The Council of Parent Attorneys and Advocates, Inc.
Protecting the Civil Rights of Students with Disabilities and their Families

June 15, 2015

Janet LaBreck
Commissioner
Rehabilitation Services Administration
U.S. Department of Education
400 Maryland Avenue SW., Room 5086
Potomac Center Plaza (PCP), Washington, DC 20202–2800

Dear Commissioner LaBreck:

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the 6 million children with disabilities in America. COPAA's mission is to serve as a national voice for special education rights and is grounded in the belief that every child deserves the right to a quality education that prepares him or her for meaningful employment, higher education and lifelong learning, as well as full participation in his or her community. Additionally, COPAA believes that every federal law should work together to help every individual with a disability, regardless of perceived severity, to achieve an independent, community-centered and quality life.

COPAA is writing to provide the attached comments to the **proposed regulations for Title IV of the Workforce Innovation and Opportunity Act (WIOA).** Primarily, our comments intend to support the youth and young adults with disabilities whom we know struggle to receive appropriate transition services under the Individual with Disabilities Education Act (IDEA) and whose quality of life and employment may be directly impacted by WIOA as they transition out of high school into adulthood. COPAA comments reflect the priorities also submitted by the Collaboration to Promote Self-Determination of which COPAA is a member.

Despite clear legislative and judicial intent, and significant public expenditure, there remains a huge gap in the state of the art *vs.* state of the practice when it comes to college and career outcomes for students with disabilities. In fact, students with intellectual and developmental disabilities frequently transition out of high school lacking the proper skills required to find and maintain employment or pursue post-secondary education. This trend is due to persistent low expectations that dominate individualized education programs (IEPs) for students and a lack of focus or knowledge in how to effectively provide hands-on work experience and training – career services – to youth with significant disabilities that is typically offered to students without disabilities during their transitional years. To date, there has been very little enforcement, monitoring or evaluation of school districts to ensure that there is strong compliance with this important provision in the IDEA law.

COPAA hopes the improved alignment between the IDEA and the WIOA will help schools and improve the outcomes of young citizens. Ultimately, the goal of both laws as it relates to transition-age youth is to provide transition services during their high school so these students may find and maintain employment in the community and at wages which promote optimal self-sufficiency and independence.

While COPAA understands the vision, leadership and initiative undertaken to update WIOA, our ongoing concern for the youth and young adults with disabilities who by virtue of the complexity and severity of their disability may be challenging to serve under WIOA, is that many of them may still end up in subminimum wage jobs in the sheltered work settings this practice creates. COPAA believes that just as students with disabilities must have an opportunity equal to that of their peers without disabilities to become college or career-ready; once employed, all workers - including those with disabilities – must be paid fair wages for fair labor. We do not want any federally funded system to support the promotion of and referrals to subminimum wage jobs.

The implementation of WIOA must distinctly support and complement the work underway at the U.S. Department of Justice (DOJ) to assert the rights under Title II of the ADA, 42 U.S.C. § 12132 (2006), as interpreted by *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), to ensure that services, programs, and activities provided by public entities, including States, be delivered in the most integrated setting appropriate to the needs of persons with disabilities. *Olmstead* is particularly relevant to transition-age youth with significant disabilities who are preparing to exit special education settings and access adult services and participate more fully in the community.

We urge you to help us reinforce through WIOA implementation that every federal law should work together to help every individual with a disability, regardless of perceived severity, to achieve an independent, community-centered and quality life. Please see attachment for our full set of comments.

Sincerely,

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Executive Director

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Comments on Proposed Regulations

DEPARTMENT OF EDUCATION

34 CFR Parts 361, 363, and 397 RIN 1820–AB70 [Docket ID ED–2015–OSERS–OOO1]

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

Note: This document contains extensive recommendations for changes in regulatory language. Suggested new language is in red. Language to be removed is struck through in ~~green.~~

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§ 361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.

Proposed Regulation:

361.49 (a) Incorporates transition services to students and youth with disabilities as a permissible service for the benefit of groups of individuals with disabilities. This service would be provided in coordination with other relevant agencies and providers.

Comment:

This clearly has the potential to reinforce the segregation of youth with significant disabilities so that they participate in "disability only" vocational preparation activities. Further, there is no research support for such group classroom activities as resume writing as contributing to the acquisition of competitive integrated employment.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

361.49 (a) Incorporates transition services to students and youth with disabilities as a permissible service for the benefit ~~of groups~~ of individuals with disabilities. This service would be provided in coordination with other relevant agencies and providers.

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§ 361.48 Scope of vocational rehabilitation services for individuals with disabilities.

Proposed Regulation:

(a) ***Pre-employment transition services.*** **Each State must ensure that the designated State unit, in collaboration with the local educational agencies involved, provide, or arrange for the provision of, pre-employment transition services for all students with disabilities, as defined in § 361.5(c)(51), in need of such services, without regard to the type of disability, from funds reserved in accordance with § 361.65 and any funds made available from State, local, or private funding sources.**

(1) ***Availability of services.*** **Pre- employment transition services may be provided to all students with disabilities, regardless of whether an application for services has been submitted.**

(2) *Required activities.* The designated State unit must provide the following pre-employment transition services:

(i) Job exploration counseling;

(ii) Work-based learning experiences, which may include in-school or after school opportunities, or experience outside the traditional school setting (including internships), that is provided in an integrated environment in the community to the maximum extent possible;

(iii) Counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education; (iv) Workplace readiness training to develop social skills and independent living; and

(v) Instruction in self-advocacy (including instruction in person- centered planning), which may include peer mentoring (including peer mentoring from individuals with disabilities working in competitive integrated employment).

(3) *Authorized activities.* Funds available and remaining after the provision of the required activities described in paragraph (a)(2) of this section may be used to improve the transition of students with disabilities from school to postsecondary education or an employment outcome by—

(i) Implementing effective strategies to increase the likelihood of independent living and inclusion in communities and competitive integrated workplaces;

(ii) Developing and improving strategies for individuals with intellectual disabilities and individuals with significant disabilities to live independently; participate in postsecondary education experiences; and obtain, advance in and retain competitive integrated employment;

(iii) Providing instruction to vocational rehabilitation counselors, school transition personnel, and other persons supporting students with disabilities;

(iv) Disseminating information about innovative, effective, and efficient approaches to achieve the goals of this section;

(v) Coordinating activities with transition services provided by local educational agencies under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*);

(vi) Applying evidence-based findings to improve policy, procedure, practice, and the preparation of personnel, in order to better achieve the goals of this section;

(vii) Developing model transition demonstration projects;

(viii) Establishing or supporting multistate or regional partnerships involving States, local educational agencies, designated State units, developmental disability agencies, private businesses, or other participants to achieve the goals of this section; and

(ix) Disseminating information and strategies to improve the transition to postsecondary activities of individuals who are members of traditionally unserved and underserved populations.

(4) *Pre-employment transition coordination.* Each local office of a designated State unit must carry out responsibilities consisting of—

(i) Attending individualized education program meetings for students with disabilities, when invited;

(ii) Working with the local workforce development boards, one-stop centers, and employers to develop work opportunities for students with disabilities, including internships, summer employment and other employment opportunities available throughout the school year, and apprenticeships;

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

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

Comment:

Transition is a continuum and it is important to provide pre-employment transition services to youth as early as possible. Case service funds spent on youth before they have exited school have the potential to be a bigger return on investment, so providing services to both eligible and potentially eligible youth represents the prospect of a more successful transition and successful case closures. This section, with the exceptions noted in the next paragraph should be strongly supported.

Research supports work-based learning experiences, especially paid jobs, as the strongest predictor of post-school employment for youth with significant disabilities. However, group vocational activities and "readiness" training are not only unsupported by research, but they have the potential to perpetuate longstanding practices of segregating individuals with significant disabilities to engage in unproductive activities that do not lead to competitive integrated employment.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

Change the following sections as noted:

(2) *Required activities.* The designated State unit must provide the following pre-employment transition services:

(i) Job exploration counseling;

(ii) Work-based learning experiences, which may include in-school or after school opportunities, or experience outside the traditional school setting (including internships), that is provided in an integrated environment in the community ~~to the maximum extent possible~~; these work-based experiences may also include opportunities to develop social skills relevant to workplace behavior;

(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

(iv) 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).

ADDITIONAL RECOMMENDATIONS REGARDING PRE-EMPLOYMENT TRANSITION SERVICES

1. Add a definition of Work-Based Learning that is aligned with definition of the School-to-Work Opportunity Act of 1994.
2. Add additional language that emphasizes the critical importance of actual work experiences in typical work settings as part of Pre-Employment Transition services.
3. Clarify that each student does not need to receive all 5 required Pre-Employment Transition Service components, and services should be provided based on individual student needs. Work-Based Learning in integrated settings should be the default service option, and others should be utilized only as necessary.
4. Clarify the distinction between employment assistance as part of work-based learning under Pre-Employment Transition services and whether/how this is distinguished from the "development of employment" as part of the definition of Transition Services in WIOA, and the responsibilities of public VR in terms of placement assistance under Pre-Employment Transition Services and Transition Services.
5. Clarify the role of local and state education agencies in relation to Pre-Employment Transition Services and Transition Services supported by public VR, including the role of schools in assisting and supporting job placement activity.
6. Define "integrated community settings" in relationship to work-based learning, to ensure that such settings are workplaces features of employment settings typically found in the community (e.g., avoiding school-based experiences/enterprises, group/enclave employment experiences, etc.). The integration language for Competitive Integrated Employment - § 361.5(c)(9) - should be used as a basis for this to ensure consistency within WIOA.
7. Maintain the proposed language in the regulations regarding the availability of Pre-Employment Transition Services to all students in need of such services.
8. Maintain the proposed language that Pre-Employment Transition services are to be made available "without regard to the type of disability"
9. Provide clarification regarding how a determination would be made regarding which students are "in need" of Pre-Employment Transition services, in terms of who would make that determination, and criteria to be utilized.
10. Clarify the parameters and limits of the requirements, regarding state responsibility for ensuring that the VR program, provide, or arrange for the provision of pre-employment transition services for all students with disabilities in need of such services, from any funds made available from State, local, or private funding sources, beyond the 15% of Title I VR funds.
11. For transition coordination by VR area offices, encourage co-location of VR staff within the school setting.
12. Specifically prohibit use of sheltered work and similar settings as a component or setting for pre-employment transition services.
13. We have major concerns regarding the use of the term Pre-Employment Transition Services, as it reinforces a focus on "readiness-type" activities which are of little benefit and create another needless hurdle for young people with disabilities to enter employment, rather than a focus on the best job readiness program there is – actual experience in real work places that reflect the features of employment outcome under the definition of Competitive Integrated Employment. While our

recommendations use the term, we recommend that in the final regulations, the term Student Career Services be used throughout the regulations, instead of Pre-Employment Transition Services. We recognize the term Pre-Employment Transition Services is legislatively based. However, we recommend implementation of the term Student Career Services, via the following changes under **§ 361.5 Applicable definitions** as follows:

Deletion of § 361.5(c)(42)

Pre-employment transition services means the required activities and authorized activities specified in § 361.48(a).

Addition of the following:

§ 361.5(c)(51)

Student career services means the required activities and authorized activities specified in § 361.48(a), designated as Pre-Employment Transition Services under Sections 7(30) and 113 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 7(30) and 733.

(Authority: Sections 7(30) and 113 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 7(30) and 733)

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§ 361.22 Coordination with education officials.

Language from Introductory Section of Regulations:

361.22(b) Coordination with Education Officials

Section 101(a)(11)(D) requires 1. Interagency collaboration between DSUs and educational agencies to 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. Requires the DSU, 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.

Section 101(c) ..nothing in the Act is to be construed as reducing the responsibility of the local education 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 servies necessary for proiding a free and appropriate education to students with disabilities.

New clause: …to incorporate, by reference, certain requirements from Section 511 into the formal interagency agreement between the DSU and the State education agency.

Comment:

There has been a longstanding recognition that collaboration is necessary for effective school-to-work transition to occur. Recently, research points to the importance of collaboration that leads to the outcome of seamless transition, that is, employment before school exit and uninterrupted service

delivery to sustain employment. Thus, this provision is consistent with that construct and should be supported.

However, the incorporation of Section 511 is problematic. Although it is generally commendable that schools and VR collaborate to prevent subminimum wage employment, Section 511 still allows a way to circumvent competitive integrated employment at or above minimum wage. This is counter to the implicit intent of the WIOA to presume employability for all youth by suggesting that it is possible to demonstrate non-employability. There is also research and sufficient demonstration of employability for all youth so that there is no need to include provisions for documenting failed attempts at employment preparation. Further, this documentation will require burdensome processes that will require targeted oversight to insure proper implementation. This oversight potentially diverts resources from the overall intent of *Section 101(a)(11)(D)*.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

New clause: …to incorporate, by reference, certain requirements from Section 511 into the formal interagency agreement between the DSU and the State education agency, to include prohibiting contracts or arrangements with, or referrals to, programs in which youth with disabilities are employed at subminimum wage.

Other considerations regarding transition:

Supported Employment and Customized Employment

In the context of work and work experience prior to school exit, these services are useful strategies. It is therefore significant that the regulations include a refinement to supported employment services so that they are especially targeted to transitioning youth with a provision that 50% of the federal money that states receive for supported employment services must be used to support youth (up to age 24) with the most significant disabilities. It is likewise significant that extended services can be provided for up to 4 years for youth. Finally, the inclusion of customized employment similarly provides avenues for competitive integrated employment of youth with the most significant disabilities. These provisions should be supported in any commentary on the regulations related to youth with disabilities.

PART 397—LIMITATIONS ON USE OF SUBMINIMUM WAGE

Comments:

1. The overall tone of this portion of the regulations, particularly Part B and Part C, should be revised within a context of detailing the actual requirements of public VR, education, and other entities in fulfilling the requirements under Section 511 of WIOA, instead of within the context of simply having proper documentation of these steps.

2. The regulations state that Section 511 of WIOA only applies to those individuals who "are known" to be employed by a 14(c) certificate holder, and that the VR program may know such individuals through the VR process, referral from the client assistance program, another agency, or the 14(c) holder. This "who are known" standard is vague and problematic, and could result in Section 511 applying to very few individuals. This standard seems at odds with the more encompassing legislative intent of Section 511. It is true that limitations on resources are a major barrier to the capacity of public VR to fulfill the requirements under Part 397 for every individual currently earning subminimum wage (over 400,000 individuals), and every youth with a disability considering subminimum wage employment. However, the response to this resource concern cannot be a vaguely defined "who are known" standard that allows public VR a wide degree of discretion in terms of application of Section 511 of WIOA. Under such a standard, public VR could virtually ignore these requirements which is not at all in keeping with Congressional intent. Given the problematic nature of the term "who are known" in terms of vagueness, it should be deleted, and replaced with specific pro-active outreach requirements as an alternative, in a way that is expansive and in keeping with Congressional intent. This would include not only individuals who are readily known to public VR via application for services, but would also require proactive efforts in identifying other individuals who are considering subminimum wage employment or are currently in subminimum wage employment. This would include language that:
    - requires local educational agencies to make referrals to public VR of any youth with a disability who is considering subminimum wage employment as an outcome of the transition process.
    - specifies requirements for inter-agency agreements with state and local education agencies that mandates the identification of all youth with disabilities considering subminimum wage employment, to ensure that the required steps under Section 511 are undertaken, prior to placement in subminimum wage employment.
    - requires inter-agency agreements with state intellectual and developmental disability (ID/DD) agencies in terms of Section 511, since the majority of individuals earning subminimum wage have intellectual and developmental disabilities.
    - require inter-agency agreements with other public agencies that serve as referral and support for entities paying subminimum wage, besides those funded by state ID/DD,
3. The proposed regulations state that a local educational agency <u>can</u> provide a youth with a disability documentation of transition services received under IDEA. This language should be changed so this is not optional, but is instead a requirement.
4. 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. It is suggested that it should be the same as those in supported employment – 24 months.
5. Add language that clearly defines "financial interest in the individual's employment outcome" in order to clarify what entities may not provide the self-advocacy, self-determination, and peer mentoring training opportunities required for those currently in subminimum wage employment. Additionally, add language that makes it clear that the entity providing subminimum wage employment to the individual cannot provide the self-advocacy, self-determination, and peer mentoring training opportunities.
6. Provide specific definitions for "self-advocacy, self-determination, and peer mentoring training opportunities", to ensure they have integrity in terms of the intent of Section 511.
7. If the proposed regulatory language continue to allow for the services required for individuals who are currently in subminimum wage employment to be provided by other public and private service providers, rather than the public VR system directly, language should be added that specifically prohibits14(c) providers from providing these services, as that would be a conflict of interest.
8. Remove 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 the Section 511 legislation.

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 prohibition on organizations that are 14(c) holders conducting such reviews, as that would be a conflict of interest.

9. Add language that specifies timelines for reviews of documentation, and that enhances enforcement mechanisms, including specifying that the Client Assistance Program and State Protection and Advocacy Organization have jurisdiction in reviewing compliance with Section 511 requirements.
10. Add additional regulatory language 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) holders in order to pay individuals subminimum wage. Add additional language regarding the responsibilities of state education agencies in enforcement of this provision. In addition, this portion of the regulation does not make clear what the phrase "other arrangement" means and consequently does not specifically prohibit referrals to programs employing youth with disabilities at subminimum wage, and this needs to be specified.
11. Within the regulations under §397.40 (responsibilities of VR for individuals who employed in subminimum wage), add language that references and reconciles these requirements with the semi-annual and annual reviews required for placement of individuals served via the VR program into extended employment (non-integrated or sheltered work setting) under **§** 361.55 to make them consistent, and vice versa.
12. Add language that emphasizes that nothing under Part 397 changes a state's obligations under the 1999 Olmstead Decision, and subsequent US Department of Justice enforcement actions, or CMS settings rules.

RECOMMENDED CHANGES TO LANGUAGE IN REGULATIONS

PART 397—LIMITATIONS ON USE OF SUBMINIMUM WAGE

Subpart A—General Provisions

§ 397.1 Purpose.

(a) The purpose of this part is to set forth requirements the designated State units and State and local educational agencies must satisfy to ensure that individuals with disabilities, especially youth with disabilities, have a meaningful opportunity to prepare for, obtain, maintain, advance in, or regain competitive integrated employment, including supported or customized employment.

(b) This part requires—

(1) A designated State unit to ensure that youth with disabilities have completed certain requirements ~~provide youth with disabilities documentation demonstrating that they have completed certain requirements~~, as described in this part, and have been provided documentation demonstrating that they have completed these requirements, prior to starting subminimum wage employment with entities holding special wage certificates under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), as defined in 397.5(d);

(2) A designated State unit to provide, at certain prescribed intervals, career counseling and information and referral services, designed to promote opportunities for competitive integrated employment, to individuals with disabilities, regardless of age, ~~who are known to be~~ employed at a subminimum wage level for the duration of such employment; and

(3) A designated State unit, in consultation with the State educational agency, to develop a, or utilize an existing, process to document completion of required activities under this part by a youth with a disability.

(c) The provisions in this part authorize a designated State unit, or a representative of a designated State unit, to engage in the review of individual documentation required to be maintained by these entities under this part.

(d) The provisions in this part work in concert with requirements in 34 CFR part 300, 361, and 363, and do not alter any requirements under those parts.

(e) A designated State unit to take proactive steps in identifying youth with disabilities considering subminimum wage employment, and identifying any individual with disabilities already in subminimum wage employment, in order to maximize the impact of Part 397 in terms of limitations on the use of subminimum wage employment including, but not limited to:

(1) Tracking youth with disabilities receiving pre-employment transition services and transition services from the designated State unit who are considering subminimum wage employment;

(2) Identification of all individuals who are currently receiving services from the designated state unit who are considering subminimum wage employment;

(3) Identification of all individuals who applied for and were found ineligible for vocational rehabilitation services for at least the past three years and are either considering or currently working in subminimum wage employment;

(4) Referral agreements with and outreach to state and local educational agencies to identify youth with disabilities considering subminimum wage employment;

(5) Referral agreements with and outreach to the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities, and any other State agency that provides services to a significant number of individuals in subminimum wage employment.

(e) Nothing in this part supersedes the requirements of § 361.55, regarding semi-annual review of individuals in extended employment and other employment under special certificate provisions of the Fair Labor Standards Act.

§ 397.3 What rules of construction apply to this part?

Nothing in this part will be construed to—

(a) Change the purpose of the Rehabilitation Act, which is to empower individuals with disabilities to maximize opportunities for achieving competitive integrated employment;

(b) Promote subminimum wage employment as a vocational rehabilitation strategy or employment outcome, as defined in 34 CFR 361.5(c)(15); and

(c) Affect the provisions of the Fair Labor Standards Act, as amended before or after July 22, 2014.

(d) Change or affect a state's obligations and requirements under the U.S. Supreme Court's 1999 Olmstead Decision and subsequent enforcement requirements under that decision by the U.S. Department of Justice.

(e) Change or affect a state's obligations and requirements from the Center for Medicare of Medicaid Services (CMS) in terms of the settings rules for Home and Community Based Services.

Subpart C—Designated State Unit Responsibilities Prior To Youth With Disabilities Starting Subminimum Wage Employment

§ 397.20 What are the responsibilities of a designated State unit to youth with disabilities ~~who are known to be~~ considering subminimum wage employment?

(a) A designated State unit must ensure the provision of the following services and provide youth with disabilities documentation upon the completion of the following actions:

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(3)(i) For purposes of paragraph (a)(2)(ii)(B) of this section, a determination as to what constitutes ''reasonable period of time'' must be consistent with the disability-related and vocational needs of the individual, as well as the anticipated length of time required to complete the services identified in the individualized plan for employment.

(ii) For any individual, ~~an individual shoes specified employment goal is in supported employment~~, such reasonable period of time is up to 24 months, unless under special circumstances the individual and the rehabilitation counselor jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment.

Subpart D—Local Educational Agency Responsibilities Prior To Youth With Disabilities Starting Subminimum Wage Employment

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

A local educational agency is responsible for referring youth with disabilities to the designated State unit, of any youth with a disability who is considering subminimum wage employment as a transition outcome, in order to complete the requirements under § 397.20

Of the documentation to demonstrate a youth with a disability's completion of the actions described in § 397.20(a) of this part, a local educational agency, as defined in § 397.5(b)(1), must provide the 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)).

§ 397.31 Are there any contracting limitations on educational agencies under this part?

Neither a local educational agency, as defined in § 397.5(b)(1), nor a State educational agency, as defined in § 397.5(b)(2), may enter into a contract or other arrangement with an entity, as defined in § 397.5(d), for the purpose of operating a program under which a youth with a disability is

engaged in subminimum wage employment, or making a referral to a program in which youth are employed at subminimum wage.

Subpart E—Designated State Unit Responsibilities to Individuals With Disabilities During Subminimum Wage Employment

§ 397.40 What are the responsibilities of a designated State unit for individuals with disabilities, regardless of age, who are employed at a subminimum wage?

(a) *Counseling and information services.* (1) A designated State unit must provide career counseling, and information and referral services, as described in § 397.20(a)(4) to individuals with disabilities, regardless of age, or the individual's representative as appropriate, who are ~~known by the designated stated unit to be~~ employed by an entity, as defined in § 397.5(d), at a subminimum wage level.

(2) A designated State unit may know the identification of individuals with disabilities described in this paragraph through the vocational rehabilitation process or by referral from the client assistance program, another agency, or an entity, as defined in § 397.5(d), or other proactive identification and outreach activities specified under 397.1(e).

(3) The career counseling and information and referral services must be provided in a manner that–

(i) Is understandable to the individual with a disability; and

(ii) Facilitates independent decision- making and informed choice as the individual makes decisions regarding opportunities for competitive integrated employment and career advancement, particularly with respect to supported employment, including customized employment.

(b) *Other services.* (1) Upon a referral by an entity, as defined in 397.5(d), that has fewer than 15 employees, of an individual with a disability who is employed at a subminimum wage by that entity, a designated State unit must also inform the individual of self- advocacy, self-determination, and peer mentoring training opportunities available in the community that are specifically designed to assist the individual in maximizing their informed choice regarding competitive integrated employment opportunities, and include peers who are currently working in competitive integrated employment.

(2) The services described in paragraph (b)(1) of this section must be provided by an entity that does not have a financial interest in the individual's employment outcome Financial interest specifically includes, among other entities, the entity that employs the individual at subminimum wage.

(c) Required intervals. The services required by this section must be carried out once every six months for the first year of the individual's subminimum wage employment and annually thereafter for the duration of such employment.

(d) *Documentation.* The designated State unit must provide timely documentation to the individual

upon completion of the activities required under this section.

(e) *Provision of services.* Nothing in this section will be construed as requiring a designated State unit to provide the services required by this section directly. A designated State unit may contract with other entities, *i.e.*, other public and private service providers, as appropriate, to fulfill the requirements of this section. The contractor may not be an entity holding a special wage certificate under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), as defined in 397.5(d).

(f) For individuals in extended employment and other employment under special certificate provisions of the Fair Labor Standards Act who are covered § 361.55, the requirements of § 361.55 take precedence. In addition, for such individuals, the requirements of (b)(1) above are also required.

Subpart F–Review of Documentation Process

§ 397.50 What is the role of the designated State unit in the review of documentation process under this part?

Option A*: *Aligns with legislative requirement that such a review must be done "by a representative working directly for the designated State unit."

The designated State unit, ~~or a contractor working directly for the designated State unit~~ is authorized to engage in the review of individual documentation required under this part that is maintained by entities, as defined at 397.5(d), under this part. At a minimum, this review must be conducted annually for individuals placed over the past five years into subminimum wage employment who are covered under Part 397.

Option B*: *If a contractor is allowed to perform this review on behalf of the designated state unit.

The designated State unit, or a contractor working directly for the designated State unit is authorized to engage in the review of individual documentation required under this part that is maintained by entities, as defined at 397.5(d), under this part. At a minimum, this review must be conducted annually for individuals placed over the past five years into subminimum wage employment who are covered under Part 397. The contractor may not be an entity holding a special wage certificate under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), as defined in 397.5(d).

§ 397.51 What is the role of the Department of Labor in the review of documentation process under this part?

The U.S. Department of Labor is authorized to engage in the review of individual documentation required under this part that is maintained by entities, as defined at 397.5(d), under this part.

§ 397.51 What is the role of additional entities in the review of documentation process under this part?

Each state's Client Assistance Program and Protection and Advocacy organization is authorized to engage in the review of individual documentation required under this part that is maintained by

entities, as defined at 397.5(d), under this part.

Subpart G–Interagency Agreement Requirements

§ 397.50 What is the requirement for interagency agreements in order to comply with Part 397?
(a) In order to ensure compliance with the requirements of Part 397, the designated State unit is required to develop inter-agency requirements as follows:

(1) The designated state unit must develop an interagency agreement with the state education agency that outlines mechanisms for compliance with Part 397 that includes, but is not limited to:

> **(i) Requirements for policy directives from the state education agency to local education agencies regarding the requirements and expectations regarding compliance with §397.31 that prohibits a local educational agency, as defined in § 397.5(b)(1), or a State educational agency, as defined in § 397.5(b)(2), to enter into a contract or other arrangement with an entity, as defined in § 397.5(d), for the purpose of operating a program under which a youth with a disability is engaged in subminimum wage employment;**
>
> **(ii) Mechanisms for monitoring compliance with § 397.31 at the state and local level;**
>
> **(iii) Mechanisms for ensuring maximum compliance and impact of § 397.20 through identification by state and local education agencies of students with disabilities who are considering subminimum wage employment, and ensuring that the designated state unit is aware of these individuals and the necessary referrals to the designated state have been made.**

(2) The designated state unit must develop an interagency agreement with the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities, and any other State agency that provides services to a significant number of individuals in subminimum wage employment, that specifies the role of the State agency in implementation of Part 397 in partnership with public VR, that includes but is not limited to the following

> **(i) Ensuring that individuals earning subminimum wage that are served by the State agency are known to public VR;**
>
> **(ii) Specifies how that the State agency will support compliance with Part 397 in terms of aligning the requirements for entities holding special wage certificates under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), as defined in 397.5(d);, with the requirements for its service provider system;**
>
> **(iii) States how the State agency will provide general support for ensuring that the required steps for youth with disabilities under § 397.20 are complied with prior to placement of an individual served by the state agency in a subminimum wage position with an entity, as defined in 397.5;**
>
> **(iv) State how the requirements for Counseling and Information Services required at least annually will be complied with for all individuals receiving services from the ID/DD agency that are currently earning subminimum wage.**

§ 361.55 Semi-annual review of individuals in extended employment and other employment under special certificate provisions of the Fair Labor Standards Act.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

Add the following language to reconcile with Part 397.

(c) The requirements in this part supersede any requirements that may apply contained in § 397.40,regarding the responsibilities of a designated State unit for individuals with disabilities, regardless of age, who are employed at a subminimum wage. In addition, individuals covered under § 361.55, as part of the review process, are subjected to the requirements under § 397.40 regarding informing the individual of self- advocacy, self-determination, and peer mentoring training opportunities available in the community that are specifically designed to assist the individual in maximizing their informed choice regarding competitive integrated employment opportunities, and include peers who are currently working in competitive integrated employment.

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

Comments:

1. Maintain the proposed additional language within the regulations regarding location of employment to ensure it is truly integrated: "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".
2. To be clear that employment should be on an individual basis, change Competitive Integrated Employment to Competitive Integrated Individualized Employment
3. To be clear about the types of settings that do not fall within the definition of Competitive Integrated Employment, add the following language:

   "iii. Does not include the following settings or locations:

   (1) Group or enclave employment.
   (2) Employment in businesses owned by community rehabilitation providers."

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§ 361.5 (c) (15) Change in Definition of Employment Outcome

Comment:

Under the new proposed regulations the definition of Employment Outcome has been strengthened

to be clear that it only includes competitive integrated employment, which must be paid. This eliminates uncompensated outcomes such as homemakers and unpaid family workers. This is a positive change, and should remain.

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§ 361.5 (c) (53) Definition of Supported Employment

Comment:

The previous Supported Employment definition allowed for individuals with the most significant disabilities "working towards competitive employment" as part of Supported Employment. The new definition under the WIOA legislation has added "short-term basis" to the concept of working towards competitive employment. There is language in the proposed regulations that defines this in detail with a 6-month time limit, as follows: "…an individual with the most significant disabilities, whose supported employment in an integrated setting does not satisfy the criteria of competitive integrated employment…is considered to be working on a short-term basis toward competitive integrated employment so long as the individual can reasonably anticipate achieving competitive integrated employment within six months of achieving an employment outcome of supported employment." What specifically constitutes "working on a short-term basis toward competitive integrated employment" is not clear. However, based on language in the introductory section to the regulations, it appears to allow working in subminimum wage employment in an integrated setting as acceptable over the short-term (up to 6 months). The inclusion of a time limit in the regulations, which did not previously exist, is a positive development, but payment of subminimum wage in supported employment should be prohibited.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

(53) ***Supported employment***

(ii) For purposes of this part, an individual with the most significant disabilities, whose supported employment in an integrated setting does not satisfy the criteria of competitive integrated employment, as defined in paragraph (c)(9) of this section, is considered to be working on a short-term basis toward competitive integrated employment so long as the individual can reasonably anticipate achieving competitive integrated employment within six months of achieving an employment outcome of supported employment. Examples of working on a short-term basis includes, but is not limited to:

(1) unpaid internships

(2) apprenticeships

(3) transitional employment as defined in this part under (c)56.

(iii) For purpose of this part, an individual may not be paid under a special wage certificate under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), as defined in 397.5(d);

(iv) For purpose of this part, placement in the following locations and settings do not qualify as supported employment:

(1) sheltered workshops;

(2) enclaves and group employment settings.

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§ 361.5 (c) (54) Definition of Supported Employment Services

Comment:

There is a need for language that supported employment services are specifically for supports post-placement. The current language is sometimes misinterpreted by designated State units, with the time limit on supported employment services (previously 18 months, now 24 months), viewed as the time limit for all services, including planning, placement, and post-placement.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

(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—

(iii) Provided by the designated State unit for a period of time not to exceed 24 months post-placement, 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;

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§ 363.4 What are the authorized activities under the State Supported Employment Services program?

Comment:

The WIOA legislation and regulations designate that 50% of each state's supported employment state grant must be now be used for youth (ages 14 to 24) with the most significant disabilities employment. In addition WIOA allows for supported employment state grant funds and Title I funds to be used for Extended Services (beyond Supported Employment Services) for up to 4 years. Previously, Supported Employment and other VR funds could not be used for Extended Services. While these change ideally will allow for the availability of Extended Services for individuals who require such services, and have no other source of funding, there is concern about this change that allows VR funds to be used for Extended Services, from two perspectives:

1. The amount of Supported Employment State Grant funds is relatively small (the federal amount was approximately $27 million in FY 2014). If these funds are going to be used for Extended Services at a significant level, that will significantly reduce the number of individuals who benefit from the Supported Employment State Grant funding.
2. Allowing for Extended Services to be funded for specific group of individuals from Title 1 funds, sets a precedent, and will result in fewer individuals being served via Title 1. Adding to this this concern, is that Extended Services have been typically funded via Medicaid. Given that Medicaid typically considers its funding to be "payer of last resort", there are major concerns that there will now be an expectation that VR will fund Extended Supports for all qualified individuals, which could result in a significant drain on VR Title 1 funds, and in addition result in extensive time at the state and local negotiating payer of last resort issues.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

To address this issue, the following additional language is recommended under § 363.4:

"(e) Funding of Extended Services under Title VI and Title I for Youth with the Most Significant Disabilities should be considered funding of last resort, and used only when no other funding source is available, including Title XIX of the Social Security Act (Medicaid)."

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§ 361.24
Cooperation and Coordination with Other Entities

Comment:

A new requirement under the WIOA legislation is the requirement for a formal cooperative agreement between public VR, the state Medicaid agency, and the state intellectual and developmental regarding the delivery of VR services including extended services for individuals receiving Medicaid home and community-based services. Within the regulations, there is limited language regarding the issues that should be addressed within the cooperative agreement. In addition, there is no requirement for a cooperative agreement between VR, Medicaid, and state Mental Health, for those individuals with psychiatric disabilities needing long-term employment supports funded by Medicaid.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

(f) ***Cooperative agreement regarding individuals eligible for home and community-based waiver programs.*** **The vocational rehabilitation services portion of the Unified or Combined State Plan must include an assurance that the designated State unit has entered into a formal cooperative agreement with the State agency responsible for administering the State Medicaid plan under title XIX of the Social Security Act (42 U.S.C. 1396** ***et seq.*****) and the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities, and the State agency responsible for providing mental health services, with respect to the delivery of vocational rehabilitation services, including extended services, for individuals with the most significant disabilities who have been determined to be eligible for home and community-based services under a Medicaid waiver, Medicaid State plan amendment, or other authority related to a State Medicaid program. Such agreements should at a minimum specifically address the following issues:**

(1) identification of individuals needing extended supports;
(2) referral mechanisms between the designated state unit and the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities, or the State agency responsible for providing mental health services;
(3) the parameters of Medicaid funded extended supports;
(4) how funds will be braided between the designated state unit and the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities, or the State agency responsible for providing mental health services, to assure long-term employment success;
(5) sources and criteria for providers of extended supports.

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§ 361.42 Assessment for Eligibility for VR Services

Comment:

Under WIOA, assessments for eligibility for VR services must now, to the maximum extent possible, rely on information obtained from experiences in integrated employment settings in the community and in other integrated community settings. The explanatory sections of the regulations make clear that this does not preclude non-integrated settings as necessary. However, there is a need for clarity regarding the parameters of non-integrated settings that are permitted for assessment, as well as the desired parameters of settings for assessment.

While the definition of "competitive integrated employment" is strong, there is concern that this definition will be used a means for inadvertently excluding individuals with more significant disabilities, as a result of a perception that they may not be able achieve this outcome, despite language in WIOA that makes it clear that even individuals with the most significant disabilities can achieve competitive integrated employment.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

§ 361.42 Assessment for Eligibility for VR Services.
In order to determine whether an individual is eligible for vocational rehabilitation services and the individual's priority under an order of selection for services (if the State is operating under an order of selection), the designated State unit must conduct an assessment for determining eligibility and priority for services. The assessment must be conducted in the most integrated setting possible, consistent with the individual's needs and informed choice, and in accordance with the following provisions:

Add the following language:
(f) Sheltered workshop settings may not be used for assessment of eligibility.
(h) Trial Work Experiences for the purposes of determining eligibility for VR services should be diverse in terms of types of jobs and employment and reflective of the diversity of the local labor market.

(i) The definition of competitive integrated employment under § 361.5(c)(9) may not be used to determine that individuals are ineligible for the VR program due to concerns over meeting this standard. Individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality, competitive integrated employment when provided the necessary skills and supports.

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§ 361.45 Development of the Individualized Plan for Employment

Comments:

1. The addition in the WIOA legislation of a specific deadline of 90 days for development of an IPE is a positive development in terms of responsiveness and accountability. However, the 90-day deadline for development of an IEP combined with the 60-day deadline for determination of eligibility could still mean up to 5 months between application for services, and service delivery. It is recommended that additional language be added that provides more timely recommendations for development of the IPE (e.g., it is expected that an IPE will generally be developed within 30 days of application for services, but absolutely no later than 90 days after application for services).
2. Under the WIOA legislation, if additional information is needed to determine an employment outcome and types of services to be included within the IPE, the assessment to gather this information must be done in the most integrated setting possible. This is a positive development. However, there is a lack of detail regarding methods for conducting assessments in integrated settings, and within the current regulations, sheltered work facilities can still be used for assessment, even though they are a poor indicator of an individual's likely success in competitive integrated employment.

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

§ 361.45 Development of the individualized plan for employment.

(e) ***Standards for developing the individualized plan for employment.*** **The individualized plan for employment must be developed as soon as possible, with the general expectation that the plan will be developed with 30 days, but not later than 90 days after the date of determination of eligibility, unless the State unit and the eligible individual agree to the extension of that deadline to a specific date by which the individualized plan for employment must be completed.**

(f) ***Data for preparing the individualized plan for employment.***

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(2) ***Preparation based on comprehensive assessment.***

(i) If additional data are necessary to determine the employment outcome and the nature and scope of services to be included in the individualized plan for employment of an eligible individual, the State unit must conduct a comprehensive assessment of the unique strengths, resources, priorities,

concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment services, of the eligible individual, in the most integrated setting possible, consistent with the informed choice of the individual in accordance with the provisions of § 361.5(c)(5)(ii). Such an assessment may not be conducted in a sheltered work setting. Examples of the type of activities that can be conducted in integrated settings for this assessment include but are not limited to job trials, situational assessment, and job shadowing. Integrated work settings used for assessment should be diverse in terms of types of jobs and employment and reflective of the diversity of the local labor market.

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§ 361.52
Informed choice

Comment:

Under § 361.52, WIOA contains extensive regulatory language regarding procedures for ensuring informed choice, similar to language contained in WIA. However there is no actually definition of "informed choice" in WIOA. It is recommended that definition of "informed choice" be added, that is consistent with the US Department of Justice requirements for informed decision making under the mandates of the 1999 Olmstead decision (see http://www.ada.gov/olmstead/q&a_olmstead.htm).

RECOMMENDED CHANGE TO PROPOSED REGULATIONS

Add the following to § 361.5 Applicable definitions:

***(32) Informed choice* mean the process of choosing from options based on accurate information and knowledge. These options are developed by a partnership consisting of the individuals with a disability and the counselor that will empower the individual to make decisions resulting in a successful vocational rehabilitation outcome. It is critical that individuals have sufficient information in order to make an informed choice, and affirmative steps must be taken to ensure individuals have sufficient context to make an informed choice via actual experiences in integrated typical community settings, rather than relying primarily or exclusively on verbal questions and answers, or time spent in disability-specific settings.**

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§ 361.48(a)(2) Scope of vocational rehabilitation services for individuals with disabilities
Pre-Employment Transition Services

Language on post-secondary education: One of the required services under Pre-Employment Transition Services is counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education. To conform with the language in the Higher Education Opportunity of 2008, this should be changed to "transition and postsecondary" rather than "transition or postsecondary". In addition, given the growth of such programs for individuals with intellectual and developmental disabilities, these should be specifically noted.

RECOMMENDED CHANGES TO LANGUAGE IN REGULATIONS

(2) *Required activities.* The designated State unit must provide the following pre-employment transition services:

(iii) Counseling on opportunities for enrollment in comprehensive transition ~~or~~ and postsecondary educational programs at institutions of higher education, including such programs and services for students with intellectual disabilities;

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§ 361.48(b) Scope of vocational rehabilitation services for individuals with disabilities
(b) Services for individuals who have applied for or been determined eligible for vocational rehabilitation services.

Comment:
The last several years have seen significant expansion in the opportunities for individuals with intellectual and developmental disabilities in post-secondary education. Nationally, the public VR system has been inconsistent in its willingness to provide support for these efforts. Therefore it is recommended that this be explicated noted as a service or activity that VR can provide and support.

RECOMMENDED CHANGES TO LANGUAGE IN REGULATIONS

(b) *Services for individuals who have applied for or been determined eligible for vocational rehabilitation services.* As appropriate to the vocational rehabilitation needs of each individual and consistent with each individual's individualized plan for employment, the designated State unit must ensure that the following vocational rehabilitation services are available to assist the individual with a disability in preparing for, securing, retaining, advancing in or regaining an employment outcome that is consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice:
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(6) Vocational and other training services, including personal and vocational adjustment training, advanced training in a field of science, technology, engineering, or mathematics (including computer science), medicine, law, or business, including tuition and services for students with intellectual or developmental disabilities in a Comprehensive Transition Program (as defined by the Higher Education Act of 2008) or receiving services at an institution of higher education; books, tools, and other training materials, except that no training or training services in an institution of higher education (universities, colleges, community or junior colleges, vocational schools, technical institutes, or hospital schools of nursing or any other postsecondary education institution) may be paid for with funds under this part unless maximum efforts have been made by the State unit and the individual to secure grant assistance in whole or in part from other sources to pay for that training.