

**To:** Department of Education Regulatory Reform Task Force  
**From:** **NY - General**  
New York State Education Department  
Office of Adult Career and Continuing Education Services –  
Vocational Rehabilitation (ACCES-VR)  
**Date:** September 20, 2017  
**Subject:** Recommendations to Improve Implementation of the Workforce Innovation  
and Opportunity Act (WIOA)

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ACCES-VR has been engaged in review and implementation of the Workforce Innovation and Opportunity Act since passage of the law, issuance of draft information, and subsequently the final regulations.

It is the position of ACCES-VR that certain expectations stated in regulation pose undue burden and carry significant cost. There is a staff cost to the magnitude of data that must be gathered and entered; there is cost related to processes and procedures that are not a part of providing direct service to our participants, but rather are necessary to execute the regulations.

The following regulations, in addition to the new Rehabilitation Services Administration (RSA) – 911 reporting requirements, were amended and developed in response to the Workforce Innovation and Opportunity Act (WIOA):

34 C.F.R. Part 361 (2016) – State Vocational Rehabilitation Services Program  
34 C.F.R. Part 363 (2016) – The State Supported Employment Services Program  
34 C.F.R. Part 397 (2016) – Limitations on the Use of Subminimum Wage

ACCES-VR has three priority areas of concern: Pre-Employment Transition Services; Limitations on the Use of Subminimum Wage; and, data collection.

Highlighted below are key points of evaluation within each priority area and a recommendation.

**1. Pre-employment Transition Services (Pre-ETS)**

**34 C.F.R. § 361.48(a)(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).*

**Evaluation:** The regulations and the interpretation issued in subsequent policy guidance places significant emphasis on these pre-employment services for students. The detailed requirements on mandatory activities, the requirement to reach all students with disabilities that “need” the services, and the burden for tracking and verifying each step is a huge and new burden for the VR agency. Much of this seems to be setting up a dual system of service. The core of the activity is service that is available within existing VR services.

RSA concluded that any services available to individuals who are receiving VR under the other subsections of 34 CRF Part 361.48 cannot be charged to the 15 percent Pre-ETS reservation of funds. To tie funding in this manner is highly burdensome. General VR services for qualifying Pre-ETS students that do not fit into the above activity definitions must be paid for from the original grant, which reduces the funds available to serve the remaining customer base.

Although Pre-ETS individuals who are determined to be potentially eligible can receive Pre-ETS prior to applying, the services they are able to receive at this stage are limited by the above narrowly-defined activities. If they require additional service or services to supplement receipt of the defined activities (such as transportation, coaching supports during work-based learning experiences, or assistive technology) they must apply for VR and they can receive the service but not from the set-aside funding.

Travel, coaching supports during work-based learning experiences, and assistive technology services are critical to effectively providing the five required Pre-ETS to students and SVRAs *would like to be* able to count these as part of the Pre-ETS reserved funds.

**Travel:** ACCES-VR offers the following regulations for consideration:

**29 U.S.C. Section 730(d)(1)** *From any State allotment under subsection (a) for a fiscal year, the State shall reserve not less than 15 percent of the allotted funds for the provision of pre-employment transition services*

*(2) Such reserved funds shall not be used to pay for the administrative costs of providing pre-employment transition services.*

**34 C.F.R. § 361.5(c)(2)(xii)** *travel costs related to carrying out the program, other than travel costs related to the provision of services*

**Technology:** Assistive technology, including software and hardware, is critical for people with disabilities to fully participate in Pre-ETS and in competitive integrated employment.

**Recommendation:** Permit services that support Pre-ETS as qualifying for use of set-aside Pre-ETS funding.

Specifically, modify guidance to permit States to pay for transportation costs incurred as a result of students' participation in Pre-ETS. Amend 29 U.S.C. Section 730(d)(1) of WIOA to exclude students' transportation or travel costs from administrative costs. And, amend the definition of administrative costs in 34 C.F.R. § 361.5(c)(2) to exclude students' transportation and travel costs for customers.

Specifically, modify guidance to allow States to pay for technology needed for students' education, skill development, and participation in Pre-ETS under "authorized activities," as defined in under 34 C.F.R. § 361.48(a)(3)(i) and 34 C.F.R. § 361.48(a)(3)(ii).

Specifically, modify guidance to include coaching supports when necessary to support work-based learning experiences.

Overall, the regulations on Pre-ETS should give states considerably more flexibility in determining a broader range of services that could potentially enhance a student's career development. The lack of flexibility inhibits the SVRAs' capacity to fully engage students in the required Pre-ETS on a scale necessary to expend the full amount of the Pre-ETS reserved funds. This may potentially limit the success of the Pre-ETS implementation.

## **2. Limitations on the Use of Subminimum Wage**

**34 C.F.R. § 397.20(a)(2)** **What are the responsibilities of a designated State unit to youth with disabilities who are known to be seeking subminimum wage employment?**

*(2) Application for vocational rehabilitation services, in accordance with 34 CFR 361.41(b), with the result that the individual was determined—*

*(i) Ineligible for vocational rehabilitation services, in accordance with 34 CFR 361.43; or*

*(ii) Eligible for vocational rehabilitation services, in accordance with 34 CFR 361.42; and*

*(A) The youth with a disability had an approved individualized plan for employment, in accordance with 34 CFR 361.46;*

*(B) The youth with a disability was unable to achieve the employment outcome specified in the individualized plan for employment, as described in 34 CFR 361.5(c)(15) and 361.46, despite working toward the employment outcome with reasonable accommodations and appropriate supports and services, including supported employment services and customized employment services, for a reasonable period of time; and*

*(C) The youth with a disability's case record, which meets all of the requirements of 34 CFR 361.47, is closed...*

**Evaluation:** Under the new Limitations on Subminimum Wage regulations, VR agencies are being put in the position of being a barrier to subminimum wage employment, particularly for youth. The availability of vocational rehabilitation services being known as an option to be selected would seem appropriate. However, the current regulations go beyond that and require a youth to apply for VR services before entering subminimum wage employment – whether they want VR services or not. If a youth refuses to apply, it is forbidden for an employer to hire them in subminimum wage employment – even though the employer has met its obligation to be a certified provider of subminimum wages under USDOL regulations, and the youth is aware of other options, but choosing subminimum employment. These regulations circumvent labor law as written, and they eliminate the opportunity for the individual to make his/her own choice.

It seems perplexing that an education law for provision of vocational rehabilitation intends to mandate that youth apply for VR services and demonstrate an inability to benefit from VR services before they can work for subminimum wage. In taking that further, it appears to mean that if the youth can benefit from VR services, they are required to proceed forward with services toward some employment goal.

It would not seem a reasonable use of resources for the individual to open a case, then choose subminimum wage employment as an IPE goal. Or, if this is an option, then it seems to be a waste of resources and time that the youth must open a case to officially choose subminimum wage employment as a goal at which time they are no longer eligible for VR services. At that point, it would seem unclear as to whether the employer could hire them. It would appear the employer would still be forbidden to hire them – since they were choosing that type of employment rather than being found ineligible to benefit from VR services.

**Example:** In provision of required activities to meet the regulations related to subminimum wage employment, ACCES-VR came upon a circumstance where youth with significant disabilities are attending an alternative high school. As part of their school program, there is a work-based learning component. The students are paid at

a subminimum wage for this developmental work experience. They work a very limited amount of time (about 45 minutes) per week. The school holds a 14 (c) certificate to permit this. A part of the process is to teach students how to manage the money they are earning. These students are not at the point of exiting high school and entering subminimum wage employment. They are in high school and they are engaged with transition planning. As needed, and at an appropriate time, students are referred to ACCES-VR as a part of the process of planning for post-high school options. However, with the current lack of flexibility in the regulations, students must apply for VR services very early in their secondary education. Options have been explored but there seems to be no good solution that both meets the letter of the law and what the students want and need.

In ACCES-VR's assessment of this situation, it does not appear that it is an employment relationship, but rather is a work-based learning experience. Without the structure and support of the special education setting, these students would not be working in a sheltered setting. The construction of Section 397.20 seems entirely antithetical to Section 361.52 that assures that individuals have opportunity to exercise informed choice in decisions related to the provision of services. Section 397.20 essentially forces students and their families to apply for VR services whether or not they are truly interested at that time.

A visit to the school by ACCES-VR staff to provide required information and other activities occurred. Counseling was provided where the student or parent was willing, and applications were offered. However, parents and guardians, as well as school officials are confused by the requirements under this provision. This is not the appropriate time in those student's lives to apply for VR services.

So, many students (some entering or exiting throughout the year) must apply for VR services that they are not seeking. This is an unnecessary burden on the students and their guardians, the school staff, and the VR program.

**34 C.F.R. § 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)(3), to individuals with disabilities, regardless of age, or the individual's representative as appropriate, who are known by the designated State 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 of an individual with a disability described in this paragraph through the vocational rehabilitation process, self-referral, or by referral from the client assistance program, another agency, or an entity, as defined in §397.5(d).*

*(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.*

*(4) The career counseling and information and referral services provided under this section may include benefits counseling, particularly with regard to the interplay between earned income and income-based financial, medical, and other benefits.*

*(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 within 30 calendar days of the referral by the entity, of self-advocacy, self-determination, and peer mentoring training opportunities available in the community.*

*(2) The services described in paragraph (b)(1) of this section must not be provided by an entity as defined in §397.5(d).*

*(c) Required intervals. (1) For individuals hired at subminimum wage on or after July 22, 2016, 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.*

*(2) For individuals already employed at subminimum wage prior to July 22, 2016, the services required by this section must be carried out once by July 22, 2017, and annually thereafter for the duration of such employment.*

*(3)(i) With regard to the intervals required by paragraphs (c)(1) and (2) of this section for purposes of the designated State unit's responsibilities to provide certain services to individuals employed at subminimum wage, the applicable intervals will be calculated based upon the date the individual becomes known to the designated State unit.*

*(ii) An individual with a disability may become “known” to the designated State unit through self-identification by the individual with a disability, referral by a third-party (including an entity as defined in §397.5(d)), through the individual's involvement with the vocational rehabilitation process, or any other method...*

**Evaluation:** The above provision mandates that VR agencies follow-up with all individuals in subminimum wage employment and provide specified counseling and information services for “the duration of such employment.” The regulations do not permit the individual to choose to opt out of this contact, even if they were previously determined to have sought subminimum wage by informed choice per 34 C.F.R. § 397.20 (see above).

**Recommendations:** Amend 34 C.F.R. § 397 to allow individuals of any age to make informed choice for subminimum wage employment and to opt out of the follow-up and follow-along services. Allowing individuals to opt out of such services would not only honor their choice, but would allow VR agencies and staff to expend the resources on services that individuals with disabilities are choosing to receive to seek and maintain employment.

**Policy Directive RSA-PD-16-04 and Reporting Manual for the Case Service Report (RSA-911) (OMB Control Number 1820-0508, June 2017)**

**Evaluation:** Reporting requirements as outlined in the new RSA-911 case service report manual are excessive, burdensome, and costly. Despite the addition of numerous data elements that will require additional staff resources to collect and maintain the data, no additional funding was provided to States to meet these requirements. There are several areas of concern to ACCES-VR:

1. **Section XVIII. Post-Exit Data Elements** - New reporting requirements include an additional year of follow-up after an individual’s case is closed. To collect wage and credential information, staff must maintain contact with closed cases, in addition to managing current, active caseloads. If an individual’s wage information is not available through access to the State’s unemployment insurance (UI) database, staff must collect supplemental wage information. Individuals who are self-employed or employed by the federal government will not have wage records in the State’s UI system, and such records can be difficult or costly to obtain. This reporting requirement also creates a burden for customers, who must collect documentation and maintain contact with the State for one year following the closure of their case.
2. There are invasive questions bordering on discrimination that must be collected from the individual. ACCES-VR believes RSA should permit States to allow individuals the option not to self-identify race, ethnicity, or gender.

Additional data elements that should be reviewed so as to determine the actual value added to the vocational rehabilitation program:

- **Element Number 64** - Foster Care Youth
- **Element Number 67** - Low Income
- **Element Number 69** - Basic Skills Deficient/Low Levels of Literacy

- **Element Number 70** – Cultural Barriers
- **Element Number 71** - Single Parent

**Recommendation:** RSA amend the following data elements in the most recent RSA-911 case services reporting manual as follows:

1. The extent, detail and frequency of the new data elements and collection are time-consuming and can possibly limit the time that SVRA staff engage with participants. It potentially inhibits establishing the counseling relationship necessary for engaging in the VR process.
2. Strike or reduce Section XVIII: Eliminate or simplify the Post-Exit Data Elements from the RSA-911 reporting requirements.
3. Allow all individuals to choose not to self-identify their race and strike instructions mandating staff to identify race.
4. Reassess and potentially remove data elements 64, 67, 69, 70, and 71.

Thank you for the opportunity to provide comment.