CPSD Policy Brief

Analysis of Title IV of WIOA Statute and Proposed Regulations and Recommendations for Regulatory Changes

By David Hoff

The Workforce Innovation and Opportunities Act (WIOA), which reauthorizes and replaces the Workforce Investment of 1998 (WIA), WIOA (H.R. 803) was signed into law by President Obama on July 22, 2014. WIOA reauthorizes and updates the Rehabilitation Act of 1973 (the law providing oversight of the public vocational rehabilitation system), while also updating the structure of the country's workforce development system, used by the general public and businesses to assist with their employment and training needs. The aspects of WIOA covering the general workforce system primarily go into effect on July 1, 2015, while Title IV of WIOA, which covers the public vocational, rehabilitation (VR) system, with a few notable exceptions, went into effect immediately upon the signing of the bill.

In April 2015 draft regulations were released by both the US Department of Labor and US Department of Education for implementation of WIOA. Comments are due on June 15, 2015. This document provides an analysis of the Vocational Rehabilitation provisions of WIOA, (Title IV), based on the legislation and draft regulations. The WIOA legislation and draft regulations are extremely lengthy and comprehensive. The goal of this policy brief is to examine those areas of WIOA in terms of the public Vocational Rehabilitation system, that are of greatest relevance to advocates of full inclusion of individuals with disabilities in the general workforce. Areas examined in depth include:

- New requirements and an enhanced role for the public vocational rehabilitation regarding transition from school to adult life.
- New limitations on use of subminimum wage under Section 511 that go into affect in July 2016.

In addition, this policy brief examines the following additional areas addressed within WIOA:

- The new definition of Competitive Integrated Employment as the expected outcome of VR services.
- The addition of Customized Employment in federal law and regulations, as part of Supported Employment.
- Change in the definition of Employment Outcome, requiring that all employment must be paid.
- Changes in the definition of Supported Employment, Supported Employment Services, and a new focus of Supported Employment State Grants on Youth with the Most Significant Disabilities.
- Cooperation of VR with state intellectual and developmental disability agencies, and state mental health agencies.
- Changes in the assessment for eligibility for VR services.
- Changes in the development of the Individualized Plan for Employment.

- Issues regarding Informed Choice.

The Basis for Changes Under WIOA

The introductory and overview section of the proposed WIOA regulations states, "The foundation of the VR program is the principle that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality, competitive integrated employment when provided the necessary skills and supports." Further on, the emphasis on assisting young people to achieve employment success is stressed: "Congress makes clear that youth with significant disabilities must be given every opportunity to receive the services necessary to ensure the maximum potential to achieve competitive integrated employment." These are powerful words, and reinforce the principle that individuals with even the most significant disabilities are capable of becoming successfully employed, and that it is the responsibility of the VR system to assist them in achieving their employment goals.

Organization of this Document

Each section of this document focuses on a specific aspect of Title IV of the WIOA legislation and proposed regulations. The heading of each section provides a reference to the actual section of text for the focus area within the proposed WIOA regulations, followed by a brief summary of what has changed in that area as a result of WIOA. This is followed in most cases by a discussion of issues for consideration, and then recommendations for changes in the proposed regulations. In a few cases, while no regulatory recommendations are made, the focus area is included to note a significant change under WIOA.

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§ 361.48 (a); § 361.65
Pre-employment Transition Services

What's Changed:

The pre-employment transition requirements, which did not previously exist, are a major change under WIOA. These new requirements significantly expand the role of public VR within the transition process, in terms of both services to be provided and use of funds. A summary of this provision, based on the legislation and proposed regulations is as follows:

<u>Summary of Pre-Employment Transition Services</u>

Each State must ensure that the public VR program, in collaboration with the local educational agencies, provide, or arrange for the provision of, pre-employment transition services for all students with disabilities in need of such services, without regard to the type of disability, using 15% of the states Title I VR and any funds made available from State, local, or private funding

sources.

A. *Availability of services.* Pre- employment transition services may be provided to all students with disabilities, regardless of whether an application for services to VR has been submitted. *(NOTE: THE LEGISLATION STATES THAT PRE-EMPLOYMENT TRANSITION SERVICES MUST BE AVAILABLE TO ALL STUDENTS WHO ARE ELIGIBLE OR POTENTIALLY ELIGIBLE FOR VR SERVICES. THIS LANGUAGE IS FROM THE PROPOSED REGULATIONS, AND IS AN EFFORT TO CLARIFY THAT LANGUAGE. SEE COMMENTARY BELOW UNDER ISSUES FOR CONSIDERATION.)*
B. *Required activities.* The state VR program must provide the following pre-employment transition services:
    1. Job exploration counseling.
    2. 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.
    3. Counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education.
    4. Workplace readiness training to develop social skills and independent living.
    5. 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).

Funds available and remaining after the provision of the required activities described above may be used for additional activities that are primarily capacity building in nature. These are delineated within the regulations.

Pre-employment transition coordination. Each local VR office must carry out responsibilities consisting of—

1. Attending individualized education program meetings for students with disabilities, when invited.
2. 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.
3. Working with schools to coordinate and ensure the provision of pre-employment transition services under this section.
4. When invited, attend person- centered planning meetings for individuals receiving services under title XIX of the Social Security Act (Medicaid).

ISSUES FOR CONSIDERATION

1) "Pre-" and Readiness Orientation: The services that VR systems are mandated to provide as pre-employment transition services are in the realm of preparatory activities for employment. The introductory language to the regulations emphasizes that the purpose of pre-employment

transition services is to prepare students with disabilities for employment – "services required by this section are those that would be most beneficial to an individual in the early stages of employment exploration", and are to prepare individuals for competitive integrated employment. This is a challenge from a number of perspectives.

- Given research that clearly supports that actual employment experience while in school is the best indicator of employment success after leaving school, it is critical that the services provided under pre-employment transition services be conducted in a way that is reflective of best practice that are truly the "most beneficial", and that support access to and success in employment while in school.
- It will be critical to avoid spending time and resources on activities that are intended to fulfill the pre-employment transition requirements, but that have limited or no impact in terms of attaining the goal of competitive integrated employment, and may even serve as a barrier in terms of unnecessary "readiness" activities that are viewed as required in order to enter the workforce. For too long individuals with significant disabilities have been subjected to needless "readiness" criteria in terms of employment, until deemed sufficiently ready for employment by a professional. Particularly for those individuals with significant disabilities, their primary mode for getting "ready" for employment is via actually experiences in employment settings in the community.

2) Work-Based Learning – Connection to Actual Work Experiences: One of the 5 elements within pre-employment transitions, work-based learning, is connected with actual work experience. Work-based learning is generally defined as work experiences connected with a student's curriculum. However, there is no definition within WIOA of work-based learning. The expired federal School-to-Work Opportunities Act of 1994 contained the following definition.

The work-based learning component of a School-to-Work Opportunities program shall include--

1. *Work experience;*
2. *A planned program of job training and work experiences (including training related to pre-employment and employment skills to be mastered at progressively higher levels) that are coordinated with learning in the school-based learning component described in section 102 and are relevant to the career majors of students and lead to the award of skill certificates;*
3. *Workplace mentoring;*
4. *Instruction in general workplace competencies, including instruction and activities related to*
5. *Developing positive work attitudes, and employability and participative skills; and*
6. *Broad instruction, to the extent practicable, in all aspects of the industry.*

Source: www.govtrack.us/congress/bills/103/hr2884/text

In addition to this federal definition, states may have their own definition of work-based learning, in part as a result of activities initially funded under the School-to-Work Opportunities Act.

The lack of a definition of Work-Based Learning in WIOA is problematic for a number of reasons:

- The lack of a definition of work-based learning could result in implementation of work-based learning that is not aligned with the actual intent of work-based learning within the career development fields, resulting in activities that are not optimal in terms of best practices regarding employment and career development for young people with disabilities.
- The emphasis on WIOA on “pre-employment transition services” as preparatory experiences for employment may result in confusion as to whether actual employment experiences should be included within pre-employment transition services, and the role of VR in assisting and supporting these employment experiences. However, based on the fact that work-based learning generally includes actual work experiences, it appears the intent is that:
  a) Work experiences during school would fall within the parameters of work-based learning experiences as part of pre-employment transition services (which are available any student with a disability who could benefit from such a service).
  b) Assistance with employment as a part of a post-secondary school outcome would fall under Transition Services as defined within the WIOA regulations (available only if an individual is accepted for VR services).

3) Clarification of VR Support for Employment under Pre-Employment Transition Services vs. Transition Services: To avoid confusion on what type of employment experiences VR can assist with under Pre-Employment Transition services vs. Transition Services (see 2a and 2b above) it is critically important to 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 role of the public VR system in each.

4) Use of Integrated Settings: The WIOA legislation states that work-based learning experiences should be in integrated community settings to the maximum extent possible. There is need to further define “integrated community settings” in relationship to work-based learning, to ensure that such settings are in typical workplaces in the community with features of typical employment settings (e.g., avoiding school-based experiences/enterprises, group/enclave employment experiences, etc.). Use of sheltered work and similar settings should be specifically prohibited as a component of all pre-employment transition services. The proposed language contained within the definition of Competitive Integrated Employment - § 361.5(c)(9) - could be used as a basis for this.

5) Individual Requirements Regarding 5 Components: The WIOA legislation states that the VR program must provide all 5 required components of Pre-Employment Transition Services. The regulations are unclear regarding whether each individual receiving Pre-Employment Transition Services must receive all 5 components. While the VR program must make all 5 components available, requiring that participants receive all 5 components would be an inappropriate use of resources, and the services provided should be based on individual student need.

6) Eligibility for Pre-Employment Transition Services: Upon the passage of WIOA, it was unclear whether students would need to be identified as eligible for VR services, prior to

receiving pre-employment transition services. The WIOA legislation contained language stating that that pre-employment transition services were to be made available to any student who was "eligible or potentially eligible for VR services who needed pre-employment transition services". The regulations attempt to clarify this issue, stating that the pre-employment transition services are to be made available to "all students with disabilities in need of such services without regard to the type of disability". This is a very expansive view of who is potentially eligible for these services, including:

- Students who are receiving special education services, who are in the age range for transition services (under federal law by age 16 until age 22; states may have a wider age range) – over 1.2 million students nationally.
- Students with disabilities who are not in Special Education, but are still covered under Section 504 of the Rehabilitation Act, which includes all students who fall under the broader Americans with Disabilities Act definition of disability (an individual: a. who has a physical or mental impairment that substantially limits one or more major life activities; b. who has a record of such an impairment; or c. who is regarded as having such an impairment).

(The Department of Education has specifically requested feedback regarding the interpretation of who is potentially eligible for Pre-Employment Transition Services.)

In addition, the WIOA regulations add to the language of the WIOA legislation making it clear that pre-employment transition services are to be inclusive and made available "without regard to the type of disability", which is a positive addition.

While state VR programs may feel that the obligation to provide pre-employment transition services ends after the expenditure of 15% of Title I funds, the language in both the WIOA legislation and regulations is clear that the obligation to provide pre-employment transition services goes beyond the 15% mandate. Per WIOA, the state (not specifically the VR program) is responsible for ensuring that the VR program, in collaboration with the local educational agencies involved, provide, or arrange for the provision of pre-employment transition services <u>for all students with disabilities in need of such services</u>, from the 15% Title I reserve and any funds made available from State, local, or private funding sources. How such a mandate will be enforced is unclear.

While there is a broad mandate for the provision of Pre-Employment Transition Services, there is also language in WIOA that places limits on this mandate:

- The introductory language to the regulations makes clear that students who require services beyond the "limited scope" of pre-employment transition services will need to apply for and be determined eligible for public VR services, and that pre-employment transition services do not apply to students in post-secondary education.
- As with WIA, WIOA makes clear that public VR should not fund or provide services that are educational in nature which are to be provided by state and local educational agencies.
- Per WIOA, only those students who are determined to be "in need of such services" will receive pre-employment transition services. The regulations are unclear as to how such a determination will be made, and this language could be used to significantly limit who

receives pre-employment transition services.

Despite these limiting factors, the requirements under Pre-Employment Transition Services place a major mandate on states and public VR in terms of services for students with disabilities. Given the limitations in resources from VR and other sources to support Pre-Employment Transition Services, as WIOA is implemented, it is critical that clear and consistent criteria be developed to determine which students need Pre-Employment Transition Services, and how these services can be delivered in a way that makes best use of available resources and ensures a pathway to employment. At the same time, it is also critical to ensure that for those students who are not in need of Pre-Employment Transition Services, that effective Transition Services are provided via collaboration between education agencies, public VR, other disability agencies, workforce development, and community partners. Ultimately, the focus needs to not be on compliance, but on ensuring that every student with a disability, including those with the most significant disabilities, has the opportunity while in school to explore and experience employment within the general workforce, and is well prepared to be successfully employed in competitive integrated employment as an adult.

Pre-Employment Transition Regulatory Recommendations:

1. Add a definition of Work-Based Learning that is aligned with definition of the School-to-Work Opportunity Act of 1994.
2. 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.
3. Add additional language that emphasizes the critical importance of actual work experiences in typical work settings as part of Pre-Employment Transition services.
4. 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.
5. 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 -
6. Maintain the proposed language in the regulations regarding the availability of Pre-Employment Transition Services to all students in need of such services.
7. Maintain the proposed language that Pre-Employment Transition services are to be made available “without regard to the type of disability”
8. 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.

9. 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,
10. Specifically prohibit use of sheltered work and similar settings as a component of pre-employment transition services.

Part 397
Limitations on the Use of Subminimum Wage

What's Changed:

WIOA contains new requirements intended to limit the payment of subminimum wage to individuals under Section 14(c) of the Fair Labor Standards Act. Section 511 of the WIOA legislation places new requirements on public VR in terms of actions that must occur before an individual 24 and under is placed into sub-minimum wage employment, as well as new requirements regarding annual reviews for anyone in subminimum wage employment. A summary of these requirements under the WIOA legislation is as follows:

Youth 24 and Under

Before a youth with a disability (age 24 and under) is placed into subminimum wage employment, they must have completed the following steps, and produce documentation of each step.

1. The individual has received Pre-Employment Transition Services available to the individual or Transition Services under IDEA.
2. The individual has either been determined ineligible for public VR services, or he/she has received public VR services and has been unable to achieve the employment goal in their IPE after a reasonable amount of time.
3. The public VR system will provide individual career counseling, and information and referrals to public programs and other locally available resources that designed to enable the individual to attain competitive integrated employment. These services may not include work compensated at subminimum wage, or result in employment at subminimum wage.

Individuals Currently Earning Subminimum Wage

When any individual (regardless of age) begins work at subminimum wage, the following steps are required after 6 months, 12 months, and then annually thereafter.

1. The public VR system will provide the individual career counseling, and information and referrals to public programs and other locally available resources that designed to enable the individual to attain competitive integrated employment. These services may not

include work compensated at subminimum wage, or result in employment at subminimum wage.
2. The individual is to be informed by the entity paying subminimum wage of self-advocacy, self-determination and peer mentoring training opportunities available in the local area. These self-advocacy, self- determination and peer mentoring training opportunities are to be provided by an entity that does not have any financial interest in the individual's employment outcome, under applicable Federal and State programs or other sources.

The WIOA legislation and regulations contains a series of requirements in terms of documentation of these steps.

Prohibition on Schools Contracting for Payment of Subminimum Wage

Under Section 511, state and local education agencies (schools) can no longer enter into a contract or any other type of arrangement with a 14(c) certificate holder, resulting in payment of a youth with a disability (age 24 and under) with disabilities subminimum wage.

ISSUES FOR CONSIDERATION

1) Focus of Regulations on Documentation, Rather Than Implementation: The overall tone of the Section 511 regulations is one of focusing on documentation of the various steps of the process, and provision of documentation to youth and adults impacted by the process. This is potentially problematic as it portrays Section 511 as a compliance requirement, rather than focusing on the actual requirements and ensuring they have integrity and fulfill the Congressional intent of limiting the use of subminimum wage.

2) Application of Section 511: The legislative language was unclear about how Section 511 would be applied in terms of individuals who do not have a relationship with public VR. The implementing regulations provide some guidance on this issue, which raise significant concerns.

It seems clear that the legislative intent of Section 511 is that the steps required before being placed into subminimum wage employment apply to all youth with disabilities, and that similarly the requirements for individuals currently being paid at subminimum wage regarding Counseling and Information services on at least an annual basis, apply to all individuals currently being paid subminimum wage. In the development of Section 511, it appears there was a presumption by Congress that all individuals with disabilities, prior to being placed in subminimum wage employment, would have a relationship with public VR. The reality is that many individuals (youth and adults) are placed in subminimum wage employment without any type of referral or relationship with public VR, with state intellectual and developmental disability systems serving as a primary referral and funding source for subminimum wage employment in sheltered workshops and enclave settings.

The regulations state that VR is required to provide the Career Counseling and Information services only to those individuals who "are known" to be employed by 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. The regulations for youth 24 and

under who are considering subminimum wage employment are less clear in this regard, but the same "who are known" standard appears to apply; the title of 397.20 states: "What are the responsibilities of a designated State unit (VR program) to youth with disabilities *who are known* to be considering subminimum wage employment?".

This "who are known" standard is vague and problematic, and could result in Section 511 covering only those few individuals who are referred to public VR for services. This standard seems at odds with the more encompassing legislative intent of Section 511. However, it does seem clear that the ability of public VR to fulfill such a legislative intent would pose major challenges for public VR systems within the existing level of resources. Based on data from the US Department of Labor Wage and Hour Division, there are approximately 3,300 entities in the United States that hold 14(c) certificates (www.dol.gov/whd/specialemployment). While the actual number of individuals being paid subminimum wage is more difficult to come by, in 2001 the Government Accountability Office estimated that 424,000 individuals were being paid subminimum wage[1]. Assuming this figure is accurate and has remained relatively stable since then, the ability of public VR to provide the required Counseling and Information services under 511 to each of these individuals on at least an annual basis is going to be a major challenge, within the existing VR resources. (To provide some context in terms of VR resources, VR annually closes 600,000 cases per year.) In addition to individuals currently in subminimum wage employment, as noted, Section 511 also requires a series of steps for youth with disabilities (age 24 and under) before being placed in subminimum wage employment. The potential number of individuals who would fall under this requirement is difficult to ascertain but it is likely substantial. The "who are known" standard may be a response to the concern about the capacity of VR to implement Section 511 with all individuals who it could potentially apply to. However, this standard allows for a wide degree of discretion for state VR programs in terms of application of Section 511, and the end result could be minimal impact, rather than resulting in significant limitations in the use of subminimum wage, as Congress intended. A series of changes should be made to the proposed regulations to address these issues.

3) Service Provider Requirements Not Addressed: The primary responsibility for implementation of Section 511 is with the public VR system. However, there are specific portions of Section 511 that are the responsibility of the entities paying subminimum wage, under Section 14(c) of the Fair Labor Standards Act, which are noted in the legislation but not addressed within the regulations The WIOA regulations are clear that the aspects of the law that impact 14(c) certificate holders, are under the purview of the US Department of Labor, which administers the FLSA. These areas are specifically:

- Before a youth with a disability (age 24 and under) goes to work at subminimum wage, the 14(c) holder must review all required documentation provided to the individual, that indicates that all required steps under Section 511 have been taken. The 14(c) holder is required to maintain copies of this documentation.

[1] United States General Accounting Office. (2001). *Special minimum wage program: Centers offer employment and support services to workers with disabilities, but labor should improve oversight. Report to congressional requesters, GAO-01-866.* - www.gao.gov/products/GAO-01-886

- In order to continue to employ an individual at subminimum wage, the 14(c) certificate holder must verify completion and documentation of the required 511 processes (initially required semi-annually, and then annually) and maintain copies of documentation.
- When an individual goes to work at subminimum wage, they are to be informed at 6 months, 12 months, and annually thereafter by the 14(c) holder of self-advocacy, self-determination and peer mentoring training opportunities available in the local area. These opportunities are to be provided by an entity that does not have any financial interest in the individual's employment outcome, under applicable Federal and State programs or other sources. (For 14(c) holders with less than 15 employees, public VR is responsible for this provision. The WIOA regulations address this VR requirement.)

To date, no implementing regulations regarding the requirements for 14(c) holders in terms of Section 511 have been issued. The text in the WIOA legislation is relatively specific regarding the 14(c) holder requirements. However, a potential concern is that these provisions will be ignored as they are separate from the other requirements of Section 511 in the regulations. It will be critical for advocates to monitor for release of implementing regulations on these provisions of Section 511, and/or any other policy guidance from DOL, including incorporation within the DOL Wage and Hour Field Operations Handbook.

4) Additional Section 511 Issues:

- Section 511 states that a youth with a disability, who has been accepted for VR services, must work towards their employment goal for a "reasonable time" before it is determined that they are unable to achieve that outcome. The "reasonable time" standard is ambiguous. The regulations do attempt to address this by providing a definition of "reasonable time" of 24 months for those individuals whose goal is supported employment. The issue in this regard is there is no standard for individuals whose goal is not supported employment.
- The WIOA legislation states that 14(c) entities with 15 or more employees are required on at least an annual basis to inform individuals of self- advocacy, self-determination, and peer mentoring training opportunities available in the community. For those entities with less than 15 employees, the public VR program must meet this requirement on their behalf. Since this requirement is legislatively based, the core requirement cannot be modified via regulation. However, it is worth noting that having the 14(c) provider responsible for this aspect of Section 511, is problematic, as the 14(c) holder may have a self-interest may be in keeping the individual in subminimum wage employment. While there is a significant need for strengthening the overall enforcement requirements for Section 511, this requirement in particular will require external monitoring.
- The WIOA legislation states that the self-advocacy, self-determination, and peer mentoring training opportunities required at least annually for those currently earning subminimum wage, cannot be provided by an entity with a "financial interest" in the individual's employment outcome. There is a need to clearly define the parameters of "financial interest". The regulations should make clear that the entity providing subminimum wage employment to the individual, cannot provide these services (which seems to be the intent of the "financial interest" language, but is not explicit). Also, the law and regulations lack

any type of definition of “self-advocacy, self-determination, and peer mentoring training opportunities”, and the regulations should provide specific definitions for each of these to ensure they have integrity in terms of the intent of Section 511.

- The regulations for Section 511 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. This provision needs to be strengthened to prohibit 14(c) providers from providing these services, as that would be a conflict of interest.
- The regulations state that the public VR system or a contractor working directly for the VR program is authorized to review the individual documentation required under Section 511. This appears to be a conflict with the Section 511 legislation, which states that this is to be done by an individual working directly for the VR system. However, if this review by a contractor is going to be allowed, parameters should be placed regarding what type of entity would be considered a qualified contractor to perform these reviews, including prohibiting 14(c) providers from providing these services, as that would be a conflict of interest.
- While there is extensive language on documentation, there is limited language regarding oversight and enforcement, except stating that documentation is subject to inspection by the public VR system or the US Department of Labor.
- There are concerns over the enforcement of prohibition on contracting by local and state educational agencies for payment of subminimum wage, particularly given the decentralized nature of school systems. It is recommended that additional language be added requiring state education agencies to issue clear policy directives to local education agencies regarding this requirement, as well as additional language regarding the responsibilities of state education agencies in enforcement of this provision.
- The semi-annual review required for placement of individuals served via the VR program into extended employment (non-integrated or sheltered work setting) under 361.55 should be referenced within the regulations for Section 511, specifically 397.40 (responsibilities of VR for individuals who employed in subminimum wage), and reconciled to make them consistent. The requirements for individuals who have been served in the public VR program and placed in extended employment (non-integrated or sheltered work setting), require a semi-annual review for two years (rather than one year under 511), and also have additional requirements requiring these reviews that are not contained in Section 511.

Limitations on Use of Subminimum Wage Regulatory Recommendations:

- The overall tone of these 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, instead of within the context of simply having proper documentation of these steps.
- The implementing regulations should clearly define the parameters of what constitutes “who are known”, in a way that is expansive and within Congressional intent, including not only individuals who are readily known to public VR via application for services, but that also requires proactive efforts in identifying other individuals who are considering

subminimum wage employment or are currently in subminimum wage employment.

- Language should be added that 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.
- Language should be added that requires inter-agency agreements with state intellectual and developmental disability (ID/DD) agencies in terms of Section 511. These agreements should: a) specify the role of the ID/DD agency in implementation of Section 511 in partnership with public VR; b) ensure that individuals earning subminimum wage that are served by ID/DD agencies, are "known" to public VR; c) state how that the ID/DD agency supports compliance with Section 511 in terms of aligning the 14(c) provider requirements in Section 511, with the requirements for its service provider system; d) state how the ID/DD agency will provide general support for ensuring that the required steps for youth with disabilities are complied with prior to placement in a subminimum wage position with a provider supported by the ID/DD agency; e) 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.

  If there are other public agencies that serve as referral and support for entities paying subminimum wage, besides those funded by state ID/DD, similar agreements should also be required via implementing regulations.

- 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.
- 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 close.
- 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.
- 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.
- 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.
- 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.
- Add language that specifies timelines for reviews of documentation, and that enhances enforcement mechanisms, including specifying that the Client Assistance Program has jurisdiction in reviewing compliance with Section 511 requirements.
- 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.
- 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.

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§ 361.55
Semi-annual Review of Individuals in Extended Employment and Other Employment under Special Certificate Provisions of the Fair Labor Standards Act

What's Changed:
Under WIA, public VR was required to conduct an annual review for two years of individuals served by VR who were placed into extended employment (non-integrated or sheltered work setting), to determine and assist the individual to identify services and strategies for entering the general workforce. (Note: such placements are not considered to be a successful VR closure). The WIOA legislation strengthens this provision by requiring a semi-annual review for up to two years, and an annual review thereafter, in which maximum efforts are made to assist the individual in engaging in competitive integrated employment.

<u>ISSUE FOR CONSIDERATION</u>
This language should be referenced and reconciled with the requirements under Part 397 that implement Limitation on Use of Subminimum Wage, under Section 511 of WIOA.

Semi-Annual Review of Individuals in Extended Employment Regulatory Recommendation:
The language under § 361.55 regarding semi-annual and annual review of individuals in special wage certificate employment, should be referenced/reconciled with the language under §397.40 regarding semi-annual and annual reviews of individuals earning subminimum wage, to

ensure consistency and avoiding confusion over which standard applies, while maintaining the requirement for semi-annual reviews for two years, and annual reviews annually thereafter.

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

What's Changed:

The term "competitive integrated employment" is new under WIOA, and is the expected employment outcome for VR services, including the type of employment individuals with the most significant disabilities are capable of achieving, if appropriate supports and services are provided. "Competitive integrated employment" replaces the term "gainful employment" and is a consolidation of the terms "competitive employment" and "integrated setting" from the previous regulations. The key features of competitive integrated employment are:

a) Employment above minimum wage and at the same wage as employees without disabilities performing the same duties, and eligibility for the same benefits as other employees.
b) Employment in integrated settings where individuals interact with individuals without disabilities in the same manner as other employees
c) Opportunities for advancement as appropriate, similar to those without disabilities.

The definition of competitive integrated employment in the WIOA legislation has been enhanced by the proposed regulations, by stating that the employment location must be one that is typically found in the community, and that interactions with individuals without disabilities must include fellow employees to the same extent as those without disabilities. As discussed at length in the explanatory text of the proposed regulations, sheltered work and similar settings would not meet the criteria for competitive integrated employment, and that interaction with customers and vendors is insufficient to consider a setting to be integrated. The explanatory text also states, "We continue to maintain the long-standing Department policy that settings established by community rehabilitation programs specifically for the purpose of employing individuals with disabilities (e.g., sheltered workshops) do not constitute integrated settings because these settings are not typically found in the competitive labor market."

ISSUE FOR CONSIDERATION

The definition of "competitive integrated employment" is a strong definition. However, there is concern that this definition will be used a means for 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.

Definition of Competitive Integrated Employment Regulatory Recommendations:

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. Add regulatory language that reiterates the language contained in the introductory section: "The definition of competitive integrated employment should not be used to exclude individuals from 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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§ 361.5(c)(11)
Definition of Customized Employment

What's Changed:

The WIOA legislation includes the addition of Customized Employment as a new option within Supported Employment. Customized Employment is defined as competitive integrated employment for an individual with a significant disability that is:

a) based on an individualized determination of the unique strengths, needs, and interests of the individual with a significant disability;
b) Designed to meet the specific abilities of the individual with a significant disability and the business needs of the employer;
c) is carried out through flexible strategies such as:
    1. Job exploration by the individual,
    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.

As a result, payment for Customized Employment services is an allowable use of public VR

funds nationally. The language with the WIOA regulations is the same as that within the legislation.

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

What's Changed:

The previous definition for "Employment Outcome" allowed for unpaid employment. Under the new proposed regulations this definition 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.

Change in Definition of Employment Outcome Regulatory Recommendation:

- This is a positive change and should be endorsed.

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§ 361.5 (c) (53)
Changes in definition of Supported Employment
§ 361.5 (c) (54)
Changes in definition of Supported Employment Services

What's Changed:

- Customized Employment is now part of the Supported Employment definition (WIOA legislative change).
- The definition now specifies that Supported Employment is for individuals with the most significant disabilities (WIOA legislative change).
- Under Supported Employment Services, the period for ongoing support services has been increased from 18 to 24 months (WIOA legislative change)
- The Supported Employment Services definition now specifies that services must be based on the needs of the individual, as stated in the individualized plan for employment (WIOA legislative change).
- 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."

ISSUE FOR CONSIDERATION

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. At the same time, it is unclear whether and how much the concept of "working towards competitive integrated employment" actually is utilized within service delivery. Particularly given the efforts in WIOA to limit the use of subminimum wage, consideration should be given towards whether allowing subminimum wage employment at all under supported employment is acceptable. At a minimum, this language should be made much clearer regarding what constitutes "working on a short-term basis towards competitive employment". In addition, while it appears that it is up to the individual to determine if they are capable of meeting the criteria for competitive integrated employment within 6 months, there is concern regarding professionals making this determination based on arbitrary and inconsistent criteria. Ideally, elimination of the "working on a short-term basis toward competitive integrated employment" language completely may be the ideal solution, but since this language is in the WIOA legislation, it cannot be deleted via regulation.

Changes in Definition of Supported Employment and Supported Employment Services Regulatory Recommendations:

- Revise the language regarding working on a short-term basis towards competitive employment to make it clear what "working towards" specifically means.
- Specifically prohibit the payment of subminimum wage under supported employment.
- Clarify that it is up to the individual with a disability to determine if they are capable of meeting the criteria for competitive integrated employment within 6 months, rather than the VR professional.

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§ 363.22, § 363.23
Changes in Supported Employment Financing – Emphasis on Youth with Most Significant Disabilities

What's Changed:

- 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 (WIOA legislative change)

- A 10% state match is required for the 50% of supported employment grant funds used for services to youth with the most significant disabilities. There continues to be no match requirement for supported employment grant funds used for other purposes. (WIOA legislative change)
- The portion of supported employment state grant funds used for youth with the most significant disabilities may be used for Extended Services (i.e., post-placement services beyond the 24 months) for up to 4 years. Previously, Supported Employment and other VR funds could not be used for Extended Services. (WIOA legislative change)

ISSUE FOR CONSIDERATION

- It appears that the intent of this provision of WIOA is to address two specific issues:
  - the needs of young people with the most significant disabilities who often experience challenges accessing services as they transition to adulthood.
  - the challenges experienced by this group in accessing long-term post-placement supports.

  However, the Supported Employment State Grants are a relatively small pool of federal funds ($27 million nationally in FY 2014 vs. $3 billion for VR Title I). As a result, if these funds are expended at a significant level for extended services, relatively few individuals will benefit from this provision – and fewer individuals will benefit from the Supported Employment States Grants, than currently do so. The introductory language to the regulations is clear that funding of extended services is not a requirement, and as states implement this provision, in order to maximize the number of individuals who benefit from the Supported Employment State Grant funding, consideration should be given to applying this provision judiciously, and only in those cases where other sources of funding for extended supports (e.g. Medicaid) are not available.
- It is important to recognize that Supported Employment can be funded via Title I funds, and that the funds available via the Supported Employment State Grants are intended to supplement not supplant the funds used under Title I in the provision of supported employment services - § 363.11(g) (4). The new provisions regarding reserving 50% of funds for youth with the most significant disabilities, does not apply to supported employment funded via Title 1.
- One of the issues regarding implementation of this provision is determining who are youth with the most significant disabilities. The definition of "most significant disability" remains virtually the same as under WIA – essentially it is an individual with a "significant disability" who meets additional criteria set by the state VR agency § 361.5 (c) (30). Significant disability is defined as an individual "who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome, and whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time." - § 361.5 (c) (29). The definition also lists a number of conditions that would be among those that could be considered a significant disability within the criteria of the definition. It is critical that this

definition be applied consistently in general, and specifically under these new provisions regarding supported employment for youth with the most significant disabilities.

Changes in Supported Employment Financing Regulatory Recommendation:

- Add language that clarifies the use of supported employment funds for extended supports for youth with the most significant disabilities, stating that supported employment state grant funds should only be used for extended supports when no other source of funding is available.

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§ 361.24
Cooperation and Coordination with Other Entities

What's Changed:

WIOA contains new requirements for cooperation between public VR and two primary agencies that serve individuals with long-term support needs: state intellectual and developmental disability (ID/DD) agencies and state mental health agencies. WIOA specifics that the state unified plan must indicate how public VR will coordinate with both of these agencies to develop opportunities for "community-based employment in integrated settings" - § 361.24(g). In addition, 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. This requirement appears to be intended to ensure a more coordinated multi-agency approach for individuals needing long-term ongoing post-placement supports. The proposed regulations - § 361.24 (f) - do not expand on this requirement.

ISSUE FOR CONSIDERATION

There is no requirement for a cooperative agreement between VR, Medicaid, and state Mental Health, for those needing long-term employment supports funded by Medicaid.

Cooperation and Coordination with Other Entities Regulatory Recommendation:

Expand the provision under § 361.24 (f) regarding VR cooperative agreements to include development of an agreement with the state department of mental health, to ensure a coordinated approach also for individuals with psychiatric disabilities needing long-term employment supports.

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§ 361.42(e)(2)(i)
Assessment for Eligibility for VR Services

What's Changed:
Under the WIOA legislation, 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.

ISSUE FOR CONSIDERATION

There is a need for clarity regarding the parameters of non-integrated settings that are permitted for assessment.

Assessment for Eligibility for VR Services Regulatory Recommendation:
In terms of assessment of eligibility for VR services, language should be added that specifically prohibits the use of sheltered work and similar settings for assessment for eligibility, which are inappropriate for eligibility determination, given that such settings are not reflective of typical workplace settings (as noted in the introductory language to the proposed regulations), and are a poor indicator of potential success in competitive integrated employment.

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§ 361.45
Development of the Individualized Plan for Employment

What's Changed:
WIOA legislation contains two significant changes in the requirements for the development of the Individualized Plan for Employment (IPE):

- There is now a specific time limit for development of an IPE. IPE's must be developed as soon as possible, but not later than 90 days of the determination of eligibility, unless the state VR program and the individual mutually agree to an extension.
- 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.

ISSUES FOR CONSIDERATION

- The addition of a specific deadline 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.

- 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.

Development of the Individualized Plan for Employment Regulatory Recommendations:

- 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).
- It is recommended that the requirement for gathering assessment information in the most integrated setting possible be strengthened with examples of the types of assessment activities that might be conducted (e.g., situational assessments, job shadowing, etc.), and also include a specific prohibition on use of sheltered workshops and similar settings, that do not reflect typical employment settings.

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§ 361.52
Informed choice

ISSUE FOR CONSIDERATION

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".

Informed Choice Regulatory Recommendation:

It is recommended that definition of "informed choice" be added. A suggested definition is as follows: Informed choice is 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, rather than relying primarily or exclusively on verbal questions and answers.