



# LEAD CENTER

## POLICY BRIEF

# Summary Description of FINAL RULES Implementing Title I (State VR Program), Title VI (State Supported Employment Services Program), and Section 511 (Limitations on Use of Subminimum Wage) of the Rehabilitation Act, as amended by Title IV OF WIOA

**August 19, 2016**

The purpose of this policy brief is to provide a summary description of the Department of Education’s Final Rules implementing Title I of the Rehabilitation Act (State Vocational Rehabilitation Program), Title VI of the Rehabilitation Act (State Supported Employment Services Program), and Section 511 of the Rehabilitation Act (Limitations on Use of Subminimum Wage), as amended by Title IV of the Workforce Innovation and Opportunity Act (WIOA). This policy brief does **not** include an analysis of the content of the Final Rule. The Final Rules were published in the Federal Register on August 19, 2016.

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## SUMMARY DESCRIPTION:

### FINAL RULE IMPLEMENTING TITLE I OF THE REHABILITATION ACT OF 1973, (STATE VOCATIONAL REHABILITATION PROGRAM), AS AMENDED BY TITLE IV OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

#### INTRODUCTION AND OVERVIEW

On July 22, 2014, President Obama signed into law [Public Law No. 113-128](#), the Workforce Innovation and Opportunity Act (WIOA). WIOA is the first legislative reform of the public workforce development system in more than 15 years. WIOA supersedes the Workforce Investment Act of 1998 (WIA). Title I of WIOA reaffirms the role of the customer-focused one-stop delivery system, a cornerstone of the public workforce development system, and enhances and increases coordination among several key employment, education, and training programs. Title IV of WIOA includes amendments to the Rehabilitation Act of 1973, including amendments to Title I of the Rehabilitation Act, which authorizes funding for the State Vocational Rehabilitation (State VR) Program.

On August 19, 2016, the Departments of Labor (DOL) and Education (ED) (or collectively, Departments) published in the Federal Register a Joint Final Rule to implement jointly administered activities authorized under Title I of WIOA (Joint WIOA Final Rule). In addition to this Joint WIOA Final Rule, the Departments issued separate final rules to implement program specific requirements of WIOA that fall under each Department's purview. The DOL issued a Final Rule governing program-specific requirements under Titles I and III of WIOA (DOL WIOA Final Rule). The Joint WIOA Final Rule and the DOL Final Rule are summarized in a separate policy brief issued by LEAD—*Summary Description From A Disability Perspective: FINAL RULE Implementing Title I of The Workforce Innovation and Opportunity Act (Workforce Development Systems)* On the same day, ED issued several final rules, including two final rules implementing all program-specific requirements for programs authorized under the Rehabilitation Act of 1973, as amended by Title IV of WIOA.

The purpose of this policy brief is to describe some of the most significant changes to the State VR Program included in the final rule issued by ED to implement Title I of the Rehabilitation Act, as amended by Title IV of WIOA. This policy brief is not intended to be comprehensive but rather to highlight select provisions in order to assist people with disabilities and other interested stakeholders to access policies included in the lengthy final rule. The final rule reflects changes made as a result of public comments received to the [Notice of Proposed Rulemaking](#) (NPRM) "State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage" that was published on April 16, 2015.

To implement the changes to the Rehabilitation Act made by WIOA, the Secretary of Education amends the regulations governing the State VR program [34 CFR part 361] and the State Supported Employment Services Program [34 CFR part 363],

administered by the Rehabilitation Services Administration (RSA), within the Office of Special Education and Rehabilitative Services. In addition, the Secretary of Education issues regulations in new 34 CFR part 397 that implement Section 511 of the Rehabilitation Act (Limitations on Use of Subminimum Wages).

The Preamble to the final rule highlights the major regulatory changes included in the final rule to implement the amendments to Title I of the Rehabilitation Act (State VR Program) included in Title IV of WIOA.

**First, the final rule strengthens the alignment of the State VR Program with other core components of the workforce development system by imposing requirements governing unified strategic planning, common performance accountability measures, and the one-stop delivery system.** In so doing, the final rule places heightened emphasis on coordination and collaboration at the Federal, State, and local levels to ensure a streamlined and coordinated service delivery system for job-seekers, including those with disabilities, and employers. [81 FR 55630 (August 19, 2016)]

**Second, the final rule emphasizes the achievement of competitive integrated employment.** The foundation of the State VR Program is the principle that individuals with disabilities, including individuals with the most significant disabilities, are capable of achieving high-quality, competitive integrated employment when provided necessary services and supports. To increase the employment of individuals with disabilities in the competitive, integrated labor market, the workforce system must provide individuals with disabilities opportunities to participate in job-driven training and to pursue high quality employment outcomes. [81 FR 55631 (August 19, 2016)]

**Third, the final rule emphasizes the provision of services to students and youth with disabilities to ensure that they have meaningful opportunities to receive the services, including training and other supports, they need to achieve employment outcomes in competitive integrated employment.**[81 FR 55631 (August 19, 2016)]

The Preamble to the final rule also highlights the major regulatory changes needed to implement the amendments to the State Supported Employment Services Program authorized under Title VI of the Rehabilitation Act, as amended by Title IV of WIOA. **The amendment to the rule implementing the State Supported Employment Services program maximize the potential of individuals with disabilities, especially those with the most significant disabilities, to achieve competitive integrated employment and to expand services for youth with the most significant disabilities.** [81 FR 55632 (August 19, 2016)]

**Section 511 of the Rehabilitation Act (Limitations on Use of Subminimum Wages), as added by WIOA, imposes requirements on employers who hold special wage certificates under Section 14(c) of the Fair Labor Standards Act (FLSA) that must be satisfied before the employers may hire youth with disabilities at subminimum wages or continue to employ individuals with disabilities of any age at the subminimum wage level.** Section 511 also establishes the roles and responsibilities of Designated State Units (DSUs) for the State 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 the State VR Program and local educational agencies. The limitations imposed by Section 511 require individuals with disabilities, including youth with disabilities, to satisfy certain service-related requirements in order to start or maintain, as applicable, subminimum wage employment. [81 FR 55632 (August 19, 2016)]

## **EFFECTIVE DATES**

The final rule is effective on **September 19, 2016**, except for amendatory instructions 2, 3, and 4 amending 34 CFR 361.10 (Submission, approval and disapproval of State plan), 361.23 (reserved), 361.40 (Reports; Evaluation standards and performance standards), which are effective October 2015. [81 FR 55630 (August 19, 2016)]

## **STATE VOCATIONAL REHABILITATION SERVICES PROGRAM**

### **DEFINITIONS [§361.5]**

#### **Competitive integrated employment and integrated setting. [§361.5(c)(9); §361.5(c)(32)]**

Title I of the Rehabilitation Act, as amended by WIOA adds a new term, “competitive integrated employment,” to the definition section. [Section 7(5)]

Although this is a new statutory term, according to ED, the term and its definition generally represent a consolidation of two separate definitions and their terms in pre-existing 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 pre-existing regulatory definitions. [81 FR 55641 (August 19, 2016)]

The final rule specifies that the term “competitive integrated employment” means work that—

- 1) Is performed on a full-time or part-time basis (including self-employment) and for which an individual is compensated at a rate that—
  - a) Is not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act or the rate required under the applicable State or local minimum wage law for the place of employment;
  - b) Is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; and
  - c) In the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities and who are self-employed in similar occupations

- or on similar tasks and who have similar training, experience, and skills; and
- d) Is eligible for the level of benefits provided to other employees; and
- 2) Is at a location—
- a) Typically found in the community; and
- b) Where the employee with a disability interacts for the purpose of performing the duties of the position with other employees within the particular work unit and the entire work site, and, as appropriate to the work performed, other persons (e.g., customers and vendors), who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons; and
- 3) Presents, as appropriate, opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions.

The Preamble to the final rule includes clarifications to key phrases specified in the definition of the term “competitive integrated employment.” According to ED:

- The substance of the definition is familiar to DSUs and does not diverge from prior regulations, long-standing Department policy, practice and the heightened emphasis on competitive integrated employment throughout the Act, as amended by WIOA. [81 FR 55641 (August 19, 2016)]
- When the integrated location criteria are properly applied by DSUs, group and enclave employment settings operated by businesses formed for the purpose of employing individuals with disabilities will not satisfy the definition of “competitive integrated employment.” [81 FR 55642 (August 19, 2016)]
- The factors that generally would result in a business being considered “not typically found in the community” include (1) the funding of positions through Javits-Wagner-O’Day Act (JWOD) contracts; (2) allowances under the FLSA for compensatory subminimum wages; and (3) compliance with a mandated direct-labor ratio of persons with disabilities. [81 FR 55643 (August 19, 2016)]
- The focus of whether the setting is integrated should be on the interaction between employees with and without disabilities, and not solely on the interaction of employees with disabilities with people outside the work unit. For example, the interaction of individuals with disabilities employed in a customer service center with other persons over the telephone, regardless of whether these persons have disabilities, would be insufficient by itself to satisfy the definition. Instead, the interaction of primary consideration should be that between the employee with the disability and his or her colleagues without disabilities in similar positions. [81 FR 55643 (August 19, 2016)]

- The phrase “work unit” may refer to all employees in a particular job category or to a group of employees working together to accomplish tasks, depending on the employer’s organizational structure. [81 FR 55644 (August 19, 2016)]
- Entities that are set up specifically for the purpose of providing employment to individuals with disabilities will likely not satisfy the definition’s criteria. The high percentage of individuals with disabilities employed with these entities most likely would result in little to no opportunities for interaction between individuals with disabilities and nondisabled individuals. These entities, therefore, likely would be considered sheltered or non-integrated employment sites. Nonetheless, DSUs must apply these criteria on a case-by-case basis when determining if an individual’s employment is in an integrated location and satisfies the definition of “competitive integrated employment.” [81 FR 556441 (August 19, 2016)]
- Individuals with disabilities hired by community rehabilitation programs to perform work under service contracts, either alone, in mobile work crews, or in other group settings (e.g., landscaping or janitorial crews), whose interaction with persons without disabilities (other than supervisors and service providers) while performing job responsibilities, is with persons working or visiting the work locations (and not with employees of the community rehabilitation programs without disabilities in similar positions) would not be performing work in an integrated setting. [81 FR 55644 (August 19, 2016)]

### **Customized employment. [§361.5(c)(11)]**

Section 7(7) of the Rehabilitation Act, as amended by WIOA, adds and defines the term “customized employment.” The definition in the final rule, §361.5(c)(11), mirrors the statute.

The definition for the term “customized employment” means competitive, integrated employment for an individual with a significant disability that is based on: an individualized determination of the unique strengths, needs, and interests of the individual with a significant disability; is designed to meet the specific abilities of the individual with a significant disability and the business needs of the employer; and is carried out through flexible strategies, such as:

1. Job exploration by the individual; and
2. Working with an employer to facilitate placement including:
  - Customizing a job description based on current employer needs or on previously unidentified and unmet employer needs;
  - Developing a set of job duties, a work schedule and job arrangement, and specifics of supervision (including performance evaluation and review), and determining a job location;
  - Using a professional representative chosen by the individual, or if

elected self-representation, to work with an employer to facilitate placement; and

- Providing services and supports at the job location.

### **Employment outcome. [§361.5(c)(15)]**

Section 7(11) of the Rehabilitation Act, as amended by WIOA, revises the definition of “employment outcome” to include “customized employment” within its scope. The final rule amends the definition of “employment outcome” in §361.5(c)(15) to specifically identify customized employment as an employment outcome under the VR program. ED also amends the definition to require that all employment outcomes achieved through the State VR Program be in competitive integrated employment or supported employment, thereby eliminating uncompensated outcomes from the scope of the definition for purposes of the State VR Program. Note, under the final rule a DSU may continue services to individuals with uncompensated employment goals on their approved IPE prior to September 19, 2016 until June 30, 2017, unless a longer period of time is required based on the needs of the individual with a disability, as documented in the individual’s service record. [81 FR 55744 (August 19, 2016)]

### **Pre-employment transition services. [§361.5(c)(42)]**

Section 7(30) of the Rehabilitation Act, as amended by WIOA, defines the term “pre-employment transition services” to mean those specific services specified in Section 113 of the Rehabilitation Act and implemented in §361.48(a). Consistent with the statute, the term is implemented in §361.5(c)(42).

### **Student with a disability. [§361.5(c)(51)]**

Section 7(37) of the Rehabilitation Act, as amended by WIOA, defines the term “student with a disability” to mean 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 Rehabilitation Act (29 U.S.C. 794). The term is implemented in §361.5(c)(51). It applies to all students enrolled in educational programs, including postsecondary education programs, so long as they satisfy the age requirements set forth in final 361.5(c)(51). The definition is also inclusive of secondary students who are homeschooled, as well as students in other non-traditional secondary education programs. ED believes that this broader interpretation will increase the potential of DSUs to maximize the use of funds reserved for the provision of pre-employment transition services by increasing the number of students who may receive these services.

### **Supported employment. [§361.5(c)(53)]**

Section 7(38) of the Rehabilitation Act, as amended by WIOA, revises the 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 toward such an outcome on a short-term basis for such work to qualify as supported employment.

These policies are reflected in §361.5(c)(53), which also specifies that an individual be considered to be working on a “short-term basis” toward competitive integrated employment so long as the individual can reasonably anticipate achieving a competitive integrated employment within six months of achieving a supported employment outcome or in limited circumstances, within a period not to exceed 12 months from the achievement of the supported employment outcome, if a longer period is necessary based on the needs of the individual, and the individual has demonstrated progress toward competitive earnings based on information contained in the service record.

According to ED, the Preamble to the final rule specifies that “Thus, in limited circumstances, individuals in supported employment may not have achieved employment that satisfies all the criteria of “competitive integrated employment” initially since they will be earning non-competitive wages on a short-term basis. This very narrow exception is the only instance in which the statute permits that all criteria of ‘competitive integrated employment’ need not be satisfied for an individual to achieve an employment outcome. However, even under this narrow exception, the expectation is that, after a short period of time, the individual will achieve competitive integrated employment in supported employment.” [81 FR 55647 (August 19, 2016)]

### **Supported employment services. [§361.5(c)(54)]**

Section 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. Consistent with the statute, the final rule 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. The final rule also clarifies that supported employment services means ongoing support services “including customized employment.”

### **Youth with a disability. [§361.5(c)(59)]**

Section 7(42) of the Rehabilitation Act, as amended by WIOA, defines the term “youth with a disability” to mean an individual with a disability who is not younger than 14 years of age and not older than 24 years of age. The term is implemented in §361.5(c)(59).

## **STATE PLAN**

### **Coordination [§361.22; §361.24] and Shared Funding [§361.27]**

Section 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, WIOA adds a new Section 101(c) to the Rehabilitation Act that 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, Section 511 of the Act (Limitations on Use of Subminimum Wage), as amended by WIOA, imposes several requirements that are particularly related to documentation of services for DSUs and State and local educational agencies with regard to youth with disabilities seeking subminimum wage employment.

The final rule amends pre-existing §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. In addition, the final rule amends pre-existing §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.

Further, the final rule amends pre-existing §361.22(b) by adding new clauses (5) and (6) to incorporate, by reference, certain requirements from Section 511 into the formal interagency agreement between the DSU and the State educational agency. More specifically, the formal interagency agreement must provide for:

- Coordination necessary to satisfy documentation requirements set forth in the regulation implementing Section 511 (34 CFR part 397) with regard to students and youth with disabilities who are seeking subminimum wage employment; and
- Assurance that neither the State educational agency nor the local educational agency will enter into a contract or other arrangement with an employer, or a contractor or subcontractor of that employer that holds a special wage certificate under Section 14(c) of FLSA for the purpose of operating a program under which a youth with a disability is engaged in work compensated at a subminimum wage.

Finally, the final rule adds a new paragraph (c) under §361.22 to incorporate the construction clause in Section 101(c) of the Act, as amended by WIOA.

Section 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 the State VR Program and other non-educational programs. §361.24(a) of the final rule incorporates non-educational agencies serving out-of-school youth to the extent that such Federal, State, and local agencies and programs are not carrying out activities through the statewide workforce development system as another entity with which the VR agency must coordinate. Pre-existing §361.24(c) and (d), which govern coordination between the DSUs and employers and Section 121 projects, respectively, are amended to include transition services among the matters that must be included in coordination efforts.

§361.24(f) of the final rule specifies that the vocational rehabilitation services portion of

the Unified or Combined State Plan must include an assurance that the DSU has entered into a formal cooperative agreement with the State Medicaid Agency and the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities, with respect to the delivery of vocational rehabilitation services, including extended services for individuals with the most significant disabilities who have been determined eligible for home and community-based services.

§361.24(g) of the final rule specifies that the vocational rehabilitation services portion of the Unified or Combined State Plan must describe how the designated State agency will collaborate with the State agency responsible for administering the State Medicaid Program, the State agency responsible for providing services for individuals with developmental disabilities, and the State agency responsible for providing mental health services, to develop opportunities for community-based employment in integrated settings, to the greatest extent practicable.

§361.27 of the final rule specifies that if the vocational rehabilitation services portion of the Unified or Combined State Plan provides for the designated State agency to share funding and administrative responsibility with another agency or local public agency to carry out a joint program to provide services to individuals with disabilities, the State must submit to the Secretary of Education for approval a plan that describes its shared funding and administrative arrangement.

### **Order of Selection [§361.36]**

Section 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.

The final rule amends pre-existing §361.36(a)(3) by adding a new paragraph (v) that requires 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 State's order of selection.

### **EVALUATION STANDARDS AND PERFORMANCE INDICATORS [§361.40]**

Under Title I of the Rehabilitation Act, as amended by WIOA, the State VR Program will no longer be subject to its own set of performance standards and indicators established by the Department of Education. Section 106 of the Rehabilitation Act, as amended by WIOA, now requires that the State VR Program comply with the common performance accountability measures established under Section 116 of WIOA, which apply to all core programs of the workforce development system. To that end, the Departments of Labor and Education have developed final joint regulations to implement these requirements. The final joint regulations regarding the performance accountability system, are incorporated in subpart E of this regulation.

## **ELIGIBILITY [§361.42]**

Section 102(a)(1) of the Rehabilitation Act, as amended by WIOA, includes clarifications of the rules regarding eligibility for VR services. Under §361.42(a), the DSU's determination of an applicant's eligibility for VR services must be based only on the following requirements:

- 1) A determination by qualified personnel that the applicant has a physical or mental impairment;
- 2) A determination by qualified personnel that the applicant's physical or mental impairment constitutes or results in a substantial impediment to employment for the applicant; and
- 3) A determination by a qualified vocational rehabilitation counselor employed by the DSU that the applicant requires VR services to prepare for, secure, retain, advance in, or regain employment.

For purposes of an assessment for determining eligibility and VR needs, an individual is presumed to have a goal of an employment outcome. Also, the DSU must presume that an applicant who meets the eligibility requirements can benefit in terms of an employment outcome. Further, any eligible individual must intend to achieve an employment outcome. The applicant's completion of the application process for VR services is sufficient evidence of the individual's intent to achieve an employment outcome, and no additional demonstration on the part of the applicant is required.

Prior to any determination that an individual with a disability is unable to benefit from VR services in terms of an employment outcome because of the severity of that individual's disability or that the individual is ineligible for VR services, the DSU must conduct an exploration of the individual's abilities, capabilities, and capacity to perform in realistic work situations. The DSU must develop a written plan through the use of trial work experiences, which must be provided in competitive integrated settings to the maximum extent possible, consistent with informed choice and rehabilitation needs of the individual.

Trial work experiences must be of sufficient variety and over a sufficient period of time for the DSU to determine that there is sufficient evidence to conclude that the individual can benefit from the provision of VR services in terms of an employment outcome or there is clear and convincing evidence that due to the severity of the individual's disability, the individual is incapable of benefitting from the provision of VR services in terms of an employment outcome; and the DSU must provide appropriate supports to accommodate the rehabilitation needs of the individual during the trial work period.

"Clear and convincing" means that the DSU has a high degree of certainty before it can conclude that an individual is incapable of benefitting from VR services in terms of an employment outcome. The "clear and convincing" standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case-by-case basis. The term "clear" means unequivocal.

WIOA amends Section 102(a)(2)(B) of the Rehabilitation Act by removing the limited exception to trial work experiences, whereby State 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 Act, this was the term used in the pre-existing 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. The final rule removes paragraph (f) from pre-existing §361.42 and redesignates (g) as (f). §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 §361.42(e).

### **PRE-EMPLOYMENT TRANSITION SERVICES. [§361.48]**

The Rehabilitation Act, as amended by WIOA includes a new Section 113 that requires State VR agencies to coordinate with local educational agencies in providing, or arranging for the provision of, pre-employment transition services for all students with disabilities in need of such services. Section 110(d) of the Rehabilitation Act and §361.65(a)(3) of the final rule require States to reserve 15 percent of their State VR allotment to provide these services.

A new ED §361.48(a) is added to the final rule implementing the provision of pre-employment transition services. §361.48(a)(1) permits 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 §361.48(b) when specified in an individualized plan for employment.

§361.48(a)(2) specifies the required pre-employment transition services that are provided directly to students with disabilities. The DSU must provide the following pre-employment transition services:

- (i) Job exploration counseling;
- (ii) Work-based learning experiences, which may include in-school or after school opportunities, or experience outside the traditional school setting (including internships), that is provided in an integrated environment in the community to the maximum extent possible;
- (iii) Counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education;
- (iv) Workplace readiness training to develop social skills and independent living;  
and
- (v) Instruction in self-advocacy (including instruction in person-centered

planning), which may include peer mentoring (including peer mentoring from individuals with disabilities working in competitive integrated employment).

§361.48(a)(3) describes 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. Funds available and remaining after the provision of the required activities may be used to improve the transition of students with disabilities from school to postsecondary education or an employment outcome by:

- (i) Implementing effective strategies to increase the likelihood of independent living and inclusion in communities and competitive integrated workplaces;
- (ii) Developing and improving strategies for individuals with intellectual disabilities and individuals with significant disabilities to live independently; participate in postsecondary education experiences; and obtain, advance in, and retain competitive integrated employment;
- (iii) Providing instruction to vocational rehabilitation counselors, school transition personnel, and other persons supporting students with disabilities;
- (iv) Disseminating information about innovative, effective, and efficient approaches to achieve the goals of this section;
- (v) Coordinating activities with transition services provided by local educational agencies under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.);
- (vi) Applying evidence-based findings to improve policy, procedure, practice, and the preparation of personnel, in order to better achieve the goals of this section;
- (vii) Developing model transition demonstration projects;
- (viii) Establishing or supporting multistate or regional partnerships involving States, local educational agencies, Designated State Units, developmental disability agencies, private businesses, or other participants to achieve the goals of this section; and
- (ix) Disseminating information and strategies to improve the transition to postsecondary activities of individuals who are members of traditionally unserved and underserved populations.

§361.48(a)(4) describes the responsibilities for pre-employment transition coordination to be carried out by State VR agencies. Each local office of a designated State unit must carry out responsibilities consisting of:

- (i) Attending individualized education program meetings for students with disabilities, when invited;
- (ii) Working with the local workforce development boards, one-stop centers, and

employers to develop work opportunities for students with disabilities, including internships, summer employment and other employment opportunities available throughout the school year, and apprenticeships;

(iii) Working with schools, including those carrying out activities under section 614(d) of the IDEA, to coordinate and ensure the provision of pre-employment transition services under this section; and

(iv) When invited, attending person-centered planning meetings for individuals receiving services under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.);

Section 103(a)(15) of the Act, as amended by WIOA, adds pre-employment transition services among the scope of VR services that may be provided in accordance with an individual's individualized plan for employment. The final rule reorganizes §361.48 so that all pre-existing provisions are retained in §361.48(b). The final rule also incorporates, 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).

#### **VR SERVICES FOR INDIVIDUALS WITH DISABILITIES [§361.48(b)]**

§361.48(b) of the final rule lists the services for individuals who have applied for or been determined eligible for VR services. Services added to the pre-existing list include customized employment and transition services for students and youth with disabilities that facilitate the transition from school to postsecondary life, such as achievement of an employment outcome of competitive integrated employment, or pre-employment transition services for students.

#### **VR SERVICES FOR GROUPS OF INDIVIDUALS WITH DISABILITIES [§361.49(a)]**

§361.49(a)(1) regarding the establishment, development, or improvement of a community rehabilitation program, is revised to clarify that services provided under this authority must be used to promote competitive integrated employment, including customized and supported employment.

#### **REVIEW OF INDIVIDUALS IN EXTENDED EMPLOYMENT AND OTHER EMPLOYMENT UNDER FLSA SPECIAL CERTIFICATES [§361.55]**

Section 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 State VR Program, obtain subminimum wage employment or extended employment. §361.55 is amended to incorporate the new statutory requirement that these reviews be conducted semi-annually for the first two years of the individual's employment and annually thereafter.

## STATE SUPPORTED EMPLOYMENT SERVICES PROGRAM

### PURPOSES AND DEFINITION [§363.1]

§363.1 of the final rule makes it clear that the purpose of the State Supported Employment Services Program authorized under Title VI of the Rehabilitation Act of 1973, as amended by Title IV of WIOA, is to enable individuals with the most significant disabilities, with on-going supports, to achieve an employment outcome of supported employment in competitive integrated employment.

Consistent with §361.5(c)(53) (the definition of supported employment under Title I of the Rehabilitation Act), §363.1(b), revises the 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 toward such an outcome on a short-term basis for such work to qualify as supported employment.

The final rule specifies that an individual will be considered to be working on a “short-term basis” toward competitive integrated employment so long as the individual can reasonably anticipate achieving a competitive integrated employment within six months of achieving a supported employment outcome or in limited circumstances, within a period not to exceed 12 months from the achievement of the supported employment outcome, if a longer period is necessary based on the needs of the individual, and the individual has demonstrated progress toward competitive earnings based on information contained in the service record.

According to ED, the Preamble to the final rule specifies that “Thus, in limited circumstances, individuals in supported employment may not have achieved employment that satisfies all the criteria of “competitive integrated employment” initially since they will be earning non-competitive wages on a short-term basis. This very narrow exception is the only instance in which the statute permits that all criteria of “competitive integrated employment” need not be satisfied for an individual to achieve an employment outcome. However, even under this narrow exception, the expectation is that, after a short period of time, the individual will achieve competitive integrated employment in supported employment.” 81 FR 55647 (August 19, 2016)

### SERVICES TO YOUTH WITH THE MOST SIGNIFICANT DISABILITIES [§363.4(a)(4); §363.22]

Section 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. [See §363.22] Other relevant statutory provisions are found in Section 602, which highlights services to youth with the most significant disabilities in the purpose section of Title VI; Section 604, which authorizes services specifically for youth with the most significant disabilities; Section 605, which identifies youth with the most significant disabilities as eligible for supported employment services; and Section 606, which establishes certain State plan requirements specific for services to youth with the most significant disabilities.

Multiple sections in the final rule (§363.1, §363.3, §363.4, §363.11, §363.22, §363.50, §363.53, §363.54, §363.55, and §363.56) incorporate these new requirements for providing supported employment services, including extended services, to youth with the most significant disabilities.

Of particular significance is §363.4(a) and (b) of the final rule, which implement the 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 DSU.

### **EXTENSION OF TIME FOR THE PROVISION OF SUPPORTED EMPLOYMENT SERVICES [§363.53 AND §363.54]**

Section 7(39) of the 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 (instead of 18 months). Consistent with the statute, as amended, §363.53 requires 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 final rule specifies 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 DSU must also identify the source of extended services (including the DSU in the case of youth with disabilities) and meet all requirements for case closure.

### **LIMITATIONS ON USE OF SUBMINIMUM WAGES**

Section 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. Section 511 of the Rehabilitation Act also establishes the roles and responsibilities of the Designated State Units (DSU) for the State 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.

The ED implements Section 511 by adding a new part to the Code of Federal Regulations [34 CFR part 397]

## **PURPOSE [§397.1]**

§397.1 establishes the purpose of the regulations in this part, which is 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. According to ED “Section 511 of the Act and final part 397 focus exclusively on the requirements that must be satisfied before an entity holding a Section 14(c) certificate may hire or continue to employ an individual with a disability at a subminimum wage, not on the setting in which those wages are paid.” [81 FR 55710 (August 19, 2016)]

The final rule also states that these regulations should be read in concert with: part 300, which implements requirements under part B of the Individuals with Disabilities Education Act; part 361, which implements requirements for the State VR Program; and part 363, which implements the State Supported Employment Services Program. ED believes this clarification is necessary to ensure all stakeholders understand that nothing in this part is to be construed as altering any requirement under parts 300, 361, or 363. Other relevant sections in the final rule include: §397.4, regarding other applicable regulations; and §397.5, regarding applicable definitions.

## **DEPARTMENT OF EDUCATION’S JURISDICTION [§397.2]**

ED has jurisdiction to implement guidelines for documentation requirements, requirements related to services that DSUs must provide, and contracting limitations on educational agencies. Nothing in part 397 will be construed to grant ED, or its grantees, jurisdiction over the requirements set forth in FLSA, including those imposed on entities holding special wage certificates under Section 14(c), which is administered by the Wage and Hour Division of the DOL.

ED explains in the Preamble that if an employer fails to comply with the Section 511 criteria for payment of a subminimum wage, the Secretary of Labor would take enforcement action pursuant to the FLSA in the same manner as he/she would against any other employer who failed to satisfy the requirements of FLSA.” [81 FR 55711 (August 19, 2016)] Section 511 does not authorize the Department of Education to revoke violators Section 14(c) certificates if entities are found to be in violation of Section 511. “Any suspension or revocation and any related regulations must be undertaken and promulgated by the Department of Labor.” [81 FR 55712 (August 19, 2016)]

## **RULES OF CONSTRUCTION [§397.3]**

In accordance with §397.3, nothing in part 397 will be construed to:

- Change the purposes of the Rehabilitation Act, which is to empower individuals with disabilities to maximize opportunities for achieving competitive integrated employment.
- Promote subminimum wage employment as a VR strategy or employment

outcome.

- Be inconsistent with the provisions of FLSA.

### **COORDINATED DOCUMENTATION PROCESS [§397.10]**

Section 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 Section 511 of the Act. Other relevant statutory provisions include Section 511(a) of the Rehabilitation Act, regarding the actions that youth must complete prior to beginning subminimum wage employment, and Section 511(c) of the Rehabilitation Act, regarding the actions that individuals with disabilities of any age must complete in order to continue employment at subminimum wage.

§397.10 requires the DSU, in consultation with the State educational agency, to develop a new process or utilize an existing process to document the completion of the actions described in §397.20 ((responsibilities of the DSU to youth with disabilities known to be seeking subminimum wage employment) and §397.30 (responsibilities of a local educational agency to youth with disabilities who are known to be seeking subminimum wage employment) by a youth with a disability, as well as a process for the transmittal of that documentation from the educational agency to the DSU. The documentation process must cover both the production and transmittal of the documentation. The final rule also establishes minimum information that must be contained in documentation of a youth's completion of required activities.

ED explains in the Preamble to the final rule the consequences of a decision by a youth with a disability to refuse to participate in the VR process. "Although Section 511 of the Act and final part 397 establish prerequisites for a youth with a disability to work in subminimum wage employment, as with any VR service, the youth with a disability, or his or her parent or guardian, as applicable, may exercise informed choice and refuse to participate. If a youth chooses not to participate in the activities required by Section 511 of the Act and final part 397, or chooses to opt out of the VR process entirely, such a choice will impact the permissibility of the youth to work at subminimum wage employment given the limitations imposed by Section 511 of the Act and final part 397. Accordingly, DSUs should inform youth with disabilities and/or their guardians of the youth's ineligibility for subminimum wage employment if he or she refuses to participate in the required activities." 81 FR 55717 (August 19, 2016)]

### **RESPONSIBILITIES OF A DSU TO YOUTH WITH DISABILITIES WHO ARE KNOWN TO BE SEEKING SUBMINIMUM WAGE EMPLOYMENT [§397.20]**

A DSU must provide youth with disabilities documentation upon the completion of the following actions:

1. Pre-employment transition services or transition services;
2. Application for VR services with the result that the individual was determined:

- Ineligible for VR services;
  - Eligible for VR services and the youth with a disability had an approved IPE, the youth with a disability was unable to achieve his/her employment outcome and despite working toward the employment outcome with reasonable accommodations and appropriate supports and services, including supported employment and customized employment services, for a reasonable period of time and the youth with a disability's case record is closed; and
3. Regardless of the determination made in 2) above, the youth with a disability received career counseling and information and referrals from the DSU to programs and other resources that offer employment related services and supports designed to enable the individual to explore, discover, experience, and attain competitive, integrated employment. The career counseling and information and referral may not be for subminimum wage employment.

A determination as to what constitutes a “reasonable period of time” must be consistent with the disability-related and vocational needs of the individual, as well as the anticipated length of time to complete the services identifies in the IPE. For an individual whose employment goal is in supported employment, such reasonable period of time is up to 24 months, unless under special circumstances the individual and the rehabilitation counselor jointly agree to extend the time.

### **RESPONSIBILITIES OF A LOCAL EDUCATIONAL AGENCY TO YOUTH WITH DISABILITIES WHO ARE KNOWN TO BE SEEKING SUBMINIMUM WAGE EMPLOYMENT [§397.30]**

A local educational agency must provide the DSU with documentation that the youth with a disability has received transition services. In the event a youth with a disability or, as applicable, the youth's parent or guardian, refuses, through informed choice, to participate in the activities required, the local educational agency must provide the specified documentation. In addition, the local educational agency must transmit the documentation to the DSU and retain a copy of all documentation provided to the DSU.

### **CONTRACTING PROHIBITION [§397.31]**

Section 511(b)(2) of the Rehabilitation Act, as added by WIOA, prohibits a local or State educational agency 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. Consistent with the statute, §397.31 specifies that neither a local educational agency nor a State educational agency may enter into a contract or other arrangement 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) for the purpose of operating a program for a youth under which work is compensated at a subminimum wage.

ED explains in the Preamble that, “this section does not preclude State and local educational agencies from contracting with entities holding Section 14(c) certificates, such

as community rehabilitation programs, for purposes other than operating a program for youth under which work is compensated at a subminimum wage. In other words, nothing in Section 511(b)(2) of the Act or §397.31 precludes a State or local educational agency from contracting with an entity, even if that entity holds a special wage certificate under Section 14(c) of the FLSA, for another purpose, including the provision of transition and pre-employment transition services that are beneficial to students with disabilities, so long as they are not paid subminimum wage if compensation is provided.” [81 FR 55722 (August 19, 2016)]

## **RESPONSIBILITIES OF A DSU FOR INDIVIDUALS WITH DISABILITIES REGARDLESS OF AGE WHO ARE EMPLOYED AT A SUBMINIMUM WAGE [§397.40]**

A DSU must provide career counseling and information and referral services (which must be provided in a specified manner) to individuals with disabilities, regardless of age, or the individual’s representative as appropriate, who are known by the DSU to be employed by an entity holding a Section 14(c) certificate at a subminimum wage level. Nothing in this section will be construed as requiring a DSU to provide the services required by this section (i.e., career counseling and information and referral services) directly. A DSU may contract with other entities i.e., other public and private service providers, as appropriate, to fulfill the requirements of this section. The contractor providing the required services on behalf of the DSU may not be an entity holding a special wage certificate under Section 14(c) of FLSA.

Also with respect to an entity holding a Section 14(c) certificate that has fewer than 15 employees, upon referral by such entity of an individual with a disability who is employed at a subminimum wage by that entity, a DSU must also inform the individual within 30 calendar days of the referral by the entity of self-advocacy, self-determination, and peer mentoring training opportunities available in the community. The services described in the previous sentence must not be provided by an entity holding a Section 14(c) certificate.

## **REVIEW OF DOCUMENTATION PROCESS [§397.50]**

Section 511(e)(2)(B) of the Rehab 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.

Consistent with the statute, §397.50 authorizes a DSU, or a contractor working directly for the DSU, to engage in the review of individual documentation, required by this part, that is maintained by employers who hold special wage certificates under the FLSA for all individuals with disabilities who are employed at the subminimum wage level. The contractor may not be an entity holding a special wage certificate under Section 14(c) of the FLSA. If deficiencies are noted during a documentation review, the DSU “should” report the deficiency to the Wage and Hour Division of DOL. ED explains in the Preamble that “The Secretary has intentionally used ‘should’ rather than ‘must’ because there is no requirement that the DSUs conduct reviews and, there is no mechanism for enforcement for failing to report deficiencies. We also

want to emphasize that the Secretary purposely used ‘should’ rather than ‘may’ to signal that the Department strongly encourages DSUs to report such deficiencies whenever they are found.” [81 FR 55728 (August 19, 2016)]

ED explains in the preamble that “it is anticipated that joint guidance from [DOL] and [ED] is forthcoming and will address, among other aspects of WIOA, the limitations on use of subminimum wage if the required services and documentation have not been provided.” [81 FR 55725 (August 19, 2016)] On August 1, 2016, the Wage & Hour Division of the Department of Labor provided guidelines to current Section 14(c) certificate holders as to the implementation of WIOA Section 511. The guidance documents include Field Assistance Bulletin 2016-2, Fact Sheet 39H, and certain Key News items.

- [Read the Field Assistance Bulletin 2016-2](#)
- [Read Fact Sheet 39H](#)
- [Read the WHD Key News](#)