ED-2017-OS-0074

The National Council of State Agencies for the Blind (NCSAB) submits the following comments and suggestions for the regulatory reform initiative of the U.S. Department of Education:

ISSUE: Misinterpretation of Regulatory Language and Resulting Consequences -- 34 CFR §361.5(c)(51)(i)(A)(2) – definition of 'student with a disability" – Age at which Pre-Employment Transition Services (Pre-ETS) can commence

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 interpretation 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 CFR §361.5(c)(48) "means any of the 50 States…" and does not specify either the inclusion or the exclusion of multiple DSUs. In addition, the definition of "State plan" in 34 CFR §361.5(c)(51) means the "State plan for vocational rehabilitation services," and likewise does not specify whether the State will have one or two State plans. Under 34 CFR §361.10(b), a blind agency will submit a State plan that must "separately conform" to the provisions contained in §361.10. Because a blind agency submits a plan that must "separately conform," and because the State plan governs the "provision of vocational rehabilitation services," it should be allowable for the State to set two different minimum ages for the commencement of Pre-ETS.

The current RSA interpretation has serious unintended consequences. General agencies serve very different demographic populations than agencies serving blind and visually impaired individuals, where 60 percent of all blind individuals are age 55 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 in turn have the capacity to serve more students at an earlier age.

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

Therefore, NCSAB recommends that the regulations and RSA policy guidance be modified to allow each DSU to set the minimum age at which Pre-ETS will become available to students with disabilities.

ISSUE: Regulations hampering the continuum of VR services -- 34 CFR §361.48(a)(2), Pre-ETS Required Activities

The above regulations and the interpretations issued in subsequent policy guidance from RSA draw an unnecessary distinction between Pre-ETS and traditional VR services. RSA concluded that any services available to individuals who are receiving VR under the other subsections of 34 CFR Part 361.48 cannot be charged to the 15 percent Pre-ETS reservation of funds. This distinction further burdens States as the 15 percent Pre-ETS set aside is removed from the original grant award with no funding to replace it. Moreover, general VR services for qualifying Pre-ETS individuals that do not fit into the above definitions must be paid for from general VR funding, which further reduces the funds available to serve the majority of the 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 definitions. Many State VR agencies are currently on an Order of Selection, thus if potentially eligible Pre-ETS individuals apply, they risk being placed on a wait list. Once on the wait list they are unable to receive any services until they are enrolled. Students aged 14-21 need services to learn to read braille, use assistive technology, orientation and mobility skills, job coaching, travel, and more.

The following services are available to individuals receiving VR services and crucial to a comprehensive employment plan, but are prohibited from being charged to Pre-ETS funds:

Evaluation for Pre-ETS: RSA has advised State agencies that the time and expenses of evaluating a student with a disability for appropriate Pre-ETS services is not an allowable Pre-ETS expenditure and cannot be charged to the 15% set-aside. This is absurd and can also lead to waste and abuse of funds if an inappropriate service is provided.

Postsecondary Tuition and Fees: Specifically, the policy statement in the preamble of 34 CFR Part 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. An RSA response 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.

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 increase the probability that students with disabilities will achieve and sustain competitive integrated employment. The new RSA 911 data elements place particular emphasis on "Credential Attainment" and "Measurable Skill Gains". It does not seem logical that on the one hand VR agencies are evaluated for participants attaining a postsecondary credential while at the same time restricted from paying postsecondary tuition and fees from the Pre-ETS reserve.

Travel: State VR agencies have 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 CFR § 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 CFR §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 addition, lodging and meals, particularly for those in more rural locations requiring overnight stays to participate in programs, would allow potentially eligible students to participate in programs without being pressured to open a VR case. The ability to receive services without the pressure to open a VR case is exactly the reason the regulations define "potentially eligible" and envision more services to students with disabilities since a student does not have to be a VR client. However, the regulations inadvertently limit a potentially eligible student from participation by attempting to restrict services that should apply to all Pre-ETS students such as transportation costs, lodging and meals for students enrolled in Pre-ETS programming. Many out-of-state conferences and programs offer valuable Pre-ETS experiences that broaden and enrich the perspective of students with disabilities lifting expectations and building self-confidence which are vital to future employability. Additionally, families of students with disabilities typically cannot afford to pay for these expenses.

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 to 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.

Despite the small number of Pre-ETS qualified students blind agencies serve, such agencies 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, the agency must purchase assistive technology for them using funds from the basic VR grant, which depletes available funds for all other customers. Again, as long as the individual is not a potentially eligible student, the individual must be a VR applicant to receive this service. This limits Pre-ETS services to the potentially eligible population which conceivably is a larger population than is usually served by VR and is consistent with the intent of section 113 of the Act – that is, to cast a wider net for students with disabilities who can achieve competitive integrated employment.

The following problems have arisen as a result of restricting purchasing for assistive technology for students with disabilities:

Long-term technology use is limited – Some blind agencies have established a loaner library to make technology available to the consumers. However, a loaner library is just a work-around and can be an expensive endeavor for the agency. A loaner library can sit idle at times and is an inefficient way to allow students to attain skills. Although a loaner library can be used 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 also currently cannot be purchased, like a laptop or a Microsoft Office license. 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 a loaner library, students can only use devices with software purchased through State agencies' accounts on a temporary basis. However, if the product is effective in helping them reach their education and employment goals, agency staff must then purchase a separate device for the student, assist them in creating and customizing a new personal account for the product, install the software on a new device purchased from the basic VR fund, collect the borrowed device, restock the device in inventory and reset it 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 their mobile devices with them to ensure they have accessible technology in every class and work setting they attend. However, State VR agencies are 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 and Magnificent are applications that turn an iPhone or iPad into a portable CCTV/video magnifier; applications such as KNFB Reader and 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.

Orientation and Mobility (O&M) Services: State agencies have received conflicting information about whether or not O&M services can be paid for using the Pre-ETS set-

aside. Like the availability of technology and auxiliary aids and devices, many blind students will need O&M services in order to access other Pre-ETS services. The interpretation of "required Pre-ETS" should include the provision of O&M as a matter of reasonable accommodation to access other Pre-ETS services.

Discussion of specific jobs and/or careers: 34 CFR §361.48(a)(2)(i) authorizes job exploration counseling as a Pre-ETS required activity. However, RSA has advised State agencies that this requirement relates to generalized exploration of jobs and careers but not the discussion of a specific job or career with the student with a disability. This interpretation makes no sense. VR services have always been individualized based upon the student's specific interests and needs. NCSAB does not believe that 34 C.F.R. § 361.48(a)(2)(i) should be interpreted so narrowly. This narrow interpretation seems in conflict with the intent of section 113 of the Act to assist students with disabilities to achieve competitive integrated employment.

Based upon the above, NCSAB recommends that RSA appropriately expand the definition/interpretation of what services can be purchased under the 15 percent set aside for Pre-ETS to include the following:

1. **Postsecondary tuition and fees –** Issue subregulatory guidance that supersedes the regulatory guidance in the preamble to 34 CFR Part 361 to allow for payment of postsecondary tuition and fees.
2. **Transportation costs –** Three potential solutions are available to RSA in order to allow the provision of transportation under Pre-ETS:
    a. Modify guidance to permit States to pay for transportation, meals and lodging costs incurred as a result of students' participation in Pre-ETS.
    b. Amend 29 U.S.C. Section 730(d)(1) of WIOA to exclude students' transportation or travel costs (including meals and lodging) from administrative costs.
    c. Amend the definition of administrative costs in 34 CFR § 361.5(c)(2) to exclude students' transportation and travel costs (including meals and lodging) 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 the required activities such as work based learning and job readiness training.
4. **Evaluation for Pre-ETS, O&M services and specific job and/or career exploration –** modify subregulatory guidance and training information that evaluation for Pre-ETS, O&M services and specific job/career exploration can be included under "required activities," as defined in 34 CFR §361.48(a)(2), specifically work place readiness training, including social skills and independent living.

ISSUE: Administrative Burden – Recordkeeping regarding the provision of Pre-ETS services and the accounting for use of the 15% set-aside funds

While State agencies acknowledge that they must account for the expenditure of the 15% set-aside for Pre-ETS, guidance and subsequent training provided by RSA have placed unrealistic burdens on State agencies with regard to documenting both the provision of Pre-ETS services and the accounting for the set-aside funds.

State VR agencies are overwhelmed trying to develop new data collection and reporting systems that allow one service to be charged as Pre-ETS and another service provided to the same individual at the same time in support of the same goal as non-Pre-ETS, rather than spending their time, energy and imagination on identifying new and creative ways of preparing students with disabilities for eventual employment.

NCSAB recommends that RSA work with State VR agencies to establish reasonable documentation standards for the 15% funds reservation that do not place unnecessary administrative burden on the agencies. As we view Pre-ETS as part of the continuum of VR services available to youth with disabilities, case record documentation should also be minimized so as not to burden the VR counselors working with students with disabilities.

On a related issue regarding documentation, NCSAB recommends that RSA consider issuing guidance on how to document that the required Pre-ETS services have been provided (to all students who need those services) so that State agencies can use the reserved funds for the nine authorized Pre-ETS services. This can become problematic especially if the grant award is being carried over. As a solution, we recommend that the guidance provided in the preamble to the final Part 361 regulations should be incorporated into State Plan instructions and other guidance provided to State agencies. The preamble stated:

> "As part of the Comprehensive Statewide Needs Assessment, States should determine the number of potential individuals eligible for pre-employment transition services. This data will enable the States to target the amount of the reserved funds necessary for ensuring the "required" pre-employment transition services are provided to students with disabilities. To the extent the States demonstrate that they have made the required pre-employment transition services available to the population identified in the Comprehensive Statewide Needs Assessment, the States have met the requirement to provide the "required" pre-employment transition services prior to the "authorized" activities. Any reserved funds remaining beyond the targeted amount necessary for the "required" activities may then be used for "authorized" activities in final §361.48(a)(3)."

NCSAB recommends that RSA issue specific guidance clarifying how such documentation should be included both in the State Plan and in fiscal records held by State agencies.

ISSUE: Conflict with legislative language -- definitions of "competitive integrated employment" under 34 CFR §361.5(c)(9) and "integrated settings" under 34 CFR §361.5(c)(32)(ii)

The regulatory definitions of "competitive integrated employment" and "integrated setting" for purposes of an employment outcome under §361.5(c)(9) and (32)(ii), respectively, are confusing and place State VR agencies in a difficult position when identifying integrated from nonintegrated sites. The current regulatory language is not helpful in clarifying the legislative definitions under section 7(5) of the Rehabilitation Act of 1973, as amended by the 2014 WIOA. The additional language in these new regulatory definitions is supposed to clarify what is meant by the ultimate goal of competitive employment in the integrated labor market for individuals with disabilities. However, the additional regulatory provisions only seem to confuse the matter of what is meant by "competitive integrated employment" in settings typically found in the community.

NCSAB recommends that the regulation at §361.5(c)(9) be amended to reflect only the legislative language at section 7(5) of the Act and that the regulation at §361.5(c)(32)(ii) be deleted as the legislative definition includes the requirements for employment in an integrated setting. The definition at section 7(5) is as follows:

> *"COMPETITIVE INTEGRATED EMPLOYMENT.—The term 'competitive integrated employment' means work that is performed on a full-time or part-time basis (including self-employment)—*
>
> *(A) for which an individual—*
> *(i) is compensated at a rate that—*
> *(I)(aa) shall be not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the rate specified in the applicable State or local minimum wage law; and*
> *(bb) is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; or*
> *(II) in the case of an individual who is selfemployed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities, and who are self-employed in similar occupations or on similar tasks and who have similar training, experience, and skills; and*
> *(ii) is eligible for the level of benefits provided to other employees;*
> *(B) that is at a location where the employee interacts with other persons who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that individuals who are not individuals with disabilities and who are in comparable positions interact with other persons; and*
> *(C) that, as appropriate, presents opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions.''*

ISSUE: Administrative Burden – need for prior approval under 2 CFR §200.407

Regulations at 34 CFR §361.4(d) makes applicable the requirements under 2 CFR Part 200 (Uniform Administrative Regulations) to the State Vocational Rehabilitation (VR) Services Program. During recent monitoring reviews by the Rehabilitation Services Administration (RSA), State VR agencies have been advised that the prior approval requirements under 2 CFR §200.407 now apply to the State VR Program. In the past EDGAR 34 CFR Part 80 applied instead. Part 80 has expired and was replaced by 2 CFR Part 200. Under Part 80, OSERS and RSA had received an exemption to the prior approval requirements.

Seeking prior approval for expenditures greater than $5,000, and in some cases an even lower threshold, would place a significant administrative burden on both State VR agencies and RSA. The amount of paperwork and the potential for significant delays in the ability to spend VR funds on capital expenditures and other items requiring prior approval will prove to be a significant and unnecessary burden for State VR agencies. For example, seeking prior approval for the purchase of auxiliary aids and devices may significantly delay the provision of needed services and equipment for individuals with significant disabilities. This delay could be seen as a violation of the Americans with Disabilities Act or section 504 of the Rehabilitation Act as it would be a delay in providing a reasonable accommodation for individuals served by the VR agency.

In addition, the need for prior approval poses a tremendous burden and delay to blind individuals operating vending facilities under the Randolph-Sheppard Program. For example, having to seek prior approval for expenditures may harm a blind vendor if there is a need to replace equipment immediately to keep the vending facility in operation. State VR agencies can utilize VR funding to provide management services to blind vendors under the Randolph-Sheppard program.

It should also be noted that the threshold for prior approval is even lower for other expenses such as travel for the members of the State Rehabilitation Council (see 2 CFR §200.456 and §2200.474) and for purchasing memberships in community organizations (see 2 CFR §200.454). There is no dollar threshold for these expenses, and seeking prior approval for these clearly allowable costs poses a serious administrative burden on the State VR agency.

NCSAB recommends that the Department of Education seek an exemption to 2 CFR §200.407 for OSERS/RSA programs as a matter of reducing administrative burden.

ISSUE: Need for more flexibility – 34 CFR §361.62(d), Waiver of maintenance of effort requirements

The regulation cited above permits States to seek waivers or modifications to maintenance of effort requirements under 34 CFR §361.62(a) due to "exceptional or uncontrollable circumstances, such as a major natural disaster or a serious economic downturn." However, these exemptions are not sufficient to account for many one-time expenses States incur to implement significant program changes or invest in infrastructure. This limitation is particularly burdensome for State VR agencies that require one-time funding increases to implement programmatic changes to comply with regulatory changes following the passage of WIOA.

Without reasonable flexibility, States are discouraged from making such investments out of fear that they will lose federal funding in the future.

NCSAB recommends that RSA amend 34 CFR §361.62(d) to clearly allow waiver or modifications for States that make significant one-time investments to better meet their customers' needs or comply with regulatory changes.

ISSUE: Need to strengthen requirements for data sharing between the State VR agency and the State Education Agency (SEA)

Current regulations at 34 CFR §361.22(b)(4) contain requirements for the formal interagency agreement between the State VR agency and the SEA, including the identification of students in need of transition services. That same regulation at §361.22(b)(5) includes language about the documentation requirements for 34 CFR Part 397 regarding students and youth with disabilities seeking subminimum wage employment. State VR agencies have found that these two regulatory provisions do not provide enough clout for VR agencies to seek and receive adequate data on students in order to carry out its responsibilities under both section 113 and section 511 of the Rehabilitation Act as amended.

NCSAB recommends that the regulations at §361.22 be strengthened to require appropriate data sharing between the State VR agency and the SEA for purposes of sections 113 and 511 of the Act.

ISSUE: Conflict with Governing Legislation -- Sub-regulatory guidance in RSA Technical Assistance Circular (TAC) 12-01

RSA issued TAC-12-01 on October 21, 2011. This sub-regulatory guidance contains a requirement that the Director of the Designated State Unit must be appointed by the Governor to serve as a member of the State Rehabilitation Council, established by section 105 of the Rehabilitation Act as amended. However, section 105(b)(2) of the Act specifies that the "director of the designated State unit shall be ... an 'ex officio' member of the State Rehabilitation Council."

NCSAB has previously requested that RSA reconsider the guidance provided in TAC-12-01 as it seems to be in conflict with section 105 of the Act. To date, we have not seen any action on this matter. While there is arguably some vagueness in Section 105 of the Rehabilitation Act, the traditional canons of statutory construction lead to the conclusion that the Director of the Designated State Unit is a statutory member of the State Rehabilitation Council, and to interpret otherwise leads to inconsistent and unreasonable results.

The use of the word "shall" in Section 105(b)(2) limits the discretion of the Governor with respect to the individual to be appointed, meaning that to interpret it to require governor appointment is redundant and inconsistent with the fact that many of the Designated State Unit Directors serve at the pleasure of the Governor. In addition, if Congress had intended the Director of the Designated State Unit to be appointed by the Governor, it would have included

the Director requirement within Section 105(b)(1), instead of setting out the requirement in Section 105(b)(2).

Given the above, NCSAB again recommends that RSA reconsider its guidance that the Director of the Designated State Unit be appointed by the governor to the State Rehabilitation Council, and that the Rehabilitation Services Administration recognize that the Director of the Designated State Unit serves as a statutory member of the State Rehabilitation Council.

ISSUE: Sub-Regulatory Guidance relating to 34 CFR § 361.5(c)(54) Supported employment services

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 and the slightly amended definition of supported employment, new guidance issued changed when services become eligible to be charged to the Supported Employment grant to be only those services, such as job coaching, that occur after an individual with a significant disability obtains employment. In a presentation from the *Employment Outcomes, Competitive Integrated Employment, and Limitations on Use of Subminimum Wage* at the RSA 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.*

The guidance offered in the training conflicts with the language in 34 C.F.R. § 361.5(c)(54) above, severely 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.

NCSAB recommends that RSA revise the regulations to include services an individual may need to find employment, including customized employment services, in the definition, or change the recent guidance to include what was originally allowable.

ISSUE: Administrative Burden – how funds can be spent under 34 CFR § 363.22

With the current definition of Supported Employment Services (34 CFR § 361.5(c)(54)) 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 significant disabilities are not fully prepared to work until after age 24. Often youth with significant disabilities under age 24 are 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 allotted funds from being used to promote the ultimate goal of competitive integrated employment.

NCSAB 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.

ISSUE: Need for more Guidance relating to 34 CFR Part 397, Limitation on Subminimum Wage

Under the new Limitations on Subminimum Wage regulations (34 CFR Part 397), VR agencies are responsible for making the determination of whether an individual is "unable to achieve the employment outcome specified in the individualized plan for employment…" and thus eligible to pursue subminimum wage employment. While regulations further define the definition of "reasonable period of time," they offer minimal guidance regarding the criteria that should be used in making this determination.

NCSAB recommends that RSA provide additional guidance and training regarding the appropriate criteria VR agency staff should use to determine whether an individual is unable to achieve an employment outcome and eligible to pursue subminimum wage employment.

ISSUE: Need for more flexibility under 34 CFR §361.45(e), Standards for developing the individualized plan for employment

While the regulations at §361.45(e) allow for a delay in developing the individualized plan for 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. State agencies 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 state audit a case record contained documentation that an IPE was developed and sent to the customer for signature but not returned until after the 90 day time period and was, therefore, deemed to be an audit 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. Per RSA guidance and instructions provided to state auditors in the Single Audit, agencies are unable to achieve 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.

NCSAB recommends that the regulation be modified 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.*

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

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 NCSAB 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 Shephard 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. There are invasive questions bordering on discrimination that must be collected from the individual. In certain States, VR agencies have been advised that they must 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.

   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 data elements deemed invasive or discriminatory 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

NCSAB recommends that RSA amend the following data elements in the most recent 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 or ethnicity, and strike instructions that in essence require VR staff to take their best guess if the individual chooses to not disclose this information.
3. Remove data elements 64, 67, 69, 70, and 71.