

**Recommendation for Repeal or Modification of 34 CFR 397.40 August 18, 2016
Regulations Department of Education 34 CFR Parts 361, 363, and 397 State Vocational
Rehabilitation Services Program; State Supported Employment Services Program;
Limitations on Use of Subminimum Wage; Final Rule**

<https://www.federalregister.gov/d/2016-15980>

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

**34 CFR § 397.40 (Regulations pages 55788-55789) 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. . .

(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.

Why? Individuals who were employed in a 14(c), or their guardian, are not given an opportunity of informed choice (opt in or out) on whether to participate in career counseling and remain employed for subminimum wage. The career counseling annually forever is a hardship on both the individuals who wish to remain employed at subminimum wage. The yearly cost for career counseling reduces funds that could be utilized for client services or an additional counselor to serve the abundance of individuals seeking services.

Recommendation:

1. Allow individuals and their guardians to have informed choice.
2. Place a time limit of years required for annual career counseling (3-5 years.)
3. Additional funding for the DSU to contract this service without reduction in client service funding.

**Recommend Repeal of Short – term basis towards competitive integrated employment.
Several sections listed below.**

Why? **Short term basis** toward competitive integrated employment is in direct conflict of the intention of individuals with the most significant disabilities to have opportunities (Employment First) to be competitive employed in an integrated career opportunity of their preference, interest and needs without an additional barrier of the need to transition to another employment situation.

Recommendation: Deletion of any reference in the regulations to short-term basis toward competitive integrated employment.

34 CFR § 361.5 (Regulation page 55748) Applicable definitions. (53) Supported Employment - *Supported employment* means . . . is working on a **short-term basis** toward competitive integrated employment that is individualized, and customized, consistent with the unique strengths, abilities, interests, and informed choice of the individual, including with ongoing support services for individuals with the most significant disabilities— . . .

(ii) For purposes of this part, an individual with a most significant disability, whose supported employment in an integrated setting does not satisfy the criteria of competitive integrated employment, as defined in paragraph (c)(9) of this section is considered to be working on a short-term basis toward competitive integrated employment so long as the individual can reasonably anticipate achieving competitive integrated employment—

(A) Within six months of achieving a supported employment outcome; or (B) In limited circumstances, within a period not to exceed 12 months from the achievement of the supported employment outcome, if a longer period is necessary based on the needs of the individual, and the individual has demonstrated progress toward competitive earnings based on information contained in the service record.

34§361.32 (Regulation page 55760) Provision of training and services for employers. . . .

(b) Working with employers to—

(1) Provide opportunities for work-based learning experiences (including internships, **short-term employment**, apprenticeships, and fellowships . . .

Subpart A—General § 363.1 (Regulation page 55780) What is the State Supported Employment Services program? . . .

(b) For purposes of this part and 34 CFR part 361, “supported employment” means competitive integrated employment, including customized employment, or employment in an integrated work setting in which an individual with a most significant disability, including a youth with a most significant disability, is working on **a short-term basis toward competitive integrated employment**, that is individualized and customized, consistent with the unique strengths, abilities, interests, and informed choice of the individual, including with ongoing support services for individuals with the most significant disabilities—. . .

(c) **Short-term basis.** For purposes of this part, an individual with a most significant disability, whose supported employment in an integrated setting does not satisfy the criteria of competitive integrated employment, as defined in 34 CFR 361.5(c)(9), is considered to be working on a **short- term basis toward competitive integrated employment** so long as the individual can reasonably anticipate achieving competitive integrated employment—. . .

34 § 363.54 (Regulation page 55784) When will an individual be considered to have achieved an employment outcome in supported employment?

An individual with a most significant disability, including a youth with a most significant disability, who is employed in competitive integrated employment or who is employed in an integrated setting working on a **short-term basis** to achieve competitive integrated employment will be considered to have achieved an employment outcome, including customized employment, in supported employment when—

(a) The individual has completed supported employment services provided under this part and 34 CFR part 361, except for any other vocational rehabilitation services listed on the individualized plan for employment provided to individuals who are working on a **short-term basis** toward the achievement of competitive integrated employment in supported employment. An individual has completed supported employment services when— . . .

34 § 363.55 (Regulation page 55784-55785) When will the service record of an individual who has achieved an employment outcome in supported employment be closed? . . .

(b) The service record of an individual with a most significant disability, including a youth with a most significant disability who is working toward competitive integrated employment on a **a short-term basis** and is receiving extended services from funds other than those allotted under this part and 34 CFR part 361 will be closed when the individual—

(1) Achieves competitive integrated employment within the **short-term basis** period established pursuant to § 363.1(c); and the individual— . . .

(c) The individual has maintained employment and achieved stability in the work setting for at least 90 days after transitioning to extended services; and

(d) The employment is individualized and customized consistent with the strengths, abilities, interests, and informed choice of the individual. . . .

(1) The youth with a most significant disability achieves an employment outcome in supported employment in competitive integrated employment without entering the **short-term basis** period; . . .

(2) The youth with a most significant disability who is working toward competitive integrated employment on a **short-term basis**—

(i) Achieves competitive integrated employment within the **short-term basis** period established pursuant to § 363.1(c); . . .

(3) The youth with a most significant disability working toward competitive integrated employment on a **short-term basis** does not achieve competitive integrated employment within the **short-term basis** period established pursuant to § 363.1(c).