, and the Northern Mariana Islands), and there is a P&A affiliated with the Native American Consortium which includes the Hopi, Navajo and Piute Nations in the Four Corners region of the Southwest.

NDRN and the P&A / CAP network promote a society where people with disabilities exercise informed choice and self-determination. The P&A / CAP network has worked to protect the human and civil rights of individuals with disabilities of any age and in any setting. Collectively, the P&A / CAP agencies are the largest provider of legally-based advocacy services for persons with disabilities in the United States.

In addition to these comments, all three of the DD Act programs support many of the comments submitted by the Employment Taskforce of the Consortium for Citizens with Disabilities and the Collaboration to Self-Determination. As such, we have chosen to not include all of those comments in this document, but where we are especially supportive of a particular comment, we have included them below.

Thank you for considering our views. For more information, please do not hesitate to contact:

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Overall, the DD Act partners are very supportive of these proposed regulations to implement the Workforce Innovation and Opportunity Act (WIOA). People with disabilities continue to be unemployed, underemployed and impoverished when compared to other diverse groups and the general population, despite being a vital and integral part of our society as recognized in the NPRM. The WIOA takes important and critical steps to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, inclusion, and integration into all aspects of society.

It is important to note that the WIOA is only one part of many significant efforts being taken by the federal, state and local governments toward this goal. For example:

- The ADA Amendments Act of 2008 returned the ADA to its original intent in regards to who is covered by the definition of disability and provided more guidance to employers about mitigating factors and entitlement to accommodations;
- The U.S. Department of Labor revised Section 503 of the Rehabilitation Act to require federal contractors and subcontractors to actively recruit, employ, train and promote qualified individuals with disabilities;
- The National Governor’s Association developed recommendations and encouraged “employment first” policies to be developed and enacted in states; and
- There are bipartisan working groups currently working on updating the Social Security Act to make it easier for people to work or return to work.

The WIOA takes more significant steps in this effort to increase employment outcomes for people with disabilities by:

- Strengthening the alignment of the vocational rehabilitation (VR) program with other general workforce systems;
- Placing heightened emphasis throughout the Act on the achievement of competitive integrated employment; and
- Placing increased 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 successful outcomes in competitive, integrated employment and are not automatically referred to non-integrated settings with wages that are not livable.

The DD Partners believe that these proposed regulations are strong and adhere to the intent of the Act. However, the DD Partners have a few recommendations that we believe will strengthen the proposed rule and/or clarify the intent of WIOA. In some places we simply comment our strong support for particular proposed comments. Our comments and suggestions are grouped by subject heading below.

**Purpose of the VR Program (361.1)**

- Goal changed from “gainful employment” to “competitive, integrated employment” and adds economic self-sufficiency as a criterion to consider when providing VR services.
COMMENT: We strongly endorse the clarified emphasis with the new addition of economic self-sufficiency. Competitive integrated employment clearly includes an integrated setting requirement and wage/hours comparability to people without disabilities. This definition and the linkage to economic self-sufficiency highlight the recent and major shifts in thinking around employment and disability. In this context, they demonstrate a system priority that seeks to facilitate employment parity between people with and without disabilities; as well as, declare that economic self-sufficiency is a goal for everyone, including people with disabilities.

Determining Eligibility and VR Needs (361.5(c)(5)(ii)(E))

- To the maximum extent possible, a comprehensive assessment should rely on information obtained from an integrated employment setting and other integrated settings within the community.

- COMMENT: We strongly endorse the focus on integrated settings. This approach will help to ensure a more accurate assessment that is related to a person’s abilities and interests.

Competitive, Integrated Employment Defined (361.5(c)(9)(iii))

- Must be a setting typically in the community (e.g. sheltered workshops do NOT meet this definition).

- Interaction must occur as part of the “work duties...both in the particular work unit and the work site.”

- If a VR client is pursuing self-employment, he/she may not reach competitive wage rates, particularly in the early stages of the business. So, this standard would be met if their income is similar to that of people without disabilities in similar occupations with similar experience and abilities.

- COMMENT: We strongly support the Rule’s new definition that combines two existing concepts in current regulations of competitive work and integrated settings and the essential criteria to meet the definition: 1) income (earnings and benefits); 2) integration, and 3) advancement. We believe the comments could go even farther to emphasize that the intent of the law and these regulations is to ensure that wages and benefits are comparable to the prevailing wage and benefits of those without disabilities.

- COMMENT: We are particularly pleased to see the self-employment caveat which addresses a previous problem related to case closures based on initial wage rates and the fact that the earnings during the initial year may fall below competitive wage rates.
• COMMENT: We endorse the definition of ‘integrated’, particularly as it relates to the work units, as long as we are not embracing the perfect definition at the expense of eliminating job opportunities for people with disabilities. We agree that it is important to view the work units (e.g. janitorial crews) as non-integrated if the unit consists only of people with disabilities. However, in order to evaluate the impact of this potential change, additional clarification is needed about how a “work unit” is specifically defined. For example, if only 2-3 people with disabilities comprise a particular work unit that might be considered an integrated setting. But, if you apply such a theory to a small group like that, what will prevent the same rationale from being applied to a segregated work unit of 10-15 people with disabilities? It is also important to emphasize that the employment setting to which the work unit is assigned should be a competitive, integrated environment.

**Definition of Employment Outcome (361.5(c)(15))**

• Customized Employment now included within scope of definition

• Uncompensated outcomes (e.g. homemakers) are eliminated from the purpose of the VR program since they don't meet the competitive, integrated criteria.

• COMMENT: We endorse the elimination of the homemaker employment outcome because it is consistent with the uniform emphasis on competitive integrated outcomes. Any service an individual is to receive from the VR system must be connected to an ultimate employment goal. Employment outcomes include full or part-time competitive employment in an integrated setting, supported employment, or other employment in an integrated setting such as self-employment, telecommuting and business ownership, that is consistent with the individual's strengths, abilities, interests and informed choice. We agree that where homemaker is the desired employment outcome, VR must provide referrals to other appropriate programs if the individual chooses not to pursue an employment goal or is found ineligible for VR services. That being said, we also recognize that individuals with disabilities may need training to enhance their mobility skills, self-care skills and/or to increase their ability to live independently, and therefore become employed. Such training could still be provided as one of the steps in an IPE toward an individual’s eventual employment outcome.

• COMMENT: We endorse the continued emphasis on competitive wages as well as the referral requirements if an individual is determined to be ineligible for VR services. A potential concern is whether VR will know where to refer these individuals. A list of potential resources may need to be developed in order for the VR agencies to be able to make appropriate referrals.

• COMMENT: We strongly endorse the clarification of the possibility of assistance with graduate level degrees. However, the regulations should make it clear that VR
clients are not simply limited to the specific graduate degrees (law, business etc.) mentioned in the statute and the proposed regulations, consistent with long-standing requirements that employment outcomes cannot be limited to entry-level work.

**Supported Employment (361.5(c)(53))**

- Defining supported employment – makes clear that supported employment outcomes must be in competitive integrated employment
- If the individual is in an integrated setting, but is not making competitive wages, the individual must be working on a “short term” basis toward competitive integrated employment. Short term is defined as “no longer than 6 months.”

  - COMMENT: We strongly endorse the definition of supported employment because it is clear that it is competitive integrated employment, and the limitation of a six-month time frame, if an individual is in an integrated setting but is not making competitive wages. This will help to ensure that individuals with disabilities do not remain in subminimum wage employment for a long period of time. It is important to also emphasize that supported employment should not be the automatically assumed first option simply because an individual has a significant or even a most significant disability.

  - Comment: We recommend a revision of §361.5(c)(53)(i)(B) to reflect the bolded language below, as we believe the language we propose is more closely aligned to the statute:

    (B) Transitional employment, as defined in paragraph (c)(56) of this section, for individuals with the most significant disabilities due to mental illness, including youth with the most significant disabilities, constitutes supported employment.

**Supported Employment Services (361.5(c)(54))**

- Extending the time frame from 18 months to 24 months for the provision of supported employment services unless a longer time is established in the IPE.

  - COMMENT: We strongly endorse extending the time frame from 18 months to 24 months for the provision of supported employment services unless a longer time is established in the IPE. It should make it easier to get an extension, if needed, and it should be clear that VR may not find someone ineligible for services based upon the opinion that an individual may need supported employment services for a period longer than 24 months.
• COMMENT: We recommend a revision of §361.5(c)(54) with the language bolded below:

(54) Supported employment services means ongoing support services, including customized employment, and other appropriate services needed to support and maintain an individual with a most significant disability, including a youth with a most significant disability, in supported employment that are—(i) Organized and made available, singly or in combination, in such a way as to assist an eligible individual to achieve competitive integrated employment; (ii) Based on a determination of the needs of an eligible individual, as specified in an individualized plan for employment; (iii) Provided by the designated State unit for a period of time not to exceed 24 months, except that period may be extended, if necessary, in order to achieve the employment outcome identified in the individualized plan for employment; unless under special circumstances the eligible individual and the rehabilitation counselor or coordinator jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment; and (iv) Following transition, as postemployment services that are unavailable from an extended services provider and that are necessary to maintain or regain the job placement or advance in employment.

Assessment for Determining Eligibility for VR Services (361.42)

• Proposing to amend 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.

• Proposing to remove 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.

• COMMENT: We strongly support the changes that will strengthen the presumption of eligibility. Currently, many individuals with disabilities, especially those with the most significant disabilities, are determined ineligible for services.

• COMMENT: We also strongly endorse and appreciate the specific mention of advancement as an appropriate function of VR services by amending the 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. We suggest clarification as to whether this means advancement within the same field or could advancement include a switch to a totally different field, even if the individual is successfully employed?
• COMMENT: We recommend modifications to 361.42(e)(2)(iii) bolded below:

(iii) Trial work experiences must be of sufficient variety and over a sufficient period of time for the designated State unit to determine that there is sufficient clear and convincing evidence to conclude that the individual cannot benefit from the provision of vocational rehabilitation services in terms of a competitive integrated employment outcome; and ...

The elimination of this standard, which is in existing regulations, appears to be an error, as the note to the proposed regulation still comments on the meaning of the clear and convincing standard.

• COMMENT: Strongly endorse this clarification of the residency requirement. At NDRN, we have been involved in cases, for example, where a potential VR client lived in NY, but worked in NJ. There was often debate about whether the individual would be eligible for VR services in NJ. This clarification would help to eliminate that issue.

• COMMENT: Strongly endorse the elimination of the extended evaluation option as it is consistent with the focus on competitive, integrated employment and will hopefully result in more people with disabilities, previously declared ineligible for VR services, the opportunity to pursue employment. We recommend that the regulations clearly state that the assessments should take place not only in realistic work settings, but also in the community.

Requirements for a State Rehabilitation Council (§367.17)

• Changes some of the requirements regarding SRC membership

• COMMENT: We recommend an addition to and seek clarification for §367.17, and recommend that the bolded language be added below. This regulation outlines requirements for a State Rehabilitation Council under Part 361 (Requirements for a State Rehabilitation Council).

• We request amending proposed §367.17 by inserting “(including intellectual disability)” between “cognitive” and “sensory”. We also request that § 367.17 is amended by inserting “At least one representative of the Councils on Developmental Disabilities established pursuant to Sec. 125 of 42 U.S.C. 15001 et. seq.” Both changes will work to ensure that the needs of persons with intellectual and developmental disabilities have their needs adequately represented by the State Rehabilitation Councils.
- COMMENT: Support the addition of programs under the Assistive Technology Act of 1998 in the list of entities with which the SRC must coordinate its activities and the acknowledgement of the role AT plays in the ability of individuals to obtain and maintain employment.

**Informed Choice (361.52)**

- COMMENT: To ensure individuals with disabilities can truly exercise informed choice, in ensuring access to information, individuals must have access to community-based situational assessments.

- We request the bolded language be added to the proposed regulation: (4) Assisting eligible individuals or, as appropriate, the individuals representatives, in acquiring information that enables them to exercise informed choice in the development of their individualized plans for employment, which for persons with the most significant disabilities will include community-based situational assessments, with respect to...

**Semi-Annual Review of Individuals in Extended Employment (361.55)**

- Proposing to amend 361.55 to incorporate new statutory requirement that extended employment reviews be conducted semi-annually for the first two years of the individual’s employment and annually thereafter.

- COMMENT: We strongly endorse the semi-annual review approach to help increase the possibility of as many people with disabilities as possible moving into competitive, integrated employment.

**Services to Groups of Individuals / Establishment of Community Rehab Programs (361.49(A))**

- If establishing, developing or improving a community rehab program, services provided must be used to promote competitive, integrated employment.

- COMMENT: Again, we strongly endorse the continued emphasis on competitive, integrated employment. Funding should not be used for the establishment or improvement of community rehabilitation programs. The focus on establishing programs should be de-emphasized as it is completely outmoded and runs contrary to the overall competitive, integrated focus of WIOA.

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

- Proposing to require the IPE of each individual be developed within 90 days following the determination of eligibility unless the DSU and the individual agree to a specific extension of that timeframe, to assure services are delivered in a timely manner.
Proposing a requirement that the individualized plan for employment include a specific employment goal consistent with the general goal of competitive integrated employment.

Amending 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.

**COMMENT:** We support the proposed regulation to require the individualized plan for employment of each individual be developed within 90 days following the determination of eligibility unless the DSU and the individual agree to a specific extension of that timeframe, to assure services are delivered in a timely manner. This will ensure that there is no prolonged delay in the receipt of services. However, it is also important to ensure that low quality IPEs are not written simply to meet the deadline requirements. Each IPE must be individualized to meet the needs and interests of each client rather than a standardized template that is simply passed from one person to another.

**COMMENT:** We agree with the new requirement that the individualized plan for employment include a specific employment goal consistent with the general goal of competitive, integrated employment.

**COMMENT:** We are pleased to see the current 361.45(c)(1) amended 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. We recommend that a list of examples be included in the regulation by stating that, for example, disability advocacy organizations include the programs funded under the Rehabilitation Act, the Developmental Disabilities and Bill of Rights Act, the Ticket to Work program and the Individuals with Disabilities Education Act.

**COMMENT:** We endorse the inclusion of benefits planning, particularly since that can be a key stumbling block to VR participation for many who may not understand the impact of employment on their benefits.

**Order of Selection Policies (361.36)**

Proposing to give State VR Agencies operating under an Order of Selection the option 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 specific services for the purpose of maintaining employment. The decision to do this is discretionary.
• COMMENT: We strongly endorse this change. It will make it easier for already-employed individuals to more easily maintain their jobs.

**Comparable Services and Benefits (361.53)**

• The comparable benefits analysis would now be applied to auxiliary aids and accommodations before that service would be provided by VR.

• The need for collaboration often occurs when individuals are pursuing post-secondary education.

• The responsibilities for the provision of such aids and accommodations must occur at the State level.

• There would be a specific, written interagency agreement that would provide a vehicle for resolving disputes that would take into account State laws and the resources of each party.

  • COMMENT: We believe the clarification and specificity about the responsibility of each party in providing aids and accommodations to the individual would be welcomed as long as this approach does not result in the denial or delay of needed aids or accommodations that the individual must have in order to progress toward his / her employment goal. For example, if a student who required a sign language interpreter was attending college, the school would be responsible for providing the interpreter services, if the student was not a VR client, so a similar approach should apply to students who are VR clients.

**Pre-Employment Transition/Transition (361.5(c)(42))**

• Establishing new definitions of student with a disability and youth with a disability

  • Youth with a disability: 14-24 years of age, regardless of whether they are in school (361.5(c)(59))

  • Student with a disability: an individual with a disability in school who is (1) 16 years old, or younger, if determined appropriate under the Individuals with Disabilities Education Act (IDEA), unless the State elects to provide pre-employment transition services at a younger age, and no older than 21, unless the State provides transition services under IDEA at 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 section 504 of the Act. (361.5(c)(51))

• Proposing to amend current 361.22(a) to incorporate reference to pre-employment transition services as an area that must be included during interagency coordination of transition services.
• Adding a new paragraph (a)(3) to §361.65 that would require the State to reserve not less than 15 percent of its allotment for the provision of pre-employment transition services.

• Pre-employment transition services are those specific services specified in section 113 of the Act and implemented in proposed 361.48(a). These services, paid for with a percentage of funds reserved from the State’s VR allotment, are available only to those individuals who meet the definition of a student with a disability.

  • Job exploration counseling
  • Work-based learning experiences – internships; in-school/out-of-school experiences
  • Counseling on opportunities for enrollment in comprehensive transition programs or post-secondary education programs at institutions of higher education
  • Workplace readiness training to develop social and independent living skills
  • Instruction in self-advocacy which may include peer mentoring.

• Permitting 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 IPE.

  • COMMENT: We support the 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 to achieve competitive integrated employment outcomes.

  • COMMENT: We recommend that the bolded language be struck in the definition below so that the regulatory language mirrors the statutory language:

  • Student with a disability: an individual with a disability in school who is (1) 16 years old, or younger, if determined appropriate under the Individuals with Disabilities Education Act (IDEA), unless the State elects to provide pre-employment transition services at a younger age, and no older than 21, unless the State provides transition services under IDEA at 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 section 504 of the Act. (361.5(c)(51))

  • COMMENT: We are pleased to see the proposal to amend current 361.22(a) to incorporate a reference to pre-employment transition services as an area that must be included during interagency coordination of transition services. This interagency collaboration agreement cannot just be broad, general or abstract statements. The agreements must be specific, concrete and in writing. They must give clear guidance about which agency is responsible for what services and in what circumstances. The comments to the final regulations should include a reference to the need to comply with the principles established in the transition-related Technical Assistance Circular (RSA-TAC-14-03).
COMMENT: We recommend that VR be required to present the VR application package to the students at the beginning of the transition process. Even if involvement with VR is not required for program participation, this approach would help to ensure VR's early involvement in the overall process and ensure that, consistent with informed choice, it is up to the family to decide when to apply for VR services. It would also trigger the availability and support of Client Assistance Program (CAP) staff, if needed.

COMMENT: While we support the list of pre-employment services, we feel that it is important to emphasize that actual work experiences in integrated work settings in the community is the most important of the list and the one that is research-based.

COMMENT: We recommend the addition of a definition of “Work-Based Learning” that is aligned with definition of the School-to-Work Opportunity Act of 1994.

COMMENT: We strongly support language that 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 do not require a specific reservation of funds.

COMMENT: “If a State considers post-secondary (college) courses to be "secondary education" then they may be considered transition services and paid with Part B funds. Letter to Dude, 113 LRP (OSEP Sept. 3, 2013).”

Based upon this letter, it is important to clarify that secondary-age students with disabilities who are still receiving services under IDEA, but may be receiving IDEA services outside of the traditional high school setting (e.g. a college program for students with intellectual disabilities) would still be eligible for pre-employment transition services.

Due Process (361.57)

- RSA has not incorporated in the proposed regulations any of the changes to the Rehabilitation Act made through WIOA regarding procedures for an individual to seek review of a decision by VR. The procedures for seeking review, commonly referred to as the VR due process procedures, are codified at 29 U.S.C. § 722(c). The proposed regulations in regards to review procedures, 34 C.F.R. § 361.57, namely the right to mediation, an impartial hearing, and review in federal court, are verbatim as they currently exist (last issued in 2001). Below is what we recommend RSA change in the regulations based on the statutory amendments.

NOTICE REQUIREMENTS

- A VR agency must provide written notice to individuals about the right to seek review of a VR decision at certain times during the VR process as contained in 29
U.S.C. § 722(c)(2). WIOA added subparagraph (iv) to this notice requirement. This new provision requires that in the written notice about the due process requirements, the VR agency must now state any deadline the State imposes by which an individual must request mediation or an impartial hearing, and the required procedures the individual must follow in order to request mediation or an impartial hearing.

- COMMENT: RSA must add this new requirement to the other requirements for the written notice that currently exist in the regulations at 34 C.F.R. § 361.57(b)(1). A new subparagraph (iv) to the regulations parroting the statutory language would be sufficient.

**IMPARTIAL HEARING OFFICER AUTHORITY**

- COMMENTS: Under paragraph (c)(5) of §722, the WIOA amendments added the requirement that an impartial hearing officer “review the evidence presented.” Furthermore, Congress clarified the authority of the impartial hearing officer by adding the following sentence that “[T]he impartial hearing officer shall have the authority to render a decision and require actions regarding the applicant’s or eligible individual’s vocational rehabilitation services under this subchapter.” Neither of these changes are reflected in the RSA proposed regulations. RSA needs to revise 34 C.F.R. § 361.57(e) to reflect these changes.

- COMMENT: We recommend that § 361.57(e)(3) be revised and rewritten as follows:

  “(3) The impartial hearing officer –
  Shall have the authority to require actions of the designated State unit, or other person or entity as appropriate, regarding the applicant’s or individual’s vocational rehabilitation services based on the written decision as required in subparagraph (ii).

  Must make a decision based on the evidence presented as part of the hearing, and on the provisions of the Act, Federal vocational rehabilitation regulations, the approved vocational rehabilitation services portion of the Unified or Combined State Plan, and State regulations and policies that are consistent with Federal requirements within 30 days of the completion of the hearing. Such decision shall be in writing, include a full report of the findings and the grounds for the decision, and be provided to the individual, or if appropriate, the individual’s representative and to the State unit.”

**KNOWLEDGE OF IMPARTIAL HEARING OFFICERS**

- COMMENTS: The WIOA amendments added one word, “Federal” before the word “laws,” to the requirement that an individual must have certain knowledge before they can be included in the list of impartial hearing officers. 29 U.S.C. § 722(c)(5)(B). The amended statutory provision now reads, in part,
“(B) List[,] The designated State unit shall maintain a list of qualified impartial hearing officers who are knowledgeable about Federal laws (including regulations) related to the provision of vocational rehabilitation services under this subchapter from which the officer described in subparagraph (A) shall be selected. * * *”

RSA did not change the definition of the impartial hearing officer in the revised regulations. See 32 C.F.R. § 361.5(c)(24). This is significant since the prior statute simply said “laws” with no qualifier, and the RSA regulatory definition contains a number of other areas the hearing officer should be knowledge about but does not include federal laws, just the regulations.

• COMMENT: We recommend the following new language to 361.5(c)(24)(D):

“(24) Impartial Hearing Officer.
(i) Impartial Hearing Officer means an individual who –
* * *
(D) Has knowledge of Federal laws, including the Act and these regulations, relating to the provision of vocational rehabilitation services.”

REQUIREMENT FOR MEDIATION AND AN IMPARTIAL HEARING

• COMMENTS: Congress added the following sentence to § 722(c)(1) concerning the general procedures for requesting a hearing and mediation:

“The [state] procedures shall allow an applicant or an eligible individual the opportunity to request mediation, an impartial due process hearing, or both procedures.”

• COMMENT: Congress added the new provision, but did not amend § 722(c)(4) which requires that states develop mediation procedures that “at a minimum, shall be available whenever a hearing is requested . . . [,]” and appears to establish a floor for when mediation needs to be offered. In order to render the new sentence in § 722(c)(1) meaningful, the proper interpretation must be that an individual can request either mediation or a hearing, or both, and that neither process is dependent on the other. In order to remove a potential conflict between § 722(c)(1) and (c)(4), RSA by regulation needs to provide that states must offer both the hearing and the mediation options to the client independent of the other option. If the individual has requested a hearing, but has not yet requested mediation, to be consistent with § 722(c)(4) the state must offer the mediation option again. Offering the ability to request mediation, of course, does not require participation in mediation, as both VR and the VR client or applicant can refuse to mediate, but the VR client or applicant has the right under the Act in the first instance to request mediation whether or not a hearing is also requested.

Sub-Minimum Wages (397)

• Proposing a new set of regulations to implement Section 511 to set 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.

- Prohibiting employers 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.

- Specifying that 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.

- COMMENT: We strongly support the intent of this section to limit youth with disabilities from being placed into subminimum wage in non-integrated settings. Currently, too many youth are placed directly from school into sheltered workshops at very low wages without ever having the opportunity to try competitive integrated work or even explore their interests and abilities.

- COMMENT: WIOA and implementing regulations impose limitations on the payment of subminimum wages by employers who hold special wage certificates under the Fair Labor Standards Act. A critical piece to the subminimum wage discussion should be informed choice. This outcome should not be determined by VR, it should be a choice of the person based on facts (rather than misconceptions and professional judgement). This is a big life decision – basically asking a person to accept discriminatory practices based on their disability. Therefore, we propose that the final rule reference the requirements under Informed Choice (361.52).

- COMMENT: We recommend the following modification to 397.30 as set out in bold, below:

  § 397.30 What are the responsibilities of a local educational agency to youth with disabilities who are known to be seeking subminimum wage employment?

- COMMENT: We recommend adding the language in bold, below. Of the documentation to demonstrate a youth with a disability’s completion of the actions described in §397.20(a), a local educational agency, as defined in § 397.5(b)(1), can provide the youth with documentation that the youth has received transition services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), such as transition services available to the individual under section 614(d) of that act (20 U.S.C. 1414(d)). The local educational agency shall retain copies of such documentation, including for review by the Client Assistance Program established under 34 C.F.R.
part 370 or a Protection and Advocacy agency established under 42 U.S.C. 15041 et. seq.

- COMMENT: We recommend that language should be added that specifies what a “reasonable time” to work towards an employment goal is for youth with disabilities not in supported employment, before an unsuccessful case closure occurs. We suggest a 24-month timeframe.

- COMMENT: We suggest removing the language that allows a contractor working for the public VR system to conduct documentation reviews of 14(c) holders, as this is in conflict with Section 511. However, if contractors are going to be allowed to conduct these documentation reviews, additional language should be developed regarding the parameters for such contractors, including a prohibition on organizations that are 14(c) certificate holders from conducting such reviews, as that would be a conflict of interest.

- COMMENT: We recommend that language be added that specifies timelines for reviews of documentation, and that enhances enforcement mechanisms, including specifying that the Client Assistance Program has jurisdiction in reviewing compliance with Section 511.

- COMMENT: We recommend that language be added requiring state education agencies to issue clear policy directives to local education agencies regarding the prohibition on state and local education agencies contracting with 14(c) certificate holders in order to pay individual’s subminimum wage.

- COMMENT: We recommend that language be added regarding the responsibilities of state education agencies in enforcement of this provision.

- COMMENT: We have concern about whether CAP advocates will have appropriate access to ensure that the documentation is completed, especially for those individuals making subminimum wage who may not be VR clients. We have an additional concern that VR actually provides meaningful career counseling to individuals rather than just checking a box off a checklist.

- COMMENT: We support specifying that the DSU will be responsible, in consultation with the State educational agency, to develop a process, or utilize an existing process, to document completion by youth with disabilities of the required activities, as applicable, under section 511.

- COMMENT: We strongly agree with the provisions in the proposed regulations to prohibit a local education 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. However, we are requesting a modification to the
proposed language to be consistent with the statutory language and intent, as noted below.

- **COMMENT:** DOL also has responsibility to oversee VR and the SEA as they implement these collaborative agreements and ensure that subminimum wage employment is not being used contrary to the statute.

- **COMMENT:** We recommend the modifications to the proposed regulatory language as highlighted in bold, below. This is required in order to be consistent with 29 U.S.C. 794g(a).

  - “Assurance that, in accordance with 34 C.F.R. 397.31, neither the State educational agency nor the local educational agency will enter into a contract, **sub-contract** or other arrangement with an entity, as defined in 34 CFR 397.5(d), for the purpose of operating a program under which a youth with a disability is engaged in subminimum wage employment”.  
  
  Nor can an LEA or SEA operate such a program where a youth with a disability is engaged in subminimum wage employment.