

To: Department of Education Regulatory Reform Task Force
From: Minnesota State Services for the Blind
Date: August 15, 2017
Subject: Recommendations to Improve Implementation of the Workforce Innovation and Opportunity Act (WIOA)

Minnesota State Services for the Blind (SSB) identified language in Department of Education (DOE) regulations, policy statements, and guidance that causes implementation barriers and undue hardship for the designated state agencies. The following regulations, in addition to the new Rehabilitation Services Administration (RSA) – 911 reporting requirements, were amended and developed in response to the passage of 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

Below, SSB outlines five policy areas that are constrained by specific sections within the above regulations or related policy guidance from the Rehabilitation Services Administration (RSA), the conflicts created for designated state units (DSUs) by the policies or guidance, and recommends solutions for each problem. Policy guidance cited in the text below comes from several sources, including the preamble of the regulations, communications and meetings with RSA staff, and RSA trainings for state administrators. In the final section, SSB recommends a strategy to improve future policy development efforts and reduce implementation barriers.

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

SSB embraces WIOA's emphasis on youth with disabilities and believes that early intervention is key to long-term employment success. However, specific language within the regulations, as well as conflicting guidance and technical assistance from RSA diminishes the overall potential for progress with youth.

34 C.F.R. § 361.5(c)(51)(i)(A)(2) – Student with a disability

If the State involved elects to use a lower minimum age for receipt of pre-employment transition services under this Act, is not younger than that minimum age;

ISSUE: Technical assistance received from RSA staff confirms that in States with two vocational rehabilitation (VR) agencies (a general vocational rehabilitation agency and an agency serving blind and visually impaired), both agencies must agree on the age at which Pre-ETS will become available to students with disabilities. The requirement that two separate designated state units (DSUs) within one State must agree on a specified age for the commencement of services is based on the language in the regulation referring to the "State" rather than the "state unit." However, the definition of "State" in 34 C.F.R. § 361.5(c)(48) "means any of the 50 States..." and does not specify the inclusion of multiple DSUs.

The current RSA interpretation has serious unintended consequences. General agencies serve very different demographic populations than agencies serving blind and visually impaired individuals, in

which 60 percent of all blind individuals are 55 years and over. Proportionally, the number of school-age blind students is much smaller than the number of students who might receive services from a general VR agency. Not only do blind agencies serve far fewer individuals aged 14-21, but this group makes up a much smaller proportion of their total customer base than in general agencies. Thus, agencies serving the blind and visually impaired have the capacity to serve more students at an earlier age with the Pre-ETS funds.

Additionally, SSB stakeholders, including parents and teachers, have petitioned SSB to serve students starting as early as middle school to begin educating them and their families regarding their potential for achieving self-sustaining employment and preparing them for the future. Early interventions for assistive technology, orientation and mobility skills training, and countering the soft bigotry of low expectations for blind students will contribute to successfully achieving long-term competitive employment goals.

SOLUTION: Modify RSA policy guidance to allow each DSU to set the minimum age at which Pre-ETS will become available to students with disabilities.

34 C.F.R. § 361.48(a) Pre-employment transition services

(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 Federal funds reserved in accordance with §361.65, and any funds made available from State, local, or private funding sources. Funds reserved and made available may be used for the required, authorized, and pre-employment transition coordination activities under paragraphs (2), (3) and (4) of this section.

(1) Availability of services. Pre-employment transition services must be made available Statewide to all students with disabilities, regardless of whether the student has applied or been determined eligible for vocational rehabilitation services.

(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.);

ISSUES: The above regulations and the interpretation issued in subsequent policy guidance draws an unnecessary distinction between Pre-ETS and traditional VR services, which ultimately impedes States' ability to efficiently spend VR funds. Rather than allowing States to use the 15 percent reservation of Pre-ETS funds for all of Pre-ETS individuals' needs, RSA maintains that only VR services fitting into the narrow subset of Pre-ETS required, authorized, or coordination activities defined above may be charged to the Pre-ETS funds. All other VR services Pre-ETS individuals require must be paid for with the basic VR grant.

Not only has the distinction between general and Pre-ETS VR services fiscally burdened States by reducing their general VR funds by 15 percent without regard to the size and needs of their Pre-ETS population, but also forces States to expend additional resources to add new monitoring procedures to track the expenditure of Pre-ETS funds. As discussed in the previous section, VR agencies serving the blind and visually impaired typically have proportionally small Pre-ETS populations. Consequentially, the relative volume of services meeting the Pre-ETS required, authorized, and coordination criteria is small, making it difficult for States to spend the earmarked funds in a manner that is most beneficial to their customers. Agencies are then left with a surplus of Pre-ETS funds and a shortage of funds available to pay for the general VR services needed by a majority of their customers, including their Pre-ETS customers.

Although Pre-ETS individuals can begin receiving Pre-ETS prior to submitting an application if they are determined to be potentially eligible, which allows them to avoid the risk of being placed on a waiting list, the services they are able to receive at that stage are limited by the above definitions. SSB is currently operating under an Order of Selection, thus potentially eligible Pre-ETS individuals who need more services than those outlined above are unable to receive them without submitting an application and potentially being placed on a wait list. If wait listed, they are unable to receive any services until they enroll.

Students aged 14-21 are in a critical developmental period and need to begin learning specific vocational skills in order to succeed in school and begin a career. Learning to read braille, use assistive technology, orientation and mobility skills, and job coaching are several examples of skills that serve as the foundation for successful employment. Without this foundation, students fall behind and are unable to continue to build upon them and advance. However, RSA's current interpretation of 34 C.F.R. § 361.48(a) does not include training for many of those skills. Thus, the crucial training is not available to Pre-ETS individuals prior to application and must be paid for with the general VR fund.

Per RSA guidance, the services below do not fall within the above definitions of Pre-ETS required, authorized, or coordination activities and although they are crucial to a comprehensive IPE are prohibited from being charged to Pre-ETS funds:

Postsecondary Tuition and Fees: Specifically, the policy statement in the preamble of 34 C.F.R. 361 states:

...a DSU may not use the funds reserved for pre-employment transition services to pay for tuition and other costs of attending postsecondary education, since this is not among those activities that are required or authorized under section 113 of the Act and final Section 361.48(a). These and other necessary services however, may be provided with VR funds not reserved for the provision of pre-employment transition

services so long as they are provided pursuant to an approved individualized plan for employment under section 103(a) of the Act and final Section 361.489b) of these final regulations.

While the regulation limits the definition of Pre-ETS, it expands the definition of a student with a disability to include individuals who are enrolled in other educational programs, including post-secondary institutions. A response from RSA in the preamble of the regulation indicates:

Nonetheless, we agree that section 7(37) of the Act, as amended by WIOA, is silent on the educational setting for a student with a disability. After much consideration of the potential effects for such change in interpretation, the Secretary agrees that the definition of a “student with a disability” in final § 361.5(c)(51) for purposes of the VR program, should be interpreted as applying to students also enrolled in educational programs outside secondary school, including postsecondary education programs, so long as the students satisfy the age requirements set forth in final § 361.5(c)(51).

The RSA interpretation to exclude postsecondary tuition and fees is inexplicably narrow and not required by WIOA. Postsecondary training aligns with workplace readiness training as defined by the federal legislation, and as such, Pre-ETS funds should be allowed to cover the associated costs of a student attending an institution of higher learning. In addition, postsecondary training aligns with the authorized activities 1 and 2, found in 34 C.F.R. § 361.48(a)(3)(i) and 34 C.F.R. § 361.48(a)(3)(ii) above.

State agencies tasked with transitioning blind, visually impaired, and DeafBlind students into postsecondary education and competitive integrated employment should be given maximum flexibility to spend the grant amounts in ways that are proven to be most effective for these individuals to achieve success and not be hindered by unnecessary restrictions. Obtaining credentials and continuing education increases the probability that students with disabilities will achieve and sustain competitive integrated employment.

Transportation: SSB has received conflicting guidance regarding transportation services for students with disabilities in relation to the above definition of Pre-ETS services and the following two regulations:

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*

According to RSA guidance, the term “travel” in the definition of “administrative costs under the vocational rehabilitation services portion of the Unified or Combined State Plan” (see 34 C.F.R. § 361.5(c)(2)(xii) above) includes transportation services for students with disabilities participating in Pre-ETS. Following this interpretation, RSA has advised States not to pay for transportation costs incurred for students participating in Pre-ETS with Pre-ETS funds. This interpretation significantly

limits students' ability to participate in Pre-ETS, particularly those in more rural locations. Transportation costs for students enrolled in daily programming can accumulate quickly and lead to exorbitant bills for families.

In contrast, SSB interprets the term "travel" in section 34 C.F.R. § 361.5(c)(2)(xii) as those costs incurred by staff for duties unrelated to the direct provision of Pre-ETS services. Examples of such costs would include staff traveling to attend a training event, educational conference, or planning meeting. SSB does not believe the definition above refers to students' transportation needs to participate in Pre-ETS. Furthermore, as in the case of postsecondary tuition and fees discussed above, transportation services increasing students' ability to independently participate in Pre-ETS or their local community fall under the definition of authorized activities 1 and 2, or 34 C.F.R. § 361.48(a)(3)(i) and 34 C.F.R. § 361.48(a)(3)(ii) (see page 3).

An RSA training directed VR programs to issue stipends to students who are participating in work, which they can in turn use to pay for any costs they incur. This workaround not only creates an inefficient process for the VR agency, but was specified as limited to students who are working and does not include those who are receiving services and in a work program. Rather than following standard procedures for reimbursing reliable transportation providers, a new procedure must be developed for estimating stipend amounts and issuing payments to customers. Moreover, students and families are burdened when forced pay for services upfront as they wait for reimbursement from the State.

Technology: assistive technology, including software and hardware, is crucial and necessary for people who are blind or visually impaired to achieve and maintain employment. Assistive technology increases independence and job readiness and is increasingly important for transition-age students to develop technology skills so they are competitive in higher education and the job market.

Due to blind and visually impaired individuals' need for technology in order to succeed in obtaining competitive integrated employment, SSB believes that technology should be allowed to be purchased with Pre-ETS funds per the definition of authorized activities 1 and 2, or 34 C.F.R. § 361.48(a)(3)(i) and 34 C.F.R. § 361.48(a)(3)(ii) (see page 3). However, in order to comply with RSA guidance, SSB designed and implemented a Transition Loaner Library in order to provide additional assistive technology to students with disabilities. RSA approved this workaround, for which SSB staff spent significant time developing the infrastructure and procedures. However, it is insufficient in meeting students' long-term needs as they grow and develop in their education programs.

Despite the small number of Pre-ETS qualified students SSB serves, SSB cannot use Pre-ETS funds to assist them in meeting their long-term technology needs. If, following a short-term loan period, it is determined that a particular device or software program is beneficial to the students' success, SSB must purchase assistive technology for them using funds from the basic grant, which depletes available funds for all other customers.

Restricting purchasing for assistive technology for students with disabilities causes the following problems:

Long-term technology use is limited – although the loaner library is to explore options, assessments typically reveal technology options that will work well for the customer. For

example, blind students typically need a refreshable Braille display or Braille note taker and low vision students often need smaller transportable desktop CCTVs for reading and writing print. Additionally, mainstream computer hardware and software, such as laptops or a Microsoft license, cannot be purchased using Pre-ETS funds. These tools are frequently recommended and students' proficiency increases as they use them regularly. Furthermore, technology skills continuously build and permit the acquisition of other skills, such as reading, writing, or developing spreadsheets.

Product ownership and licensing – currently, most computer software and mobile applications are sold exclusively via digital download and must be associated with a specific user account for the product's owner or developer. Operating with technology from the loaner library, students can only use devices with software purchased through SSB accounts temporarily. However, if the product is effective in helping them reach their education and employment goals, SSB staff must purchase a separate device for the student using dollars from the basic VR fund, assist them in creating and customizing a new personal account for the product, install the software on the new device, collect the borrowed device, and then restock and reset the loaner device for the next customer.

Mobile Devices and Applications – mobile devices have the capacity to do much more than they used to and are frequently more cost effective than their stationary counterparts. Their portability makes them particularly useful to students with disabilities who can bring it with them to ensure they have accessible technology in every class and work setting they attend. However, SSB is currently prohibited from purchasing data plans for customers using Pre-ETS funds, which often maximizes the usefulness of mobile devices. Several examples of mobile devices that serve blind and low vision users every day are: VisionAssist or Magnificent are applications that turn an iPhone or iPad into a portable CCTV/video magnifier; applications such as KNFB Reader or Text Grabber take pictures of documents and instantly read them aloud; applications are available to identify money, colors, or light; Bookshare, BARD, and Kindle, are examples of accessible book reading services; GPS, transit, and ride sharing applications assist users in navigating transit routes.

SOLUTION: SSB recommends that RSA expand the definition of Pre-ETS to also include the full-scope of VR services as defined in 34 C.F.R. § 361.48(b). Allowing States to spend Pre-ETS funds on all services that are “appropriate to the vocational rehabilitation needs of each individual and consistent with each individual’s individualized plan for employment” (34 C.F.R. § 361.48(b)) will better facilitate individuals in achieving competitive integrated employment. Furthermore, removing the distinction between traditional VR services and Pre-ETS will eliminate the need for new burdensome processes and the resulting wasteful spending.

While SSB advocates for the solution presented above, a more limited alternative that would alleviate some of the burden imposed by the language in 34 C.F.R. § 361(a) and the related guidance would be to allow the following activities to be charged to the Pre-ETS funds:

- 1. Postsecondary tuition and fees** – Amend the regulatory guidance in the preamble to 34 C.F.R. § 361 to allow for payment of postsecondary tuition and fees. Guidance should allow states to pay for postsecondary education and related costs as “authorized activities” defined in under 34 C.F.R. § 361.48(a)(3)(i) and 34 C.F.R. § 361.48(a)(3)(ii) (see above).

2. **Transportation costs** – Three potential solutions are available to RSA in order to allow the provision of transportation under Pre-ETS:
 - a. Modify RSA guidance to permit States to pay for transportation costs incurred due to students’ participation in Pre-ETS.
 - b. Amend 29 U.S.C. Section 730(d)(1) of WIOA to exclude students’ transportation or travel costs from administrative costs.
 - c. Amend the definition of administrative costs in 34 C.F.R. § 361.5(c)(2) to exclude students’ transportation and travel costs for customers.
3. **Technology** – 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).

2. Supported Employment

The amended definition of supported employment services and new mandate to reserve 50 percent of supported employment funds for youth 24 years and younger restricts States’ access to funds needed to provide VR services to individuals with the most severe disabilities.

34 C.F.R. § 361.5(c)(54) Supported employment services

means ongoing support services, including customized employment, and other appropriate services needed to support and maintain an individual with a most significant disability, including a youth with a most significant disability, in supported employment that are—

(i) Organized and made available, singly or in combination, in such a way as to assist an eligible individual to achieve competitive integrated employment;

(ii) Based on a determination of the needs of an eligible individual, as specified in an individualized plan for employment;

(iii) Provided by the designated State unit for a period of time not to exceed 24 months, unless under special circumstances the eligible individual and the rehabilitation counselor jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment; and

(iv) Following transition, as post-employment services that are unavailable from an extended services provider and that are necessary to maintain or regain the job placement or advance in employment.

ISSUE: Previous technical assistance received from RSA prior to the current regulations indicated that Supported Employment services could begin immediately upon determination that supported employment would be the employment goal on an IPE including job development and customized employment services.

Following WIOA, the slightly amended definition of supported employment services paired with new RSA guidance changes when services become eligible to be charged to the Supported Employment grant. Now only services that occur after an individual with a significant disability obtains employment, such as job coaching. In the [Employment Outcomes, Competitive Integrated](#)

[Employment, and Limitations on Use of Subminimum Wage](#) presentation at the Regulations Implementing the Rehabilitation Act of 1973, as Amended by the Workforce Innovation and Opportunity Act: Regional Training Series (2016), slide 25 states:

Because supported employment funds are meant to be used to support and maintain an individual with a most significant disability in employment, (section 7(39) of the Rehabilitation Act), the provision of supported employment services may not be provided prior to an individual being placed into an employment position requiring supported employment services. All Federal expenditures for an individual that occur prior to the individual being placed into a supported employment position, must be provided with federal VR funds.

Guidance offered in the training conflicts with the language in 34 C.F.R. § 361.5(c)(54) above, limiting the agency's ability to expend funds from the Supported Employment grant, especially for youth. Enabling states more flexibility will allow them to spend the funds and support individuals in achieving competitive integrated employment.

SOLUTION: SSB recommends two potential solutions:

1. Amend the definition of supported employment services to include services an individual may need to find employment, including customized employment services.
2. RSA should amend its recently issued guidance to allow States to include services that were originally allowable under supported employment.

34 C.F.R. § 363.22 How are funds reserved for youth with the most significant disabilities?

A State that receives an allotment under this part must reserve and expend 50 percent of such allotment for the provision of supported employment services, including extended services, to youth with the most significant disabilities in order to assist those youth in achieving an employment outcome in supported employment.

ISSUE: With the current definition of Supported Employment Services (see 34 C.F.R. § 361.5(c)(54) above) and the restriction on services that may be provided under these grant dollars, this provision further constrains States' abilities to access supported employment funds, as many youth with severe disabilities are not fully prepared to work until after age 24. Youth with significant disabilities under age 24 are often still developing employment skills and are not prepared for full employment until later in life. Although a significant amount of time and effort is spent on creating and developing customized employment situations for these individuals before they turn 24, they are often not able to fully engage until after age 24. In these circumstances, the provision above renders supported employment funds useless to States' supported employment efforts, as the individual is not prepared to take advantage of the supported employment opportunity until he or she is over the age of 24. This limitation prevents designated funds from being used to promote the ultimate goal they are intended to promote - competitive integrated employment.

SOLUTION: SSB recommends that RSA allow States more flexibility to spend VR funds by removing specific requirements for supported employment spending and add supported employment dollars to the basic VR grant. If RSA is unwilling to grant States this level of flexibility, another potential solution that would give States greater access to the supported employment dollars is to eliminate

the 50 percent set aside for youth and allow it to be spent on all customers meeting the supported employment requirements.

3. Subminimum Wage

Reducing the number of individuals with disabilities who hold subminimum wage jobs is crucial to realizing WIOA's broader goals of developing a more competitive workforce and increasing individuals' employment, retention, and earnings. While SSB supports WIOA's overall efforts to divert individuals with disabilities away from subminimum wage employment, 34 C.F.R. § 397 "Limitations on Use of Subminimum Wage" is an unfunded mandate that requires States to develop and implement extensive new processes without offering sufficient resources to effectively do so.

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.

ISSUE: The new requirement that States must determine whether youth are "unable to achieve the employment outcome... despite working toward the employment outcome with reasonable accommodations... for a reasonable period of time" and thus eligible to pursue subminimum wage employment adds a step to the VR process that bears serious consequences. As VR agencies and staff are unaccustomed to deeming individuals with disabilities, particularly youth, "unable to achieve," establishing procedures to make this determination requires significant research and effort. States must either design or adopt new assessments and establish thresholds for staff to follow when declaring a youth "unable to achieve the employment outcome."

RSA has provided minimal to no guidance regarding the appropriate assessments, criteria, and documentation required to declare a youth "unable to achieve the employment outcome." Moreover, mandating that States must officially document such a determination without sufficient federal guidance and support subjects States to potential appeals and legal challenges if individuals

with disabilities, their families, or guardians object to the State's determination. While the regulations further define the definition of "reasonable period of time" in 34 C.F.R. § 397.20(b)(3), it is contingent upon the needs of each individual, as is the definition of "reasonable accommodations and appropriate supports and services." RSA has not offered any resources that would guide States in complying with this subjective regulation, such as: methods to estimate the "anticipated length of time required to complete the services...", criteria and standards for reasonable modification of the employment outcome (for example, how many times an employment outcome may be modified for each individual), when exceptions may be made, and at which point States are required to declare a youth "unable to achieve the employment outcome."

SOLUTION: SSB recommends that RSA:

1. Provide States with additional funding to design and implement the new assessment and documentation procedures required by the new subminimum wage regulations.
2. Issue clear guidance regarding the specific assessments and criteria that States should use when determining whether a youth is "unable to achieve the employment outcome," as well as the documentation that should be maintained in the individual's case file.

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.

ISSUE: The above provision mandates that VR agencies must track and contact all individuals in subminimum wage employment to provide the specified counseling and information services for "the duration of such employment." As time goes on, the number of individuals who States are perpetually tracking will continue to accumulate. VR agencies have had to design new tracking systems and dedicate resources specifically to this new process, which will require more and more resources over time.

Although language in 34 C.F.R. § 397.40(d)(3) permits individuals or their representatives to opt out of the required activities above, RSA technical assistance maintains that individuals may only opt out of the required activities on an annual basis. In other words, individuals may only opt out of the counseling services for one year, and States must continue to contact them annually for the duration of their employment in subminimum wage. While SSB understands that the intent of this guidance is to maximize the potential to move individuals into competitive integrated employment, continual contact with individuals and their families after repeated refusals will upset them.

SOLUTION: SSB recommends the following two-part solution:

1. Provide States with additional funding, proportionate to the size of the agency and estimated number of individuals in subminimum wage, to design and implement tracking systems and ensure provision of the required counseling and information services.

2. Allow States to stop tracking and contacting individuals with disabilities in subminimum wage after the individual has refused the required counseling and information services for three (3) consecutive years.

4. Performance Standards and Reporting Requirements

This section addresses the need for RSA to allow some flexibility when measuring States' performance to account for unpredictable and extenuating circumstances, as well as excessive new data collection and reporting requirements that further strain States' limited VR budgets.

34 C.F.R. § 361.45(e) Standards for developing the individualized plan for employment

The individualized plan for employment must be developed as soon as possible, 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.

ISSUE: While the regulations allow for a delay in developing the individualized plan of employment (IPE) within 90 days, previous guidance from RSA to States was that delays are only acceptable in unusual circumstances and that cases should be closed if a customer is non-responsive. Further discussion of this performance measure in a meeting with RSA leadership, confirmed that it is not the intent of Congress to simply close cases, but that it would be nearly impossible for States to achieve 100% compliance without doing so. SSB requested that new instructions be sent to the state legislative auditors to clarify this point, as auditors are currently considering IPE completion time within the 90-day threshold and are not considering any delay documentation as allowable when reviewing and presenting findings. For example, in a recent SSB audit a case record contained documentation that an IPE was developed and sent to the customer for signature but not returned was not deemed an exception.

Allowing VR agencies more flexibility to work with and accommodate customers would improve efficiency and benefit customers. VR agencies are serving individuals with significant disabilities who often face communication and transportation barriers. It would be reasonable to accept documentation that an IPE was developed and sent to the customer but not yet returned, as staff cannot control the actions of individuals and their response time. In the case of agencies on order of selection, simply closing cases when an IPE is not in place by the 90th day may prevent the individual from returning to receive VR services due to a waiting list. RSA guidance and instructions to state auditors prevents VR agencies from achieving 100 percent compliance unless they close cases in which an IPE is not signed by the 90th day. This leads to burdensome and counterproductive processes in order to meet reporting and compliance standards.

SOLUTION: SSB recommends the following two-part solution:

1. Amend 34 C.F.R. § 361.45(e) as follows:

The individualized plan for employment must be developed as soon as possible, 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.~~ documents a delay due to exceptional or unforeseen circumstances.

2. Instruct State auditors acting on behalf of RSA to review case notes and other relevant materials to determine whether any delay in IPE development beyond the 90-day threshold was due to exceptional or unforeseen circumstances. States should not be penalized for cases in which an IPE development delay was determined to have been due to exceptional or unforeseen circumstances and appropriate documentation was present in the case file.

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

ISSUE: Reporting requirements as outlined in the new RSA-911 case service report manual are excessive and burdensome. 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. Of particular concern to SSB are the following required data elements:

1. Section XVIII. Post-Exit Data Elements - New reporting requirements include an additional year of follow-up after an individual's case is closed. In order 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. Agencies serving the blind and visually impaired have a number of customers who are self-employed under the Randolph-Sheppard Act. 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. Barriers to Employment - New data elements in this section require staff to ask individuals invasive and discriminatory questions. The Diversity and Equal Opportunity Office (DEEO) of the Minnesota Department of Employment and Economic Development (DEED) advised SSB to allow individuals the option not to self-identify race, ethnicity, or gender and not to remove the "Chooses Not to Self-Identify" option when reporting on these three demographic elements. Although this direction is contrary to instructions in the RSA-911 Reporting manual below (p. 12-13, June 2017), the DEEO has given consistent guidance to our Title I partners regarding similar data elements on the Participant Individual Record Layout (PIRL).

Race information should be recorded for all individuals whose service records were opened in the quarter being reported. For students or youth with disabilities in elementary or secondary education, reporting on race is required. If such students or youth refuses to identify his/her race, the counselor should, at a minimum, notify the individual that if he/she fails to self-identify, an observer-identification method will be used. The counselor or interviewer would then provide the best assessment of the individual's race. This guidance is consistent with the Department of Education's and the Office of Management and Budget's (OMB's) standards for collecting race data.

Additional invasive or discriminatory data elements include:

- **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

SOLUTION: SSB recommends that RSA amend the new RSA-911 case services reporting manual as follows:

1. Strike Section XVIII: Post-Exit Data Elements from the RSA-911 reporting requirements.
2. Allow all individuals to choose not to self-identify their race and strike instructions mandating staff to identify race based on observer-identification.
3. Remove data elements 64, 67, 69, 70, and 71.

5. Maintenance of Effort Waiver

34 C.F.R. § 361.62(d) Maintenance of effort requirements

(d) Waiver or modification. (1) The Secretary may waive or modify the maintenance of effort requirement in paragraph (a) of this section if the Secretary determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural disaster or a serious economic downturn, that—

(i) Cause significant unanticipated expenditures or reductions in revenue that result in a general reduction of programs within the State; or

(ii) Require the State to make substantial expenditures in the vocational rehabilitation program for long-term purposes due to the one-time costs associated with the construction of a facility for community rehabilitation program purposes, the establishment of a facility for community rehabilitation program purposes, or the acquisition of equipment.

(2) The Secretary may waive or modify the maintenance of effort requirement in paragraph (b) of this section or the 10 percent allotment limitation in §361.61 if the Secretary determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural disaster, that result in significant destruction of existing facilities and require the State to make substantial expenditures for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation program purposes in order to provide vocational rehabilitation services.

(3) A written request for waiver or modification, including supporting justification, must be submitted to the Secretary for consideration as soon as the State has determined that it has failed to satisfy its maintenance of effort requirement due to

an exceptional or uncontrollable circumstance, as described in paragraphs (d)(1) and (2) of this section.

ISSUE: Although the language above permits States waivers or modifications to maintenance of effort requirements (see [34 C.F.R. § 361.62\(a\)](#)) due to “exceptional or uncontrollable circumstances, such as a major natural disaster or a serious economic downturn,” this is insufficient to account for many one-time expenses States incur to implement significant program changes, improvements, or invest in infrastructure.

While the intent of the policy may be to encourage States to establish consistent budgeting and spending practices, unpredictable and ever-changing political climates prevent consistent investment in VR programs as legislative priorities shift from year to year. In effect, designated VR agencies and their beneficiaries are held accountable for State legislature actions. For example, if a VR agency is operating under order of selection due to insufficient funding, that agency is punished if it is able to secure, temporary funding to open its waiting list. Currently, many agencies are seeking one-time funding increases to implement programmatic changes necessary to comply with regulatory changes following WIOA. However, if agencies are unable to secure a permanent increase from their legislature, they face a future reduction in federal funding that negates any temporary relief they may receive. Without reasonable flexibility, States are discouraged from making such investments out of fear that they will lose federal funding in the future.

SOLUTION: RSA should amend 34 C.F.R. § 361.62(d) to clearly permit waivers or modifications for States that make significant one-time investments to improve services or comply with regulatory changes.

6. Improving Future Policy Development Efforts

ISSUE: Federal regulations are frequently developed in isolation from the State administrators and staff who are tasked with enforcing and implementing them. Although policy-makers are well intentioned and SSB recognizes the insurmountable task of revising regulations following such a consequential overhaul of federal law, as in the case of WIOA, steps can be taken to improve the process in the future. As direct service-providers, VR agencies are knowledgeable of the process and implementation issues leading to inefficiencies, as well as the issues beneficiaries face in accessing services and obtaining employment. As such, States can serve as resources to RSA during the policy development process. Including the perspective from those in directly connected to service providers and beneficiaries will reduce the potential for conflicts and issues similar to those outlined in this memorandum.

SOLUTION: RSA should create a workgroup including State VR professionals to provide input and feedback when drafting or amending regulations affecting the VR program.