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|  | Edmund G. Brown Jr.,  Governor    State of California Health and Human Services Agency | |
| United States Department of Education  Regulatory Reform Task Force  Attn: Hillary Malawer  Assistant General Counsel  Room 6E231  400 Maryland Avenue SW  Washington, DC 20202 | | Office of the Director  721 Capitol Mall  Sacramento, CA 95814  916-558-5800 Voice  916-558-5806 FAX  916-558-5807 TTY |
|  | | September 19, 2017 |

**RE: Evaluation of Existing Regulations**

**ED-2017-OS-0074-0001**

Dear Department of Education Regulatory Reform Task Force:

The California Department of Rehabilitation (CDOR) welcomes the opportunity to provide input on the United States Department of Education (USDOE) regulations that may be appropriate for repeal, replacement, or modification in accordance with Executive Order 13777. CDOR has identified regulations that do not further CDOR’s and the Rehabilitation Act’s missions of providing opportunities for individuals with disabilities to become employed and live with equality and independence.

In developing comments, CDOR sought input from its stakeholders, including individuals eligible for services, the State Rehabilitation Council and other advisory bodies, provider organizations, and employers. A recurring theme from the stakeholders as well as from our employees is that it is critical that the federal regulations provide flexibility, so that we may meet the unique needs of Californians throughout our diverse state and utilize the federal funds most effectively. We identified several USDOE regulations that meet the President’s call to identify federal regulations that:

* eliminate jobs, or inhibit job creation
* are outdated, unnecessary, or ineffective
* impose costs that exceed benefits
* create serious inconsistency or otherwise interfere with regulatory reform initiatives and policies
* rely on data or methods that are not publicly available or insufficiently transparent to meet the standard for reproducibility, or
* derive from or implement Executive Orders or other presidential directives that have been subsequently rescinded or substantially modified.

**1. Authorize Reasonable Accommodations for Equal Access to Pre-Employment Transition Services**

The Rehabilitation Act, as amended by the Workforce Innovation and Opportunity Act, identifies five mandatory and nine authorized pre-employment transition services (Pre-ETS). In the preamble to the Final Federal Rules (81 FR 55685, 55694, 55695), the Rehabilitation Services Administration created an unnecessary distinction between Pre-ETS and individualized transition services. This has the result of requiring a student with a disability who needs an individualized tool, service, or accommodation to access Pre-ETS, to go through the lengthier process of applying for vocational rehabilitation services. This distinction has limited equal access to Pre-ETS for students with disabilities who require individualized tools, services, or accommodations such as assistive technology and transportation.

This distinction between Pre-ETS and individualized transition services, created in the preamble to the final federal rules, is not required by the statutory language and could lead to unintended discrimination against students with disabilities. This distinction is ineffective in furthering the goals of Pre-ETS and imposes costs without any apparent benefit.

To address this issue, the California Department of Rehabilitation recommends deleting the guidance in the preamble that creates the unnecessary distinction and modifying 34 CFR 361.48(a) to state, “Pre-Employment transition services include any reasonable, individualized service listed in section 361.48 required for a student with a disability to receive any of the pre-employment transition services listed in 361.48(a).”

**2. Allow Alternatives for Traditional Written Signatures**

The Rehabilitation Services Administration (RSA) regulations contain many references to “in writing,” “written consent,” “signed,” “signature,” and similar descriptions of how an individual indicates consent or agreement – traditionally, by a signature (See, among many others, 34 CFR 361.38, 34 CFR 361.41 and 34 CFR 361.45). Meanwhile, the Government Paperwork Elimination Act (P.L. 105-277) requires federal agencies to recognize electronic and digital signatures. Further, traditional “wet signatures” are not accessible to many recipients of vocational rehabilitation services under the Rehabilitation Act and licensed blind vendors under the Randolph-Sheppard Act.

The California Department of Rehabilitation requests that RSA modify its definitions in 34 CFR 361.5(b) to specify explicitly that references to signatures and written consent permit the use of electronic and digital signatures and other alternate forms of signature.

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

The California Department of Rehabilitation (CDOR) acknowledges the value of data to help improve outcomes for people with disabilities across the nation and between our core partners. CDOR also firmly believes that individuals have a right to privacy in information pertaining to them, as expressed in California’s Information Practices Act (California Civil Code section 1798 et. seq.). CDOR only maintains personal information if it is relevant and necessary to accomplish its purposes, if it is authorized by the California Constitution or statute, or mandated by the federal government. When collecting data regarding consumers and applicants, CDOR must notify the individuals of the purpose for which the information will be used and of the consequences of not providing any of the requested information, as required by the Information Practices Act. (California Civil Code section 1798.17.)

In keeping with these principles, CDOR believes that states should not be required to collect information that does not contribute to the job preparation or employment of a person applying for or receiving services. Reducing the burden of unnecessary data collection will also give vocational rehabilitation (VR) agencies greater flexibility and time to assist individuals in achieving their employment goals. CDOR is aware that some of the recent increased demands for data collection reflect the greater collaboration and cooperation that is expected between VR agencies and our workforce development partners who serve the general population. We are not asking that persons with disabilities be left out of the mainstream – to the contrary, we are committed to them being part of the mainstream. In the following paragraphs we identify burdensome data and reporting requirements that are either specific to VR agencies or which do not appear to us to offer significant value from a VR perspective. We ask that all of these be considered with an eye to reducing burdens across all workforce agencies. We share with our partners a mission to put people to work. Data gathering and reporting should be light enough to not interfere with that mission.

**a. Allow Sampling of Data Elements**

The Rehabilitation Services Administration’s (RSA) Policy Directive 16-04 (RSA PD-16-04) requires the submission of every applicable data element for every individual, instead of allowing sampling for non-required data. The Rehabilitation Act as amended allows for sampling of data; however, RSA PD-16-04 in conjunction with RSA’s system for data submission does not allow states to implement sampling methods. If states were allowed to implement the sampling method provided for in the Rehabilitation Act for the non-required data, staff could utilize the significant time savings to provide more vocational counseling and guidance and other vocational rehabilitation services resulting in more individuals with disabilities going to work.

The California Department of Rehabilitation recommends that RSA modify RSA PD-16-04 to allow sampling for non-required data. Requiring submission of every data element for every individual imposes substantial costs with little benefit. This is inconsistent with regulatory reform initiatives designed to reduce the regulatory burden on the American people.

**b. Allow Annual Reporting rather than Quarterly**

Quarterly reporting is a new requirement under the Rehabilitation Services Administration (RSA) Policy Directive (PD) 16-04 (RSA PD-16-04). States previously reported only an annual basis. Section 101(a)(10)(b) of the Rehabilitation Act, as amended, provides that the Commissioner shall require annual reporting. There is no provision requiring quarterly reporting. Reporting quarterly increases the reporting workload, incrementally diverting staff and resources from serving consumers in need of services, without providing any commensurate benefit.

The California Department of Rehabilitation (CDOR) recommends that RSA modify the RSA PD-16-04 to replace quarterly reporting with annual reporting. RSA PD-16-04’s new quarterly reporting requirement is ineffective, imposes costs that exceed benefits, and is inconsistent with regulatory reform initiatives to reduce the regulatory burden on American people. This data collection requirement does not assist CDOR to achieve its purposes of employment and independence of individuals with disabilities.

**4. Do Not Require Speculation of Race**

The RSA-911 Reporting Manual requires the collection of race information, even when the individual chooses otherwise (p. 12-13, June 2017):

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.

The requirement for staff to attempt to identify the race of an individual who declines to self-identify violates the privacy of that individual, diverts staff from providing services to the individual, and may interfere with the staff’s working relationship with the individual. Forcing staff to guess the race of an individual introduces a significant risk of error into this data set.

The California Department of Rehabilitation recommends that the US Department of Education remove from the RSA-911 Reporting Manual the requirement to collect race data when the individual declines to self-identify. The current method is ineffective because the guesswork it requires will not result in accurate collection of race information and may be offensive to the public.

**5. Authorize In-Kind Contributions from State and Local Public Agencies to Serve as State Match**

The federal regulations 34 CFR 361.28(c), 34 CFR 361.60 (b)(2), and 34 CFR 363.23(b) do not allow many types of third-party in-kind contributions as a source of certified match for the non-federal share, even if the contributions are permissible under 2 CFR 200.306. These regulatory provisions are unnecessary. In-kind contributions by third parties add real value and reflect the complete cost to acquire the goods and services contributed. Expanding the use of these contributions will increase flexibility for States and their partners, strengthen the relationship between state agencies and the contributing partners, and guide federal resources to locations where those essential relationships are strong. All of this will contribute to greater success in supporting persons with disabilities to achieve and maintain employment.

Effective August 2016, these restrictions were added through the regulatory package implementing the Workforce Innovation and Opportunity Act (WIOA), despite the fact that the WIOA did not amend the Rehabilitation Act by making changes to the matching requirements for vocational rehabilitation. As a direct result of these changes, the California Department of Rehabilitation (CDOR) lost six cooperative programs and several other programs reduced their budgets, meaning that there are fewer opportunities for individuals with disabilities to receive services through a coordinated effort in California.

CDOR recommends repeal of 34 CFR 361.28(c), 34 CFR 361.60(b)(2), and 34 CFR 363.23(b), as these regulatory provisions are unnecessary.

**6. Do Not Require Prior Approval of Equipment Purchases for Consumers and Vendors**

The Office of Management and Budget (OMB) “Super Circular” (2 CFR Part 200) issued in 2014, resulted in the application of pre-approval requirements to vocational rehabilitation (VR) agencies, which have not been subject to requirements of this nature for at least a decade. Applying the Super Circular to VR agencies conflicts with other legal requirements and is unnecessarily burdensome.

The California Department of Rehabilitation (CDOR) recommends that regulation be modified to explicitly state that VR agencies (including State Licensing Agencies, under the Randolph-Sheppard Act), in making consumer purchases, need not seek pre-approval in accordance with 2 CFR 200.439, or 2 CFR 200.313. Consumers and vendors are not sub-recipients (2 CFR 200.93). Further, the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, specifies that a range of goods are considered services, and so should not be accounted for as equipment or capital expenditures (see 29 USC 723(a)). The CDOR recommends that United States Department of Education (USDOE) modify its regulation to explicitly state, as well as coordinate with OMB to modify 2 CFR 200.313 and 2 CFR 200.439 to include a provision that states the following:

“Pre-approval requirements shall not apply when the equipment or capital expenditures are purchased for the benefit of recipients of vocational rehabilitation services under the Rehabilitation Act and licensed blind vendors under the Randolph-Sheppard Act.”

Should VR agencies (State Licensing Agencies) seek pre-approval of purchases $5,000 or more, services will be delayed, in conflict with other law and regulation. Requiring pre-approval would both seriously conflict with other laws as well as create a cost that is outweighed by the burden.

**7. Do Not Require Prior Approval of Equipment Purchases by Subrecipients and Contractors.**

The Office of Management and Budget (OMB) “Super Circular” (2 CFR Part 200) issued in 2014, resulted in the application of pre-approval requirements to vocational rehabilitation (VR) agencies, which have not been subject to requirements of this nature for at least a decade. Applying the Super Circular to VR agencies duplicates other legal requirements and is unnecessarily burdensome.

These provisions are duplicative of State procurement systems as well as other federal requirements regarding proper accounting for direct and indirect charges, all of which exist for substantially similar reasons. The misapplication of the Super Circular to these transactions will result in delay in the delivery of services, conflicting with the assurances of service without delay required by 34 CFR 361.36(b) and the flexible procurement policies required by 34 CFR 361.52(b)(3). All of this will have the unintended effect of harming the very people who are to be served, while imposing needless and burdensome administrative costs on state VR agencies and on the Rehabilitation Services Administration, which does not have the resources or systems to process approvals of this sort. For example, applying this restriction to the Older Individuals who are Blind Program could result in a delay in services to those individuals, interfering with the ability of CDOR and its subawardees to assist these individuals to live independently.

CDOR recommends that United States Department of Education (USDOE) continue its longstanding practice, including if necessary, modifying regulation as well as coordinating with OMB to modify 2 CFR 200.313 and 2 CFR 200.439 to include a provision that states the following:

“Pre-approval requirements shall not apply when the equipment purchases or capital expenditures made by designated state units under the Rehabilitation Act and state licensing agencies under the Randolph-Sheppard Act.”

**8. Modify Regulation To Ensure the Priority Intended in the Randolph-Sheppard Act**

The priority afforded by the Randolph-Sheppard Act (20 U.S.C. § 107 et seq.) and implementing regulations (34 C.F.R. § 395.33) are not consistently and correctly applied by Federal contracting agencies for cafeteria operations, which include military and Coast Guard contracted food service operations. The misapplication of the priority eliminates significant economic opportunities and jobs for qualified licensed blind vendors, as well as results in substantial arbitration and litigation costs for both the Federal government and states.

To ensure the appropriate application of the priority, we recommend modification of 34 CFR 395.33 to include the following language:

“A contract for the operation of a cafeteria under the Randolph-Sheppard Act, and which is subject to the priority provided in that Act, includes a contract for the provision of any type of goods or services necessary to provide food and beverages, such as full food service, dining facilities attendant services and any type of services necessary to provide food and beverages.”

**9. Modify Regulations For Timely and Fair Randolph-Sheppard Arbitrations**

The United States Department of Education (USDOE) continues to maintain the policies and procedures that it adopted on an interim basis in 1978 to govern the arbitration process established by the Randolph-Sheppard Act (20 U.S.C. § 107 et seq.). These policies and procedures have not been adopted through the rulemaking process and are outdated, extremely slow, cumbersome, and costly for all parties involved, often taking several years to reach a decision. Moreover, the existing arbitration policies and procedures do not ensure accessibility to individuals who utilize screen reader software.

We recommend that USDOE adopt the arbitration policies and procedures through the rulemaking process, after engaging State Licensing Agencies, licensed vendors and Vendor Policy Committees nation-wide, and Federal contracting agencies, to including but not limited to a timeframe for commencing arbitrations, which we recommend be no more than six months from the date USDOE receives a complaint. We also recommend including that all notices, documentary evidence, briefing, and decisions be submitted to the arbitration panel in accessible electronic format, as well as in a complainant vendor’s preferred mode of communication if different. The modernized rules should allow arbitration to be conducted based on the written record if the parties consent, which would reduce the costs of all parties and the federal Randolph-Sheppard program.

We recognize that significant delays are typically due to the challenges in identifying a neutral agreed upon third arbitrator. We recommend consideration be given to recruiting additional qualified individuals to serve as arbitrators and establishing pay commensurate with the work, as many individuals on the arbitrator lists provided by the USDOE are no longer working or not interested in light of the low pay.

We appreciate the Department of Education Regulatory Reform Task Force’s attention to our recommendations and this important opportunity for public engagement.

Sincerely,

Joe Xavier

Director