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Part VI

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34 CFR Part 361
State Vocational Rehabilitation Services Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 361

RIN 1820–AB50

State Vocational Rehabilitation Services Program

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the State Vocational Rehabilitation Services Program. These amendments implement changes to the Rehabilitation Act of 1973 made by the Rehabilitation Act Amendments of 1998 that were contained in Title IV of the Workforce Investment Act of 1998 (WIA), enacted on August 7, 1998, and as further amended in 1998 by technical amendments in the Reading Excellence Act and the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1998 (hereinafter collectively referred to as the 1998 Amendments).

DATES: These regulations are effective February 16, 2001. However, affected parties do not have to comply with the information collection requirements in §§ 361.10, 361.12, 361.13, 361.14, 361.15, 361.16, 361.17, 361.18, 361.19, 361.20, 361.21, 361.22, 361.23, 361.24, 361.25, 361.26, 361.27, 361.28, 361.29, 361.30, 361.31, 361.32, 361.34, 361.35, 361.36, 361.37, 361.38, 361.40, 361.41, 361.46, 361.47, 361.48, 361.49, 361.50, 361.51, 361.52, 361.53, 361.54, 361.55, 361.57, 361.60 and 361.62 until the Department of Education publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Beverlee Stafford, U.S. Department of Education, 400 Maryland Avenue, SW., room 3014, Mary E. Switzer Building, Washington, DC 20202–2531. Telephone (202) 205–8831. If you use a telecommunications device for the deaf (TDD), you may call (202) 205–5538.

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SUPPLEMENTARY INFORMATION: The State Vocational Rehabilitation Services Program (VR program) is authorized by Title I of the Rehabilitation Act of 1973, as amended (Act) (29 U.S.C. 701–744). The VR program provides support to each State to assist it in operating a statewide comprehensive, coordinated, effective, efficient, and accountable State program, as an integral part of a statewide workforce investment system, to assess, plan, develop, and provide vocational rehabilitation (VR) services for individuals with disabilities so that those individuals may prepare for and engage in gainful employment consistent with their strengths, priorities, concerns, abilities, capabilities, interests, and informed choice.

On February 28, 2000, we published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register** (65 FR 10620). In the preamble to the NPRM, we discussed on pages 10620 through 10630 the major changes proposed to the regulations in 34 CFR part 361 as a result of the 1998 Amendments. These included the following:

- Streamlining the regulatory requirements pertaining to the State plan for the VR program by changing several State plan descriptions or assurances to program requirements that need not be addressed in the State plan. These proposed changes were intended to reduce the paperwork burden associated with the development of the State plan.
- Amending the regulations to reflect the responsibilities of the designated state unit (DSU or State unit) as a required partner in the One-Stop service delivery system (One-Stop system) established under Title I of the WIA, Pub. L. 105–22. For example, we proposed amending § 361.4 to include among the regulations applicable to the VR program the One-Stop system requirements in 20 CFR part 662 and the civil rights requirements in 29 CFR part 37. In addition to these changes and, as noted later, amending other sections of the current regulations to reflect requirements in WIA, we discuss in some detail in the preamble to the NPRM (65 FR 10620 and 10621) the relationship between the VR program, the One-Stop system in general, and persons with disabilities. We suggest that you refer to that discussion for additional guidance in coordinating between One-Stop system components.
- Amending § 361.5 to include a new definition of the term ''fair hearing board,'' a revised definition of ''physical or mental impairment,'' a new definition of the term ''qualified and impartial mediator,'' and several new statutory definitions found in WIA, including ''local workforce investment board,'' ''State workforce investment board,'' and ''Statewide workforce investment system.''
- Amending § 361.10 to require that each State submit its State plan for the VR program on the same date that it submits either a State plan under section 112 of WIA or a State unified plan under section 501 of that Act.
- Amending § 361.13 to expand the list of activities that are the responsibility of the DSU.
- Amending § 361.18(c) to require, as appropriate, DSUs to address in a written plan their retraining, recruitment, hiring, and other strategies to ensure that their personnel meet the statutory standards related to the comprehensive system of personnel development.
- Amending § 361.22 to reflect new statutory requirements that foster the transition of students from educational to VR services.
- Amending § 361.23 to reflect both the VR program's responsibilities as a partner of the One-Stop system under WIA and the requirements in the 1988 Amendments related to interagency coordination between the VR program and other components of the statewide workforce investment system under WIA.
- Amending § 361.26 to reflect the authority of States to use geographically earmarked funds without requesting a waiver of statewideness.
- Amending § 361.29 to guide States in developing a required comprehensive, forward-thinking plan for administering and improving their VR programs.
- Conforming § 361.30 solely to the requirement in the Act that DSUs provide VR services to eligible American Indians to the same extent as other significant populations of individuals with disabilities.
- Amending § 361.31 to conform to the requirement in the Act that the DSU establish cooperative agreements with private nonprofit VR service providers.
- Removing § 361.33 of the current regulations (regarding the use, assessment, and support of community rehabilitation programs) since these requirements are addressed in other

regulatory sections and reserving this section for future use.

• Amending § 361.35 to reflect the requirement in section 101(a)(18) of the Act that the State reserve a portion of its allotment under section 110 of the Act to further innovation and expansion of its VR program.

• Amending § 361.36 to incorporate the requirement in the 1998 Amendments that individuals who do not meet the State's order of selection criteria for receiving services be provided access to the DSU's information and referral system under § 361.37.

• Amending § 361.37 to reflect new requirements in the Act for referring individuals, including eligible individuals who do not meet the State's order of selection criteria for receiving services, to those components of the statewide workforce investment system best suited to meet an individual's employment needs.

• Amending § 361.42 to implement new requirements in the Act regarding presumptive eligibility for Social Security recipients and beneficiaries and the use of trial work experiences as part of the assessment for determining eligibility, to revise regulatory requirements concerning extended evaluations, and to identify the type of personnel who must conduct eligibility determinations.

• Amending § 361.45 to implement new requirements in the Act that expand an eligible individual's options for developing the Individualized Plan for Employment (IPE), enable individuals to receive technical assistance in developing their IPEs, specify the information that the DSU must provide to the eligible individual during IPE development, and detail applicable procedural requirements.

• Amending § 361.47 to require the States to determine, with input from the State Rehabilitation Councils, the type of documentation that they will maintain for each applicant and eligible individual to meet the content items that must be included in each individual's record of services.

• Amending § 361.52 to implement the expanded authority in the Act requiring that applicants and eligible individuals be able to exercise informed choice throughout the rehabilitation process.

• Amending § 361.53 to require interagency agreements between the DSU and other appropriate public entities to ensure that eligible individuals with disabilities receive, in a timely manner, necessary services to which each party to the agreement has an obligation, or the authority, to contribute.

• Amending § 361.54 to expand the list of VR services exempt from State financial needs tests to include interpreter services for individuals who are deaf or hard of hearing, reader services for individuals who are blind, and personal assistant services. Also, this section was amended to prohibit States from applying financial needs tests to individuals receiving Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI).

• Re-titling and Amending § 361.56 to better reflect the requirements that must be met before the State unit can close the record of services for an individual who has achieved an employment outcome.

• Amending § 361.57 to implement new requirements in the 1998 Amendments regarding mediation and administrative review of disputes regarding the provision of VR services to applicants or eligible individuals.

• Amending § 361.60 to reflect the elimination of statutory authority for the innovation and expansion grant program and to implement new statutory provisions regarding the use of geographically limited earmarked funds as part of the State's non-Federal share.

These final regulations contain several significant changes from the NPRM. We fully explain each of these changes in the Analysis of Comments and Changes in the appendix at the end of these final regulations.

Analysis of Comments and Changes

In response to our invitation in the NPRM, 109 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these final regulations.

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes—and suggested changes that the law does not authorize the Secretary to make.

National Education Goals

The eight National Education Goals focus the Nation's education reform efforts and provide a framework for improving teaching and learning.

These regulations address the National Education Goal that every adult American, including individuals with disabilities, will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the final regulations justify the costs.

We also have determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

We discussed the potential costs and benefits of these final regulations in the preamble to the NPRM (65 FR 10630 and 10631) and throughout the section-by-section analysis (65 FR 10621 through 10630). Our analysis of potential costs and benefits generally remains the same as in the NPRM, although we include additional discussion of potential costs and benefits in the Appendix to these final regulations titled Analysis of Comments and Changes.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and

responsibilities among the various levels of government.

These regulations implement various statutory changes to the State Vocational Rehabilitation Services Program. We do not believe that these regulations have federalism implications as defined in Executive Order 13132 or that they preempt State law. Accordingly, the Secretary has determined that these regulations do not contain policies that have federalism implications.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number: 84.126 State Vocational Rehabilitation Services Program)

List of Subjects in 34 CFR Part 361

Reporting and recordkeeping requirements, State-administered grant program—education, Vocational rehabilitation.

Dated: December 7, 2000.

Richard W. Riley,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by revising part 361 to read as follows:

PART 361—STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

Subpart A—General

Subpart B—State Plan and Other Requirements for Vocational Rehabilitation Services

Administration

Provision and Scope of Services

Subpart C—Financing of State Vocational Rehabilitation Programs

Subpart D—[Reserved]

Subpart E—Evaluation Standards and Performance Indicators

Authority: 29 U.S.C. 709(c), unless otherwise noted.

Subpart A—General

§ 361.1 Purpose.

Under the State Vocational Rehabilitation Services Program (Program), the Secretary provides grants to assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable programs, each of which is—

(a) An integral part of a statewide workforce investment system; and

(b) Designed to assess, plan, develop, and provide vocational rehabilitation

services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that they may prepare for and engage in gainful employment.

(Authority: Section 100(a)(2) of the Act; 29 U.S.C. 720(a)(2))

§ 361.2 Eligibility for a grant.

Any State that submits to the Secretary a State plan that meets the requirements of section 101(a) of the Act and this part is eligible for a grant under this Program.

(Authority: Section 101(a) of the Act; 29 U.S.C. 721(a))

§ 361.3 Authorized activities.

The Secretary makes payments to a State to assist in—

(a) The costs of providing vocational rehabilitation services under the State plan; and

(b) Administrative costs under the State plan.

(Authority: Section 111(a)(1) of the Act; 29 U.S.C. 731(a)(1))

§ 361.4 Applicable regulations.

The following regulations apply to this Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 74 (Administration of Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-profit Organizations), with respect to subgrants to entities that are not State or local governments or Indian tribal organizations.

(2) 34 CFR part 76 (State-Administered Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), except for § 80.24(a)(2).

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) 34 CFR part 86 (Drug and Alcohol Abuse Prevention).

(b) The regulations in this part 361.

(c) 20 CFR part 662 (Description of One-Stop Service Delivery System under Title I of the Workforce Investment Act of 1998).

(d) 29 CFR part 37, to the extent programs and activities are being conducted as part of the One-Stop service delivery system under section 121(b) of the Workforce Investment Act of 1998.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.5 Applicable definitions.

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Department
EDGAR
Fiscal year
Nonprofit
Private
Public
Secretary

(b) *Other definitions.* The following definitions also apply to this part:

(1) *Act* means the Rehabilitation Act of 1973, as amended (29 U.S.C. 701 *et seq.*).

(2) *Administrative costs under the State plan* means expenditures incurred in the performance of administrative functions under the vocational rehabilitation program carried out under this part, including expenses related to program planning, development, monitoring, and evaluation, including, but not limited to, expenses for—

(i) Quality assurance;

(ii) Budgeting, accounting, financial management, information systems, and related data processing;

(iii) Providing information about the program to the public;

(iv) Technical assistance and support services to other State agencies, private nonprofit organizations, and businesses and industries, except for technical assistance and support services described in § 361.49(a)(4);

(v) The State Rehabilitation Council and other advisory committees;

(vi) Professional organization membership dues for designated State unit employees;

(vii) The removal of architectural barriers in State vocational rehabilitation agency offices and State-operated rehabilitation facilities;

(viii) Operating and maintaining designated State unit facilities, equipment, and grounds;

(ix) Supplies;

(x) Administration of the comprehensive system of personnel development described in § 361.18, including personnel administration, administration of affirmative action plans, and training and staff development;

(xi) Administrative salaries, including clerical and other support staff salaries, in support of these administrative functions;

(xii) Travel costs related to carrying out the program, other than travel costs related to the provision of services;

(xiii) Costs incurred in conducting reviews of determinations made by personnel of the designated State unit, including costs associated with mediation and impartial due process hearings under § 361.57; and

(xiv) Legal expenses required in the administration of the program.

(Authority: Section 7(1) of the Act; 29 U.S.C. 705(1))

(3) *American Indian* means an individual who is a member of an Indian tribe.

(Authority: Section 7(19)(A) of the Act; 29 U.S.C. 705(19)(A))

(4) *Applicant* means an individual who submits an application for vocational rehabilitation services in accordance with § 361.41(b)(2).

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(5) *Appropriate modes of communication* means specialized aids and supports that enable an individual with a disability to comprehend and respond to information that is being communicated. Appropriate modes of communication include, but are not limited to, the use of interpreters, open and closed captioned videos, specialized telecommunications services and audio recordings, Brailled and large print materials, materials in electronic formats, augmentative communication devices, graphic presentations, and simple language materials.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(6) *Assessment for determining eligibility and vocational rehabilitation needs* means, as appropriate in each case—

(i)(A) A review of existing data—

(*1*) To determine if an individual is eligible for vocational rehabilitation services; and

(*2*) To assign priority for an order of selection described in § 361.36 in the States that use an order of selection; and

(B) To the extent necessary, the provision of appropriate assessment activities to obtain necessary additional data to make the eligibility determination and assignment;

(ii) To the extent additional data are necessary to make a determination of the employment outcomes and the nature and scope of vocational

rehabilitation services to be included in the individualized plan for employment of an eligible individual, a comprehensive assessment to determine the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment, of the eligible individual. This comprehensive assessment—

(A) Is limited to information that is necessary to identify the rehabilitation needs of the individual and to develop the individualized plan of employment of the eligible individual;

(B) Uses as a primary source of information, to the maximum extent possible and appropriate and in accordance with confidentiality requirements—

(*1*) Existing information obtained for the purposes of determining the eligibility of the individual and assigning priority for an order of selection described in § 361.36 for the individual; and

(*2*) Information that can be provided by the individual and, if appropriate, by the family of the individual;

(C) May include, to the degree needed to make such a determination, an assessment of the personality, interests, interpersonal skills, intelligence and related functional capacities, educational achievements, work experience, vocational aptitudes, personal and social adjustments, and employment opportunities of the individual and the medical, psychiatric, psychological, and other pertinent vocational, educational, cultural, social, recreational, and environmental factors that affect the employment and rehabilitation needs of the individual; and

(D) May include, to the degree needed, an appraisal of the patterns of work behavior of the individual and services needed for the individual to acquire occupational skills and to develop work attitudes, work habits, work tolerance, and social and behavior patterns necessary for successful job performance, including the use of work in real job situations to assess and develop the capacities of the individual to perform adequately in a work environment;

(iii) Referral, for the provision of rehabilitation technology services to the individual, to assess and develop the capacities of the individual to perform in a work environment; and

(iv) An exploration of the individual's abilities, capabilities, and capacity to perform in work situations, which must be assessed periodically during trial work experiences, including experiences in which the individual is provided appropriate supports and training.

(Authority: Section 7(2) of the Act; 29 U.S.C. 705(2))

(7) *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of an individual with a disability.

(Authority: Section 7(3) of the Act; 29 U.S.C. 705(3))

(8) *Assistive technology service* means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device, including—

(i) The evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in his or her customary environment;

(ii) Purchasing, leasing, or otherwise providing for the acquisition by an individual with a disability of an assistive technology device;

(iii) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(iv) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(v) Training or technical assistance for an individual with a disability or, if appropriate, the family members, guardians, advocates, or authorized representatives of the individual; and

(vi) Training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or others who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities, to the extent that training or technical assistance is necessary to the achievement of an employment outcome by an individual with a disability.

(Authority: Sections 7(4) and 12(c) of the Act; 29 U.S.C. 705(4) and 709(c))

(9) *Community rehabilitation program.*

(i) *Community rehabilitation program* means a program that provides directly or facilitates the provision of one or more of the following vocational rehabilitation services to individuals with disabilities to enable those individuals to maximize their opportunities for employment, including career advancement:

(A) Medical, psychiatric, psychological, social, and vocational services that are provided under one management.

(B) Testing, fitting, or training in the use of prosthetic and orthotic devices.

(C) Recreational therapy.

(D) Physical and occupational therapy.

(E) Speech, language, and hearing therapy.

(F) Psychiatric, psychological, and social services, including positive behavior management.

(G) Assessment for determining eligibility and vocational rehabilitation needs.

(H) Rehabilitation technology.

(I) Job development, placement, and retention services.

(J) Evaluation or control of specific disabilities.

(K) Orientation and mobility services for individuals who are blind.

(L) Extended employment.

(M) Psychosocial rehabilitation services.

(N) Supported employment services and extended services.

(O) Services to family members if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(P) Personal assistance services.

(Q) Services similar to the services described in paragraphs (A) through (P) of this definition.

(ii) For the purposes of this definition, the word *program* means an agency, organization, or institution, or unit of an agency, organization, or institution, that provides directly or facilitates the provision of vocational rehabilitation services as one of its major functions.

(10) *Comparable services and benefits* means—

(i) Services and benefits that are—

(A) Provided or paid for, in whole or in part, by other Federal, State, or local public agencies, by health insurance, or by employee benefits;

(B) Available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's individualized plan for employment in accordance with § 361.53; and

(C) Commensurate to the services that the individual would otherwise receive from the designated State vocational rehabilitation agency.

(ii) For the purposes of this definition, comparable benefits do not include awards and scholarships based on merit.

(*Authority:* Sections 12(c) and 101(a)(8) of the Act; 29 U.S.C. 709(c) and 721(a)(8))

(11) *Competitive employment* means work—

(i) In the competitive labor market that is performed on a full-time or part-time basis in an integrated setting; and

(ii) For which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals who are not disabled.

(*Authority:* Sections 7(11) and 12(c) of the Act; 29 U.S.C. 705(11) and 709(c))

(12) *Construction of a facility for a public or nonprofit community rehabilitation program* means—

(i) The acquisition of land in connection with the construction of a new building for a community rehabilitation program;

(ii) The construction of new buildings;

(iii) The acquisition of existing buildings;

(iv) The expansion, remodeling, alteration, or renovation of existing buildings;

(v) Architect's fees, site surveys, and soil investigation, if necessary, in connection with the construction project;

(vi) The acquisition of initial fixed or movable equipment of any new, newly acquired, newly expanded, newly remodeled, newly altered, or newly renovated buildings that are to be used for community rehabilitation program purposes; and

(vii) Other direct expenditures appropriate to the construction project, except costs of off-site improvements.

(*Authority:* Sections 7(6) and 12(c) of the Act; 29 U.S.C. 705(6) and 709(c))

(13) *Designated State agency* or *State agency* means the sole State agency, designated in accordance with § 361.13(a), to administer, or supervise the local administration of, the State plan for vocational rehabilitation services. The term includes the State agency for individuals who are blind, if designated as the sole State agency with respect to that part of the plan relating to the vocational rehabilitation of individuals who are blind.

(Authority: Sections 7(8)(A) and 101(a)(2)(A) of the Act; 29 U.S.C. 705(8)(A) and 721(a)(2)(A))

(14) *Designated State unit* or *State unit* means either—

(i) The State vocational rehabilitation bureau, division, or other organizational unit that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and that is responsible for the administration of the vocational rehabilitation program of the State agency, as required under § 361.13(b); or

(ii) The State agency that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities.

(Authority: Sections 7(8)(B) and 101(a)(2)(B) of the Act; 29 U.S.C. 705(8)(B) and 721(a)(2)(B))

(15) *Eligible individual* means an applicant for vocational rehabilitation services who meets the eligibility requirements of § 361.42(a).

(Authority: Sections 7(20)(A) and 102(a)(1) of the Act; 29 U.S.C. 705(20)(A) and 722(a)(1))

(16) *Employment outcome* means, with respect to an individual, entering or retaining full-time or, if appropriate, part-time competitive employment in the integrated labor market to the greatest extent practicable; supported employment; or any other type of employment, including self-employment, telecommuting, or business ownership, that is consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(Authority: Sections 7(11), 12(c), 100(a)(2), and 102(b)(3)(A) of the Act; 29 U.S.C. 705(11), 709(c), 720(a)(2), and 722(b)(3)(A))

(17) *Establishment, development, or improvement of a public or nonprofit community rehabilitation program* means—

(i) The establishment of a facility for a public or nonprofit community rehabilitation program as defined in paragraph (b)(18) of this section to provide vocational rehabilitation services to applicants or eligible individuals;

(ii) Staffing, if necessary to establish, develop, or improve a community rehabilitation program for the purpose of providing vocational rehabilitation services to applicants or eligible individuals, for a maximum period of 4 years, with Federal financial participation available at the applicable matching rate for the following levels of staffing costs:

(A) 100 percent of staffing costs for the first year.

(B) 75 percent of staffing costs for the second year.

(C) 60 percent of staffing costs for the third year.

(D) 45 percent of staffing costs for the fourth year; and

(iii) Other expenditures related to the establishment, development, or improvement of a community rehabilitation program that are necessary to make the program functional or increase its effectiveness in providing vocational rehabilitation services to applicants or eligible individuals, but are not ongoing operating expenses of the program.

(Authority: Sections 7(12) and 12(c) of the Act; 29 U.S.C. 705(12) and 709(c))

(18) *Establishment of a facility for a public or nonprofit community rehabilitation program* means—

(i) The acquisition of an existing building and, if necessary, the land in connection with the acquisition, if the building has been completed in all respects for at least 1 year prior to the date of acquisition and the Federal share of the cost of acquisition is not more than $300,000;

(ii) The remodeling or alteration of an existing building, provided the estimated cost of remodeling or alteration does not exceed the appraised value of the existing building;

(iii) The expansion of an existing building, provided that—

(A) The existing building is complete in all respects;

(B) The total size in square footage of the expanded building, notwithstanding the number of expansions, is not greater than twice the size of the existing building;

(C) The expansion is joined structurally to the existing building and does not constitute a separate building; and

(D) The costs of the expansion do not exceed the appraised value of the existing building;

(iv) Architect's fees, site survey, and soil investigation, if necessary in connection with the acquisition, remodeling, alteration, or expansion of an existing building; and

(v) The acquisition of fixed or movable equipment, including the costs of installation of the equipment, if necessary to establish, develop, or improve a community rehabilitation program.

(Authority: Sections 7(12) and 12(c) of the Act; 29 U.S.C. 705(12) and 709(c))

(19) *Extended employment* means work in a non-integrated or sheltered setting for a public or private nonprofit agency or organization that provides compensation in accordance with the Fair Labor Standards Act and any needed support services to an individual with a disability to enable the individual to continue to train or otherwise prepare for competitive employment, unless the individual through informed choice chooses to remain in extended employment.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(20) *Extended services* means ongoing support services and other appropriate services that are needed to support and

maintain an individual with a most significant disability in supported employment and that are provided by a State agency, a private nonprofit organization, employer, or any other appropriate resource, from funds other than funds received under this part and 34 CFR part 363 after an individual with a most significant disability has made the transition from support provided by the designated State unit.

(Authority: Sections 7(13) and 623 of the Act; 29 U.S.C. 705(13) and 795i)

(21) *Extreme medical risk* means a probability of substantially increasing functional impairment or death if medical services, including mental health services, are not provided expeditiously.

(Authority: Sections 12(c) and 101(a)(8)(A)(i)(III) of the Act; 29 U.S.C. 709(c) and 721(a)(8)(A)(i)(III))

(22) *Fair hearing board* means a committee, body, or group of persons established by a State prior to January 1, 1985 that—

(i) Is authorized under State law to review determinations made by personnel of the designated State unit that affect the provision of vocational rehabilitation services; and

(ii) Carries out the responsibilities of the impartial hearing officer in accordance with the requirements in § 361.57(j).

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(23) *Family member,* for purposes of receiving vocational rehabilitation services in accordance with § 361.48(i), means an individual—

(i) Who either—

(A) Is a relative or guardian of an applicant or eligible individual; or

(B) Lives in the same household as an applicant or eligible individual;

(ii) Who has a substantial interest in the well-being of that individual; and

(iii) Whose receipt of vocational rehabilitation services is necessary to enable the applicant or eligible individual to achieve an employment outcome.

(Authority: Sections 12(c) and 103(a)(17) of the Act; 29 U.S.C. 709(c) and 723(a)(17))

(24) *Governor* means a chief executive officer of a State.

(Authority: Section 7(15) of the Act; 29 U.S.C. 705(15))

(25) *Impartial hearing officer.*

(i) *Impartial hearing officer* means an individual who—

(A) Is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(B) Is not a member of the State Rehabilitation Council for the designated State unit;

(C) Has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;

(D) Has knowledge of the delivery of vocational rehabilitation services, the State plan, and the Federal and State regulations governing the provision of services;

(E) Has received training with respect to the performance of official duties; and

(F) Has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual.

(ii) An individual is not considered to be an employee of a public agency for the purposes of this definition solely because the individual is paid by the agency to serve as a hearing officer.

(Authority: Section 7(16) of the Act; 29 U.S.C. 705(16))

(26) *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act).

(Authority: Section 7(19)(B) of the Act; 29 U.S.C. 705(19)(B))

(27) *Individual who is blind* means a person who is blind within the meaning of applicable State law. (Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(28) *Individual with a disability,* except as provided in § 361.5(b)(29), means an individual—

(i) Who has a physical or mental impairment;

(ii) Whose impairment constitutes or results in a substantial impediment to employment; and

(iii) Who can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

(Authority: Section 7(20)(A) of the Act; 29 U.S.C. 705(20)(A))

(29) *Individual with a disability,* for purposes of §§ 361.5(b)(14), 361.13(a), 361.13(b)(1), 361.17(a), (b), (c), and (j), 361.18(b), 361.19, 361.20, 361.23(b)(2), 361.29(a) and (d)(5), and 361.51(b), means an individual—

(i) Who has a physical or mental impairment that substantially limits one or more major life activities;

(ii) Who has a record of such an impairment; or

(iii) Who is regarded as having such an impairment.

(Authority: Section 7(20)(B) of the Act; 29 U.S.C. 705(20)(B))

(30) *Individual with a most significant disability* means an individual with a significant disability who meets the designated State unit's criteria for an individual with a most significant disability. These criteria must be consistent with the requirements in § 361.36(d)(1) and (2).

(Authority: Sections 7(21)(E)(i) and 101(a)(5)(C) of the Act; 29 U.S.C. 705(21)(E)(i) and 721(a)(5)(C))

(31) *Individual with a significant disability* means an individual with a disability—

(i) Who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome;

(ii) Whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(iii) Who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitation.

(Authority: Section 7(21)(A) of the Act; 29 U.S.C. 705(21)(A))

(32) *Individual's representative* means any representative chosen by an applicant or eligible individual, as appropriate, including a parent, guardian, other family member, or advocate, unless a representative has been appointed by a court to represent the individual, in which case the court-appointed representative is the individual's representative.

(Authority: Sections 7(22) and 12(c) of the Act; 29 U.S.C. 705(22) and 709(c))

(33) *Integrated setting,*—

(i) With respect to the provision of services, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals other than non-disabled individuals who are

providing services to those applicants or eligible individuals;

(ii) With respect to an employment outcome, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals, other than non-disabled individuals who are providing services to those applicants or eligible individuals, to the same extent that non-disabled individuals in comparable positions interact with other persons.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(34) *Local workforce investment board* means a local workforce investment board established under section 117 of the Workforce Investment Act of 1998.

(Authority: Section 7(25) of the Act; 29 U.S.C. 705(25))

(35) *Maintenance* means monetary support provided to an individual for expenses, such as food, shelter, and clothing, that are in excess of the normal expenses of the individual and that are necessitated by the individual's participation in an assessment for determining eligibility and vocational rehabilitation needs or the individual's receipt of vocational rehabilitation services under an individualized plan for employment.

(Authority: Sections 12(c) and 103(a)(7) of the Act; 29 U.S.C. 709(c) and 723(a)(7))

(i) *Examples:* The following are examples of expenses that would meet the definition of maintenance. The examples are illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgment.

Example 1: The cost of a uniform or other suitable clothing that is required for an individual's job placement or job-seeking activities.

Example 2: The cost of short-term shelter that is required in order for an individual to participate in assessment activities or vocational training at a site that is not within commuting distance of an individual's home.

Example 3: The initial one-time costs, such as a security deposit or charges for the initiation of utilities, that are required in order for an individual to relocate for a job placement.

Example 4: The costs of an individual's participation in enrichment activities related to that individual's training program.

(ii) [Reserved]

(36) *Mediation* means the act or process of using an independent third party to act as a mediator, intermediary, or conciliator to assist persons or parties in settling differences or disputes prior to pursuing formal administrative or other legal remedies. Mediation under the program must be conducted in accordance with the requirements in § 361.57(d) by a qualified and impartial mediator as defined in § 361.5(b)(43).

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(37) *Nonprofit,* with respect to a community rehabilitation program, means a community rehabilitation program carried out by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual and the income of which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986.

(Authority: Section 7(26) of the Act; 29 U.S.C. 705(26))

(38) *Ongoing support services,* as used in the definition of ''Supported employment''

(i) Means services that are—

(A) Needed to support and maintain an individual with a most significant disability in supported employment;

(B) Identified based on a determination by the designated State unit of the individual's need as specified in an individualized plan for employment; and

(C) Furnished by the designated State unit from the time of job placement until transition to extended services, unless post-employment services are provided following transition, and thereafter by one or more extended services providers throughout the individual's term of employment in a particular job placement or multiple placements if those placements are being provided under a program of transitional employment;

(ii) Must include an assessment of employment stability and provision of specific services or the coordination of services at or away from the worksite that are needed to maintain stability based on—

(A) At a minimum, twice-monthly monitoring at the worksite of each individual in supported employment; or

(B) If under specific circumstances, especially at the request of the individual, the individualized plan for employment provides for off-site monitoring, twice monthly meetings with the individual;

(iii) Consist of—

(A) Any particularized assessment supplementary to the comprehensive assessment of rehabilitation needs described in paragraph (b)(6)(ii) of this section;

(B) The provision of skilled job trainers who accompany the individual for intensive job skill training at the work site;

(C) Job development and training;

(D) Social skills training;

(E) Regular observation or supervision of the individual;

(F) Follow-up services including regular contact with the employers, the individuals, the parents, family members, guardians, advocates or authorized representatives of the individuals, and other suitable professional and informed advisors, in order to reinforce and stabilize the job placement;

(G) Facilitation of natural supports at the worksite;

(H) Any other service identified in the scope of vocational rehabilitation services for individuals, described in § 361.48; or

(I) Any service similar to the foregoing services.

(Authority: Sections 7(27) and 12(c) of the Act; 29 U.S.C. 705(27) and 709(c))

(39) *Personal assistance services* means a range of services provided by one or more persons designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform without assistance if the individual did not have a disability. The services must be designed to increase the individual's control in life and ability to perform everyday activities on or off the job. The services must be necessary to the achievement of an employment outcome and may be provided only while the individual is receiving other vocational rehabilitation services. The services may include training in managing, supervising, and directing personal assistance services.

(Authority: Sections 7(28), 102(b)(3)(B)(i)(I), and 103(a)(9) of the Act; 29 U.S.C. 705(28), 722(b)(3)(B)(i)(I), and 723(a)(9))

(40) *Physical and mental restoration services* means—

(i) Corrective surgery or therapeutic treatment that is likely, within a reasonable period of time, to correct or modify substantially a stable or slowly progressive physical or mental impairment that constitutes a substantial impediment to employment;

(ii) Diagnosis of and treatment for mental or emotional disorders by qualified personnel in accordance with State licensure laws;

(iii) Dentistry;

(iv) Nursing services;

(v) Necessary hospitalization (either inpatient or outpatient care) in connection with surgery or treatment and clinic services;

(vi) Drugs and supplies;

(vii) Prosthetic and orthotic devices;

(viii) Eyeglasses and visual services, including visual training, and the

examination and services necessary for the prescription and provision of eyeglasses, contact lenses, microscopic lenses, telescopic lenses, and other special visual aids prescribed by personnel that are qualified in accordance with State licensure laws;

(ix) Podiatry;

(x) Physical therapy;

(xi) Occupational therapy;

(xii) Speech or hearing therapy;

(xiii) Mental health services;

(xiv) Treatment of either acute or chronic medical complications and emergencies that are associated with or arise out of the provision of physical and mental restoration services, or that are inherent in the condition under treatment;

(xv) Special services for the treatment of individuals with end-stage renal disease, including transplantation, dialysis, artificial kidneys, and supplies; and

(xvi) Other medical or medically related rehabilitation services.

(Authority: Sections 12(c) and 103(a)(6) of the Act; 29 U.S.C. 709(c) and 723(a)(6))

(41) *Physical or mental impairment* means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(Authority: Sections 7(20)(A) and 12(c) of the Act; 29 U.S.C. 705(20)(A) and 709(c))

(42) *Post-employment services* means one or more of the services identified in § 361.48 that are provided subsequent to the achievement of an employment outcome and that are necessary for an individual to maintain, regain, or advance in employment, consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(Authority: Sections 12(c) and 103(a)(18) of the Act; 29 U.S.C. 709(c)) and 723(a)(18))

Note to paragraph (b)(42): Post-employment services are intended to ensure that the employment outcome remains consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. These services are available to meet rehabilitation needs that do not require a complex and comprehensive provision of services and, thus, should be limited in scope and duration. If more comprehensive services are required, then a new rehabilitation effort should be considered. Post-employment services are to be provided under an amended individualized plan for employment; thus, a re-determination of eligibility is not required. The provision of post-employment services is subject to the same requirements in this part as the provision of any other vocational rehabilitation service. Post-employment services are available to assist an individual to maintain employment, *e.g.,* the individual's employment is jeopardized because of conflicts with supervisors or co-workers, and the individual needs mental health services and counseling to maintain the employment; to regain employment, *e.g.,* the individual's job is eliminated through reorganization and new placement services are needed; and to advance in employment, *e.g.,* the employment is no longer consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(43) *Qualified and impartial mediator.*

(i) *Qualified and impartial mediator* means an individual who—

(A) Is not an employee of a public agency (other than an administrative law judge, hearing examiner, employee of a State office of mediators, or employee of an institution of higher education);

(B) Is not a member of the State Rehabilitation Council for the designated State unit;

(C) Has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;

(D) Is knowledgeable of the vocational rehabilitation program and the applicable Federal and State laws, regulations, and policies governing the provision of vocational rehabilitation services;

(E) Has been trained in effective mediation techniques consistent with any State-approved or -recognized certification, licensing, registration, or other requirements; and

(F) Has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual during the mediation proceedings.

(ii) An individual serving as a mediator is not considered to be an employee of the designated State agency or designated State unit for the purposes of this definition solely because the individual is paid by the designated State agency or designated State unit to serve as a mediator.

(Authority: Sections 12(c) and 102(c)(4) of the Act; 29 U.S.C. 709(c) and 722(c)(4))

(44) *Rehabilitation engineering* means the systematic application of engineering sciences to design, develop, adapt, test, evaluate, apply, and distribute technological solutions to problems confronted by individuals with disabilities in functional areas, such as mobility, communications, hearing, vision, and cognition, and in activities associated with employment, independent living, education, and integration into the community.

(Authority: Section 7(12)(c) of the Act; 29 U.S.C. 709(c))

(45) *Rehabilitation technology* means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of, and address the barriers confronted by, individuals with disabilities in areas that include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services.

(Authority: Section 7(30) of the Act; 29 U.S.C. 705(30))

(46) *Reservation* means a Federal or State Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act.

(Authority: Section 121(c) of the Act; 29 U.S.C. 741(c))

(47) *Sole local agency* means a unit or combination of units of general local government or one or more Indian tribes that has the sole responsibility under an agreement with, and the supervision of, the State agency to conduct a local or tribal vocational rehabilitation program, in accordance with the State plan.

(Authority: Section 7(24) of the Act; 29 U.S.C. 705(24))

(48) *State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Authority: Section 7(32) of the Act; 29 U.S.C. 705(32))

(49) *State workforce investment board* means a State workforce investment board established under section 111 of the Workforce Investment Act of 1998.

(Authority: Section 7(33) of the Act; 29 U.S.C. 705(33))

(50) *Statewide workforce investment system* means a system described in

section 111(d)(2) of the Workforce Investment Act of 1998.

(Authority: Section 7(34) of the Act; 29 U.S.C. 705(34))

(51) *State plan* means the State plan for vocational rehabilitation services submitted under § 361.10.

(Authority: Sections 12(c) and 101 of the Act; 29 U.S.C. 709(c) and 721)

(52) *Substantial impediment to employment* means that a physical or mental impairment (in light of attendant medical, psychological, vocational, educational, communication, and other related factors) hinders an individual from preparing for, entering into, engaging in, or retaining employment consistent with the individual's abilities and capabilities.

(Authority: Sections 7(20)(A) and 12(c) of the Act; 29 U.S.C. 705(20)(A) and 709(c))

(53) *Supported employment* means—

(i) Competitive employment in an integrated setting, or employment in integrated work settings in which individuals are working toward competitive employment, consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individuals with ongoing support services for individuals with the most significant disabilities—

(A) For whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or intermittent as a result of a significant disability; and

(B) Who, because of the nature and severity of their disabilities, need intensive supported employment services from the designated State unit and extended services after transition as described in paragraph (b)(20) of this section to perform this work; or

(ii) Transitional employment, as defined in paragraph (b)(54) of this section, for individuals with the most significant disabilities due to mental illness.

(Authority: Section 7(35) of the Act; 29 U.S.C. 705(35))

(54) *Supported employment services* means ongoing support services and other appropriate services needed to support and maintain an individual with a most significant disability in supported employment that are provided by the designated State unit—

(i) For a period of time not to exceed 18 months, unless under special circumstances the eligible individual and the rehabilitation counselor or coordinator jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment; and

(ii) 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.

(Authority: Sections 7(36) and 12(c) of the Act; 29 U.S.C. 705(36) and 709(c))

(55) *Transition services* means a coordinated set of activities for a student designed within an outcome-oriented process that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities must be based upon the individual student's needs, taking into account the student's preferences and interests, and must include instruction, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. Transition services must promote or facilitate the achievement of the employment outcome identified in the student's individualized plan for employment.

(Authority: Section 7(37) and 103(a)(15) of the Act; 29 U.S.C. 705(37) and 723(a)(15))

(56) *Transitional employment,* as used in the definition of ''Supported employment,'' means a series of temporary job placements in competitive work in integrated settings with ongoing support services for individuals with the most significant disabilities due to mental illness. In transitional employment, the provision of ongoing support services must include continuing sequential job placements until job permanency is achieved.

(Authority: Sections 7(35)(B) and 12(c) of the Act; 29 U.S.C. 705(35)(B) and 709(c)

(57) *Transportation* means travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a vocational rehabilitation service, including expenses for training in the use of public transportation vehicles and systems.

(Authority: 103(a)(8) of the Act; 29 U.S.C. 723(a)(8))

(i) *Examples:* The following are examples of expenses that would meet the definition of transportation. The examples are purely illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgment.

Example 1: Travel and related expenses for a personal care attendant or aide if the services of that person are necessary to enable the applicant or eligible individual to travel to participate in any vocational rehabilitation service.

Example 2: The purchase and repair of vehicles, including vans, but not the modification of these vehicles, as modification would be considered a rehabilitation technology service.

Example 3: Relocation expenses incurred by an eligible individual in connection with a job placement that is a significant distance from the eligible individual's current residence.

(ii) [Reserved]

(58) *Vocational rehabilitation services*—

(i) If provided to an individual, means those services listed in § 361.48; and

(ii) If provided for the benefit of groups of individuals, also means those services listed in § 361.49.

(Authority: Sections 7(38) and 103(a) and (b) of the Act; 29 U.S.C. 705(38), 723(a) and (b))

Subpart B—State Plan and Other Requirements for Vocational Rehabilitation Services

§ 361.10 Submission, approval, and disapproval of the State plan.

(a) *Purpose.* For a State to receive a grant under this part, the designated State agency must submit to the Secretary, and obtain approval of, a State plan that contains a description of the State's vocational rehabilitation services program, the plans and policies to be followed in carrying out the program, and other information requested by the Secretary, in accordance with the requirements of this part.

(b) *Separate part relating to the vocational rehabilitation of individuals who are blind.* If a separate State agency administers or supervises the administration of a separate part of the State plan relating to the vocational rehabilitation of individuals who are blind, that part of the State plan must separately conform to all requirements under this part that are applicable to a State plan.

(c) *State unified plan.* The State may choose to submit the State plan for vocational rehabilitation services as part of the State unified plan under section 501 of the Workforce Investment Act of 1998. The portion of the State unified plan that includes the State plan for vocational rehabilitation services must meet the State plan requirements in this part.

(d) *Public participation.* Prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the State plan, including making any substantive amendment to those policies and procedures, the designated State agency must conduct public meetings throughout the State, in accordance with the requirements of § 361.20.

(e) *Duration.* The State plan remains in effect subject to the submission of modifications the State determines to be necessary or the Secretary may require based on a change in State policy, a change in Federal law, including regulations, an interpretation of the Act by a Federal court or the highest court of the State, or a finding by the Secretary of State noncompliance with the requirements of the Act or this part.

(f) *Submission of the State plan.* The State must submit the State plan for approval—

(1) To the Secretary on the same date that the State submits a State plan relating to the statewide workforce investment system under section 112 of the Workforce Investment Act of 1998;

(2) As part of the State unified plan submitted under section 501 of that Act; or

(3) To the Secretary on the same date that the State submits a State unified plan under section 501 of that Act that does not include the State plan under this part.

(g) *Annual submission.* (1) The State must submit to the Secretary for approval revisions to the State plan in accordance with paragraph (e) of this section and 34 CFR 76.140.

(2) The State must submit to the Secretary reports containing annual updates of the information required under §§ 361.18, 361.29, and 361.35 and any other updates of the information required under this part that are requested by the Secretary.

(3) The State is not required to submit policies, procedures, or descriptions required under this part that have been previously submitted to the Secretary and that demonstrate that the State meets the requirements of this part, including any policies, procedures, or descriptions submitted under this part that are in effect on August 6, 1998.

(h) *Approval.* The Secretary approves any State plan and any revisions to the State plan that conform to the requirements of this part and section 101(a) of the Act.

(i) *Disapproval.* The Secretary disapproves any State plan that does not conform to the requirements of this part and section 101(a) of the Act, in accordance with the following procedures:

(1) *Informal resolution.* Prior to disapproving any State plan, the Secretary attempts to resolve disputes informally with State officials.

(2) *Notice.* If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to disapprove the State plan and of the opportunity for a hearing.

(3) *State plan hearing.* If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this Program, to conduct a hearing in accordance with the provisions of 34 CFR part 81, subpart A.

(4) *Initial decision.* The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(5) *Petition for review of an initial decision.* The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR part 81.

(6) *Review by the Secretary.* The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(7) *Final decision of the Department.* The final decision of the Department is made in accordance with 34 CFR 81.44.

(8) *Judicial review.* A State may appeal the Secretary's decision to disapprove the State plan by filing a petition for review with the United States Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Authority: Sections 101(a) and (b), and 107(d) of the Act; 20 U.S.C. 1231g(a); and 29 U.S.C. 721(a) and (b), and 727(d))

§ 361.11 Withholding of funds.

(a) *Basis for withholding.* The Secretary may withhold or limit payments under section 111 or 622(a) of the Act, as provided by section 107(c) and (d) of the Act, if the Secretary determines that—

(1) The State plan, including the supported employment supplement, has been so changed that it no longer conforms with the requirements of this part or 34 CFR part 363; or

(2) In the administration of the State plan, there has been a failure to comply substantially with any provision of that plan or a program improvement plan established in accordance with section 106(b)(2) of the Act.

(b) *Informal resolution.* Prior to withholding or limiting payments in accordance with this section, the Secretary attempts to resolve disputed issues informally with State officials.

(c) *Notice.* If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to withhold or limit payments and of the opportunity for a hearing.

(d) *Withholding hearing.* If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this Program, to conduct a hearing in accordance with the provisions of 34 CFR part 81, subpart A.

(e) *Initial decision.* The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(f) *Petition for review of an initial decision.* The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR 81.42.

(g) *Review by the Secretary.* The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(h) *Final decision of the Department.* The final decision of the Department is made in accordance with 34 CFR 81.44.

(i) *Judicial review.* A State may appeal the Secretary's decision to withhold or limit payments by filing a petition for review with the U.S. Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Authority: Sections 101(b), 107(c), and 107(d) of the Act; 29 U.S.C. 721(b), 727(c)(1) and (2), and 727(d))

Administration

§ 361.12 Methods of administration.

The State plan must assure that the State agency, and the designated State unit if applicable, employs methods of administration found necessary by the Secretary for the proper and efficient administration of the plan and for carrying out all functions for which the State is responsible under the plan and this part. These methods must include procedures to ensure accurate data collection and financial accountability.

(Authority: Sections 101(a)(6) and (a)(10)(A) of the Act; 29 U.S.C. 721(a)(6) and (a)(10)(A))

§ 361.13 State agency for administration.

(a) *Designation of State agency.* The State plan must designate a State agency as the sole State agency to administer the State plan, or to supervise its administration in a political subdivision of the State by a sole local agency, in accordance with the following requirements:

(1) *General.* Except as provided in paragraphs (a)(2) and (3) of this section,

the State plan must provide that the designated State agency is one of the following types of agencies:

(i) A State agency that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities; or

(ii) A State agency that includes a vocational rehabilitation unit as provided in paragraph (b) of this section.

(2) *American Samoa.* In the case of American Samoa, the State plan must designate the Governor.

(3) *Designated State agency for individuals who are blind.* If a State commission or other agency that provides assistance or services to individuals who are blind is authorized under State law to provide vocational rehabilitation services to individuals who are blind, and this commission or agency is primarily concerned with vocational rehabilitation or includes a vocational rehabilitation unit as provided in paragraph (b) of this section, the State plan may designate that agency as the sole State agency to administer the part of the plan under which vocational rehabilitation services are provided for individuals who are blind or to supervise its administration in a political subdivision of the State by a sole local agency.

(b) *Designation of State unit.*

(1) If the designated State agency is not of the type specified in paragraph (a)(1)(i) of this section or if the designated State agency specified in paragraph (a)(3) of this section is not primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities, the State plan must assure that the agency (or each agency if two agencies are designated) includes a vocational rehabilitation bureau, division, or unit that—

(i) Is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and is responsible for the administration of the State agency's vocational rehabilitation program under the State plan;

(ii) Has a full-time director;

(iii) Has a staff, at least 90 percent of whom are employed full time on the rehabilitation work of the organizational unit; and

(iv) Is located at an organizational level and has an organizational status within the State agency comparable to that of other major organizational units of the agency.

(2) In the case of a State that has not designated a separate State agency for individuals who are blind, as provided for in paragraph (a)(3) of this section, the State may assign responsibility for the part of the plan under which vocational rehabilitation services are provided to individuals who are blind to one organizational unit of the designated State agency and may assign responsibility for the rest of the plan to another organizational unit of the designated State agency, with the provisions of paragraph (b)(1) of this section applying separately to each of these units.

(c) *Responsibility for administration.*

(1) At a minimum, the following activities are the responsibility of the designated State unit or the sole local agency under the supervision of the State unit:

(i) All decisions affecting eligibility for vocational rehabilitation services, the nature and scope of available services, and the provision of these services.

(ii) The determination to close the record of services of an individual who has achieved an employment outcome in accordance with § 361.56.

(iii) Policy formulation and implementation.

(iv) The allocation and expenditure of vocational rehabilitation funds.

(v) Participation as a partner in the One-Stop service delivery system under Title I of the Workforce Investment Act of 1998, in accordance with 20 CFR part 662.

(2) The responsibility for the functions described in paragraph (c)(1) of this section may not be delegated to any other agency or individual.

(Authority: Section 101(a)(2) of the Act; 29 U.S.C. 721(a)(2))

§ 361.14 Substitute State agency.

(a) *General provisions.*

(1) If the Secretary has withheld all funding from a State under § 361.11, the State may designate another agency to substitute for the designated State agency in carrying out the State's program of vocational rehabilitation services.

(2) Any public or nonprofit private organization or agency within the State or any political subdivision of the State is eligible to be a substitute agency.

(3) The substitute agency must submit a State plan that meets the requirements of this part.

(4) The Secretary makes no grant to a substitute agency until the Secretary approves its plan.

(b) *Substitute agency matching share.* The Secretary does not make any payment to a substitute agency unless it has provided assurances that it will contribute the same matching share as the State would have been required to contribute if the State agency were carrying out the vocational rehabilitation program.

(Authority: Section 107(c)(3) of the Act; 29 U.S.C. 727(c)(3))

§ 361.15 Local administration.

(a) If the State plan provides for the administration of the plan by a local agency, the designated State agency must—

(1) Ensure that each local agency is under the supervision of the designated State unit and is the sole local agency as defined in § 361.5(b)(47) that is responsible for the administration of the program within the political subdivision that it serves; and

(2) Develop methods that each local agency will use to administer the vocational rehabilitation program, in accordance with the State plan.

(b) A separate local agency serving individuals who are blind may administer that part of the plan relating to vocational rehabilitation of individuals who are blind, under the supervision of the designated State unit for individuals who are blind.

(Authority: Sections 7(24) and 101(a)(2)(A) of the Act; 29 U.S.C. 705(24) and 721(a)(2)(A))

§ 361.16 Establishment of an independent commission or a state rehabilitation council.

(a) *General requirement.* Except as provided in paragraph (b) of this section, the State plan must contain one of the following two assurances:

(1) An assurance that the designated State agency is an independent State commission that—

(i) Is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State and is primarily concerned with vocational rehabilitation or vocational and other rehabilitation services, in accordance with § 361.13(a)(1)(i);

(ii) Is consumer-controlled by persons who—

(A) Are individuals with physical or mental impairments that substantially limit major life activities; and

(B) Represent individuals with a broad range of disabilities, unless the designated State unit under the direction of the commission is the State agency for individuals who are blind;

(iii) Includes family members, advocates, or other representatives of individuals with mental impairments; and

(iv) Conducts the functions identified in § 361.17(h)(4).

(2) An assurance that—

(i) The State has established a State Rehabilitation Council (Council) that meets the requirements of § 361.17;

(ii) The designated State unit, in accordance with § 361.29, jointly develops, agrees to, and reviews annually State goals and priorities and jointly submits to the Secretary annual reports of progress with the Council;

(iii) The designated State unit regularly consults with the Council regarding the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services;

(iv) The designated State unit transmits to the Council—

(A) All plans, reports, and other information required under this part to be submitted to the Secretary;

(B) All policies and information on all practices and procedures of general applicability provided to or used by rehabilitation personnel providing vocational rehabilitation services under this part; and

(C) Copies of due process hearing decisions issued under this part and transmitted in a manner to ensure that the identity of the participants in the hearings is kept confidential; and

(v) The State plan, and any revision to the State plan, includes a summary of input provided by the Council, including recommendations from the annual report of the Council, the review and analysis of consumer satisfaction described in § 361.17(h)(4), and other reports prepared by the Council, and the designated State unit's response to the input and recommendations, including explanations of reasons for rejecting any input or recommendation of the Council.

(b) *Exception for separate State agency for individuals who are blind.* In the case of a State that designates a separate State agency under § 361.13(a)(3) to administer the part of the State plan under which vocational rehabilitation services are provided to individuals who are blind, the State must either establish a separate State Rehabilitation Council for each agency that does not meet the requirements in paragraph (a)(1) of this section or establish one State Rehabilitation Council for both agencies if neither agency meets the requirements of paragraph (a)(1) of this section.

(Authority: Sections 101(a)(21) of the Act; 29 U.S.C. 721(a)(21))

§ 361.17 Requirements for a state rehabilitation council.

If the State has established a Council under § 361.16(a)(2) or (b), the Council must meet the following requirements:

(a) *Appointment.*

(1) The members of the Council must be appointed by the Governor or, in the case of a State that, under State law, vests authority for the administration of the activities carried out under this part in an entity other than the Governor (such as one or more houses of the State legislature or an independent board), the chief officer of that entity.

(2) The appointing authority must select members of the Council after soliciting recommendations from representatives of organizations representing a broad range of individuals with disabilities and organizations interested in individuals with disabilities. In selecting members, the appointing authority must consider, to the greatest extent practicable, the extent to which minority populations are represented on the Council.

(b) *Composition.*

(1) *General.* Except as provided in paragraph (b)(3) of this section, the Council must be composed of at least 15 members, including—

(i) At least one representative of the Statewide Independent Living Council, who must be the chairperson or other designee of the Statewide Independent Living Council;

(ii) At least one representative of a parent training and information center established pursuant to section 682(a) of the Individuals with Disabilities Education Act;

(iii) At least one representative of the Client Assistance Program established under 34 CFR part 370, who must be the director of or other individual recommended by the Client Assistance Program;

(iv) At least one qualified vocational rehabilitation counselor with knowledge of and experience with vocational rehabilitation programs who serves as an ex officio, nonvoting member of the Council if employed by the designated State agency;

(v) At least one representative of community rehabilitation program service providers;

(vi) Four representatives of business, industry, and labor;

(vii) Representatives of disability groups that include a cross section of—

(A) Individuals with physical, cognitive, sensory, and mental disabilities; and

(B) Representatives of individuals with disabilities who have difficulty representing themselves or are unable due to their disabilities to represent themselves;

(viii) Current or former applicants for, or recipients of, vocational rehabilitation services;

(ix) In a State in which one or more projects are carried out under section 121 of the Act (American Indian Vocational Rehabilitation Services), at least one representative of the directors of the projects;

(x) At least one representative of the State educational agency responsible for the public education of students with disabilities who are eligible to receive services under this part and part B of the Individuals with Disabilities Education Act;

(xi) At least one representative of the State workforce investment board; and

(xii) The director of the designated State unit as an ex officio, nonvoting member of the Council.

(2) *Employees of the designated State agency.* Employees of the designated State agency may serve only as nonvoting members of the Council. This provision does not apply to the representative appointed pursuant to paragraph (b)(1)(iii) of this section.

(3) *Composition of a separate Council for a separate State agency for individuals who are blind.* Except as provided in paragraph (b)(4) of this section, if the State establishes a separate Council for a separate State agency for individuals who are blind, that Council must—

(i) Conform with all of the composition requirements for a Council under paragraph (b)(1) of this section, except the requirements in paragraph (b)(1)(vii), unless the exception in paragraph (b)(4) of this section applies; and

(ii) Include—

(A) At least one representative of a disability advocacy group representing individuals who are blind; and

(B) At least one representative of an individual who is blind, has multiple disabilities, and has difficulty representing himself or herself or is unable due to disabilities to represent himself or herself.

(4) *Exception.* If State law in effect on October 29, 1992 requires a separate Council under paragraph (b)(3) of this section to have fewer than 15 members, the separate Council is in compliance with the composition requirements in paragraphs (b)(1)(vi) and (b)(1)(viii) of this section if it includes at least one representative who meets the requirements for each of those paragraphs.

(c) *Majority.*

(1) A majority of the Council members must be individuals with disabilities who meet the requirements of § 361.5(b)(29) and are not employed by the designated State unit.

(2) In the case of a separate Council established under § 361.16(b), a majority

of the Council members must be individuals who are blind and are not employed by the designated State unit.

(d) *Chairperson.* The chairperson must be—

(1) Selected by the members of the Council from among the voting members of the Council, subject to the veto power of the Governor; or

(2) In States in which the Governor does not have veto power pursuant to State law, the appointing authority described in paragraph (a)(1) of this section must designate a member of the Council to serve as the chairperson of the Council or must require the Council to designate a member to serve as chairperson.

(e) *Terms of appointment.*

(1) Each member of the Council must be appointed for a term of no more than 3 years, and each member of the Council, other than a representative identified in paragraph (b)(1)(iii) or (ix) of this section, may serve for no more than two consecutive full terms.

(2) A member appointed to fill a vacancy occurring prior to the end of the term for which the predecessor was appointed must be appointed for the remainder of the predecessor's term.

(3) The terms of service of the members initially appointed must be, as specified by the appointing authority as described in paragraph (a)(1) of this section, for varied numbers of years to ensure that terms expire on a staggered basis.

(f) *Vacancies.*

(1) A vacancy in the membership of the Council must be filled in the same manner as the original appointment, except the appointing authority as described in paragraph (a)(1) of this section may delegate the authority to fill that vacancy to the remaining members of the Council after making the original appointment.

(2) No vacancy affects the power of the remaining members to execute the duties of the Council.

(g) *Conflict of interest.* No member of the Council shall cast a vote on any matter that would provide direct financial benefit to the member or the member's organization or otherwise give the appearance of a conflict of interest under State law.

(h) *Functions.* The Council must, after consulting with the State workforce investment board—

(1) Review, analyze, and advise the designated State unit regarding the performance of the State unit's responsibilities under this part, particularly responsibilities related to—

(i) Eligibility, including order of selection;

(ii) The extent, scope, and effectiveness of services provided; and

(iii) Functions performed by State agencies that affect or potentially affect the ability of individuals with disabilities in achieving employment outcomes under this part;

(2) In partnership with the designated State unit—

(i) Develop, agree to, and review State goals and priorities in accordance with § 361.29(c); and

(ii) Evaluate the effectiveness of the vocational rehabilitation program and submit reports of progress to the Secretary in accordance with § 361.29(e);

(3) Advise the designated State agency and the designated State unit regarding activities carried out under this part and assist in the preparation of the State plan and amendments to the plan, applications, reports, needs assessments, and evaluations required by this part;

(4) To the extent feasible, conduct a review and analysis of the effectiveness of, and consumer satisfaction with—

(i) The functions performed by the designated State agency;

(ii) The vocational rehabilitation services provided by State agencies and other public and private entities responsible for providing vocational rehabilitation services to individuals with disabilities under the Act; and

(iii) The employment outcomes achieved by eligible individuals receiving services under this part, including the availability of health and other employment benefits in connection with those employment outcomes;

(5) Prepare and submit to the Governor and to the Secretary no later than 90 days after the end of the Federal fiscal year an annual report on the status of vocational rehabilitation programs operated within the State and make the report available to the public through appropriate modes of communication;

(6) To avoid duplication of efforts and enhance the number of individuals served, coordinate activities with the activities of other councils within the State, including the Statewide Independent Living Council established under 34 CFR part 364, the advisory panel established under section 612(a)(21) of the Individuals with Disabilities Education Act, the State Developmental Disabilities Planning Council described in section 124 of the Developmental Disabilities Assistance and Bill of Rights Act, the State mental health planning council established under section 1914(a) of the Public Health Service Act, and the State workforce investment board;

(7) Provide for coordination and the establishment of working relationships between the designated State agency and the Statewide Independent Living Council and centers for independent living within the State; and

(8) Perform other comparable functions, consistent with the purpose of this part, as the Council determines to be appropriate, that are comparable to the other functions performed by the Council.

(i) *Resources.*

(1) The Council, in conjunction with the designated State unit, must prepare a plan for the provision of resources, including staff and other personnel, that may be necessary and sufficient for the Council to carry out its functions under this part.

(2) The resource plan must, to the maximum extent possible, rely on the use of resources in existence during the period of implementation of the plan.

(3) Any disagreements between the designated State unit and the Council regarding the amount of resources necessary to carry out the functions of the Council must be resolved by the Governor, consistent with paragraphs (i)(1) and (2) of this section.

(4) The Council must, consistent with State law, supervise and evaluate the staff and personnel that are necessary to carry out its functions.

(5) Those staff and personnel that are assisting the Council in carrying out its functions may not be assigned duties by the designated State unit or any other agency or office of the State that would create a conflict of interest.

(j) *Meetings.* The Council must—

(1) Convene at least four meetings a year in locations determined by the Council to be necessary to conduct Council business. The meetings must be publicly announced, open, and accessible to the general public, including individuals with disabilities, unless there is a valid reason for an executive session; and

(2) Conduct forums or hearings, as appropriate, that are publicly announced, open, and accessible to the public, including individuals with disabilities.

(k) *Compensation.* Funds appropriated under Title I of the Act, except funds to carry out sections 112 and 121 of the Act, may be used to compensate and reimburse the expenses of Council members in accordance with section 105(g) of the Act.

(Authority: Section 105 of the Act; 29 U.S.C. 725)

§ 361.18 Comprehensive system of personnel development.

The State plan must describe the procedures and activities the State agency will undertake to establish and maintain a comprehensive system of personnel development designed to ensure an adequate supply of qualified rehabilitation personnel, including professionals and paraprofessionals, for the designated State unit. If the State agency has a State Rehabilitation Council, this description must, at a minimum, specify that the Council has an opportunity to review and comment on the development of plans, policies, and procedures necessary to meet the requirements of paragraphs (b) through (d) of this section. This description must also conform with the following requirements:

(a) *Data system on personnel and personnel development.* The State plan must describe the development and maintenance of a system by the State agency for collecting and analyzing on an annual basis data on qualified personnel needs and personnel development, in accordance with the following requirements:

(1) Data on qualified personnel needs must include—

(i) The number of personnel who are employed by the State agency in the provision of vocational rehabilitation services in relation to the number of individuals served, broken down by personnel category;

(ii) The number of personnel currently needed by the State agency to provide vocational rehabilitation services, broken down by personnel category; and

(iii) Projections of the number of personnel, broken down by personnel category, who will be needed by the State agency to provide vocational rehabilitation services in the State in 5 years based on projections of the number of individuals to be served, including individuals with significant disabilities, the number of personnel expected to retire or leave the field, and other relevant factors.

(2) Data on personnel development must include—

(i) A list of the institutions of higher education in the State that are preparing vocational rehabilitation professionals, by type of program;

(ii) The number of students enrolled at each of those institutions, broken down by type of program; and

(iii) The number of students who graduated during the prior year from each of those institutions with certification or licensure, or with the credentials for certification or licensure, broken down by the personnel category for which they have received, or have the credentials to receive, certification or licensure.

(b) *Plan for recruitment, preparation, and retention of qualified personnel.* The State plan must describe the development, updating, and implementation of a plan to address the current and projected needs for personnel who are qualified in accordance with paragraph (c) of this section. The plan must identify the personnel needs based on the data collection and analysis system described in paragraph (a) of this section and must provide for the coordination and facilitation of efforts between the designated State unit and institutions of higher education and professional associations to recruit, prepare, and retain personnel who are qualified in accordance with paragraph (c) of this section, including personnel from minority backgrounds and personnel who are individuals with disabilities.

(c) *Personnel standards.*

(1) The State plan must include the State agency's policies and describe the procedures the State agency will undertake to establish and maintain standards to ensure that all professional and paraprofessional personnel needed within the designated State unit to carry out this part are appropriately and adequately prepared and trained, including—

(i) Standards that are consistent with any national or State-approved or -recognized certification, licensing, or registration requirements, or, in the absence of these requirements, other comparable requirements (including State personnel requirements) that apply to the profession or discipline in which that category of personnel is providing vocational rehabilitation services; and

(ii) To the extent that existing standards are not based on the highest requirements in the State, the steps the State is currently taking and the steps the State plans to take to retrain or hire personnel to meet standards that are based on the highest requirements in the State, including measures to notify State unit personnel, the institutions of higher education identified under paragraph (a)(2)(i) of this section, and other public agencies of these steps and the timelines for taking each step. The steps taken by the State unit under this paragraph must be described in a written plan that includes—

(A) Specific strategies for retraining, recruiting, and hiring personnel;

(B) The specific time period by which all State unit personnel will meet the standards described in paragraph (c)(1)(i) of this section;

(C) Procedures for evaluating the State unit's progress in hiring or retraining personnel to meet applicable personnel standards within the time period established under paragraph (c)(1)(ii)(B) of this section; and

(D) In instances in which the State unit is unable to immediately hire new personnel who meet the requirements in paragraph (c)(1)(i) of this section, the initial minimum qualifications that the designated State unit will require of newly hired personnel and a plan for training those individuals to meet applicable requirements within the time period established under paragraph (c)(1)(ii)(B) of this section.

(2) As used in this section—

(i) *Highest requirements in the State applicable to that profession or discipline* means the highest entry-level academic degree needed for any national or State-approved or -recognized certification, licensing, registration, or, in the absence of these requirements, other comparable requirements that apply to that profession or discipline. The current requirements of all State statutes and regulations of other agencies in the State applicable to that profession or discipline must be considered and must be kept on file by the designated State unit and available to the public.

(ii) *Profession or discipline* means a specific occupational category, including any paraprofessional occupational category, that—

(A) Provides rehabilitation services to individuals with disabilities;

(B) Has been established or designated by the State unit; and

(C) Has a specified scope of responsibility.

(d) *Staff development.*

(1) The State plan must include the State agency's policies and describe the procedures and activities the State agency will undertake to ensure that all personnel employed by the State unit receive appropriate and adequate training, including a description of—

(i) A system of staff development for rehabilitation professionals and paraprofessionals within the State unit, particularly with respect to assessment, vocational counseling, job placement, and rehabilitation technology; and

(ii) Procedures for acquiring and disseminating to rehabilitation professionals and paraprofessionals within the designated State unit significant knowledge from research and other sources.

(2) The specific training areas for staff development must be based on the

needs of each State unit and may include, but are not limited to—

(i) Training regarding the Workforce Investment Act of 1998 and the amendments to the Rehabilitation Act of 1973 made by the Rehabilitation Act Amendments of 1998;

(ii) Training with respect to the requirements of the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and Social Security work incentive programs, including programs under the Ticket to Work and Work Incentives Improvement Act of 1999, training to facilitate informed choice under this program, and training to improve the provision of services to culturally diverse populations; and

(iii) Activities related to—

(A) Recruitment and retention of qualified rehabilitation personnel;

(B) Succession planning; and

(C) Leadership development and capacity building.

(e) *Personnel to address individual communication needs.* The State plan must describe how the State unit—

(1) Includes among its personnel, or obtains the services of, individuals able to communicate in the native languages of applicants and eligible individuals who have limited English speaking ability; and

(2) Includes among its personnel, or obtains the services of, individuals able to communicate with applicants and eligible individuals in appropriate modes of communication.

(f) *Coordination with personnel development under the Individuals with Disabilities Education Act.* The State plan must describe the procedures and activities the State agency will undertake to coordinate its comprehensive system of personnel development under the Act with personnel development under the Individuals with Disabilities Education Act.

(Authority: Section 101(a)(7) of the Act; 29 U.S.C. 721(a)(7))

§ 361.19 Affirmative action for individuals with disabilities.

The State plan must assure that the State agency takes affirmative action to employ and advance in employment qualified individuals with disabilities covered under and on the same terms and conditions as stated in section 503 of the Act.

(Authority: Section 101(a)(6)(B) of the Act; 29 U.S.C. 721(a)(6)(B))

§ 361.20 Public participation requirements.

(a) *Conduct of public meetings.* The State plan must assure that prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the State plan, including making any substantive amendments to the policies and procedures, the designated State agency conducts public meetings throughout the State to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures.

(b) *Notice requirements.* The State plan must assure that the designated State agency, prior to conducting the public meetings, provides appropriate and sufficient notice throughout the State of the meetings in accordance with—

(1) State law governing public meetings; or

(2) In the absence of State law governing public meetings, procedures developed by the designated State agency in consultation with the State Rehabilitation Council.

(c) *Summary of input of the State Rehabilitation Council.* The State plan must provide a summary of the input of the State Rehabilitation Council, if the State agency has a Council, into the State plan and any amendment to the plan, in accordance with § 361.16(a)(2)(v).

(d) *Special consultation requirements.* The State plan must assure that the State agency actively consults with the director of the Client Assistance Program, the State Rehabilitation Council, if the State agency has a Council, and, as appropriate, Indian tribes, tribal organizations, and native Hawaiian organizations on its policies and procedures governing the provision of vocational rehabilitation services under the State plan.

(e) *Appropriate modes of communication.* The State unit must provide to the public, through appropriate modes of communication, notices of the public meetings, any materials furnished prior to or during the public meetings, and the policies and procedures governing the provision of vocational rehabilitation services under the State plan.

(Authority: Sections 101(a)(16)(A) and 105(c)(3) of the Act; 29 U.S.C. 721(a)(16)(A), and 725(c)(3))

§ 361.21 Consultations regarding the administration of the state plan.

The State plan must assure that, in connection with matters of general policy arising in the administration of the State plan, the designated State agency takes into account the views of—

(a) Individuals and groups of individuals who are recipients of vocational rehabilitation services or, as appropriate, the individuals' representatives;

(b) Personnel working in programs that provide vocational rehabilitation services to individuals with disabilities;

(c) Providers of vocational rehabilitation services to individuals with disabilities;

(d) The director of the Client Assistance Program; and

(e) The State Rehabilitation Council, if the State has a Council.

(Authority: Sections 101(a)(16)(B) of the Act; 29 U.S.C. 721(a)(16)(B))

§ 361.22 Coordination with education officials.

(a) *Plans, policies, and procedures.* (1) The State plan must contain plans, policies, and procedures for coordination between the designated State agency and education officials responsible for the public education of students with disabilities that are designed to facilitate the transition of students with disabilities from the receipt of educational services in school to the receipt of vocational rehabilitation services under the responsibility of the designated State agency.

(2) These plans, policies, and procedures in paragraph (a)(1) of this section must provide for the development and approval of an individualized plan for employment in accordance with § 361.45 as early as possible during the transition planning process but, at the latest, by the time each student determined to be eligible for vocational rehabilitation services leaves the school setting or, if the designated State unit is operating under an order of selection, before each eligible student able to be served under the order leaves the school setting.

(b) *Formal interagency agreement.* The State plan must include information on a formal interagency agreement with the State educational agency that, at a minimum, provides for—

(1) Consultation and technical assistance to assist educational agencies in planning for the transition of students with disabilities from school to post-school activities, including vocational rehabilitation services;

(2) Transition planning by personnel of the designated State agency and educational agency personnel for students with disabilities that facilitates the development and completion of their individualized education programs (IEPs) under section 614(d) of the Individuals with Disabilities Education Act;

(3) The roles and responsibilities, including financial responsibilities, of

each agency, including provisions for determining State lead agencies and qualified personnel responsible for transition services; and

(4) Procedures for outreach to and identification of students with disabilities who are in need of transition services. Outreach to these students should occur as early as possible during the transition planning process and must include, at a minimum, a description of the purpose of the vocational rehabilitation program, eligibility requirements, application procedures, and scope of services that may be provided to eligible individuals.

(Authority: Section 101(a)(11)(D) of the Act; 29 U.S.C. 721 (a)(11)(D))

§ 361.23 Requirements related to the statewide workforce investment system.

(a) *Responsibilities as a partner of the One-Stop service delivery system.* As a required partner in the One-Stop service delivery system (which is part of the statewide workforce investment system under Title I of the Workforce Investment Act of 1998), the designated State unit must carry out the following functions consistent with the Act, this part, Title I of the Workforce Investment Act of 1998, and the regulations in 20 CFR part 662:

(1) Make available to participants through the One-Stop service delivery system the core services (as described in 20 CFR 662.240) that are applicable to the Program administered by the designated State unit under this part.

(2) Use a portion of funds made available to the Program administered by the designated State unit under this part, consistent with the Act and this part, to—

(i) Create and maintain the One-Stop service delivery system; and

(ii) Provide core services (as described in 20 CFR 662.240).

(3) Enter into a memorandum of understanding (MOU) with the Local Workforce Investment Board under section 117 of the Workforce Investment Act of 1998 relating to the operation of the One-Stop service delivery system that meets the requirements of section 121(c) of the Workforce Investment Act and 20 CFR 662.300, including a description of services, how the cost of the identified services and operating costs of the system will be funded, and methods for referrals.

(4) Participate in the operation of the One-Stop service delivery system consistent with the terms of the MOU and the requirements of the Act and this part.

(5) Provide representation on the Local Workforce Investment Board under section 117 of the Workforce Investment Act of 1998.

(b) *Cooperative agreements with One-Stop partners.* (1) The State plan must assure that the designated State unit or the designated State agency enters into cooperative agreements with the other entities that are partners under the One-Stop service delivery system under Title I of the Workforce Investment Act of 1998 and replicates those agreements at the local level between individual offices of the designated State unit and local entities carrying out the One-Stop service delivery system or other activities through the statewide workforce investment system.

(2) Cooperative agreements developed under paragraph (b)(1) of this section may provide for—

(i) Intercomponent training and technical assistance regarding—

(A) The availability and benefits of, and information on eligibility standards for, vocational rehabilitation services; and

(B) The promotion of equal, effective and meaningful participation by individuals with disabilities in the One-Stop service delivery system and other workforce investment activities through the promotion of program accessibility consistent with the requirements of the Americans with Disabilities Act of 1990 and section 504 of the Act, the use of nondiscriminatory policies and procedures, and the provision of reasonable accommodations, auxiliary aids and services, and rehabilitation technology for individuals with disabilities;

(ii) The use of information and financial management systems that link all of the partners of the One-Stop service delivery system to one another and to other electronic networks, including nonvisual electronic networks, and that relate to subjects such as employment statistics, job vacancies, career planning, and workforce investment activities;

(iii) The use of customer service features such as common intake and referral procedures, customer databases, resource information, and human services hotlines;

(iv) The establishment of cooperative efforts with employers to facilitate job placement and carry out other activities that the designated State unit and the employers determine to be appropriate;

(v) The identification of staff roles, responsibilities, and available resources and specification of the financial responsibility of each partner of the One-Stop service delivery system with respect to providing and paying for necessary services, consistent with the requirements of the Act, this part, other Federal requirements, and State law; and

(vi) The specification of procedures for resolving disputes among partners of the One-Stop service delivery system.

(Authority: Section 101(a)(11)(A) of the Act; 29 U.S.C. 721(a)(11)(A); Sections 121 and 134 of the Workforce Investment Act of 1998; 29 U.S.C. 2841 and 2864)

§ 361.24 Cooperation and coordination with other entities.

(a) *Interagency cooperation.* The State plan must describe the designated State agency's cooperation with and use of the services and facilities of Federal, State, and local agencies and programs, including programs carried out by the Under Secretary for Rural Development of the Department of Agriculture and State use contracting programs, to the extent that those agencies and programs are not carrying out activities through the statewide workforce investment system.

(b) *Coordination with the Statewide Independent Living Council and independent living centers.* The State plan must assure that the designated State unit, the Statewide Independent Living Council established under 34 CFR part 364, and the independent living centers established under 34 CFR part 366 have developed working relationships and coordinate their activities.

(c) *Cooperative agreement with recipients of grants for services to American Indians.*

(1) *General.* In applicable cases, the State plan must assure that the designated State agency has entered into a formal cooperative agreement with each grant recipient in the State that receives funds under part C of the Act (American Indian Vocational Rehabilitation Services).

(2) *Contents of formal cooperative agreement.* The agreement required under paragraph (a)(1) of this section must describe strategies for collaboration and coordination in providing vocational rehabilitation services to American Indians who are individuals with disabilities, including—

(i) Strategies for interagency referral and information sharing that will assist in eligibility determinations and the development of individualized plans for employment;

(ii) Procedures for ensuring that American Indians who are individuals with disabilities and are living near a reservation or tribal service area are provided vocational rehabilitation services; and

(iii) Provisions for sharing resources in cooperative studies and assessments,

joint training activities, and other collaborative activities designed to improve the provision of services to American Indians who are individuals with disabilities.

(d) *Reciprocal referral services between two designated State units in the same State.* If there is a separate designated State unit for individuals who are blind, the two designated State units must establish reciprocal referral services, use each other's services and facilities to the extent feasible, jointly plan activities to improve services in the State for individuals with multiple impairments, including visual impairments, and otherwise cooperate to provide more effective services, including, if appropriate, entering into a written cooperative agreement.

(Authority: Sections 12(c) and 101(a)(11)(C), (E), and (F) of the Act; 29 U.S.C. 709(c) and 721(a)(11) (C), (E), and (F))

§ 361.25 Statewideness.

The State plan must assure that services provided under the State plan will be available in all political subdivisions of the State, unless a waiver of statewideness is requested and approved in accordance with § 361.26.

(Authority: Section 101(a)(4) of the Act; 29 U.S.C. 721(a)(4))

§ 361.26 Waiver of statewideness.

(a) *Availability.* The State unit may provide services in one or more political subdivisions of the State that increase services or expand the scope of services that are available statewide under the State plan if—

(1) The non-Federal share of the cost of these services is met from funds provided by a local public agency, including funds contributed to a local public agency by a private agency, organization, or individual;

(2) The services are likely to promote the vocational rehabilitation of substantially larger numbers of individuals with disabilities or of individuals with disabilities with particular types of impairments; and

(3) For purposes other than those specified in § 361.60(b)(3)(i) and consistent with the requirements in § 361.60(b)(3)(ii), the State includes in its State plan, and the Secretary approves, a waiver of the statewideness requirement, in accordance with the requirements of paragraph (b) of this section.

(b) *Request for waiver.* The request for a waiver of statewideness must—

(1) Identify the types of services to be provided;

(2) Contain a written assurance from the local public agency that it will make available to the State unit the non-Federal share of funds;

(3) Contain a written assurance that State unit approval will be obtained for each proposed service before it is put into effect; and

(4) Contain a written assurance that all other State plan requirements, including a State's order of selection requirements, will apply to all services approved under the waiver.

(Authority: Section 101(a)(4) of the Act; 29 U.S.C. 721(a)(4))

§ 361.27 Shared funding and administration of joint programs.

(a) If the State plan provides for the designated State agency to share funding and administrative responsibility with another State agency or local public agency to carry out a joint program to provide services to individuals with disabilities, the State must submit to the Secretary for approval a plan that describes its shared funding and administrative arrangement.

(b) The plan under paragraph (a) of this section must include—

(1) A description of the nature and scope of the joint program;

(2) The services to be provided under the joint program;

(3) The respective roles of each participating agency in the administration and provision of services; and

(4) The share of the costs to be assumed by each agency.

(c) If a proposed joint program does not comply with the statewideness requirement in § 361.25, the State unit must obtain a waiver of statewideness, in accordance with § 361.26.

(Authority: Section 101(a)(2)(A) of the Act; 29 U.S.C. 721(a)(2)(A))

§ 361.28 Third-party cooperative arrangements involving funds from other public agencies.

(a) The designated State unit may enter into a third-party cooperative arrangement for providing or administering vocational rehabilitation services with another State agency or a local public agency that is furnishing part or all of the non-Federal share, if the designated State unit ensures that—

(1) The services provided by the cooperating agency are not the customary or typical services provided by that agency but are new services that have a vocational rehabilitation focus or existing services that have been modified, adapted, expanded, or reconfigured to have a vocational rehabilitation focus;

(2) The services provided by the cooperating agency are only available to applicants for, or recipients of, services from the designated State unit;

(3) Program expenditures and staff providing services under the cooperative arrangement are under the administrative supervision of the designated State unit; and

(4) All State plan requirements, including a State's order of selection, will apply to all services provided under the cooperative program.

(b) If a third party cooperative agreement does not comply with the statewideness requirement in § 361.25, the State unit must obtain a waiver of statewideness, in accordance with § 361.26.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.29 Statewide assessment; annual estimates; annual State goals and priorities; strategies; and progress reports.

(a) *Comprehensive statewide assessment.* (1) The State plan must include—

(i) The results of a comprehensive, statewide assessment, jointly conducted by the designated State unit and the State Rehabilitation Council (if the State unit has a Council) every 3 years describing the rehabilitation needs of individuals with disabilities residing within the State, particularly the vocational rehabilitation services needs of—

(A) Individuals with the most significant disabilities, including their need for supported employment services;

(B) Individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program carried out under this part; and

(C) Individuals with disabilities served through other components of the statewide workforce investment system as identified by those individuals and personnel assisting those individuals through the components of the system; and

(ii) An assessment of the need to establish, develop, or improve community rehabilitation programs within the State.

(2) The State plan must assure that the State will submit to the Secretary a report containing information regarding updates to the assessments under paragraph (a) of this section for any year in which the State updates the assessments.

(b) *Annual estimates.* The State plan must include, and must assure that the State will annually submit a report to the Secretary that includes, State estimates of—

(1) The number of individuals in the State who are eligible for services under this part;

(2) The number of eligible individuals who will receive services provided with funds provided under part B of Title I of the Act and under part B of Title VI of the Act, including, if the designated State agency uses an order of selection in accordance with § 361.36, estimates of the number of individuals to be served under each priority category within the order; and

(3) The costs of the services described in paragraph (b)(1) of this section, including, if the designated State agency uses an order of selection, the service costs for each priority category within the order.

(c) *Goals and priorities.*

(1) *In general.* The State plan must identify the goals and priorities of the State in carrying out the program.

(2) *Council.* The goals and priorities must be jointly developed, agreed to, reviewed annually, and, as necessary, revised by the designated State unit and the State Rehabilitation Council, if the State unit has a Council.

(3) *Submission.* The State plan must assure that the State will submit to the Secretary a report containing information regarding revisions in the goals and priorities for any year in which the State revises the goals and priorities.

(4) *Basis for goals and priorities.* The State goals and priorities must be based on an analysis of—

(i) The comprehensive statewide assessment described in paragraph (a) of this section, including any updates to the assessment;

(ii) The performance of the State on the standards and indicators established under section 106 of the Act; and

(iii) Other available information on the operation and the effectiveness of the vocational rehabilitation program carried out in the State, including any reports received from the State Rehabilitation Council under § 361.17(h) and the findings and recommendations from monitoring activities conducted under section 107 of the Act.

(5) *Service and outcome goals for categories in order of selection.* If the designated State agency uses an order of selection in accordance with § 361.36, the State plan must identify the State's service and outcome goals and the time within which these goals may be achieved for individuals in each priority category within the order.

(d)*Strategies.* The State plan must describe the strategies the State will use to address the needs identified in the assessment conducted under paragraph (a) of this section and achieve the goals and priorities identified in paragraph (c) of this section, including—

(1) The methods to be used to expand and improve services to individuals with disabilities, including how a broad range of assistive technology services and assistive technology devices will be provided to those individuals at each stage of the rehabilitation process and how those services and devices will be provided to individuals with disabilities on a statewide basis;

(2) Outreach procedures to identify and serve individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program;

(3) As applicable, the plan of the State for establishing, developing, or improving community rehabilitation programs;

(4) Strategies to improve the performance of the State with respect to the evaluation standards and performance indicators established pursuant to section 106 of the Act; and

(5) Strategies for assisting other components of the statewide workforce investment system in assisting individuals with disabilities.

(e) *Evaluation and reports of progress.*

(1) The State plan must include—

(i) The results of an evaluation of the effectiveness of the vocational rehabilitation program; and

(ii) A joint report by the designated State unit and the State Rehabilitation Council, if the State unit has a Council, to the Secretary on the progress made in improving the effectiveness of the program from the previous year. This evaluation and joint report must include—

(A) An evaluation of the extent to which the goals and priorities identified in paragraph (c) of this section were achieved;

(B) A description of the strategies that contributed to the achievement of the goals and priorities;

(C) To the extent to which the goals and priorities were not achieved, a description of the factors that impeded that achievement; and

(D) An assessment of the performance of the State on the standards and indicators established pursuant to section 106 of the Act.

(2) The State plan must assure that the designated State unit and the State Rehabilitation Council, if the State unit has a Council, will jointly submit to the Secretary an annual report that contains the information described in paragraph (e)(1) of this section.

(Authority: Section 101(a)(15) of the Act; 29 U.S.C. 721(a)(15))

§ 361.30 Services to American Indians.

The State plan must assure that the designated State agency provides vocational rehabilitation services to American Indians who are individuals with disabilities residing in the State to the same extent as the designated State agency provides vocational rehabilitation services to other significant populations of individuals with disabilities residing in the State.

(Authority: Sections 101(a)(13) and 121(b)(3) of the Act; 29 U.S.C. 721(a)(13) and 741(b)(3))

§ 361.31 Cooperative agreements with private nonprofit organizations.

The State plan must describe the manner in which cooperative agreements with private nonprofit vocational rehabilitation service providers will be established.

(Authority: Sections 101(a)(24)(B); 29 U.S.C. 721(a)(24)(B))

§ 361.32 Use of profitmaking organizations for on-the-job training in connection with selected projects.

The State plan must assure that the designated State agency has the authority to enter into contracts with for-profit organizations for the purpose of providing, as vocational rehabilitation services, on-the-job training and related programs for individuals with disabilities under the Projects With Industry program, 34 CFR part 379, if the designated State agency has determined that for-profit agencies are better qualified to provide needed vocational rehabilitation services than nonprofit agencies and organizations.

(Authority: Section 101(a)(24)(A) of the Act; 29 U.S.C. 721(a)(24)(A))

§ 361.33 [Reserved]

§ 361.34 Supported employment State plan supplement.

(a) The State plan must assure that the State has an acceptable plan under 34 CFR part 363 that provides for the use of funds under that part to supplement funds under this part for the cost of services leading to supported employment.

(b) The supported employment plan, including any needed annual revisions, must be submitted as a supplement to the State plan submitted under this part.

(Authority: Sections 101(a)(22) and 625(a) of the Act; 29 U.S.C. 721(a)(22) and 795(k))

§ 361.35 Innovation and expansion activities.

(a) The State plan must assure that the State will reserve and use a portion of the funds allotted to the State under section 110 of the Act—

(1) For the development and implementation of innovative

approaches to expand and improve the provision of vocational rehabilitation services to individuals with disabilities, particularly individuals with the most significant disabilities, consistent with the findings of the comprehensive, statewide assessment of the rehabilitation needs of individuals with disabilities under § 361.29(a) and the State's goals and priorities under § 361.29(c); and

(2) To support the funding of—

(i) The State Rehabilitation Council, if the State has a Council, consistent with the resource plan identified in § 361.17(i); and

(ii) The Statewide Independent Living Council, consistent with the plan prepared under 34 CFR 364.21(i).

(b) The State plan must—

(1) Describe how the reserved funds will be used; and

(2) Include, on an annual basis, a report describing how the reserved funds were used during the preceding year.

(Authority: Section 101(a)(18) of the Act; 29 U.S.C. 721(a)(18))

§ 361.36 Ability to serve all eligible individuals; order of selection for services.

(a) *General provisions.*

(1) The designated State unit either must be able to provide the full range of services listed in section 103(a) of the Act and § 361.48, as appropriate, to all eligible individuals or, in the event that vocational rehabilitation services cannot be provided to all eligible individuals in the State who apply for the services, include in the State plan the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services.

(2) The ability of the designated State unit to provide the full range of vocational rehabilitation services to all eligible individuals must be supported by a determination that satisfies the requirements of paragraph (b) or (c) of this section and a determination that, on the basis of the designated State unit's projected fiscal and personnel resources and its assessment of the rehabilitation needs of individuals with significant disabilities within the State, it can—

(i) Continue to provide services to all individuals currently receiving services;

(ii) Provide assessment services to all individuals expected to apply for services in the next fiscal year;

(iii) Provide services to all individuals who are expected to be determined eligible in the next fiscal year; and

(iv) Meet all program requirements.

(3) If the designated State unit is unable to provide the full range vocational rehabilitation services to all eligible individuals in the State who apply for the services, the State plan must—

(i) Show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;

(ii) Provide a justification for the order of selection;

(iii) Identify service and outcome goals and the time within which the goals may be achieved for individuals in each priority category within the order, as required under § 361.29(c)(5); and

(iv) Assure that—

(A) In accordance with criteria established by the State for the order of selection, individuals with the most significant disabilities will be selected first for the provision of vocational rehabilitation services; and

(B) Individuals who do not meet the order of selection criteria will have access to services provided through the information and referral system established under § 361.37.

(b) *Basis for assurance that services can be provided to all eligible individuals.*

(1) For a designated State unit that determined, for the current fiscal year and the preceding fiscal year, that it is able to provide the full range of services, as appropriate, to all eligible individuals, the State unit, during the current fiscal and preceding fiscal year, must have in fact—

(i) Provided assessment services to all applicants and the full range of services, as appropriate, to all eligible individuals;

(ii) Made referral forms widely available throughout the State;

(iii) Conducted outreach efforts to identify and serve individuals with disabilities who have been unserved or underserved by the vocational rehabilitation system; and

(iv) Not delayed, through waiting lists or other means, determinations of eligibility, the development of individualized plans for employment for individuals determined eligible for vocational rehabilitation services, or the provision of services for eligible individuals for whom individualized plans for employment have been developed.

(2) For a designated State unit that was unable to provide the full range of services to all eligible individuals during the current or preceding fiscal year or that has not met the requirements in paragraph (b)(1) of this section, the determination that the designated State unit is able to provide the full range of vocational rehabilitation services to all eligible individuals in the next fiscal year must be based on—

(i) Circumstances that have changed that will allow the designated State unit to meet the requirements of paragraph (a)(2) of this section in the next fiscal year, including—

(A) An estimate of the number of and projected costs of serving, in the next fiscal year, individuals with existing individualized plans for employment;

(B) The projected number of individuals with disabilities who will apply for services and will be determined eligible in the next fiscal year and the projected costs of serving those individuals;

(C) The projected costs of administering the program in the next fiscal year, including, but not limited to, costs of staff salaries and benefits, outreach activities, and required statewide studies; and

(D) The projected revenues and projected number of qualified personnel for the program in the next fiscal year;

(ii) Comparable data, as relevant, for the current or preceding fiscal year, or for both years, of the costs listed in paragraphs (b)(2)(i)(A) through (C) of this section and the resources identified in paragraph (b)(2)(i)(D) of this section and an explanation of any projected increases or decreases in these costs and resources; and

(iii) A determination that the projected revenues and the projected number of qualified personnel for the program in the next fiscal year are adequate to cover the costs identified in paragraphs (b)(2)(i)(A) through (C) of this section to ensure the provision of the full range of services, as appropriate, to all eligible individuals.

(c) *Determining need for establishing and implementing an order of selection.*

(1) The designated State unit must determine, prior to the beginning of each fiscal year, whether to establish and implement an order of selection.

(2) If the designated State unit determines that it does not need to establish an order of selection, it must reevaluate this determination whenever changed circumstances during the course of a fiscal year, such as a decrease in its fiscal or personnel resources or an increase in its program costs, indicate that it may no longer be able to provide the full range of services, as appropriate, to all eligible individuals, as described in paragraph (a)(2) of this section.

(3) If a DSU establishes an order of selection, but determines that it does not need to implement that order at the beginning of the fiscal year, it must continue to meet the requirements of paragraph (a)(2) of this section, or it must implement the order of selection

by closing one or more priority categories.

(d) *Establishing an order of selection.*

(1) *Basis for order of selection.* An order of selection must be based on a refinement of the three criteria in the definition of ''individual with a significant disability'' in section 7(21)(A) of the Act and § 361.5(b)(31).

(2) *Factors that cannot be used in determining order of selection of eligible individuals.* An order of selection may not be based on any other factors, including—

(i) Any duration of residency requirement, provided the individual is present in the State;

(ii) Type of disability;

(iii) Age, gender, race, color, or national origin;

(iv) Source of referral;

(v) Type of expected employment outcome;

(vi) The need for specific services or anticipated cost of services required by an individual; or

(vii) The income level of an individual or an individual's family.

(e) *Administrative requirements.* In administering the order of selection, the designated State unit must—

(1) Implement the order of selection on a statewide basis;

(2) Notify all eligible individuals of the priority categories in a State's order of selection, their assignment to a particular category, and their right to appeal their category assignment;

(3) Continue to provide all needed services to any eligible individual who has begun to receive services under an individualized plan for employment prior to the effective date of the order of selection, irrespective of the severity of the individual's disability; and

(4) Ensure that its funding arrangements for providing services under the State plan, including third-party arrangements and awards under the establishment authority, are consistent with the order of selection. If any funding arrangements are inconsistent with the order of selection, the designated State unit must renegotiate these funding arrangements so that they are consistent with the order of selection.

(f) *State Rehabilitation Council.* The designated State unit must consult with the State Rehabilitation Council, if the State unit has a Council, regarding the—

(1) Need to establish an order of selection, including any reevaluation of the need under paragraph (c)(2) of this section;

(2) Priority categories of the particular order of selection;

(3) Criteria for determining individuals with the most significant disabilities; and

(4) Administration of the order of selection.

(Authority: Sections 12(d); 101(a)(5); 101(a)(12); 101(a)(15)(A), (B) and (C); 101(a)(21)(A)(ii); and 504(a) of the Act; 29 U.S.C. 709(d), 721(a)(5), 721(a)(12), 721(a)(15)(A), (B) and (C); 721(a)(21)(A)(ii), and 794(a))

§ 361.37 Information and referral services.

(a) *General provisions.* The State plan must assure that—

(1) The designated State agency will implement an information and referral system adequate to ensure that individuals with disabilities, including eligible individuals who do not meet the agency's order of selection criteria for receiving vocational rehabilitation services if the agency is operating on an order of selection, are provided accurate vocational rehabilitation information and guidance (which may include counseling and referral for job placement) using appropriate modes of communication to assist them in preparing for, securing, retaining, or regaining employment; and

(2) The designated State agency will refer individuals with disabilities to other appropriate Federal and State programs, including other components of the statewide workforce investment system.

(b) *Criteria for appropriate referrals.* In making the referrals identified in paragraph (a)(2) of this section, the designated State unit must—

(1) Refer the individual to Federal or State programs, including programs carried out by other components of the statewide workforce investment system, best suited to address the specific employment needs of an individual with a disability; and

(2) Provide the individual who is being referred—

(i) A notice of the referral by the designated State agency to the agency carrying out the program;

(ii) Information identifying a specific point of contact within the agency to which the individual is being referred; and

(iii) Information and advice regarding the most suitable services to assist the individual to prepare for, secure, retain, or regain employment.

(c) *Order of selection.* In providing the information and referral services under this section to eligible individuals who are not in the priority category or categories to receive vocational rehabilitation services under the State's order of selection, the State unit must identify, as part of its reporting under section 101(a)(10) of the Act and § 361.40, the number of eligible individuals who did not meet the agency's order of selection criteria for receiving vocational rehabilitation services and did receive information and referral services under this section.

(Authority: Sections 101(a)(5)(D) and (20) and 101(a)(10)(C)(ii) of the Act; 29 U.S.C. 721(a)(5)(D) and (20) and (a)(10)(C)(ii))

§ 361.38 Protection, use, and release of personal information.

(a) *General provisions.*

(1) The State agency and the State unit must adopt and implement written policies and procedures to safeguard the confidentiality of all personal information, including photographs and lists of names. These policies and procedures must ensure that—

(i) Specific safeguards are established to protect current and stored personal information;

(ii) All applicants and eligible individuals and, as appropriate, those individuals' representatives, service providers, cooperating agencies, and interested persons are informed through appropriate modes of communication of the confidentiality of personal information and the conditions for accessing and releasing this information;

(iii) All applicants or their representatives are informed about the State unit's need to collect personal information and the policies governing its use, including—

(A) Identification of the authority under which information is collected;

(B) Explanation of the principal purposes for which the State unit intends to use or release the information;

(C) Explanation of whether providing requested information to the State unit is mandatory or voluntary and the effects of not providing requested information;

(D) Identification of those situations in which the State unit requires or does not require informed written consent of the individual before information may be released; and

(E) Identification of other agencies to which information is routinely released;

(iv) An explanation of State policies and procedures affecting personal information will be provided to each individual in that individual's native language or through the appropriate mode of communication; and

(v) These policies and procedures provide no fewer protections for individuals than State laws and regulations.

(2) The State unit may establish reasonable fees to cover extraordinary costs of duplicating records or making extensive searches and must establish policies and procedures governing access to records.

(b) *State program use.* All personal information in the possession of the State agency or the designated State unit must be used only for the purposes directly connected with the administration of the vocational rehabilitation program. Information containing identifiable personal information may not be shared with advisory or other bodies that do not have official responsibility for administration of the program. In the administration of the program, the State unit may obtain personal information from service providers and cooperating agencies under assurances that the information may not be further divulged, except as provided under paragraphs (c), (d), and (e) of this section.

(c) *Release to applicants and eligible individuals.*

(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, if requested in writing by an applicant or eligible individual, the State unit must make all requested information in that individual's record of services accessible to and must release the information to the individual or the individual's representative in a timely manner.

(2) Medical, psychological, or other information that the State unit determines may be harmful to the individual may not be released directly to the individual, but must be provided to the individual through a third party chosen by the individual, which may include, among others, an advocate, a family member, or a qualified medical or mental health professional, unless a representative has been appointed by a court to represent the individual, in which case the information must be released to the court-appointed representative.

(3) If personal information has been obtained from another agency or organization, it may be released only by, or under the conditions established by, the other agency or organization.

(4) An applicant or eligible individual who believes that information in the individual's record of services is inaccurate or misleading may request that the designated State unit amend the information. If the information is not amended, the request for an amendment must be documented in the record of services, consistent with § 361.47(a)(12).

(d) *Release for audit, evaluation, and research.* Personal information may be released to an organization, agency, or individual engaged in audit, evaluation, or research only for purposes directly connected with the administration of the vocational rehabilitation program or for purposes that would significantly improve the quality of life for applicants and eligible individuals and only if the organization, agency, or individual assures that—

(1) The information will be used only for the purposes for which it is being provided;

(2) The information will be released only to persons officially connected with the audit, evaluation, or research;

(3) The information will not be released to the involved individual;

(4) The information will be managed in a manner to safeguard confidentiality; and

(5) The final product will not reveal any personal identifying information without the informed written consent of the involved individual or the individual's representative.

(e) *Release to other programs or authorities.*

(1) Upon receiving the informed written consent of the individual or, if appropriate, the individual's representative, the State unit may release personal information to another agency or organization for its program purposes only to the extent that the information may be released to the involved individual or the individual's representative and only to the extent that the other agency or organization demonstrates that the information requested is necessary for its program.

(2) Medical or psychological information that the State unit determines may be harmful to the individual may be released if the other agency or organization assures the State unit that the information will be used only for the purpose for which it is being provided and will not be further released to the individual.

(3) The State unit must release personal information if required by Federal law or regulations.

(4) The State unit must release personal information in response to investigations in connection with law enforcement, fraud, or abuse, unless expressly prohibited by Federal or State laws or regulations, and in response to an order issued by a judge, magistrate, or other authorized judicial officer.

(5) The State unit also may release personal information in order to protect the individual or others if the individual poses a threat to his or her safety or to the safety of others.

(Authority: Sections 12(c) and 101(a)(6)(A) of the Act; 29 U.S.C. 709(c) and 721(a)(6)(A))

§ 361.39 State-imposed requirements.

The designated State unit must, upon request, identify those regulations and policies relating to the administration or operation of its vocational rehabilitation program that are State-imposed, including any regulations or policy based on State interpretation of any Federal law, regulations, or guideline.

(Authority: Section 17 of the Act; 29 U.S.C. 714)

§ 361.40 Reports.

(a) The State plan must assure that the designated State agency will submit reports, including reports required under sections 13, 14, and 101(a)(10) of the Act—

(1) In the form and level of detail and at the time required by the Secretary regarding applicants for and eligible individuals receiving services under this part; and

(2) In a manner that provides a complete count (other than the information obtained through sampling consistent with section 101(a)(10)(E) of the Act) of the applicants and eligible individuals to—

(i) Permit the greatest possible cross-classification of data; and

(ii) Protect the confidentiality of the identity of each individual.

(b) The designated State agency must comply with any requirements necessary to ensure the accuracy and verification of those reports.

(Authority: Section 101(a)(10)(A) and (F) of the Act; 29 U.S.C. 721(a)(10)(A) and (F))

Provision and Scope of Services

§ 361.41 Processing referrals and applications.

(a) *Referrals.* The designated State unit must establish and implement standards for the prompt and equitable handling of referrals of individuals for vocational rehabilitation services, including referrals of individuals made through the One-Stop service delivery systems established under section 121 of the Workforce Investment Act of 1998. The standards must include timelines for making good faith efforts to inform these individuals of application requirements and to gather information necessary to initiate an assessment for determining eligibility and priority for services.

(b) *Applications.*

(1) Once an individual has submitted an application for vocational rehabilitation services, including applications made through common intake procedures in One-Stop centers established under section 121 of the Workforce Investment Act of 1998, an eligibility determination must be made within 60 days, unless—

(i) Exceptional and unforeseen circumstances beyond the control of the designated State unit preclude making an eligibility determination within 60 days and the designated State unit and

the individual agree to a specific extension of time; or

(ii) An exploration of the individual's abilities, capabilities, and capacity to perform in work situations is carried out in accordance with § 361.42(e) or, if appropriate, an extended evaluation is carried out in accordance with § 361.42(f).

(2) An individual is considered to have submitted an application when the individual or the individual's representative, as appropriate—

(i)(A) Has completed and signed an agency application form;

(B) Has completed a common intake application form in a One-Stop center requesting vocational rehabilitation services; or

(C) Has otherwise requested services from the designated State unit;

(ii) Has provided to the designated State unit information necessary to initiate an assessment to determine eligibility and priority for services; and

(iii) Is available to complete the assessment process.

(3) The designated State unit must ensure that its application forms are widely available throughout the State, particularly in the One-Stop centers established under section 121 of the Workforce Investment Act of 1998.

(Authority: Sections 101(a)(6)(A) and 102(a)(6) of the Act; 29 U.S.C. 721(a)(6)(A) and 722(a)(6))

§ 361.42 Assessment for determining eligibility and priority for services.

In order to determine whether an individual is eligible for vocational rehabilitation services and the individual's priority under an order of selection for services (if the State is operating under an order of selection), the designated State unit must conduct an assessment for determining eligibility and priority for services. The assessment must be conducted in the most integrated setting possible, consistent with the individual's needs and informed choice, and in accordance with the following provisions:

(a) *Eligibility requirements.*

(1) *Basic requirements.* The designated State unit's determination of an applicant's eligibility for vocational rehabilitation services must be based only on the following requirements:

(i) A determination by qualified personnel that the applicant has a physical or mental impairment.

(ii) A determination by qualified personnel that the applicant's physical or mental impairment constitutes or results in a substantial impediment to employment for the applicant.

(iii) A determination by a qualified vocational rehabilitation counselor employed by the designated State unit that the applicant requires vocational rehabilitation services to prepare for, secure, retain, or regain employment consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(iv) A presumption, in accordance with paragraph (a)(2) of this section, that the applicant can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

(2) *Presumption of benefit.* The designated State unit must presume that an applicant who meets the eligibility requirements in paragraphs (a)(1)(i) and (ii) of this section can benefit in terms of an employment outcome unless it demonstrates, based on clear and convincing evidence, that the applicant is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the applicant's disability.

(3) *Presumption of eligibility for Social Security recipients and beneficiaries.*

(i) Any applicant who has been determined eligible for Social Security benefits under Title II or Title XVI of the Social Security Act is—

(A) Presumed eligible for vocational rehabilitation services under paragraphs (a)(1) and (2) of this section; and

(B) Considered an individual with a significant disability as defined in § 361.5(b)(31).

(ii) If an applicant for vocational rehabilitation services asserts that he or she is eligible for Social Security benefits under Title II or Title XVI of the Social Security Act (and, therefore, is presumed eligible for vocational rehabilitation services under paragraph (a)(3)(i)(A) of this section), but is unable to provide appropriate evidence, such as an award letter, to support that assertion, the State unit must verify the applicant's eligibility under Title II or Title XVI of the Social Security Act by contacting the Social Security Administration. This verification must be made within a reasonable period of time that enables the State unit to determine the applicant's eligibility for vocational rehabilitation services within 60 days of the individual submitting an application for services in accordance with § 361.41(b)(2).

(4) *Achievement of an employment outcome.* Any eligible individual, including an individual whose eligibility for vocational rehabilitation services is based on the individual being eligible for Social Security benefits under Title II or Title XVI of the Social Security Act, must intend to achieve an employment outcome that is consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(i) The State unit is responsible for informing individuals, through its application process for vocational rehabilitation services, that individuals who receive services under the program must intend to achieve an employment outcome.

(ii) The applicant's completion of the application process for vocational rehabilitation services is sufficient evidence of the individual's intent to achieve an employment outcome, and no additional demonstration on the part of the applicant is required for purposes of satisfying paragraph (a)(4) of this section.

(5) *Interpretation.* Nothing in this section, including paragraph (a)(3)(i), is to be construed to create an entitlement to any vocational rehabilitation service.

(b) *Interim determination of eligibility.*

(1) The designated State unit may initiate the provision of vocational rehabilitation services for an applicant on the basis of an interim determination of eligibility prior to the 60-day period described in § 361.41(b)(2).

(2) If a State chooses to make interim determinations of eligibility, the designated State unit must—

(i) Establish criteria and conditions for making those determinations;

(ii) Develop and implement procedures for making the determinations; and

(iii) Determine the scope of services that may be provided pending the final determination of eligibility.

(3) If a State elects to use an interim eligibility determination, the designated State unit must make a final determination of eligibility within 60 days of the individual submitting an application for services in accordance with § 361.41(b)(2).

(c) *Prohibited factors.*

(1) The State plan must assure that the State unit will not impose, as part of determining eligibility under this section, a duration of residence requirement that excludes from services any applicant who is present in the State.

(2) In making a determination of eligibility under this section, the designated State unit also must ensure that—

(i) No applicant or group of applicants is excluded or found ineligible solely on the basis of the type of disability; and

(ii) The eligibility requirements are applied without regard to the—

(A) Age, gender, race, color, or national origin of the applicant;

(B) Type of expected employment outcome;

(C) Source of referral for vocational rehabilitation services; and

(D) Particular service needs or anticipated cost of services required by an applicant or the income level of an applicant or applicant's family.

(d) *Review and assessment of data for eligibility determination.* Except as provided in paragraph (e) of this section, the designated State unit—

(1) Must base its determination of each of the basic eligibility requirements in paragraph (a) of this section on—

(i) A review and assessment of existing data, including counselor observations, education records, information provided by the individual or the individual's family, particularly information used by education officials, and determinations made by officials of other agencies; and

(ii) To the extent existing data do not describe the current functioning of the individual or are unavailable, insufficient, or inappropriate to make an eligibility determination, an assessment of additional data resulting from the provision of vocational rehabilitation services, including trial work experiences, assistive technology devices and services, personal assistance services, and any other support services that are necessary to determine whether an individual is eligible; and

(2) Must base its presumption under paragraph (a)(3)(i) of this section that an applicant who has been determined eligible for Social Security benefits under Title II or Title XVI of the Social Security Act satisfies each of the basic eligibility requirements in paragraph (a) of this section on determinations made by the Social Security Administration.

(e) *Trial work experiences for individuals with significant disabilities.*

(1) Prior to any determination that an individual with a disability is incapable of benefiting from vocational rehabilitation services in terms of an employment outcome because of the severity of that individual's disability, the designated State unit must conduct an exploration of the individual's abilities, capabilities, and capacity to perform in realistic work situations to determine whether or not there is clear and convincing evidence to support such a determination.

(2)(i) The designated State unit must develop a written plan to assess periodically the individual's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences, which must be provided in the most integrated setting possible, consistent with the informed choice and rehabilitation needs of the individual.

(ii) Trial work experiences include supported employment, on-the-job training, and other experiences using realistic work settings.

(iii) Trial work experiences must be of sufficient variety and over a sufficient period of time for the designated State unit to determine that—

(A) There is sufficient evidence to conclude that the individual can benefit from the provision of vocational rehabilitation services in terms of an employment outcome; or

(B) There is clear and convincing evidence that the individual is incapable of benefiting from vocational rehabilitation services in terms of an employment outcome due to the severity of the individual's disability.

(iv) The designated State unit must provide appropriate supports, including assistive technology devices and services and personal assistance services, to accommodate the rehabilitation needs of the individual during the trial work experiences.

(f) *Extended evaluation for certain individuals with significant disabilities.*

(1) Under limited circumstances if an individual cannot take advantage of trial work experiences or if options for trial work experiences have been exhausted before the State unit is able to make the determinations described in paragraph (e)(2)(iii) of this section, the designated State unit must conduct an extended evaluation to make these determinations.

(2) During the extended evaluation period, vocational rehabilitation services must be provided in the most integrated setting possible, consistent with the informed choice and rehabilitation needs of the individual.

(3) During the extended evaluation period, the designated State unit must develop a written plan for providing services necessary to make a determination under paragraph (e)(2)(iii) of this section.

(4) During the extended evaluation period, the designated State unit provides only those services that are necessary to make the determinations described in paragraph (e)(2)(iii) of this section and terminates extended evaluation services when the State unit is able to make the determinations.

(g) *Data for determination of priority for services under an order of selection.* If the designated State unit is operating under an order of selection for services, as provided in § 361.36, the State unit must base its priority assignments on—

(1) A review of the data that was developed under paragraphs (d) and (e) of this section to make the eligibility determination; and

(2) An assessment of additional data, to the extent necessary.

(Authority: Sections 7(2)(A), 7(2)(B)(ii)(I), 7(2)(C), 7(2)(D), 101(a)(12), 102(a)(1), 102(a)(2), 102(a)(3), 102(a)(4)(A), 102(a)(4)(B), 102(a)(4)(C), 103(a)(1), 103(a)(9), 103(a)(10) and 103(a)(14) of the Act; 29 U.S.C. 705(2)(A), 705(2)(B)(ii)(I), 705(2)(C), 705(2)(D), 721(a)(12), 722(a)(1), 722(a)(2), 722(a)(3), 722(a)(4)(A), 722(a)(4)(B), 722(a)(4)(C), 723(a)(1), 723(a)(9), 723(a)(10) and 723(a)(14))

Note to § 361.42: *Clear and convincing evidence* means that the designated State unit shall have a high degree of certainty before it can conclude that an individual is incapable of benefiting from services in terms of an employment outcome. The ''clear and convincing'' standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case-by-case basis. The term *clear* means unequivocal. For example, the use of an intelligence test result alone would not constitute clear and convincing evidence. Clear and convincing evidence might include a description of assessments, including situational assessments and supported employment assessments, from service providers who have concluded that they would be unable to meet the individual's needs due to the severity of the individual's disability. The demonstration of ''clear and convincing evidence'' must include, if appropriate, a functional assessment of skill development activities, with any necessary supports (including assistive technology), in real life settings. (S. Rep. No. 357, 102d Cong., 2d. Sess. 37–38 (1992))

§ 361.43 Procedures for ineligibility determination.

If the State unit determines that an applicant is ineligible for vocational rehabilitation services or determines that an individual receiving services under an individualized plan for employment is no longer eligible for services, the State unit must—

(a) Make the determination only after providing an opportunity for full consultation with the individual or, as appropriate, with the individual's representative;

(b) Inform the individual in writing, supplemented as necessary by other appropriate modes of communication consistent with the informed choice of the individual, of the ineligibility determination, including the reasons for that determination, the requirements under this section, and the means by which the individual may express and seek remedy for any dissatisfaction, including the procedures for review of State unit personnel determinations in accordance with § 361.57;

(c) Provide the individual with a description of services available from a

client assistance program established under 34 CFR part 370 and information on how to contact that program;

(d) Refer the individual to other training or employment-related programs that are part of the One-Stop service delivery system under the Workforce Investment Act; and

(e) Review within 12 months and annually thereafter if requested by the individual or, if appropriate, by the individual's representative any ineligibility determination that is based on a finding that the individual is incapable of achieving an employment outcome. This review need not be conducted in situations in which the individual has refused it, the individual is no longer present in the State, the individual's whereabouts are unknown, or the individual's medical condition is rapidly progressive or terminal.

(Authority: Sections 102(a)(5) and 102(c) of the Act; 29 U.S.C. 722(a)(5) and 722(c))

§ 361.44 Closure without eligibility determination.

The designated State unit may not close an applicant's record of services prior to making an eligibility determination unless the applicant declines to participate in, or is unavailable to complete, an assessment for determining eligibility and priority for services, and the State unit has made a reasonable number of attempts to contact the applicant or, if appropriate, the applicant's representative to encourage the applicant's participation.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.45 Development of the individualized plan for employment.

(a) *General requirements.* The State plan must assure that—

(1) An individualized plan for employment (IPE) meeting the requirements of this section and § 361.46 is developed and implemented in a timely manner for each individual determined to be eligible for vocational rehabilitation services or, if the designated State unit is operating under an order of selection in accordance with § 361.36, for each eligible individual to whom the State unit is able to provide services; and

(2) Services will be provided in accordance with the provisions of the IPE.

(b) *Purpose.*

(1) The designated State unit must conduct an assessment for determining vocational rehabilitation needs, if appropriate, for each eligible individual or, if the State is operating under an order of selection, for each eligible individual to whom the State is able to provide services. The purpose of this assessment is to determine the employment outcome, and the nature and scope of vocational rehabilitation services to be included in the IPE.

(2) The IPE must—

(i) Be designed to achieve the specific employment outcome that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice; and

(ii) To the maximum extent appropriate, result in employment in an integrated setting.

(c) *Required information.* The State unit must provide the following information to each eligible individual or, as appropriate, the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or the individual's representative:

(1) *Options for developing an IPE.* Information on the available options for developing the IPE, including the option that an eligible individual or, as appropriate, the individual's representative may develop all or part of the IPE—

(i) Without assistance from the State unit or other entity; or

(ii) With assistance from—

(A) A qualified vocational rehabilitation counselor employed by the State unit;

(B) A qualified vocational rehabilitation counselor who is not employed by the State unit; or

(C) Resources other than those in paragraph (A) or (B) of this section.

(2) *Additional information.* Additional information to assist the eligible individual or, as appropriate, the individual's representative in developing the IPE, including—

(i) Information describing the full range of components that must be included in an IPE;

(ii) As appropriate to each eligible individual—

(A) An explanation of agency guidelines and criteria for determining an eligible individual's financial commitments under an IPE;

(B) Information on the availability of assistance in completing State unit forms required as part of the IPE; and

(C) Additional information that the eligible individual requests or the State unit determines to be necessary to the development of the IPE;

(iii) A description of the rights and remedies available to the individual, including, if appropriate, recourse to the processes described in § 361.57; and

(iv) A description of the availability of a client assistance program established under 34 CFR part 370 and information on how to contact the client assistance program.

(d) *Mandatory procedures.* The designated State unit must ensure that—

(1) The IPE is a written document prepared on forms provided by the State unit;

(2) The IPE is developed and implemented in a manner that gives eligible individuals the opportunity to exercise informed choice, consistent with § 361.52, in selecting—

(i) The employment outcome, including the employment setting;

(ii) The specific vocational rehabilitation services needed to achieve the employment outcome, including the settings in which services will be provided;

(iii) The entity or entities that will provide the vocational rehabilitation services; and

(iv) The methods available for procuring the services;

(3) The IPE is—

(i) Agreed to and signed by the eligible individual or, as appropriate, the individual's representative; and

(ii) Approved and signed by a qualified vocational rehabilitation counselor employed by the designated State unit;

(4) A copy of the IPE and a copy of any amendments to the IPE are provided to the eligible individual or, as appropriate, to the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or, as appropriate, the individual's representative;

(5) The IPE is reviewed at least annually by a qualified vocational rehabilitation counselor and the eligible individual or, as appropriate, the individual's representative to assess the eligible individual's progress in achieving the identified employment outcome;

(6) The IPE is amended, as necessary, by the individual or, as appropriate, the individual's representative, in collaboration with a representative of the State unit or a qualified vocational rehabilitation counselor (to the extent determined to be appropriate by the individual), if there are substantive changes in the employment outcome, the vocational rehabilitation services to be provided, or the providers of the vocational rehabilitation services;

(7) Amendments to the IPE do not take effect until agreed to and signed by the eligible individual or, as appropriate, the individual's representative and by a qualified vocational rehabilitation counselor

employed by the designated State unit; and

(8) An IPE for a student with a disability receiving special education services is developed—

(i) In consideration of the student's IEP; and

(ii) In accordance with the plans, policies, procedures, and terms of the interagency agreement required under § 361.22.

(e) *Standards for developing the IPE.* The designated State unit must establish and implement standards for the prompt development of IPEs for the individuals identified under paragraph (a) of this section, including timelines that take into consideration the needs of the individuals.

(f) *Data for preparing the IPE.*

(1) *Preparation without comprehensive assessment.* To the extent possible, the employment outcome and the nature and scope of rehabilitation services to be included in the individual's IPE must be determined based on the data used for the assessment of eligibility and priority for services under § 361.42.

(2) *Preparation based on comprehensive assessment.*

(i) If additional data are necessary to determine the employment outcome and the nature and scope of services to be included in the IPE of an eligible individual, the State unit must conduct a comprehensive assessment of the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment services, of the eligible individual, in the most integrated setting possible, consistent with the informed choice of the individual in accordance with the provisions of § 361.5(b)(6)(ii).

(ii) In preparing the comprehensive assessment, the State unit must use, to the maximum extent possible and appropriate and in accordance with confidentiality requirements, existing information that is current as of the date of the development of the IPE, including—

(A) Information available from other programs and providers, particularly information used by education officials and the Social Security Administration;

(B) Information provided by the individual and the individual's family; and

(C) Information obtained under the assessment for determining the individual's eligibility and vocational rehabilitation needs.

(Authority: Sections 7(2)(B), 101(a)(9), 102(b)(1), 102(b)(2), 102(c) and 103(a)(1); 29 U.S.C. 705(2)(B), 721(a)(9), 722(b)(1), 722(b)(2), 722(c) and 723(a)(1))

§ 361.46 Content of the individualized plan for employment.

(a) *Mandatory components.* Regardless of the approach in § 361.45(c)(1) that an eligible individual selects for purposes of developing the IPE, each IPE must include—

(1) A description of the specific employment outcome that is chosen by the eligible individual that—

(i) Is consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interests, and informed choice; and

(ii) To the maximum extent appropriate, results in employment in an integrated setting;

(2) A description of the specific rehabilitation services under § 361.48 that are—

(i) Needed to achieve the employment outcome, including, as appropriate, the provision of assistive technology devices, assistive technology services, and personal assistance services, including training in the management of those services; and

(ii) Provided in the most integrated setting that is appropriate for the services involved and is consistent with the informed choice of the eligible individual;

(3) Timelines for the achievement of the employment outcome and for the initiation of services;

(4) A description of the entity or entities chosen by the eligible individual or, as appropriate, the individual's representative that will provide the vocational rehabilitation services and the methods used to procure those services;

(5) A description of the criteria that will be used to evaluate progress toward achievement of the employment outcome; and

(6) The terms and conditions of the IPE, including, as appropriate, information describing—

(i) The responsibilities of the designated State unit;

(ii) The responsibilities of the eligible individual, including—

(A) The responsibilities the individual will assume in relation to achieving the employment outcome;

(B) If applicable, the extent of the individual's participation in paying for the cost of services; and

(C) The responsibility of the individual with regard to applying for and securing comparable services and benefits as described in § 361.53; and

(iii) The responsibilities of other entities as the result of arrangements made pursuant to the comparable services or benefits requirements in § 361.53.

(b) *Supported employment requirements.* An IPE for an individual with a most significant disability for whom an employment outcome in a supported employment setting has been determined to be appropriate must—

(1) Specify the supported employment services to be provided by the designated State unit;

(2) Specify the expected extended services needed, which may include natural supports;

(3) Identify the source of extended services or, to the extent that it is not possible to identify the source of extended services at the time the IPE is developed, include a description of the basis for concluding that there is a reasonable expectation that those sources will become available;

(4) Provide for periodic monitoring to ensure that the individual is making satisfactory progress toward meeting the weekly work requirement established in the IPE by the time of transition to extended services;

(5) Provide for the coordination of services provided under an IPE with services provided under other individualized plans established under other Federal or State programs;

(6) To the extent that job skills training is provided, identify that the training will be provided on site; and

(7) Include placement in an integrated setting for the maximum number of hours possible based on the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of individuals with the most significant disabilities.

(c) *Post-employment services.* The IPE for each individual must contain, as determined to be necessary, statements concerning—

(1) The expected need for post-employment services prior to closing the record of services of an individual who has achieved an employment outcome;

(2) A description of the terms and conditions for the provision of any post-employment services; and

(3) If appropriate, a statement of how post-employment services will be provided or arranged through other entities as the result of arrangements made pursuant to the comparable services or benefits requirements in § 361.53.

(d) *Coordination of services for students with disabilities who are receiving special education services.* The IPE for a student with a disability who is receiving special education services must be coordinated with the

IEP for that individual in terms of the goals, objectives, and services identified in the IEP.

(Authority: Sections 101(a)(8), 101(a)(9), 102(b)(3), and 625(b)(6) of the Act; 29 U.S.C. 721(a)(8), 721(a)(9), 722(b)(3), and 795(k))

§ 361.47 Record of services.

(a) The designated State unit must maintain for each applicant and eligible individual a record of services that includes, to the extent pertinent, the following documentation:

(1) If an applicant has been determined to be an eligible individual, documentation supporting that determination in accordance with the requirements under § 361.42.

(2) If an applicant or eligible individual receiving services under an IPE has been determined to be ineligible, documentation supporting that determination in accordance with the requirements under § 361.43.

(3) Documentation that describes the justification for closing an applicant's or eligible individual's record of services if that closure is based on reasons other than ineligibility, including, as appropriate, documentation indicating that the State unit has satisfied the requirements in § 361.44.

(4) If an individual has been determined to be an individual with a significant disability or an individual with a most significant disability, documentation supporting that determination.

(5) If an individual with a significant disability requires an exploration of abilities, capabilities, and capacity to perform in realistic work situations through the use of trial work experiences or, as appropriate, an extended evaluation to determine whether the individual is an eligible individual, documentation supporting the need for, and the plan relating to, that exploration or, as appropriate, extended evaluation and documentation regarding the periodic assessments carried out during the trial work experiences or, as appropriate, the extended evaluation, in accordance with the requirements under § 361.42(e) and (f).

(6) The IPE, and any amendments to the IPE, consistent with the requirements under § 361.46.

(7) Documentation describing the extent to which the applicant or eligible individual exercised informed choice regarding the provision of assessment services and the extent to which the eligible individual exercised informed choice in the development of the IPE with respect to the selection of the specific employment outcome, the specific vocational rehabilitation services needed to achieve the employment outcome, the entity to provide the services, the employment setting, the settings in which the services will be provided, and the methods to procure the services.

(8) In the event that the IPE provides for services or an employment outcome in a non-integrated setting, a justification to support the non-integrated setting.

(9) In the event that an individual obtains competitive employment, verification that the individual is compensated at or above the minimum wage and that the individual's wage and level of benefits are not less than that customarily paid by the employer for the same or similar work performed by non-disabled individuals in accordance with § 361.5(b)(11)(ii).

(10) In the event that an individual obtains an employment outcome in an extended employment setting in a community rehabilitation program or any other employment under section 14(c) of the Fair Labor Standards Act, documentation of the results of the annual reviews required under § 361.55, the individual's input into those reviews, and the individual's or, if appropriate, the individual's representative's acknowledgement that those reviews were conducted.

(11) Documentation concerning any action or decision resulting from a request by an individual under § 361.57 for a review of determinations made by designated State unit personnel.

(12) In the event that an applicant or eligible individual requests under § 361.38(c)(4) that documentation in the record of services be amended and the documentation is not amended, documentation of the request.

(13) In the event an individual is referred to another program through the State unit's information and referral system under § 361.37, including other components of the statewide workforce investment system, documentation on the nature and scope of services provided by the designated State unit to the individual and on the referral itself, consistent with the requirements of § 361.37.

(14) In the event an individual's record of service is closed under § 361.56, documentation that demonstrates the services provided under the individual's IPE contributed to the achievement of the employment outcome.

(15) In the event an individual's record of service is closed under § 361.56, documentation verifying that the provisions of § 361.56 have been satisfied.

(b) The State unit, in consultation with the State Rehabilitation Council if the State has a Council, must determine the type of documentation that the State unit must maintain for each applicant and eligible individual in order to meet the requirements in paragraph (a) of this section.

(Authority: Sections 101(a)(6), (9), (14), (20) and 102(a), (b), and (d) of the Act; 29 U.S.C. 721(a)(6), (9), (14), (20) and 722(a),(b), and (d))

§ 361.48 Scope of vocational rehabilitation services for individuals with disabilities.

As appropriate to the vocational rehabilitation needs of each individual and consistent with each individual's informed choice, the designated State unit must ensure that the following vocational rehabilitation services are available to assist the individual with a disability in preparing for, securing, retaining, or regaining an employment outcome that is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice:

(a) Assessment for determining eligibility and priority for services by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology, in accordance with § 361.42.

(b) Assessment for determining vocational rehabilitation needs by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology, in accordance with § 361.45.

(c) Vocational rehabilitation counseling and guidance, including information and support services to assist an individual in exercising informed choice in accordance with § 361.52.

(d) Referral and other services necessary to assist applicants and eligible individuals to secure needed services from other agencies, including other components of the statewide workforce investment system, in accordance with §§ 361.23, 361.24, and 361.37, and to advise those individuals about client assistance programs established under 34 CFR part 370.

(e) In accordance with the definition in § 361.5(b)(40), physical and mental restoration services, to the extent that financial support is not readily available from a source other than the designated State unit (such as through health insurance or a comparable service or benefit as defined in § 361.5(b)(10)).

(f) Vocational and other training services, including personal and vocational adjustment training, books, tools, and other training materials,

except that no training or training services in an institution of higher education (universities, colleges, community or junior colleges, vocational schools, technical institutes, or hospital schools of nursing) may be paid for with funds under this part unless maximum efforts have been made by the State unit and the individual to secure grant assistance in whole or in part from other sources to pay for that training.

(g) Maintenance, in accordance with the definition of that term in § 361.5(b)(35).

(h) Transportation in connection with the rendering of any vocational rehabilitation service and in accordance with the definition of that term in § 361.5(b)(57).

(i) Vocational rehabilitation services to family members, as defined in § 361.5(b)(23), of an applicant or eligible individual if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(j) Interpreter services, including sign language and oral interpreter services, for individuals who are deaf or hard of hearing and tactile interpreting services for individuals who are deaf-blind provided by qualified personnel.

(k) Reader services, rehabilitation teaching services, and orientation and mobility services for individuals who are blind.

(l) Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services.

(m) Supported employment services in accordance with the definition of that term in § 361.5(b)(54).

(n) Personal assistance services in accordance with the definition of that term in § 361.5(b)(39).

(o) Post-employment services in accordance with the definition of that term in § 361.5(b)(42).

(p) Occupational licenses, tools, equipment, initial stocks, and supplies.

(q) Rehabilitation technology in accordance with the definition of that term in § 361.5(b)(45), including vehicular modification, telecommunications, sensory, and other technological aids and devices.

(r) Transition services in accordance with the definition of that term in § 361.5(b)(55).

(s) Technical assistance and other consultation services to conduct market analyses, develop business plans, and otherwise provide resources, to the extent those resources are authorized to be provided through the statewide workforce investment system, to eligible individuals who are pursuing self-employment or telecommuting or establishing a small business operation as an employment outcome.

(t) Other goods and services determined necessary for the individual with a disability to achieve an employment outcome.

(Authority: Section 103(a) of the Act; 29 U.S.C. 723(a))

§ 361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.

(a) The designated State unit may also provide for the following vocational rehabilitation services for the benefit of groups of individuals with disabilities:

(1) The establishment, development, or improvement of a public or other nonprofit community rehabilitation program that is used to provide vocational rehabilitation services that promote integration and competitive employment, including, under special circumstances, the construction of a facility for a public or nonprofit community rehabilitation program. Examples of ''special circumstances'' include the destruction by natural disaster of the only available center serving an area or a State determination that construction is necessary in a rural area because no other public agencies or private nonprofit organizations are currently able to provide vocational rehabilitation services to individuals.

(2) Telecommunications systems that have the potential for substantially improving vocational rehabilitation service delivery methods and developing appropriate programming to meet the particular needs of individuals with disabilities, including telephone, television, video description services, satellite, tactile-vibratory devices, and similar systems, as appropriate.

(3) Special services to provide nonvisual access to information for individuals who are blind, including the use of telecommunications, Braille, sound recordings, or other appropriate media; captioned television, films, or video cassettes for individuals who are deaf or hard of hearing; tactile materials for individuals who are deaf-blind; and other special services that provide information through tactile, vibratory, auditory, and visual media.

(4) Technical assistance and support services to businesses that are not subject to Title I of the Americans with Disabilities Act of 1990 and that are seeking to employ individuals with disabilities.

(5) In the case of any small business enterprise operated by individuals with significant disabilities under the supervision of the designated State unit, including enterprises established under the Randolph-Sheppard program, management services and supervision provided by the State unit along with the acquisition by the State unit of vending facilities or other equipment, initial stocks and supplies, and initial operating expenses, in accordance with the following requirements:

(i) ''Management services and supervision'' includes inspection, quality control, consultation, accounting, regulating, in-service training, and related services provided on a systematic basis to support and improve small business enterprises operated by individuals with significant disabilities. ''Management services and supervision'' may be provided throughout the operation of the small business enterprise.

(ii) ''Initial stocks and supplies'' includes those items necessary to the establishment of a new business enterprise during the initial establishment period, which may not exceed 6 months.

(iii) Costs of establishing a small business enterprise may include operational costs during the initial establishment period, which may not exceed 6 months.

(iv) If the designated State unit provides for these services, it must ensure that only individuals with significant disabilities will be selected to participate in this supervised program.

(v) If the designated State unit provides for these services and chooses to set aside funds from the proceeds of the operation of the small business enterprises, the State unit must maintain a description of the methods used in setting aside funds and the purposes for which funds are set aside. Funds may be used only for small business enterprises purposes, and benefits that are provided to operators from set-aside funds must be provided on an equitable basis.

(6) Other services that promise to contribute substantially to the rehabilitation of a group of individuals but that are not related directly to the individualized plan for employment of any one individual. Examples of those other services might include the purchase or lease of a bus to provide transportation to a group of applicants or eligible individuals or the purchase of equipment or instructional materials that would benefit a group of applicants or eligible individuals.

(7) Consultative and technical assistance services to assist educational agencies in planning for the transition of students with disabilities from school to post-school activities, including employment.

(b) If the designated State unit provides for vocational rehabilitation services for groups of individuals, it must—

(1) Develop and maintain written policies covering the nature and scope of each of the vocational rehabilitation services it provides and the criteria under which each service is provided; and

(2) Maintain information to ensure the proper and efficient administration of those services in the form and detail and at the time required by the Secretary, including the types of services provided, the costs of those services, and, to the extent feasible, estimates of the numbers of individuals benefiting from those services.

(Authority: Sections 12(c), 101(a)(6)(A), and 103(b) of the Act; 29 U.S.C. 709(c), 721(a)(6), and 723(b))

§ 361.50 Written policies governing the provision of services for individuals with disabilities.

(a) *Policies.* The State unit must develop and maintain written policies covering the nature and scope of each of the vocational rehabilitation services specified in § 361.48 and the criteria under which each service is provided. The policies must ensure that the provision of services is based on the rehabilitation needs of each individual as identified in that individual's IPE and is consistent with the individual's informed choice. The written policies may not establish any arbitrary limits on the nature and scope of vocational rehabilitation services to be provided to the individual to achieve an employment outcome. The policies must be developed in accordance with the following provisions:

(b) *Out-of-State services.*

(1) The State unit may establish a preference for in-State services, provided that the preference does not effectively deny an individual a necessary service. If the individual chooses an out-of-State service at a higher cost than an in-State service, if either service would meet the individual's rehabilitation needs, the designated State unit is not responsible for those costs in excess of the cost of the in-State service.

(2) The State unit may not establish policies that effectively prohibit the provision of out-of-State services.

(c) *Payment for services.*

(1) The State unit must establish and maintain written policies to govern the rates of payment for all purchased vocational rehabilitation services.

(2) The State unit may establish a fee schedule designed to ensure a reasonable cost to the program for each service, if the schedule is—

(i) Not so low as to effectively deny an individual a necessary service; and

(ii) Not absolute and permits exceptions so that individual needs can be addressed.

(3) The State unit may not place absolute dollar limits on specific service categories or on the total services provided to an individual.

(d) *Duration of services.*

(1) The State unit may establish reasonable time periods for the provision of services provided that the time periods are—

(i) Not so short as to effectively deny an individual a necessary service; and

(ii) Not absolute and permit exceptions so that individual needs can be addressed.

(2) The State unit may not establish absolute time limits on the provision of specific services or on the provision of services to an individual. The duration of each service needed by an individual must be determined on an individual basis and reflected in that individual's individualized plan for employment.

(e) *Authorization of services.* The State unit must establish policies related to the timely authorization of services, including any conditions under which verbal authorization can be given.

(Authority: Sections 12(c) and 101(a)(6) of the Act and 29 U.S.C. 709(c) and 721(a)(6))

§ 361.51 Standards for facilities and providers of services.

(a) *Accessibility of facilities.* The State plan must assure that any facility used in connection with the delivery of vocational rehabilitation services under this part meets program accessibility requirements consistent with the requirements, as applicable, of the Architectural Barriers Act of 1968, the Americans with Disabilities Act of 1990, section 504 of the Act, and the regulations implementing these laws.

(b) *Affirmative action.* The State plan must assure that community rehabilitation programs that receive assistance under part B of Title I of the Act take affirmative action to employ and advance in employment qualified individuals with disabilities covered under and on the same terms and conditions as in section 503 of the Act.

(c) *Special communication needs personnel.* The designated State unit must ensure that providers of vocational rehabilitation services are able to communicate—

(1) In the native language of applicants and eligible individuals who have limited English speaking ability; and

(2) By using appropriate modes of communication used by applicants and eligible individuals.

(Authority: Sections 12(c) and 101(a)(6)(B) and (C) of the Act; 29 U.S.C. 709(c) and 721(a)(6)(B) and (C))

§ 361.52 Informed choice.

(a) *General provision.* The State plan must assure that applicants and eligible individuals or, as appropriate, their representatives are provided information and support services to assist applicants and eligible individuals in exercising informed choice throughout the rehabilitation process consistent with the provisions of section 102(d) of the Act and the requirements of this section.

(b) *Written policies and procedures.* The designated State unit, in consultation with its State Rehabilitation Council, if it has a Council, must develop and implement written policies and procedures that enable an applicant or eligible individual to exercise informed choice throughout the vocational rehabilitation process. These policies and procedures must provide for—

(1) Informing each applicant and eligible individual (including students with disabilities who are making the transition from programs under the responsibility of an educational agency to programs under the responsibility of the designated State unit), through appropriate modes of communication, about the availability of and opportunities to exercise informed choice, including the availability of support services for individuals with cognitive or other disabilities who require assistance in exercising informed choice throughout the vocational rehabilitation process;

(2) Assisting applicants and eligible individuals in exercising informed choice in decisions related to the provision of assessment services;

(3) Developing and implementing flexible procurement policies and methods that facilitate the provision of vocational rehabilitation services and that afford eligible individuals meaningful choices among the methods used to procure vocational rehabilitation services;

(4) Assisting eligible individuals or, as appropriate, the individuals' representatives in acquiring information that enables them to exercise informed choice in the development of their IPEs with respect to the selection of the—

(i) Employment outcome;

(ii) Specific vocational rehabilitation services needed to achieve the employment outcome;

(iii) Entity that will provide the services;

(iv) Employment setting and the settings in which the services will be provided; and

(v) Methods available for procuring the services; and

(5) Ensuring that the availability and scope of informed choice is consistent with the obligations of the designated State agency under this part.

(c) *Information and assistance in the selection of vocational rehabilitation services and service providers.* In assisting an applicant and eligible individual in exercising informed choice during the assessment for determining eligibility and vocational rehabilitation needs and during development of the IPE, the designated State unit must provide the individual or the individual's representative, or assist the individual or the individual's representative in acquiring, information necessary to make an informed choice about the specific vocational rehabilitation services, including the providers of those services, that are needed to achieve the individual's employment outcome. This information must include, at a minimum, information relating to the—

(1) Cost, accessibility, and duration of potential services;

(2) Consumer satisfaction with those services to the extent that information relating to consumer satisfaction is available;

(3) Qualifications of potential service providers;

(4) Types of services offered by the potential providers;

(5) Degree to which services are provided in integrated settings; and

(6) Outcomes achieved by individuals working with service providers, to the extent that such information is available.

(d) *Methods or sources of information.* In providing or assisting the individual or the individual's representative in acquiring the information required under paragraph (c) of this section, the State unit may use, but is not limited to, the following methods or sources of information:

(1) Lists of services and service providers.

(2) Periodic consumer satisfaction surveys and reports.

(3) Referrals to other consumers, consumer groups, or disability advisory councils qualified to discuss the services or service providers.

(4) Relevant accreditation, certification, or other information relating to the qualifications of service providers.

(5) Opportunities for individuals to visit or experience various work and service provider settings.

(Authority: Sections 12(c), 101(a)(19); 102(b)(2)(B) and 102(d) of the Act; 29 U.S.C. 709(c), 721(a)(19); 722(b)(2)(B) and 722(d))

§ 361.53 Comparable services and benefits.

(a) *Determination of availability.* The State plan must assure that prior to providing any vocational rehabilitation services, except those services listed in paragraph (b) of this section, to an eligible individual, or to members of the individual's family, the State unit must determine whether comparable services and benefits, as defined in § 361.5(b)(10), exist under any other program and whether those services and benefits are available to the individual unless such a determination would interrupt or delay—

(1) The progress of the individual toward achieving the employment outcome identified in the individualized plan for employment;

(2) An immediate job placement; or

(3) The provision of vocational rehabilitation services to any individual who is determined to be at extreme medical risk, based on medical evidence provided by an appropriate qualified medical professional.

(b) *Exempt services.* The following vocational rehabilitation services described in § 361.48(a) are exempt from a determination of the availability of comparable services and benefits under paragraph (a) of this section:

(1) Assessment for determining eligibility and vocational rehabilitation needs.

(2) Counseling and guidance, including information and support services to assist an individual in exercising informed choice.

(3) Referral and other services to secure needed services from other agencies, including other components of the statewide workforce investment system, if those services are not available under this part.

(4) Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services.

(5) Rehabilitation technology, including telecommunications, sensory, and other technological aids and devices.

(6) Post-employment services consisting of the services listed under paragraphs (b)(1) through (5) of this section.

(c) *Provision of services.*

(1) If comparable services or benefits exist under any other program and are available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit must use those comparable services or benefits to meet, in whole or part, the costs of the vocational rehabilitation services.

(2) If comparable services or benefits exist under any other program, but are not available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit must provide vocational rehabilitation services until those comparable services and benefits become available.

(d) *Interagency coordination.*

(1) The State plan must assure that the Governor, in consultation with the entity in the State responsible for the vocational rehabilitation program and other appropriate agencies, will ensure that an interagency agreement or other mechanism for interagency coordination takes effect between the designated State vocational rehabilitation unit and any appropriate public entity, including the State entity responsible for administering the State medicaid program, a public institution of higher education, and a component of the statewide workforce investment system, to ensure the provision of vocational rehabilitation services (other than those services listed in paragraph (b) of this section) that are included in the IPE, including the provision of those vocational rehabilitation services during the pendency of any interagency dispute in accordance with the provisions of paragraph (d)(3)(iii) of this section.

(2) The Governor may meet the requirements of paragraph (d)(1) of this section through—

(i) A State statute or regulation;

(ii) A signed agreement between the respective officials of the public entities that clearly identifies the responsibilities of each public entity for the provision of the services; or

(iii) Another appropriate mechanism as determined by the designated State vocational rehabilitation unit.

(3) The interagency agreement or other mechanism for interagency coordination must include the following:

(i) *Agency financial responsibility.* An identification of, or description of a method for defining, the financial responsibility of the public entity for providing the vocational rehabilitation services other than those listed in paragraph (b) of this section and a provision stating the financial

responsibility of the public entity for providing those services.

(ii) *Conditions, terms, and procedures of reimbursement.* Information specifying the conditions, terms, and procedures under which the designated State unit must be reimbursed by the other public entities for providing vocational rehabilitation services based on the terms of the interagency agreement or other mechanism for interagency coordination.

(iii) *Interagency disputes.* Information specifying procedures for resolving interagency disputes under the interagency agreement or other mechanism for interagency coordination, including procedures under which the designated State unit may initiate proceedings to secure reimbursement from other public entities or otherwise implement the provisions of the agreement or mechanism.

(iv) *Procedures for coordination of services.* Information specifying policies and procedures for public entities to determine and identify interagency coordination responsibilities of each public entity to promote the coordination and timely delivery of vocational rehabilitation services other than those listed in paragraph (b) of this section.

(e) *Responsibilities under other law.*

(1) If a public entity (other than the designated State unit) is obligated under Federal law (such as the Americans with Disabilities Act, section 504 of the Act, or section 188 of the Workforce Investment Act) or State law, or assigned responsibility under State policy or an interagency agreement established under this section, to provide or pay for any services considered to be vocational rehabilitation services (*e.g.*, interpreter services under § 361.48(j)), other than those services listed in paragraph (b) of this section, the public entity must fulfill that obligation or responsibility through—

(i) The terms of the interagency agreement or other requirements of this section;

(ii) Providing or paying for the service directly or by contract; or

(iii) Other arrangement.

(2) If a public entity other than the designated State unit fails to provide or pay for vocational rehabilitation services for an eligible individual as established under this section, the designated State unit must provide or pay for those services to the individual and may claim reimbursement for the services from the public entity that failed to provide or pay for those services. The public entity must reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in paragraph (d) of this section in accordance with the procedures established in the agreement or mechanism pursuant to paragraph (d)(3)(ii) of this section.

(Authority: Sections 12(c) and 101(a)(8) of the Act; 29 U.S.C. 709(c) and 721(a)(8))

§ 361.54 Participation of individuals in cost of services based on financial need.

(a) *No Federal requirement.* There is no Federal requirement that the financial need of individuals be considered in the provision of vocational rehabilitation services.

(b) *State unit requirements.*

(1) The State unit may choose to consider the financial need of eligible individuals or individuals who are receiving services through trial work experiences under § 361.42(e) or during an extended evaluation under § 361.42(f) for purposes of determining the extent of their participation in the costs of vocational rehabilitation services, other than those services identified in paragraph (b)(3) of this section.

(2) If the State unit chooses to consider financial need—

(i) It must maintain written policies—

(A) Explaining the method for determining the financial need of an eligible individual; and

(B) Specifying the types of vocational rehabilitation services for which the unit has established a financial needs test;

(ii) The policies must be applied uniformly to all individuals in similar circumstances;

(iii) The policies may require different levels of need for different geographic regions in the State, but must be applied uniformly to all individuals within each geographic region; and

(iv) The policies must ensure that the level of an individual's participation in the cost of vocational rehabilitation services is—

(A) Reasonable;

(B) Based on the individual's financial need, including consideration of any disability-related expenses paid by the individual; and

(C) Not so high as to effectively deny the individual a necessary service.

(3) The designated State unit may not apply a financial needs test, or require the financial participation of the individual—

(i) As a condition for furnishing the following vocational rehabilitation services:

(A) Assessment for determining eligibility and priority for services under § 361.48(a), except those non-assessment services that are provided to an individual with a significant disability during either an exploration of the individual's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences under § 361.42(e) or an extended evaluation under § 361.42(f).

(B) Assessment for determining vocational rehabilitation needs under § 361.48(b).

(C) Vocational rehabilitation counseling and guidance under § 361.48(c).

(D) Referral and other services under § 361.48(d).

(E) Job-related services under § 361.48(l).

(F) Personal assistance services under § 361.48(n).

(G) Any auxiliary aid or service (e.g., interpreter services under § 361.48(j), reader services under § 361.48(k)) that an individual with a disability requires under section 504 of the Act (29 U.S.C. 794) or the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*), or regulations implementing those laws, in order for the individual to participate in the VR program as authorized under this part; or

(ii) As a condition for furnishing any vocational rehabilitation service if the individual in need of the service has been determined eligible for Social Security benefits under Titles II or XVI of the Social Security Act.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.55 Annual review of individuals in extended employment or other employment under special certificate provisions of the Fair Labor Standards Act.

The State plan must assure that the designated State unit—

(a) Annually reviews and reevaluates the status of each individual with a disability served under the vocational rehabilitation program who has achieved an employment outcome either in an extended employment setting in a community rehabilitation program or in any other employment setting in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act for 2 years after the individual achieves the employment outcome (and thereafter if requested by the individual or, if appropriate, the individual's representative) to determine the interests, priorities, and needs of the individual with respect to competitive employment or training for competitive employment;

(b) Enables the individual or, if appropriate, the individual's

representative to provide input into the review and reevaluation and documents that input in the record of services, consistent with § 361.47(a)(10), with the individual's or, as appropriate, the individual's representative's signed acknowledgment that the review and reevaluation have been conducted; and

(c) Makes maximum efforts, including identifying and providing vocational rehabilitation services, reasonable accommodations, and other necessary support services, to assist the individuals identified in paragraph (a) of this section in engaging in competitive employment as defined in § 361.5(b)(11).

(Authority: Section 101(a)(14) of the Act; 29 U.S.C. 721(a)(14))

§ 361.56 Requirements for closing the record of services of an individual who has achieved an employment outcome.

The record of services of an individual who has achieved an employment outcome may be closed only if all of the following requirements are met:

(a) *Employment outcome achieved.* The individual has achieved the employment outcome that is described in the individual's IPE in accordance with § 361.46(a)(1) and is—

(1) Consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice; and (2) In the most integrated setting possible, consistent with the individual's informed choice.

(b) *Employment outcome maintained.* The individual has maintained the employment outcome for an appropriate period of time, but not less than 90 days, necessary to ensure the stability of the employment outcome, and the individual no longer needs vocational rehabilitation services.

(c) *Satisfactory outcome.* At the end of the appropriate period under paragraph (b) of this section, the individual and the qualified rehabilitation counselor employed by the designated State unit consider the employment outcome to be satisfactory and agree that the individual is performing well in the employment.

(d) *Post-employment services.* The individual is informed through appropriate modes of communication of the availability of post-employment services.

(Authority: Sections 12(c), 101(a)(6), and 106(a)(2) of the Act; 29 U.S.C. 711(c), 721(a)(6), and 726(a)(2))

§ 361.57 Review of determinations made by designated State unit personnel.

(a) *Procedures.* The designated State unit must develop and implement procedures to ensure that an applicant or eligible individual who is dissatisfied with any determination made by personnel of the designated State unit that affects the provision of vocational rehabilitation services may request, or, if appropriate, may request through the individual's representative, a timely review of that determination. The procedures must be in accordance with paragraphs (b) through (k) of this section:

(b) *General requirements.*

(1) *Notification.* Procedures established by the State unit under this section must provide an applicant or eligible individual or, as appropriate, the individual's representative notice of—

(i) The right to obtain review of State unit determinations that affect the provision of vocational rehabilitation services through an impartial due process hearing under paragraph (e) of this section;

(ii) The right to pursue mediation under paragraph (d) of this section with respect to determinations made by designated State unit personnel that affect the provision of vocational rehabilitation services to an applicant or eligible individual;

(iii) The names and addresses of individuals with whom requests for mediation or due process hearings may be filed;

(iv) The manner in which a mediator or impartial hearing officer may be selected consistent with the requirements of paragraphs (d) and (f) of this section; and

(v) The availability of the client assistance program, established under 34 CFR part 370, to assist the applicant or eligible individual during mediation sessions or impartial due process hearings.

(2) *Timing.* Notice described in paragraph (b)(1) of this section must be provided in writing—

(i) At the time the individual applies for vocational rehabilitation services under this part;

(ii) At the time the individual is assigned to a category in the State's order of selection, if the State has established an order of selection under § 361.36;

(iii) At the time the IPE is developed; and

(iv) Whenever vocational rehabilitation services for an individual are reduced, suspended, or terminated.

(3) *Evidence and representation.* Procedures established under this section must—

(i) Provide an applicant or eligible individual or, as appropriate, the individual's representative with an opportunity to submit during mediation sessions or due process hearings evidence and other information that supports the applicant's or eligible individual's position; and

(ii) Allow an applicant or eligible individual to be represented during mediation sessions or due process hearings by counsel or other advocate selected by the applicant or eligible individual.

(4) *Impact on provision of services.* The State unit may not institute a suspension, reduction, or termination of vocational rehabilitation services being provided to an applicant or eligible individual, including evaluation and assessment services and IPE development, pending a resolution through mediation, pending a decision by a hearing officer or reviewing official, or pending informal resolution under this section unless—

(i) The individual or, in appropriate cases, the individual's representative requests a suspension, reduction, or termination of services; or

(ii) The State agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual or the individual's representative.

(5) *Ineligibility.* Applicants who are found ineligible for vocational rehabilitation services and previously eligible individuals who are determined to be no longer eligible for vocational rehabilitation services pursuant to § 361.43 are permitted to challenge the determinations of ineligibility under the procedures described in this section.

(c) *Informal dispute resolution.* The State unit may develop an informal process for resolving a request for review without conducting mediation or a formal hearing. A State's informal process must not be used to deny the right of an applicant or eligible individual to a hearing under paragraph (e) of this section or any other right provided under this part, including the right to pursue mediation under paragraph (d) of this section. If informal resolution under this paragraph or mediation under paragraph (d) of this section is not successful in resolving the dispute within the time period established under paragraph (e)(1) of this section, a formal hearing must be conducted within that same time period, unless the parties agree to a specific extension of time.

(d) *Mediation.*

(1) The State must establish and implement procedures, as required under paragraph (b)(1)(ii) of this section, to allow an applicant or eligible individual and the State unit to resolve disputes involving State unit determinations that affect the provision of vocational rehabilitation services through a mediation process that must be made available, at a minimum, whenever an applicant or eligible individual or, as appropriate, the individual's representative requests an impartial due process hearing under this section.

(2) Mediation procedures established by the State unit under paragraph (d) must ensure that—

(i) Participation in the mediation process is voluntary on the part of the applicant or eligible individual, as appropriate, and on the part of the State unit;

(ii) Use of the mediation process is not used to deny or delay the applicant's or eligible individual's right to pursue resolution of the dispute through an impartial hearing held within the time period specified in paragraph (e)(1) of this section or any other rights provided under this part. At any point during the mediation process, either party or the mediator may elect to terminate the mediation. In the event mediation is terminated, either party may pursue resolution through an impartial hearing;

(iii) The mediation process is conducted by a qualified and impartial mediator, as defined in § 361.5(b)(43), who must be selected from a list of qualified and impartial mediators maintained by the State—

(A) On a random basis;

(B) By agreement between the director of the designated State unit and the applicant or eligible individual or, as appropriate, the individual's representative; or

(C) In accordance with a procedure established in the State for assigning mediators, provided this procedure ensures the neutrality of the mediator assigned; and

(iv) Mediation sessions are scheduled and conducted in a timely manner and are held in a location and manner that is convenient to the parties to the dispute.

(3) Discussions that occur during the mediation process must be kept confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings, and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(4) An agreement reached by the parties to the dispute in the mediation process must be described in a written mediation agreement that is developed by the parties with the assistance of the qualified and impartial mediator and signed by both parties. Copies of the agreement must be sent to both parties.

(5) The costs of the mediation process must be paid by the State. The State is not required to pay for any costs related to the representation of an applicant or eligible individual authorized under paragraph (b)(3)(ii) of this section.

(e) *Impartial due process hearings.* The State unit must establish and implement formal review procedures, as required under paragraph (b)(1)(i) of this section, that provide that—

(1) A hearing conducted by an impartial hearing officer, selected in accordance with paragraph (f) of this section, must be held within 60 days of an applicant's or eligible individual's request for review of a determination made by personnel of the State unit that affects the provision of vocational rehabilitation services to the individual, unless informal resolution or a mediation agreement is achieved prior to the 60th day or the parties agree to a specific extension of time;

(2) In addition to the rights described in paragraph (b)(3) of this section, the applicant or eligible individual or, if appropriate, the individual's representative must be given the opportunity to present witnesses during the hearing and to examine all witnesses and other relevant sources of information and evidence;

(3) The impartial hearing officer must—

(i) Make a decision based on the provisions of the approved State plan, the Act, Federal vocational rehabilitation regulations, and State regulations and policies that are consistent with Federal requirements; and

(ii) Provide to the individual or, if appropriate, the individual's representative and to the State unit a full written report of the findings and grounds for the decision within 30 days of the completion of the hearing; and

(4) The hearing officer's decision is final, except that a party may request an impartial review under paragraph (g)(1) of this section if the State has established procedures for that review, and a party involved in a hearing may bring a civil action under paragraph (i) of this section.

(f) *Selection of impartial hearing officers.* The impartial hearing officer for a particular case must be selected—

(1) From a list of qualified impartial hearing officers maintained by the State unit. Impartial hearing officers included on the list must be—

(i) Identified by the State unit if the State unit is an independent commission; or

(ii) Jointly identified by the State unit and the State Rehabilitation Council if the State has a Council; and

(2)(i) On a random basis; or

(ii) By agreement between the director of the designated State unit and the applicant or eligible individual or, as appropriate, the individual's representative.

(g) *Administrative review of hearing officer's decision.* The State may establish procedures to enable a party who is dissatisfied with the decision of the impartial hearing officer to seek an impartial administrative review of the decision under paragraph (e)(3) of this section in accordance with the following requirements:

(1) A request for administrative review under paragraph (g) of this section must be made within 20 days of the mailing of the impartial hearing officer's decision.

(2) Administrative review of the hearing officer's decision must be conducted by—

(i) The chief official of the designated State agency if the State has established both a designated State agency and a designated State unit under § 361.13(b); or

(ii) An official from the office of the Governor.

(3) The reviewing official described in paragraph (g)(2)(i) of this section—

(i) Provides both parties with an opportunity to submit additional evidence and information relevant to a final decision concerning the matter under review;

(ii) May not overturn or modify the hearing officer's decision, or any part of that decision, that supports the position of the applicant or eligible individual unless the reviewing official concludes, based on clear and convincing evidence, that the decision of the impartial hearing officer is clearly erroneous on the basis of being contrary to the approved State plan, the Act, Federal vocational rehabilitation regulations, or State regulations and policies that are consistent with Federal requirements;

(iii) Makes an independent, final decision following a review of the entire hearing record and provides the decision in writing, including a full report of the findings and the statutory, regulatory, or policy grounds for the decision, to the applicant or eligible individual or, as appropriate, the individual's representative and to the State unit within 30 days of the request

for administrative review under paragraph (g)(1) of this section; and

(iv) May not delegate the responsibility for making the final decision under paragraph (g) of this section to any officer or employee of the designated State unit.

(4) The reviewing official's decision under paragraph (g) of this section is final unless either party brings a civil action under paragraph (i) of this section.

(h) *Implementation of final decisions.* If a party brings a civil action under paragraph (h) of this section to challenge the final decision of a hearing officer under paragraph (e) of this section or to challenge the final decision of a State reviewing official under paragraph (g) of this section, the final decision of the hearing officer or State reviewing official must be implemented pending review by the court.

(i) *Civil action.*

(1) Any party who disagrees with the findings and decision of an impartial hearing officer under paragraph (e) of this section in a State that has not established administrative review procedures under paragraph (g) of this section and any party who disagrees with the findings and decision under paragraph (g)(3)(iii) of this section have a right to bring a civil action with respect to the matter in dispute. The action may be brought in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

(2) In any action brought under paragraph (i) of this section, the court—

(i) Receives the records related to the impartial due process hearing and the records related to the administrative review process, if applicable;

(ii) Hears additional evidence at the request of a party; and

(iii) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(j) *State fair hearing board.* A fair hearing board as defined in § 361.5(b)(22) is authorized to carry out the responsibilities of the impartial hearing officer under paragraph (e) of this section in accordance with the following criteria:

(1) The fair hearing board may conduct due process hearings either collectively or by assigning responsibility for conducting the hearing to one or more members of the fair hearing board.

(2) The final decision issued by the fair hearing board following a hearing under paragraph (j)(1) of this section must be made collectively by, or by a majority vote of, the fair hearing board.

(3) The provisions of paragraphs (b)(1), (2), and (3) of this section that relate to due process hearings and of paragraphs (e), (f), (g), and (h) of this section do not apply to fair hearing boards under this paragraph (j).

(k) *Data collection.*

(1) The director of the designated State unit must collect and submit, at a minimum, the following data to the Commissioner of the Rehabilitation Services Administration (RSA) for inclusion each year in the annual report to Congress under section 13 of the Act:

(i) A copy of the standards used by State reviewing officials for reviewing decisions made by impartial hearing officers under this section.

(ii) The number of mediations held, including the number of mediation agreements reached.

(iii) The number of hearings and reviews sought from impartial hearing officers and State reviewing officials, including the type of complaints and the issues involved.

(iv) The number of hearing officer decisions that were not reviewed by administrative reviewing officials.

(v) The number of hearing decisions that were reviewed by State reviewing officials and, based on these reviews, the number of hearing decisions that were—

(A) Sustained in favor of an applicant or eligible individual;

(B) Sustained in favor of the designated State unit;

(C) Reversed in whole or in part in favor of the applicant or eligible individual; and

(D) Reversed in whole or in part in favor of the State unit.

(2) The State unit director also must collect and submit to the Commissioner of RSA copies of all final decisions issued by impartial hearing officers under paragraph (e) of this section and by State review officials under paragraph (g) of this section.

(3) The confidentiality of records of applicants and eligible individuals maintained by the State unit may not preclude the access of the RSA Commissioner to those records for the purposes described in this section.

(Authority: Section 102(c) of the Act; 29 U.S.C. 722(c))

Subpart C—Financing of State Vocational Rehabilitation Programs

§ 361.60 Matching requirements.

(a) *Federal share.*

(1) *General.* Except as provided in paragraph (a)(2) of this section, the Federal share for expenditures made by the State under the State plan, including expenditures for the provision of vocational rehabilitation services and the administration of the State plan, is 78.7 percent.

(2) *Construction projects.* The Federal share for expenditures made for the construction of a facility for community rehabilitation program purposes may not be more than 50 percent of the total cost of the project.

(b) *Non-Federal share.*

(1) *General.* Except as provided in paragraph (b)(2) and (3) of this section, expenditures made under the State plan to meet the non-Federal share under this section must be consistent with the provisions of 34 CFR 80.24.

(2) *Third party in-kind contributions.* Third party in-kind contributions specified in 34 CFR 80.24(a)(2) may not be used to meet the non-Federal share under this section.

(3) *Contributions by private entities.* Expenditures made from contributions by private organizations, agencies, or individuals that are deposited in the account of the State agency or sole local agency in accordance with State law and that are earmarked, under a condition imposed by the contributor, may be used as part of the non-Federal share under this section if the funds are earmarked for—

(i) Meeting in whole or in part the State's share for establishing a community rehabilitation program or constructing a particular facility for community rehabilitation program purposes;

(ii) Particular geographic areas within the State for any purpose under the State plan, other than those described in paragraph (b)(3)(i) of this section, in accordance with the following criteria:

(A) Before funds that are earmarked for a particular geographic area may be used as part of the non-Federal share, the State must notify the Secretary that the State cannot provide the full non-Federal share without using these funds.

(B) Funds that are earmarked for a particular geographic area may be used as part of the non-Federal share without requesting a waiver of statewideness under § 361.26.

(C) Except as provided in paragraph (b)(3)(i) of this section, all Federal funds must be used on a statewide basis consistent with § 361.25, unless a waiver of statewideness is obtained under § 361.26; and

(iii) Any other purpose under the State plan, provided the expenditures do not benefit in any way the donor, an individual to whom the donor is related by blood or marriage or with whom the donor has a close personal relationship,

or an individual, entity, or organization with whom the donor shares a financial interest. The Secretary does not consider a donor's receipt from the State unit of a grant, subgrant, or contract with funds allotted under this part to be a benefit for the purposes of this paragraph if the grant, subgrant, or contract is awarded under the State's regular competitive procedures.

(Authority: Sections 7(14), 101(a)(3), 101(a)(4) and 104 of the Act; 29 U.S.C. 706(14), 721(a)(3), 721(a)(4) and 724))

Example for paragraph (b)(3): Contributions may be earmarked in accordance with § 361.60(b)(3)(iii) for providing particular services (*e.g.*, rehabilitation technology services); serving individuals with certain types of disabilities (*e.g.*, individuals who are blind), consistent with the State's order of selection, if applicable; providing services to special groups that State or Federal law permits to be targeted for services (*e.g.*, students with disabilities who are receiving special education services), consistent with the State's order of selection, if applicable; or carrying out particular types of administrative activities permissible under State law. Contributions also may be restricted to particular geographic areas to increase services or expand the scope of services that are available statewide under the State plan in accordance with the requirements in § 361.60(b)(3)(ii).

§ 361.61 Limitation on use of funds for construction expenditures.

No more than 10 percent of a State's allotment for any fiscal year under section 110 of the Act may be spent on the construction of facilities for community rehabilitation program purposes.

(Authority: Section 101(a)(17)(A) of the Act; 29 U.S.C. 721(a)(17)(A))

§ 361.62 Maintenance of effort requirements.

(a) *General requirements.*

(1) The Secretary reduces the amount otherwise payable to a State for a fiscal year by the amount by which the total expenditures from non-Federal sources under the State plan for the previous fiscal year were less than the total of those expenditures for the fiscal year 2 years prior to the previous fiscal year.

Example: For fiscal year 2001, a State's maintenance of effort level is based on the amount of its expenditures from non-Federal sources for fiscal year 1999. Thus, if the State's non-Federal expenditures in 2001 are less than they were in 1999, the State has a maintenance of effort deficit, and the Secretary reduces the State's allotment in 2002 by the amount of that deficit.

(2) If, at the time the Secretary makes a determination that a State has failed to meet its maintenance of effort requirements, it is too late for the Secretary to make a reduction in accordance with paragraph (a)(1) of this section, then the Secretary recovers the amount of the maintenance of effort deficit through audit disallowance.

(b) *Specific requirements for construction of facilities.* If the State provides for the construction of a facility for community rehabilitation program purposes, the amount of the State's share of expenditures for vocational rehabilitation services under the plan, other than for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation purposes, must be at least equal to the expenditures for those services for the second prior fiscal year. If a State fails to meet the requirements of this paragraph, the Secretary recovers the amount of the maintenance of effort deficit through audit disallowance.

(c) *Separate State agency for vocational rehabilitation services for individuals who are blind.* If there is a separate part of the State plan administered by a separate State agency to provide vocational rehabilitation services for individuals who are blind—

(1) Satisfaction of the maintenance of effort requirements under paragraphs (a) and (b) of this section are determined based on the total amount of a State's non-Federal expenditures under both parts of the State plan; and

(2) If a State fails to meet any maintenance of effort requirement, the Secretary reduces the amount otherwise payable to the State for that fiscal year under each part of the plan in direct relation to the amount by which expenditures from non-Federal sources under each part of the plan in the previous fiscal year were less than they were for that part of the plan for the fiscal year 2 years prior to the previous fiscal year.

(d) *Waiver or modification.*

(1) The Secretary may waive or modify the maintenance of effort requirement in paragraph (a)(1) 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 as soon as the State determines that an exceptional or uncontrollable circumstance will prevent it from making its required expenditures from non-Federal sources.

(Authority: Sections 101(a)(17) and 111(a)(2) of the Act; 29 U.S.C. 721(a)(17) and 731(a)(2))

§ 361.63 Program income.

(a) *Definition.* For purposes of this section, *program income* means gross income received by the State that is directly generated by an activity supported under this part.

(b) *Sources.* Sources of program income include, but are not limited to, payments from the Social Security Administration for assisting Social Security beneficiaries and recipients to achieve employment outcomes, payments received from workers' compensation funds, fees for services to defray part or all of the costs of services provided to particular individuals, and income generated by a State-operated community rehabilitation program.

(c) *Use of program income.*

(1) Except as provided in paragraph (c)(2) of this section, program income, whenever earned, must be used for the provision of vocational rehabilitation services and the administration of the State plan. Program income is considered earned when it is received.

(2) Payments provided to a State from the Social Security Administration for assisting Social Security beneficiaries and recipients to achieve employment outcomes may also be used to carry out programs under part B of Title I of the Act (client assistance), part B of Title VI

of the Act (supported employment), and Title VII of the Act (independent living).

(3) The State is authorized to treat program income as—

(i) An addition to the grant funds to be used for additional allowable program expenditures, in accordance with 34 CFR 80.25(g)(2); or

(ii) A deduction from total allowable costs, in accordance with 34 CFR 80.25(g)(1).

(4) Program income cannot be used to meet the non-Federal share requirement under § 361.60.

(Authority: Section 108 of the Act; 29 U.S.C. 728; 34 CFR 80.25)

§ 361.64 Obligation of Federal funds and program income.

(a) Except as provided in paragraph (b) of this section, any Federal funds, including reallotted funds, that are appropriated for a fiscal year to carry out a program under this part that are not obligated by the State by the beginning of the succeeding fiscal year and any program income received during a fiscal year that is not obligated by the State by the beginning of the succeeding fiscal year remain available for obligation by the State during that succeeding fiscal year.

(b) Federal funds appropriated for a fiscal year remain available for obligation in the succeeding fiscal year only to the extent that the State met the matching requirement for those Federal funds by obligating, in accordance with 34 CFR 76.707, the non-Federal share in the fiscal year for which the funds were appropriated.

(Authority: Section 19 of the Act; 29 U.S.C. 716)

§ 361.65 Allotment and payment of Federal funds for vocational rehabilitation services.

(a) *Allotment.*

(1) The allotment of Federal funds for vocational rehabilitation services for each State is computed in accordance with the requirements of section 110 of the Act, and payments are made to the State on a quarterly basis, unless some other period is established by the Secretary.

(2) If the State plan designates one State agency to administer, or supervise the administration of, the part of the plan under which vocational rehabilitation services are provided for individuals who are blind and another State agency to administer the rest of the plan, the division of the State's allotment is a matter for State determination.

(b) *Reallotment.*

(1) The Secretary determines not later than 45 days before the end of a fiscal year which States, if any, will not use their full allotment.

(2) As soon as possible, but not later than the end of the fiscal year, the Secretary reallots these funds to other States that can use those additional funds during the current or subsequent fiscal year, provided the State can meet the matching requirement by obligating the non-Federal share of any reallotted funds in the fiscal year for which the funds were appropriated.

(3) Funds reallotted to another State are considered to be an increase in the recipient State's allotment for the fiscal year for which the funds were appropriated.

(Authority: Sections 110 and 111 of the Act; 29 U.S.C. 730 and 731)

Subpart D—[Reserved]

Subpart E—Evaluation Standards and Performance Indicators

§ 361.80 Purpose.

The purpose of this subpart is to establish evaluation standards and performance indicators for the Program.

(Authority: 29 U.S.C. 726(a))

§ 361.81 Applicable definitions.

In addition to those definitions in § 361.5(b), the following definitions apply to this subpart:

Average hourly earnings means the average per hour earnings in the week prior to exiting the vocational rehabilitation (VR) program of an eligible individual who has achieved a competitive employment outcome.

Business Enterprise Program (BEP) means an employment outcome in which an individual with a significant disability operates a vending facility or other small business under the management and supervision of a designated State unit (DSU). This term includes home industry, farming, and other enterprises.

Exit the VR program means that a DSU has closed the individual's record of VR services in one of the following categories:

(1) Ineligible for VR services.

(2) Received services under an individualized plan for employment (IPE) and achieved an employment outcome.

(3) Received services under an IPE but did not achieve an employment outcome.

(4) Eligible for VR services but did not receive services under an IPE.

General or combined DSU means a DSU that does not serve exclusively individuals with visual impairments or blindness.

Individuals from a minority background means individuals who report their race and ethnicity in any of the following categories: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino.

Minimum wage means 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), (i.e., the Federal minimum wage) or applicable State minimum wage law.

Non-minority individuals means individuals who report themselves exclusively as White, non-Hispanic.

Performance period is the reporting period during which a DSU's performance is measured. For Evaluation Standards 1 and 2, performance data must be aggregated and reported for each fiscal year beginning with fiscal year 1999. However, DSUs that exclusively serve individuals with visual impairments or blindness must report each year the aggregated data for the 2 previous years for Performance Indicators 1.1 through 1.6; the second year must coincide with the performance period for general or combined DSUs.

Primary indicators means Performance Indicators 1.3, 1.4, and 1.5, which are specifically designed to measure—

(1) The achievement of competitive, self-, or BEP employment with earnings equivalent to the minimum wage or higher, particularly by individuals with significant disabilities; and

(2) The ratio between the average hourly earnings of individuals who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to the minimum wage or higher and the State's average hourly earnings for all employed individuals.

RSA–911 means the Case Service Report that is submitted annually by a DSU as approved by the Office of Management and Budget (OMB).

Self-employment means an employment outcome in which the individual works for profit or fee in his or her own business, farm, shop, or office, including sharecroppers.

Service rate means the result obtained by dividing the number of individuals who exit the VR program after receiving one or more services under an IPE during any reporting period by the total number of individuals who exit the VR program (as defined in this section) during that reporting period.

State's average hourly earnings means the average hourly earnings of all persons in the State in which the DSU is located.

(Authority: 29 U.S.C. 726(a))

§ 361.82 Evaluation standards.

(a) The Secretary establishes two evaluation standards to evaluate the performance of each DSU that receives funds under this part. The evaluation standards assist the Secretary and each DSU to evaluate a DSU's performance in serving individuals with disabilities under the VR program.

(b) A DSU must achieve successful performance on both evaluation standards during each performance period.

(c) The evaluation standards for the VR program are—

(1) *Evaluation Standard 1—Employment outcomes.* A DSU must assist any eligible individual, including an individual with a significant disability, to obtain, maintain, or regain high-quality employment.

(2) *Evaluation Standard 2—Equal access to services.* A DSU must ensure that individuals from minority backgrounds have equal access to VR services. (Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(a))

§ 361.84 Performance indicators.

(a) The performance indicators establish what constitutes minimum compliance with the evaluation standards.

(b) The performance indicators require a DSU to provide information on a variety of factors to enable the Secretary to measure compliance with the evaluation standards.

(c) The performance indicators are as follows:

(1) *Employment outcomes.*

(i) *Performance Indicator 1.1.* The number of individuals exiting the VR program who achieved an employment outcome during the current performance period compared to the number of individuals who exit the VR program after achieving an employment outcome during the previous performance period.

(ii) *Performance Indicator 1.2.* Of all individuals who exit the VR program after receiving services, the percentage who are determined to have achieved an employment outcome.

(iii) *Performance Indicator 1.3.* Of all individuals determined to have achieved an employment outcome, the percentage who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to at least the minimum wage.

(iv) *Performance Indicator 1.4.* Of all individuals who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to at least the minimum wage, the percentage who are individuals with significant disabilities.

(v) *Performance Indicator 1.5.* The average hourly earnings of all individuals who exit the VR program in competitive, self-, or BEP employment with earnings levels equivalent to at least the minimum wage as a ratio to the State's average hourly earnings for all individuals in the State who are employed (as derived from the Bureau of Labor Statistics report ''State Average Annual Pay'' for the most recent available year).

(vi) *Performance Indicator 1.6.* Of all individuals who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to at least the minimum wage, the difference between the percentage who report their own income as the largest single source of economic support at the time they exit the VR program and the percentage who report their own income as the largest single source of support at the time they apply for VR services.

(2) *Equal access to services.*

(i) *Performance Indicator 2.1.* The service rate for all individuals with disabilities from minority backgrounds as a ratio to the service rate for all non-minority individuals with disabilities.

(Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(a))

§ 361.86 Performance levels.

(a) *General.*

(1) Paragraph (b) of this section establishes performance levels for—

(i) General or combined DSUs; and

(ii) DSUs serving exclusively individuals who are visually impaired or blind.

(2) The Secretary may establish, by regulations, new performance levels.

(b) *Performance levels for each performance indicator.*

(1)(i) The performance levels for Performance Indicators 1.1 through 1.6 are—

Performance indicator	Performance level by type of DSU	
	General/Combined	Blind
1.1	Equal or exceed previous performance period	Same.
1.2	55.8%	68.9%.
1.3	72.6%	35.4%.
1.4	62.4%	89.0%.
1.5	.52 (Ratio)	.59.
1.6	53.0 (Math. Difference)	30.4.

(ii) To achieve successful performance on Evaluation Standard 1 (Employment outcomes), a DSU must meet or exceed the performance levels established for four of the six performance indicators in the evaluation standard, including meeting or exceeding the performance levels for two of the three primary indicators (Performance Indicators 1.3, 1.4, and 1.5).

(2)(i) The performance level for Performance Indicator 2.1 is—

Performance indicator	Performance levels
2.1	.80 (Ratio).

(ii) To achieve successful performance on Evaluation Standard 2 (Equal access), DSUs must meet or exceed the performance level established for Performance Indicator 2.1 or meet the performance requirement in paragraph (2)(iii) of this section.

(iii) If a DSU's performance does not meet or exceed the performance level required for Performance Indicator 2.1, or if fewer than 100 individuals from a minority population have exited the VR program during the reporting period, the DSU must describe the policies it has adopted or will adopt and the steps it has taken or will take to ensure that individuals with disabilities from minority backgrounds have equal access to VR services.

(Authority: 29 U.S.C. 726(a))

§ 361.88 Reporting requirements.

(a) The Secretary requires that each DSU report within 60 days after the end of each fiscal year the extent to which the State is in compliance with the

evaluation standards and performance indicators and include in this report the following RSA–911 data:

(1) The number of individuals who exited the VR program in each closure category as specified in the definition of ''Exit the VR program'' under § 361.81.

(2) The number of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage.

(3) The number of individuals with significant disabilities who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage.

(4) The weekly earnings and hours worked of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage.

(5) The number of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage whose primary source of support at the time they applied for VR services was ''personal income.''

(6) The number of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage whose primary source of support at closure was ''personal income.''

(7) The number of individuals exiting the VR program who are individuals from a minority background.

(8) The number of non-minority individuals exiting the VR program.

(9) The number of individuals from a minority background exiting the VR program after receiving services under an IPE.

(10) The number of non-minority individuals exiting the VR program after receiving services under an IPE.

(b) In lieu of the report required in paragraph (a) of this section, a DSU may submit its RSA–911 data on tape, diskette, or any alternative electronic format that is compatible with RSA's capability to process such an alternative, as long as the tape, diskette, or alternative electronic format includes the data that—

(1) Are required by paragraph (a)(1) through (10) of this section; and

(2) Meet the requirements of paragraph (c) of this section.

(c) Data reported by a DSU must be valid, accurate, and in a consistent format. If a DSU fails to submit data that are valid, accurate, and in a consistent format within the 60-day period, the DSU must develop a program improvement plan pursuant to § 361.89(a). (Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(b))

§ 361.89 Enforcement procedures.

(a) If a DSU fails to meet the established performance levels on both evaluation standards as required by § 361.82(b), the Secretary and the DSU must jointly develop a program improvement plan that outlines the specific actions to be taken by the DSU to improve program performance.

(b) In developing the program improvement plan, the Secretary considers all available data and information related to the DSU's performance.

(c) When a program improvement plan is in effect, review of the plan is conducted on a biannual basis. If necessary, the Secretary may request that a DSU make further revisions to the plan to improve performance. If the Secretary establishes new performance levels under § 361.86(a)(2), the Secretary and the DSU must jointly modify the program improvement plan based on the new performance levels. The Secretary continues reviews and requests revisions until the DSU sustains satisfactory performance based on the current performance levels over a period of more than 1 year.

(d) If the Secretary determines that a DSU with less than satisfactory performance has failed to enter into a program improvement plan or comply substantially with the terms and conditions of the program improvement plan, the Secretary, consistent with the procedures specified in § 361.11, reduces or makes no further payments to the DSU under this program until the DSU has met one of these two requirements or raised its subsequent performance to meet the current overall minimum satisfactory level on the compliance indicators.

(Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(b) and (c))

Appendix

Analysis of Comments and Changes

Note: The following appendix will not appear in the Code of Federal Regulations.

Section 361.4—Applicable Regulations

Comments: Several commenters requested clarification of proposed § 361.4(c) and (d) that made applicable to the VR program the regulations implementing the One-Stop system under Title I of the WIA. In particular, these commenters requested that the Secretary assure in this section that the regulations governing the One-Stop system do not conflict with the regulations in part 361 and that the One-Stop system requirements would not apply if conflicts between regulatory provisions arise.

Discussion: Proposed § 361.4(c) listed the regulations in 20 CFR part 662 (Description of One-Stop Service Delivery System under Title I of WIA) among the regulations applicable to the VR program. Similarly, proposed § 361.4(d) identified the civil rights protections under 29 CFR part 37 (Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIA) as applicable to VR program activities that are conducted as part of the One-Stop system. Citing these parts of Federal regulations is intended solely as a means of notifying State units of their regulatory obligations as One-Stop system partners.

Moreover, both Title I of WIA and its implementing regulations specify that partner programs, such as the VR program, are to participate in applicable One-Stop system activities in a manner that is consistent with the Federal law authorizing the individual partner program (see e.g., section 121(b)(1)(A)(ii) of WIA; 20 CFR 662.230(d)). We interpret this requirement to mean that the DSU administering the VR program in the State must partner with the other components of the One-Stop system in accordance with the requirements of both Title I of the Rehabilitation Act of 1973 and these final regulations. Given that condition on One-Stop system participation, and the fact that these regulations generally govern State conduct, we do not consider it appropriate to include in the regulations the assurances sought by the commenters. However, we emphasize that we have worked closely with the U.S. Department of Labor to ensure that the One-Stop system regulations do not conflict with VR program requirements. Despite these efforts, we urge State units and others to inform us of any apparent conflicts between regulatory provisions that arise so that we, along with the Department of Labor, can address any inconsistencies that might remain.

Changes: None.

Section 361.5(b)—Applicable Definitions

• *General*

Comments: Several commenters asked that additional terms be defined in the final regulations. One commenter requested that a definition of ''informed choice'' be added to the regulations. Other commenters asked that separate definitions of the terms ''qualified vocational rehabilitation counselor'' and ''qualified vocational rehabilitation counselor employed by the designated State unit'' be included among the regulatory definitions. Finally, some commenters asked that ''rehabilitation engineering'' be defined in the final regulations since that term is used in the definition of ''rehabilitation technology,'' while others suggested that ''mediation'' be defined in the final regulations in order to clarify the scope of the mediation process.

Discussion: We do not believe it is necessary to define ''informed choice'' in the final regulations. Section 361.52 of both the proposed and final regulations, which tracks section 102(d) of the Act, enumerates the critical aspects of informed choice and reflects the statutory emphasis that individuals participating in the VR program must be able to exercise informed choice

throughout the entire rehabilitation process. That section of the regulations also retains additional choice-related provisions from the current regulations, including, in § 361.52(c), the types of information that must be provided for an individual to exercise choice in selecting VR services and service providers. Thus, § 361.52, as a whole, contains a comprehensive list of requirements intended to ensure that individuals are given meaningful choices, and the opportunity to exercise those choices, in each aspect of their rehabilitation, as the Act intends.

For further discussion of our decision to not define ''informed choice,'' please see the analysis of comments to § 361.52 in this appendix.

We agree that clarification is needed concerning the distinction between a ''qualified vocational rehabilitation counselor'' and a ''qualified vocational rehabilitation counselor employed by the DSU.'' However, we do not believe that defining these terms would provide the necessary clarification since States can readily determine which counselors they employ. Rather, we think it would be more helpful to further explain the differences between the functions that must be performed by DSU and non-DSU counselors. That discussion can be found in the analysis of comments received under § 361.45.

We agree that retaining the current regulatory definition of ''rehabilitation engineering'' would be beneficial.

Finally, the 1998 Amendments introduced mediation as another means for individuals and State units to resolve disputes regarding the provision of VR services. Although mediation is new to the VR program, it has been used for years in other programs as a less adversarial process for resolving disputes than formal due process hearings or court litigation. The NPRM provided guidance to States in developing their systems of mediation by defining the statutory term ''qualified and impartial mediator.'' However, we agree that defining ''mediation'' in the regulations would provide further clarification.

We believe it is important that the regulations give States sufficient flexibility to establish mediation procedures that best meet the needs of individuals with disabilities in the State and the needs of the State unit. At the same time, for efficiency purposes, we feel that the definition of ''mediation'' in the final regulations should allow for States to conduct mediations under the VR program in a manner that is consistent with those conducted by the State under similar programs. We believe that a definition that is based on relevant portions of the definition of ''mediation'' in the Federal regulations governing the Client Assistance Program (CAP) in 34 CFR 370.6(b) serves both of those purposes.

Changes: We have amended the proposed regulations to include definitions of the terms ''mediation'' and ''rehabilitation engineering.'' These definitions are located in § 361.5(b)(36) and (b)(44), respectively, meaning that other definitions in the proposed regulations have been renumbered in the final regulations.

• *Administrative costs under the State plan*

Comments: One commenter asked why the listing of costs in the proposed definition of ''administrative costs under the State plan'' was preceded by the term ''including'' rather than ''including, but not limited to,'' as in the current regulations. This same commenter also asked what is meant by ''support services'' to other entities, which was listed as an administrative cost under § 361.5(b)(2)(iv) of the proposed regulations.

Discussion: The proposed definition of ''administrative costs under the State plan,'' which tracks the definition in section 7(1) of the Act, does not differ substantively from the previous regulatory definition. However, because we interpret the statutory definition to allow for ''administrative costs'' other than those listed in the Act, we agree with the commenter that the definition should specify that the scope of administrative costs is not limited to the costs listed in the definition.

''Support services to other State agencies, private nonprofit organizations, and businesses and industries,'' which is referenced in section 7(1)(D) of the Act, as well as in § 361.5(b)(2)(iv), can include activities such as training the staff of the One-Stop system on disability issues, providing organizations with materials and advice on auxiliary aids and services and other accessibility issues, reviewing employers' workplace policies and hiring practices, and other activities that would facilitate and promote the employment of individuals with disabilities. The scope of support services that a State unit may provide would differ depending upon the circumstances in that State.

Changes: We have amended the definition of ''administrative costs under the State plan'' to clarify that the scope of administrative costs under the program includes, but is not limited to, the costs listed in the definition.

• *Appropriate modes of communication*

Comments: Several commenters requested that we amend the proposed definition of ''appropriate modes of communication'' to include additional communication modes that are available for individuals who are deaf or hard of hearing.

Discussion: The definition of ''appropriate modes of communication'' in the proposed regulations, which was the same as the previous regulatory definition, was not intended as a comprehensive list of communication modes used by persons with disabilities. Accordingly, the definition specified that the scope of appropriate modes was not limited to the identified examples and allowed for other modes as they are needed.

Changes: None.

• Assessment for determining eligibility and vocational rehabilitation needs

Comments: One commenter asked that this proposed definition be amended to ensure that the information used in assessing eligibility, order of selection category, and vocational rehabilitation needs of an individual with a disability is provided by professionals with expertise in the individual's disabling condition or conditions. This commenter also asked that we revise the proposed regulations to require that appropriate modes of communication are used in the course of conducting assessments.

Discussion: The points made by the commenter relate to important elements of the assessment process. However, we believe those points are sufficiently addressed by other requirements in the regulations. For example, § 361.42(a) of both the proposed and final regulations requires that determinations of eligibility be made by qualified personnel. Similarly, § 361.18(e) requires that the State unit be able to communicate with applicants, as well as eligible individuals, through appropriate modes of communication. Because these requirements apply to the State unit as it conducts assessments and fulfills its other functions, we do not consider it necessary to amend the proposed definition as the commenter requested.

Changes: None.

• *Comparable services and benefits*

Comments: One commenter asked that the proposed definition be revised to specifically exclude the personal resources of the eligible individual from the scope of ''comparable services and benefits'' that the State unit must use before expending program funds in support of VR services.

In addition, a number of commenters asked whether a ''ticket'' issued to an individual with a disability under the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. 106–170 (TWWIIA) constitutes a comparable service or benefit. Several other commenters stated that a Plan for Achieving Self-Support (PASS) issued by the Social Security Administration (SSA) should not be treated as a comparable service or benefit.

Discussion: The proposed regulatory definition of comparable services and benefits—services and benefits that are provided or paid for by other Federal, State or local public agencies, by health insurance, or by employee benefits—did not include the eligible individual's personal resources. Nonetheless, an individual may be asked to participate in the costs of certain VR services to the extent that the State unit uses a financial needs test that is consistent with the requirements in § 361.54 of the regulations.

Because Social Security recipients with disabilities are issued ''tickets'' under TWWIIA in order to receive training and employment-related services from an employment network as defined in that act, we believe that the ticket constitutes a comparable service and benefit under the VR program. Thus, to the extent that a ticket holder is receiving services from another entity that is serving as that individual's employment network, the DSU need not expend VR program funds on services that are comparable to the services the individual is already receiving. On the other hand, if the individual initially chooses the DSU as its employment network under TWWIIA, or otherwise transfers his or her ticket to the DSU, then the individual would be served solely by the DSU, and the ticket would not be considered a comparable service and benefit.

On a related point, we note that DSUs must accept a ticket as sufficient evidence that the

ticket holder has a disability, is receiving Social Security benefits, and therefore is presumptively eligible under the VR program (see § 361.42(a)(3) of the final regulations).

Finally, we agree with the commenters' assertion that a PASS does not constitute a comparable service or benefit. Simply stated, a PASS is a mechanism made available to SSDI beneficiaries under the Social Security Act that enables its holder to conserve certain amounts of his or her own income or resources for purposes of supporting himself or herself in the future. Thus, because a PASS is not a source of support for VR services, we do not view it as a comparable benefit that the DSU can look to as an alternative to expending VR program funds.

Changes: None.

• *Competitive employment*

Comments: One commenter questioned the basis for the requirement that ''competitive employment'' be limited to employment outcomes in integrated settings. A second commenter asked that we broaden the definition of ''competitive employment'' in the proposed regulations to include employment under the Javits-Wagner-O'Day (JWOD) program if that employment is chosen by the eligible individual.

Discussion: The proposed definition of ''competitive employment'' was the same as that found in the previous regulations. Although the term is not defined in the Act, section 7(11), the statutory definition of ''employment outcome'' does refer to competitive employment in the integrated labor market. On that basis, and in light of the great emphasis that the Act places on maximizing the integration into society of persons with disabilities, it has been our longstanding policy to define ''competitive employment'' to mean employment in an integrated setting (at or above minimum wage). For further information on the integrated setting (and wage) components of the ''competitive employment'' definition, please refer to the relevant discussion in the preamble to the previous regulations (62 FR 6310 through 6311).

Whether an employment outcome meets the regulatory definition of ''competitive employment'' is to be determined on case-by-case basis. If a particular job, including a job secured under the JWOD program, is integrated (*i.e.,* the individual with a disability interacts with non-disabled persons to the same extent that non-disabled individuals in comparable positions interact with other persons; § 361.5(b)(33)(ii) of the final regulations) and the individual is compensated at or above the minimum wage (and not less than the customary wage and benefit level paid by the employer for the same or similar work performed by individuals who are not disabled; § 361.5(b)(11)(ii) of the final regulations), then that position would be considered competitive employment. In fact, we expect that many jobs secured under JWOD service contracts would meet these criteria. On the other hand, employment in a non-integrated setting such as a sheltered workshop would not qualify as competitive employment regardless of whether the position is obtained under a JWOD contract or another program or arrangement.

Changes: None.

• *Employment outcome*

Comments: A number of commenters recommended that we expand the definition of ''employment outcome'' in the proposed regulations (*i.e.*, entering or retaining full- or part-time competitive, supported, or other employment) to include ''advancing in'' appropriate employment. This change, the commenters believe, would encourage DSUs to look beyond entry-level employment options for eligible individuals.

Another commenter asked that we define ''part-time employment'' in the final regulations. This commenter expressed concern about DSUs expending resources on individuals who might work very few hours in the course of a week or a month.

Discussion: The chief purpose of the VR program is to assist eligible individuals with disabilities to achieve high-quality employment outcomes consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. Because that standard is reflected in the definition of the term ''employment outcome,'' we believe that the regulations sufficiently support the commenters' point that individuals with disabilities who are currently employed should be able to receive VR services in order to advance in their careers.

Additionally, the availability of VR services for purposes of ''advancing in'' employment is addressed in other parts of the regulations. For example, § 361.46(a)(1)(i)) of the final regulations also specifies that the employment outcome identified in the individualized plan for employment, *i.e.*, the employment goal the individual must pursue with the assistance of the State unit, must be consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interests, and informed choice. That section requires that States look beyond options in entry-level employment for VR program participants who are capable of more challenging work. Specifically, the eligible individual should be assisted in pursuing the job that reflects his or her strengths, resources, abilities, and other employment factors previously listed. We suggest that you consult Rehabilitation Services Administration (RSA) Policy Directive 97–04 for a more complete discussion of the scope and selection of employment outcomes for eligible individuals.

We have not defined ''part-time employment'' as used in the proposed definition of ''employment outcome.'' We note that most employers generally consider any job of less than 35 hours per week to be part-time. Yet, we do not believe that it would be appropriate to require a minimum number of hours for part-time work secured through the VR program.

Although we think that instances in which eligible individuals work only a handful of hours per week are limited, we do not want to discourage State units from serving potential part-time workers who, with the State unit's support, may increase their hours or even become employed full-time at a later date.

Changes: None.

• *Fair Hearing Board*

Comments: One commenter suggested modifying the proposed regulations to require a State's fair hearing board to include at least one individual with a disability.

Discussion: By defining ''fair hearing board'' in the proposed regulations, we intended to clarify past confusion about the scope of the fair hearing board exception to the due process requirements under section 102(c)(6)(A) of the Act. In particular, the proposed regulations specified in § 361.57(j) that for a State's pre-1985 fair hearing board to qualify under the exception, that board must be comprised of a group of persons that acts collectively when issuing final decisions to resolve disputes concerning the provision of VR services to applicants or eligible individuals.

These proposed requirements were intended to address instances in which some States had misinterpreted the exception as enabling a single administrative law judge or other official of a State office of hearing examiners to carry out hearings under § 361.57 without following the procedural requirements in that section. In response, we modeled the proposed definition after the actual State fair hearing board that served as the catalyst for the statutory exception in the 1986 Amendments to the Rehabilitation Act. Because those few States with hearing boards that qualify under the exception have long followed this authorized State process for resolving individual disputes under the VR program, we do not believe it is necessary or prudent to impose special membership requirements on those boards through regulations. We do, however, encourage the few fair hearing board States to consider qualified individuals with disabilities when vacancies on these boards arise.

Changes: None.

• *Maintenance*

Comments: Several commenters objected to the use of examples following this definition, stating that the information included in the examples should be placed in sub-regulatory guidance. Other commenters supported the use of the examples in the proposed regulations.

In addition, one commenter asked that we clarify the types of ''enrichment activities'' that would fall under the fourth example to the proposed definition, while another asked that we eliminate that example altogether.

Discussion: As we have stated in preambles to prior versions of the VR program regulations, we believe that the limited use of examples following the regulatory definition of ''maintenance'' is helpful in understanding the types of services that maintenance may include. The examples are purely illustrative and are not meant to limit or exclude other types of services that could be considered maintenance.

The fourth example to both the proposed and previous regulatory definition stated that maintenance can include the costs of an individual's ''participation in enrichment activities'' related to the individual's training. This example was added to the previous regulations in 1997 in response to the requests of public commenters who noted that some DSUs establish limits in

maintenance budgets that preclude individuals from participating in enrichment activities (*e.g.,* student trips, visits to museums, supplemental lectures, etc.) that are often important components of a student's training program. The ''enrichment'' example was intended to encourage DSUs to factor in these extra costs when developing an individualized plan for employment (IPE) for a student so that the individual can take advantage of supplemental enrichment activities as appropriate.

Changes: None.

• *Personal assistance services*

Comments: One commenter questioned the point at which a State unit can provide personal assistance services to an individual with a disability.

Discussion: The proposed definition, which was the same as that in the previous regulations, specified that ''personal assistance services'' (*i.e.,* services designed to assist persons with disabilities in daily living activities) must be necessary to the achievement of an employment outcome and may be provided only while the individual is receiving other VR services. As long as those conditions are met, personal assistance services, as defined in § 361.5(b)(39) of the regulations, can be made available at any stage in the VR process, including during the assessment for determining the individual's eligibility and priority for VR services.

Changes: None.

• *Physical and mental restoration services*

Comments: One commenter asked us to require that all services listed in the proposed definition of ''physical and mental restoration services'' be provided by personnel who are qualified in accordance with applicable State licensure laws. Another commenter asked that the definition in the final regulations specifically refer to ''assistive listening and alerting devices.'' Finally, one commenter asked that the regulations prohibit a State unit from providing physical or mental restoration services if other resources are available.

Discussion: The proposed regulations followed the scope of physical and mental restoration services specified in section 103(a)(6) of the Act, and we do not believe that it would be appropriate to apply, solely through regulations, State licensure requirements on the provision of additional restoration services. However, a State may, if it has not done so already, choose to establish licensure or other qualified personnel requirements for providers of physical and mental restoration services. Those States would need to address those requirements in its written policies on the nature and scope of services developed under § 361.50.

We do not believe it is necessary to list additional restoration services in the final regulatory definition. Additional medical or medically related services that an individual needs in order to achieve an employment outcome are authorized under § 361.5(b)(40)(xvi).

Similarly, the commenter's concerns about using other resources before expending VR funds in support of restoration services is fully addressed elsewhere in the regulations. Section 361.48(e) of both the proposed and final regulations, under which restoration services are authorized, specifies that those services can be made available only to the extent that financial support for the services is not available from other sources. The application of the more general comparable services and benefit requirements in § 361.53 produces the same result.

Changes: None.

• *Physical or mental impairment*

Comments: Several commenters questioned the proposed revision to the previous regulatory definition of ''physical or mental impairment'' to mirror the definition used in the regulations implementing section 504 of the Act (section 504) (34 CFR 104.3) and the Americans with Disabilities Act (ADA). The commenters stated that using the ADA or section 504 definition may create confusion, conflict with existing definitions in State law, and weaken the eligibility criteria of the VR program. Several other commenters supported the revised definition, stating that consistency across Federal disability laws leads to more effective administration of the VR and other programs.

Discussion: As noted in the preamble discussion of the changes to the definition of ''physical or mental impairment'' proposed in the NPRM (65 FR 10622), the revised definition does not impact on the employment-related eligibility criteria under the VR program. The changes to the definition in the previous regulations were proposed in an effort to make the VR program regulations more consistent with other Federal disability laws that define ''physical or mental impairment.'' We agree with those commenters who indicated that consistency with the definition used in the ADA and section 504 regulations increases efficiency and actually lessens confusion by eliminating the need to duplicate efforts in assessing whether an individual has an impairment. Again, the changes address only whether an impairment exists; eligibility for VR services remains dependent on whether an individual also satisfies the eligibility criteria that are focused on employment (*i.e.,* the impairment results in a substantial impediment to employment and the other criteria in § 361.42(a)).

Also, we do not believe that the proposed definition restricted the scope of physical or mental impairments that satisfied the previous regulatory definition or that the proposed definition conflicted with definitions of the same term in State law. If such a conflict exists, we ask that the State seek technical assistance from RSA in modifying its requirements in order to ensure that the State does not employ additional or more restrictive eligibility criteria for individuals to receive VR services as compared to the criteria specified in these final regulations.

Changes: None.

• *Post-employment services*

Comments: One commenter requested that the proposed regulations be modified to eliminate the availability of post-employment services for purposes of ''advancing'' in employment.

Discussion: Although the term ''post-employment services'' is not defined in the Act, section 103(a)(18) of the Act specifically authorizes post-employment services that are necessary to assist an individual with a disability to retain, regain, or *advance* in employment. The proposed definition, which followed the definition in the previous regulations, supported the use of post-employment services to enable persons to ''advance'' in employment. As in the previous regulations, the note that followed the proposed definition offered additional guidance regarding the provision of post-employment services.

Changes: None.

• *Qualified and impartial mediator*

Comments: We received many comments on the proposed definition of ''qualified and impartial mediator.'' First, several commenters stated that requiring mediators to be ''trained in effective mediation techniques consistent with any State-approved or -recognized certification, licensing, registration, or other requirements* * *'' establishes too restrictive a standard for mediators. Others sought additional guidance on how to implement this requirement if the State has not established applicable certification or other requirements. In addition, several commenters asked whether the prohibition on public agency employees serving as mediators under the proposed definition applies to those from a State Office of Dispute Resolution who conduct mediations across multiple State programs.

Aside from those issues, some commenters asked that we clarify whether a qualified and impartial mediator could also serve as an impartial hearing officer in resolving individual disputes that arise under the VR program. Other commenters voiced support for the proposed definition and for the emphasis given to mediation in the proposed regulations.

Discussion: In establishing the general guidelines that govern mediations, section 102(c)(4) of the Act requires that mediations be conducted by a ''qualified and impartial mediator who is trained in effective mediation techniques.'' We defined ''qualified and impartial mediator'' in the proposed regulations as a means of providing guidance to the States in identifying or training available mediators.

As indicated previously, we are aware that many States already use mediation to resolve disputes arising under other authorities (*e.g.,* the Individuals with Disabilities Education Act (IDEA) or family law statutes) and that education, experience, or other qualification standards for mediators may vary from State to State. Thus, the proposed requirement that mediators under the VR program be trained consistent with applicable certification or other requirements was intended to ensure that mediators of disputes arising under the VR program are sufficiently qualified and that the State unit is able to use its State's existing pool of qualified mediators.

We fully agree that mediators in a State Office of Dispute Resolution or other similar office should be able to conduct mediations under the VR program, and we have modified the proposed definition to accommodate that situation. This change is analogous to the provision that enables administrative law judges and hearing examiners in the State to

serve as impartial hearing officers even though those individuals are public employees (see the definition of ''impartial hearing officer'' in § 361.5(b)(25)).

In addition, although we believe that it is not generally the case, if there are no recognized credentialing or qualification standards for mediators in the State, then the Act and these final regulations require only that the State unit ensure that its mediators are trained in effective mediation techniques and meet the other components of the definition in § 361.5(b)(43).

It is critical that qualified and impartial mediators be neutral in facilitating the resolution of disputes regarding the provision of services to applicants or eligible individuals under the VR program. Therefore, we modeled the impartiality requirements in the proposed definition of ''qualified and impartial mediator'' after similar requirements in the previous definition of ''impartial hearing officer.'' Nevertheless, we realize that many States, particularly rural States with relatively small populations, have difficulty maintaining an appropriate pool of individuals to serve as hearing officers. It is not unusual in these or other States for hearing officers also to be trained as mediators, and we interpret the Act as allowing individuals to serve as both mediators and hearing officers under the VR program, provided they meet the applicable qualifications for each position. However, we also interpret the statutory requirement that mediators and hearing officers be impartial (see section 102(c)(4)(B)(iii) of the Act in reference to mediators and sections 7(16) and 102(c)(5) of the Act in reference to hearing officers) to preclude the same individual from serving as both mediator and hearing officer in the same case.

Changes: We have revised the definition of ''qualified and impartial mediator'' to allow employees of a State office of mediators or similar office to serve as qualified and impartial mediators under the VR program.

• *Substantial impediment to employment*

Comments: One commenter suggested that ''communication'' be listed among the attendant factors in the definition that could indicate the existence of a ''substantial impediment to employment,'' since communication plays a critical role in the individual's ability to function in the workplace. Other commenters requested that the proposed definition be revised to include examples of how the attendant medical factors are applied if medical measures are taken and result in mitigating functional limitations.

Discussion: We agree that communication competence is crucial to success in the workplace. Although the proposed and previous regulations stated explicitly that a ''substantial impediment to employment'' could be measured in terms of ''other factors,'' we agree that ''communication'' should be added to the specific factors listed in the final regulatory term.

We suspect that those commenters who suggested that the final regulations explain how attendant medical factors indicating the existence of a ''substantial impediment to employment'' are assessed if medical measures that mitigate functional limitations (also referred to as ''mitigating measures'') are taken are questioning the application to the VR program of recent Supreme Court case law interpreting the ADA. The relevant cases require that any mitigating measures (*e.g.,* medication) that an individual is using to lessen the effects of that person's impairment be taken into account in determining whether the individual has a disability under the ADA (*i.e.,* an impairment that substantially limits one or more major life activities).

It is not clear, however, that the Court's decisions apply to the VR program eligibility criterion that an individual's impairment constitutes a substantial impediment to employment, since that provision and ADA language in question are not identical. Moreover, the purpose of the ADA, which is a civil rights statute, differs from that of the VR program, which provides Federal funding to assist individuals with disabilities enter into employment. We are not aware of any instances in which States, based on these cases, have altered their processes for assessing an individual's eligibility for the VR program; nor would we encourage them to do so.

Changes: None.

• *Supported employment*

Comments: Some commenters requested clarification of what it means to be ''working toward competitive employment'' for purposes of meeting the definition of ''supported employment'' in the proposed regulations. These commenters also asked whether the fact that an individual in supported employment is working toward competitive employment affects the 18-month limit on supported employment services provided by the State unit.

Discussion: The 1998 Amendments expanded the prior statutory definition of ''supported employment'' (''competitive work in an integrated setting with ongoing supports'') to also include ''employment in integrated settings in which individuals are working toward competitive work'' in order to cover persons who are working in supported employment settings but are making less than the minimum wage. ''Competitive employment,'' which we have long viewed as synonymous with the term ''competitive work'' used in the supported employment definition, generally refers to employment that is performed in an integrated setting for which the individual is compensated at or above the minimum wage. Thus, as long as an individual receiving ongoing support services while working in an integrated setting is also progressing or moving toward the minimum wage level, then the individual's job is considered ''supported employment.'' We note, however, that an individual in supported employment working toward competitive employment would not be considered to have achieved a ''competitive employment'' outcome until the individual is earning at least the minimum wage consistent with the definition of ''competitive employment'' in § 361.5(b)(11).

We also note that the change to the statutory definition of ''supported employment'' does not affect the 18-month period for which the DSU can provide supported employment services. Once that 18 months has passed (and unless the special circumstances warrant an extension), ongoing services, if needed, must be provided by a provider of extended services (see § 361.5(b)(20) of the final regulations) regardless of whether the individual has yet to receive at least the minimum wage.

Changes: None.

• *Transportation*

Comments: Five commenters asked that the examples following the proposed definition of ''transportation'' be deleted. Another commenter supported specifically the example stating that the modification of a vehicle is a rehabilitation technology, rather than a transportation, service. Another commenter asked that we include in the final regulations specific authority for DSUs to pay for the repair and maintenance of vehicles.

Discussion: We have found that the examples following the previous regulatory definition of ''transportation,'' which were largely the same as those included in the proposed regulations, were helpful to State agency personnel, individuals with disabilities, and others in clarifying the scope of transportation services authorized under the VR program. As we have always maintained, these examples are purely illustrative and are not meant to provide a comprehensive set of allowable transportation services.

Thus, because other authorized ''transportation'' services exist, and should be considered in light of the needs of the individual, we do not believe it is necessary to specify additional transportation costs in the regulations. We do note, however, that the second example to the proposed definition identifies the ''purchase and repair'' of vehicles as an example of an authorized transportation expense. We view the vehicle ''repair and maintenance'' expense identified by the commenter as covered by that example and, therefore, authorized. We would also instruct each DSU to include in its written policies governing the nature and scope of services under § 361.50(a) any additional transportation expenses that the DSU generally provides.

Changes: None.

Section 361.10 Submission, Approval, and Disapproval of the State Plan

Comments: Commenters expressed concern that the proposed regulations would require the State unit to hold public meetings throughout the State prior to adopting any new substantive policy or procedure concerning the provision of VR services or substantively amending an existing service-related policy or procedure. Consequently, many commenters viewed the provision as both burdensome and costly. Some of these commenters suggested that the State unit be permitted to adopt new policies and procedures (and make any amendments to existing policies) initially in accordance with applicable State laws and later invite public comment and input on those additions or changes during the State's public meetings on the State plan. Other commenters sought clarification of what constituted a ''substantive'' policy, procedure, or amendment and asked who would determine whether a policy is ''substantive.''

Additional comments on this section of the proposed regulations reflected concerns about the different dates that govern the submission of the VR State plan. These commenters recommended that all States be required to submit updates and revisions to their State plans by the same date.

Discussion: Section 101(a)(16)(A) of the Act requires the State to hold public meetings prior to adopting policies or procedures governing the provision of services under the State plan. This requirement is essentially the same as the statutory requirements concerning public meetings that preceded the 1998 Amendments. Thus, we interpret the requirement in section 101(a)(16)(A) of the Act in the same manner as we have historically, i.e., the public is to be given the opportunity to comment on the State plan prior to the State unit adopting substantive policies and procedures (and any amendments thereto) governing the provision of vocational rehabilitation services under the plan. Typically, a State unit fulfills this requirement by taking comment on new policies during public meetings on State plan revisions and updates. Regardless of the timing of the State's public meetings, however, section 101(a)(16)(A) clearly requires that these meetings for receiving public input be held *prior* to States adopting new or revised policies affecting the provision of VR services. Implementing new policies in advance of the public meetings is not permitted.

We also note that section 101(a)(16)(B) of the Act and § 361.21 of both the previous and the proposed regulations required the designated State agency to consult with certain groups on matters of general policy arising in the administration of the State plan. In addition, a State unit that has a State Rehabilitation Council (Council), in accordance with section 101(a)(21)(A)(ii)(II) of the Act and § 361.16(a) of the regulations (again, both previous and proposed), must consult with the Council regarding the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services. Each of the public comment or consultation requirements specified in the proposed regulations, and the resulting burden, was imposed by the Act, and each was intended to ensure that the State unit accounts for the diverse needs of its State's disability population before modifying its service-provision practices.

Nonetheless, in an effort to reduce the burden on the States, we incorporated into both the proposed and final regulations the term ''substantive'' to clarify that States need not hold public meetings on policy or procedural changes that are merely technical or do not affect the provision of VR services in any substantive manner. Longstanding RSA guidance (see PD–90–08 and PAC–90–05) provides additional information on the scope of this requirement. We note that the determination of whether a specific policy or procedure is sufficiently ''substantive'' to warrant public input is made by the State unit. Yet, we strongly urge State units to consult with their Councils in assessing whether proposed policy changes are ''substantive'' or in developing evaluative criteria for the State unit to use in making that assessment.

Section 101(a)(1)(A) of the Act requires the State to submit its State plan for the VR program on the same date that its submits its plan under section 112 of WIA. In addition, section 501 of WIA authorizes the State to submit a State unified plan in place of both a WIA section 112 plan and separate State plans for those WIA partner programs, including the VR program. We believe that in order to foster collaboration and cooperation between the VR program and other components of the One-Stop service delivery system, a State plan for the VR program that is not included in the State's unified plan should be submitted on the same date as that unified plan. That view is reflected in § 361.10(f)(3) of the proposed and the final regulations.

Changes: None

Section 361.16 Establishment of an Independent Commission or a State Rehabilitation Council

Comments: One commenter expressed concern that the proposed regulations failed to require the State unit to provide documents to the Council in alternative formats and in a timely manner. As a result, this commenter stated that Council members who are blind will not have sufficient opportunity to review and respond to information provided by the State unit.

Discussion: This section of the proposed regulations made only technical changes to the previous regulations in order to conform to statutory changes in the 1998 Amendments to the Act. We do not believe that a regulatory change to this provision is warranted based on the comment received. Providing information in appropriate formats to Council members with disabilities falls under the State unit's general responsibility under section 504(a) of the Act to not exclude, on the basis of disability, any individual from participating in programs or activities receiving Federal financial assistance. Moreover, Federal regulations at 34 CFR 104.4(b)(1)(vi) specify that a recipient's responsibility under section 504 of the Act extends to the participation of individuals with disabilities on advisory boards. Thus, as in many other instances in which it distributes written materials, the State unit must ensure that Council members who are blind or otherwise disabled are able to review information that the State unit transmits to the Council, as well as participate generally in Council activities.

Changes: None.

Section 361.17 Requirements for a State Rehabilitation Council

Comments: We received several comments regarding the composition requirements of the Council. One commenter requested clarification as to whether an entity that is a required member of the Council could select someone other than a member of that entity as its representative to the Council.

Several commenters suggested that the regulations specify that the ''nonvoting'' membership status of Council members who are employees of the designated State agency does not apply to the representative of the CAP. This change, the commenters assert, is necessary since the CAPs in some States are components of the designated State agency that administers the VR program. The commenters raised questions regarding the required Council membership of a representative of the directors of the American Indian VR services projects authorized under section 121 of the Act. Some of these commenters indicated that the Council should include members from each of the section 121 projects and that a single representative of all the directors could not adequately represent all American Indian VR service projects in the State. Other commenters described situations in which a section 121 project is ''headquartered'' in one State but has a service area that extends across State lines into another State and asked whether that project must be represented on the Council of each State that it serves.

One commenter questioned whether a Council member could be appointed to the State Workforce Investment Board (SWIB) under section 111 of WIA in order to satisfy the requirement in the proposed regulations that the Council include a member of the SWIB. This commenter stated that otherwise this requirement would be difficult to meet given the limited pool of persons interested in serving on the Council as evidenced by the difficulty Councils experience in filling vacancies as they occur.

Finally, we received several comments indicating that the proposed regulations failed to incorporate the new statutory requirement that the majority of members to a Council for a State agency for the blind must be individuals who are blind.

Discussion: Section 105(b) of the Act contains the membership requirements for the Council to ensure that various constituencies of the VR program have a voice in the conduct of the VR program in the State. Section 105(b)(3) requires that the Governor, after soliciting recommendations from organizations representing individuals with disabilities, appoint members to the Council in accordance with the membership criteria in section 105(b)(1) of the Act.

The question as to whether an entity can be represented on the Council by someone other than one of its own members or employees has been raised in the past. With few exceptions, the Council membership requirements in section 105(b)(1) of the Act state that a ''representative'' of an identified entity must serve on the Council. The Act does not require that the ''representative'' be an employee or member of the required entity. Thus, we interpret section 105(b) of the Act and § 361.17(b) of the regulations to allow an entity that is required to be represented on the Council to be represented by someone who is not an employee or member of that organization. Recommendations of appropriate representatives can be made by the organizations themselves, although final appointment authority rests with the Governor. Moreover, we would expect that such a Council member would be closely affiliated with and knowledgeable about the

organization or entity whose interests the individual is charged with representing.

We agree that the non-voting status of State agency or State unit employees under § 361.17(b)(2) of the proposed regulations does not apply to Council members representing the State's CAP pursuant to proposed § 361.17(b)(1)(iii).

Questions regarding Council representation of the section 121 project directors have been raised frequently since the passage of the 1998 Amendments to the Act. Moreover, the commenters' concerns as to whether one project director can sufficiently represent the interests of several independent projects serving different populations of American Indians have generated the most debate. Yet, the requirement in proposed § 361.17(b)(1)(ix) enabling one person to represent all section 121 project directors in the State came directly from section 105(b)(1)(ix) of the Act. This requirement appears to reflect an intent of Congress to minimize the burden on States and to ensure that the size of the Councils not be so large as to become unmanageable. Nevertheless, we urge the directors of section 121 projects in the same State to collaborate more extensively than they may have in the past and to work to ensure that their collective views are represented on the Council. We also note that neither the Act nor regulations prohibit the Governor from appointing to the Council more than one representative of the State's section 121 projects (or other groups) if warranted as long as the remaining composition requirements in the Act and regulations (*e.g.,* the requirement that a majority of Council members be individuals with disabilities) are met. As for section 121 projects that are ''headquartered'' in one State but serve those in another State, it is our understanding that to the extent this occurs, affected projects primarily serve American Indians with disabilities in the State in which the project is located and serve only a relatively small area in a neighboring State. We do not believe that the Council must include a representative of a section 121 project serving American Indians with disabilities in the State if that project is primarily located, and serves those, in another State. In that instance, § 361.17(b)(1)(ix) of the final regulations would apply only to the State in which the project is located. The Governor, however, always has the discretion to appoint to the Council a representative of an out-of-State project that also serves American Indians with disabilities in the Governor's State.

Since the time that the Council requirements came into effect, questions regarding whether the same individual can fulfill more than one role on the Council have been raised often. In response, we consistently have taken the position that an individual may represent only one entity on the Council even though that same individual may qualify under more than one of the composition requirements. We recognize that some States have difficulty maintaining a sufficient pool of qualified individuals to serve on statewide Councils and that the 1998 Amendments to the Act added three new required members to the Council. Nevertheless, section 105(b) of the Act establishes a minimum number of members for the Council, each of whom represents a specific component of the disability community. Because each member represents a different interest, sometimes one that is divergent from that of other members, we maintain that each organizational requirement must be met separately. Thus, a Council member who serves on the SWIB cannot represent both the SWIB and another organization on the Council.

We agree with the commenters who pointed out the discrepancy between the Act and the regulations regarding the membership requirements that apply to a Council for a separate State agency that administers the VR program for individuals who are blind. These commenters correctly noted that the proposed regulations did not specify, as does the statute, that the majority of members of these Councils must be individuals who are blind. This omission was inadvertent, and we agree that it needs to be corrected in the final regulations.

Changes: We have revised § 361.17(b)(2) of the proposed regulations to clarify that the CAP representative is, in all instances, a voting member of the Council. In addition, we have modified § 361.17(c) to reflect the requirement in section 105(b)(4)(B) of the Act that a majority of the members on a Council for a separate State agency for the blind must be individuals who are blind.

Section 361.18(c) Comprehensive System of Personnel Development—Personnel Standards

Comments: Some commenters expressed concern with the indication in the preamble to the NPRM that statewide ''multi-tiered'' personnel standards could be used by the State unit in establishing standards for its rehabilitation personnel. Other commenters suggested that the proposed regulations be revised to require that all rehabilitation counselors obtain a Master's degree consistent with the national certification standards for rehabilitation counselors.

In addition, a number of commenters sought waiver or ''grandfather'' provisions in the final regulations that would exempt current rehabilitation counselors and other professionals from the State's personnel standards. On a related point, some commenters asked whether currently employed rehabilitation counselors who do not meet the State unit's personnel standards can continue to serve as counselors while training to meet the standard.

Additionally, several commenters viewed the requirement in the proposed regulations that the State unit develop a written plan for retraining, recruiting, and hiring staff to meet applicable personnel standards as unduly burdensome. Other commenters supported this requirement and suggested that the written plan be developed with input from the Council.

Finally, several commenters suggested that RSA define the professional and paraprofessional disciplines for which a State unit must establish personnel standards, while others asked what standards the State unit should apply to professions or paraprofessions for which no certification or similar criteria exist.

Discussion: The preamble discussion in the NPRM concerning the ability of State units to use the same multi-tiered personnel standards as those applied by other State agencies to its rehabilitation staff was intended to clarify the level of flexibility the proposed regulations give State units in ensuring that its personnel are qualified within the meaning of the Act. Typically, multi-tiered certification systems require rehabilitation counselors to reach a certain academic level depending on the amount of experience the individual has had in that field. As we indicated in the NPRM (65 FR 10623), because the Act clearly allows State units to base their personnel standards on applicable State standards, it is permissible for a DSU to apply the multi-tiered counselor certification criteria of, for example, the State Workers' Compensation program to DSU counselors if the counselors of both agencies perform similar functions. The Act gives State units that discretion, and that same discretion also prohibits requiring by Federal regulations that all State unit counselors obtain a Master's degree consistent with the national rehabilitation counselor certification standards as sought by some commenters. Nonetheless, as we stressed in the preamble to the NPRM, we encourage each State unit to ensure that its personnel standards promote quality among its counselors and other staff, and we caution State units not to employ minimally qualified individuals by routinely substituting ''equivalent experience'' for higher-level degree criteria.

The Act does not authorize ''grandfathering'' or the waiving of personnel standards for current staff. Rather, section 101(a)(7)(B)(ii) of the Act compels the State unit, if its current personnel does not meet the ''highest requirements in the State'' (i.e., the highest entry-level academic degree needed for the applicable State or national certification, licensing, or registration requirements—*see* § 361.18(b)(2)(i) of the final regulations), to retrain existing staff, as well as recruit new employees, to meet the personnel standards applicable to each profession.

The written plan under § 361.18(c)(ii) that describes the retraining, recruitment, and other efforts of a State unit whose current personnel standards do not conform to the highest requirements in the State is based on the requirement in the Act that directs the State to provide this information in its State plan. More importantly, however, we believe that the limited components of the written plan (*e.g.,* retraining, recruiting, and hiring steps, timelines for those efforts, procedures for evaluating progress, etc.) are essential to ensuring that the State unit employs a fully qualified staff that is best able to meet the diverse needs of individuals with disabilities. Any burden associated with developing the plan, we believe, is caused by the intent of the Act. The narrow scope of required plan components is expected to provide States with a helpful framework for fulfilling their personnel development responsibilities and improving their service delivery capacity.

As we have stated in the past, we recognize the many constraints faced by State agencies in securing a fully qualified staff, not the least of which is the time that it takes to

retrain existing staff. Thus, current counselors who, pursuant to the State unit's plan under § 361.18(c)(1)(ii), are working toward applicable qualification standards can continue to perform their counselor functions. The Act establishes an expectation that rehabilitation counselors and other staff will become qualified consistent with the highest applicable personnel standards in the State. Accordingly, the requirements in the regulations are intended to ensure that the State unit can continue to serve persons with disabilities while it progresses as rapidly as possible toward the point at which all of its staff, both current and new hires, meet the highest qualifications that the State applies to their professions.

We also emphasize the importance of the role of the Council in the area of personnel development. Section 361.18(a) of the final regulations requires that the Council, if it exists, have an opportunity to review and comment on the development of all plans, policies, and procedures necessary to meet the State unit's obligations under the comprehensive system of personnel development (CSPD). As with each of the Council's functions, we view the Council's input into the development of the State unit's personnel policies, procedures, and standards as vital toward ensuring that those efforts result in a State unit workforce that is fully capable of meeting the training and employment needs of persons with disabilities in the State.

We decline to define the professional and paraprofessional disciplines for which a State unit must establish personnel standards, as some commenters requested. While a State unit must apply to its staff the highest personnel requirements that exist in the State and that apply to each profession, determining the types of professionals and paraprofessionals needed to effectively administer its VR program and establishing the scope of functions for each job are the responsibility of the State unit. It is the State unit that can best judge its staffing needs and establish staffing arrangements that meet the particular needs of that agency's service recipients. In the preamble to the NPRM, however, we did provide some guidance on the categories of professional and paraprofessional disciplines most closely associated with the VR program for which the State unit should give priority in developing both specific job criteria and appropriate qualification standards. Those professions include rehabilitation counselors, vocational evaluators, job coaches for individuals in supported employment or transitional employment, job development and job placement specialists, and personnel who provide medical or psychological services to individuals with disabilities.

As a final matter, we note that if there are no State or national licensing, certification, or registration requirements for a given profession established by the State unit, then both the Act and the final regulations require the State to use other ''comparable requirements'' (such as State personnel requirements) for that profession or discipline. The scope of these ''comparable requirements'' (*e.g.,* degree criteria, work experience, etc.) that are applied to jobs for which no licensing or similar requirements exist is left to the reasonable judgement of the State unit.

Changes: None.

Section 361.22 Coordination With Education Officials

Comments: Some commenters opposed the requirement in the proposed regulations that the State unit complete the IPE for students eligible for VR services before they leave school. These commenters stated, for example, that the proposed requirement would be impracticable for State units to fulfill, would lead to rashly formulated IPEs, or would exceed applicable statutory requirements. Other commenters supported requiring completion of the IPE before the student leaves school and viewed the requirement in the proposed regulations as essential if transition planning is to prove effective.

In addition, one commenter requested that the proposed regulations be revised to require that the formal interagency agreement between the State unit and educational agencies specify both the manner and the time in which State unit staff will participate in transition planning for students with disabilities. Another commenter suggested that each agreement include provisions for resolving disputes regarding the agencies' financial responsibilities in paying for transition services and for enabling students to retain assistive technology provided by schools that the student needs following transition.

Discussion: The proposed requirement that State units provide for the development and completion of the IPE before students who are eligible for VR services leave the school setting was carried over from the previous regulations. As we have indicated from the time the previous regulations were published in 1997, we believe that requiring IPE completion before eligible students with disabilities leave school is entirely consistent with the emphasis on transition in both the Act and its legislative history (see Senate Report 102–357). That emphasis was only heightened by the requirement in the 1998 Amendments that State units increase their participation in transition planning and related activities. More importantly, requiring the IPE to be in place before the student exits school is essential toward ensuring a smooth transition process, one in which students do not suffer unnecessary delays in services and can continue the progress toward employment that they began making while in school. In fact, it is in support of that effort that we have made two clarifications in these final regulations: (1) that designated State agencies should be involved in the transition planning process as early as possible; and (2) that the IPE must be ''approved'' (i.e., agreed to and signed by the individual and the DSU) prior to the student leaving school, as opposed to simply ''completed'' as stated in the proposed regulations.

We have determined it necessary to clarify in the final regulations steps that the designated State agency must take, at a minimum, when conducting the statutorily required outreach to students with disabilities. It is essential for the designated State agency to inform these students of the purpose of the VR program, the application procedures, the eligibility requirements, and the potential scope of services that may be available. This information should be provided as early as possible during the transition planning process in order to enable students with disabilities to make an informed choice on whether to apply for VR services while still in school.

We are not aware that State units have had great difficulty in completing IPEs for students. As before, the final regulations require that if the State is operating under an order of selection, only the IPEs of those students that the State unit can serve under the order must be developed before the student leaves school. Moreover, we believe that State units will be even better prepared to fulfill this requirement as they become more active in transition planning for special education and other students with disabilities (*e.g.,* those students receiving services pursuant to section 504 of the Act or the IDEA) and in generally coordinating with school officials.

We believe, as did some commenters, that the extent to which the State unit should be involved in transition planning for individual students with disabilities should be based on the needs of the student. However, we also believe that it is important for the designated State agency to participate actively throughout the transition planning process, not just when the student is nearing graduation. Early involvement by the designated State agency can be very beneficial in terms of assisting the student to make the transition from school to employment. For this reason, these final regulations clarify that the designated State agency should become involved in the transition planning process as early as possible. The designated State agency and the State education agency should negotiate more specific provisions, as part of their interagency agreement, to ensure that the students' needs are met in a timely manner. Congress clearly envisioned that that approach be followed in developing the terms of the State's interagency agreement (*see e.g.,* Conference Report 105–659, page 354). Also left to local discretion is the scope of components, other than those limited components specified in the Act and clarified previously, that should be included in the agreement. Some of the additional agreement items identified by commenters may be considered in that regard.

However, in response to the commenter's suggestion that each agreement should include provisions for resolving disputes in paying for transition services, we note that State units are authorized to pay for only transition services for students who have been determined eligible under the VR program and who have an approved IPE. Thus, as long as those criteria have been met, and the IPE specifies those transition services necessary for the successful implementation of the IPE, we anticipate that disputes of the type raised by the commenter will not be prevalent.

Changes: We have amended § 361.22(a) of the proposed regulations to clarify that the

IPE for a student determined to be eligible for vocational rehabilitation services must be developed and approved before the student leaves the school setting and as early as possible during the transition planning process. In addition, we have amended § 361.22(b)(4) of the proposed regulations to clarify information that must be provided by the designated State agency, at a minimum, when conducting outreach to students with disabilities, and we have clarified that outreach should begin as early as possible during the transition planning process.

Section 361.23 Requirements Related to the Statewide Workforce Investment System

Comments: We received a great many comments on this section of the proposed regulations that raise important policy issues and questions of interpretation that relate not only to the proposed regulations, but also to WIA and the regulations in 20 CFR part 662.

Most commenters requested more detail in the final regulations that elaborates on how the VR program is to fulfill the requirements in proposed § 361.23(a). For example, several commenters asked that we specify in the final regulations those core services under WIA that the VR program is expected to provide in accordance with proposed § 361.23(a)(1), while others asked that we explain which activities related to ''creating and maintaining'' the One-Stop system under § 361.23(a)(2) are allowable under the VR program.

Some of the commenters on this proposed section also urged us to identify in the final regulations certain restrictions in the Act (*e.g.,* the order of selection requirements under section 101(a)(5)) that may affect the extent to which State units can contribute to the cost of One-Stop system services or other One-Stop system activities. Of critical importance to the final regulations, most commenters stressed, is the need to address the responsibility of all WIA partner programs to serve individuals with disabilities.

Other commenters asked that we add to the One-Stop system responsibilities listed in proposed § 361.23(a) other items that are necessary for DSUs to effectively participate with other partner programs of the One-Stop system, including methods for allocating costs between programs, methods for ensuring proportionality between the partner's financial participation in the One-Stop system and the resulting benefits it receives, and methods for resolving disputes regarding funding that may arise between partner programs.

Several other commenters identified additional components that they suggested be included in the required cooperative agreements between the designated State agency and those entities administering other One-Stop system partner programs. In addition, some commenters asked whether the requirement that State units, through the cooperative agreements, promote participation by individuals with disabilities in the One-Stop system also requires that State units pay the cost of reasonable accommodations at the One-Stop system center or other locations.

Discussion: As we discussed at some length in the preamble to the NPRM (65 FR 10620, 10621, and 10624), we restated in § 361.23(a) of the proposed regulations the responsibilities of One-Stop system partners, including the VR program, that are described in the regulations implementing Title I of WIA (20 CFR part 662). That effort was intended solely to inform State units of the One-Stop system responsibilities to which they are subject under WIA. We also asked that commenters raise specific interpretive or policy questions related to these One-Stop system responsibilities so that we may address, through appropriate guidance, those most pressing matters that DSUs face as they participate in the One-Stop service delivery system. Most of the comments received on this section of the proposed regulations focus on those types of questions.

Although we anticipate addressing in future guidance materials, and in cooperation with other appropriate Federal agencies, the workforce policy questions posed by the commenters, we do note that many of the issues raised are impacted by a number of key One-Stop system principles embedded in WIA, its implementing regulations, and these final regulations.

First, participation by DSUs in the One-Stop system must be performed in a manner that is consistent with the legal requirements applicable to the VR program (*i.e.,* the Act and these final regulations). Thus, the DSUs' participation in the cost of core services or any other One-Stop system activities cannot, for example, result in expenditures for services to individuals who do not meet the priority for services in the order of selection under which a DSU is currently operating (although the DSU can participate, as appropriate, in the cost of intake and other expenditures that would normally be borne by the DSU prior to determining eligibility and the individual's priority category under the State's order of selection; see the discussion in the following section of this analysis of comments for further information on the relationship between order of selection requirements and participation in One-Stop system activities.) The fact that DSUs must comply with the Act and the VR program regulations in the course of participating in the One-Stop system, we believe, was made clear in the proposed regulations, as it is in Title I of WIA and the regulations implementing that title.

Compliance with the ADA and section 504 of the Act represents another key issue that directly impacts the One-Stop system. In sum, those laws obligate One-Stop system centers and their partners to make their services accessible to individuals with disabilities. Thus, we, along with the Department of Labor and many of the commenters, have emphasized that the legal responsibility for assisting persons with disabilities does not fall to the DSU alone. Consequently, individuals with disabilities are likely to receive services through a variety of arrangements (*e.g.,* through the One-Stop system center, through a combination of core services at the One-Stop system center and specialized VR services from the DSU, etc.) depending on the configuration and structure of the local One-Stop system. Nonetheless, because the universal access principles reflected in the ADA and section 504 relate to the responsibilities of non-DSU entities and because these final regulations establish requirements for designated State agencies and designated State units administering VR programs, we do not believe this section should be revised to address the application of the ADA and section 504 to the One-Stop system generally. Those responsibilities are fully addressed in WIA, particularly in section 188 of that act and its implementing regulations, 29 CFR part 37, which establish the civil rights protections that must be provided by the State and local workforce development systems.

Many of the commenters also raised important issues related to collaboration between the DSU and its One-Stop system partners. In response, we note that those issues can, and should, be addressed through the development of the memorandum of understanding (MOU) governing the operation of the One-Stop system referred to in § 361.23(a)(3) or through the cooperative agreements developed between these same parties under § 361.23(b). In fact, some of the suggested items, including the methods for funding One-Stop system costs among partner programs, are addressed in the regulations implementing title I of WIA (see MOU requirements in 20 CFR 662.300). Rather than specifying additional MOU or cooperative agreement components in these final regulations, we would urge DSUs and their One-Stop system partners to determine which components, other than those specified in the MOU requirements in 20 CFR part 662 and the agreement components in § 361.23(b) of these final regulations, would be most appropriate to address given State and local circumstances.

We do believe it is necessary, however, to clarify one technical item related to the cooperative agreement under § 361.23(b) that some commenters raised. The commenters appeared to interpret § 361.23(b)(2)(i)(B) as requiring DSUs to pay for reasonable accommodations, auxiliary aids, and other services for persons with disabilities participating in the One-Stop system. Yet, that proposed section, which comes directly from section 101(a)(11)(A)(i)(II) of the Act, states only that DSUs, in promoting meaningful participation by persons with disabilities in One-Stop system and other workforce investment activities through program accessibility, may provide training and technical assistance to its One-Stop system partners on how to provide reasonable accommodations and auxiliary aids and services. Neither the relevant statutory provision nor the proposed regulatory section questioned by commenters instructs DSUs to pay the costs of providing individuals with disabilities access to the One-Stop system. In fact, as previously noted, that responsibility falls to the One-Stop system pursuant to the ADA and section 504.

Changes: None.

Section 361.31 Cooperative Agreements With Private Nonprofit Organizations

Comments: None.

Discussion: We wish to clarify the relationship between these final regulations

and potential agreements that DSUs may enter into with employment networks authorized under the recently enacted TWWIIA. In particular, we note that neither the Act nor the regulations, including the requirement in section 101(a)(24)(B) of the Act and § 361.31 of the regulations that the DSU enter into cooperative agreements under the VR program with private nonprofit VR service providers, are intended to limit or prohibit the establishment of a fee-for-service or other reimbursement type agreement between DSUs and employment networks. Typically, fee-for-service arrangements enable private service providers to purchase from the DSU services that are needed by an individual with a disability who is not a VR program participant.

On a related note, we also emphasize that nothing in the Act or these regulations would affect the ability of a DSU to serve as an employment network as authorized under TWWIIA.

Changes: None.

Section 361.36 Ability To Serve All Eligible Individuals; Order of Selection for Services

Comments: One commenter suggested that this section of the proposed regulations be strengthened to ensure that States preserve resources and provide needed services to individuals with significant disabilities, particularly as the State unit becomes more closely linked to, and participates in, the One-Stop system under WIA.

Discussion: As we discussed in the previous section, we agree that the policy behind the order of selection requirements in the Act and regulations—to preserve the fiscal and personnel resources of the DSU so that those with the most significant disabilities can receive the full range of VR services that they need to become appropriately employed—must be safeguarded. However, we believe those safeguards are in place. As a required partner in the One-Stop system, the State unit must participate toward the development and maintenance of an effective One-Stop system at the local level. Moreover, Title I of WIA and the regulations implementing that title clearly condition that participation on compliance with the Rehabilitation Act and these regulations. Thus, the order of selection requirements in section 101(a)(5) of the Act and these regulations, or any other statutory or regulatory requirement applicable to the VR program, must be followed in the course of participating in One-Stop system activities. If the State is operating on an order of selection because it cannot serve all eligible individuals given its current level of VR program resources, then the State unit can pay only for services (i.e., services beyond intake and assessment that are necessary to determine whether an individual is eligible under the program and, if so, to determine the individual's priority category under the order of selection) for the individuals who qualify for services under that order, regardless of whether those services are provided within or apart from the One-Stop system center. The severity of an individual's disability or the cost of the individual's program of services can have no bearing on the scope of services the individual receives.

Changes: We have made one clarifying change to § 361.36(c) of the proposed regulations that was not based on public comment. This proposed section has been revised to clarify that a DSU that has developed but not implemented an order of selection must continue to provide the full range of services, as appropriate, to all eligible individuals.

Section 361.42 Assessment for Determining Eligibility and Priority for Services

Comments: Several commenters recommended requiring in this section of the final regulations a written assessment for determining eligibility and priority for services by a qualified VR counselor employed by the DSU, as a means of emphasizing the importance of the professional opinion of the VR counselor. These commenters also proposed that this written assessment be included with the information given to the eligible individual during IPE development.

Some commenters opposed the eligibility provisions stated in proposed § 361.42(a)(i) and (ii) (i.e., determinations by qualified personnel that the applicant has a physical or mental impairment and the impairment constitutes or results in a substantial impediment to employment) on the basis that neither provision required that the applicable determination be made by a qualified employee of the DSU. These commenters stated that all eligibility-related determinations should be made by the DSU.

Several commenters opposed § 361.42(a)(3) of the proposed regulations, which implemented the statutory requirements regarding presumptive VR program eligibility for individuals receiving SSI or SSDI under the Social Security Act. These commenters stated that a categorical presumption of eligibility for this group of individuals could be misconstrued as creating an entitlement to VR services, could lead to efforts to extend presumptive eligibility inappropriately to other groups with common characteristics, and may undermine the individualized nature of the VR program. Some of the commenters asserted that a presumption of eligibility should be able to be rebutted by a showing that an individual receiving SSI or SSDI does not meet one or more of the eligibility criteria. Other commenters suggested that presumptive eligibility for these individuals should apply to only those Social Security recipients or beneficiaries seeking to earn wages as opposed to those intending to become homemakers.

On the other hand, several commenters supported the proposed requirements regarding presumptive VR program eligibility for individuals receiving SSI or SSDI. Some noted that the relevant statutory provision, section 102(a)(3) of the Act, already has been effective in reducing the time expended on eligibility determinations, thereby allowing counselors and individuals to focus on IPE development and initiating needed services.

Many commenters opposed the manner in which the proposed regulations implemented the passage in section 102(a)(3)(ii) of the Act that states that Social Security recipients are presumed eligible under the VR program ''provided that the individual intends to achieve an employment outcome.'' Specifically, these commenters believed that completion of the application process, as described in the proposed regulations, is insufficient evidence of the individual's intent to achieve an employment outcome. They urged that the applicable paragraph in the proposed regulations be stricken on the basis that DSUs make eligibility-related decisions not only at the time of application but throughout the VR process.

Several commenters opposed authorizing DSUs, under § 361.42(b) of the proposed regulations, to make interim determinations of eligibility. Most of these commenters questioned the statutory authority for the proposed section or viewed the provision as unnecessary since all eligibility determinations must be completed within 60 days from the time the individual applies for VR services. On the other hand, many commenters supported the proposed interim eligibility authority and the fact that using it rests with the discretion of the DSU.

Several commenters supported proposed § 361.42(c)(1) that the DSU will not impose, as part of the eligibility determination process, a duration of residence requirement that excludes from services any applicant who is present in the State. Two commenters suggested that the proposed language more closely track the Act by applying the prohibition not only to applicants but to any individual who is present in the State. Other commenters supported retaining specific language stating that a requirement for an applicant to be present in the State cannot be used to circumvent an individual's choice of an out-of-State service provider.

We received many comments on proposed § 361.42(e), which implemented new statutory requirements regarding the use of trial work experiences as part of the process for determining eligibility for VR services. Several commenters responded to our request in the preamble to the NPRM that they identify examples of trial work experiences, other than supported employment and on-the-job training, that DSUs might employ. Suggestions included contract or production work in the individual's own home, internships, unpaid work experiences, on-the-job evaluations, job shadowing, structured volunteer experiences in real work settings, and community-based work assessments with supports, among others.

Many commenters suggested that the final regulations authorize a DSU to consider trial work that the individual performed previously, and that is documented, for purposes of meeting the requirement that it assess the individual's capacity to perform trial work before the individual is determined too severely disabled to achieve an employment outcome (and, therefore, ineligible). These commenters also recommended that the final regulations clarify that trial work experiences need not be used for all individuals with significant disabilities or in instances in which an individual's ability to achieve an employment outcome is not in question.

A number of commenters opposed the requirement in proposed § 361.42(e)(2)(i) that the DSU develop a written plan to assess the individual's capacity to perform in realistic

work settings. These commenters noted that the Act does not require a written plan and that the proposed provision could have the unintended effect of delaying services to the individual. Other commenters expressed concern that the trial work assessment for an individual appeared open-ended and, therefore, recommended that the regulations apply a specific time limit to the use of trial work for purposes of determining eligibility.

One commenter questioned the authority for the proposed regulatory requirement that DSUs provide appropriate supports, including assistive technology devices and services and personal assistance services, to accommodate the rehabilitation needs of an individual while performing trial work. In contrast, another commenter stated that it is vital for DSUs to provide the supports and assistive technology that are needed for an individual during the trial work period.

Several commenters recommended deleting proposed § 361.42(h), which authorized the continued use of extended evaluations in instances in which trial work experience options have been exhausted or cannot be used by the individual. These same commenters suggested that the 18-month time limit that applied to extended evaluation under the current regulations be applied to trial work experience options. Some of the commenters also questioned the authority for keeping the extended evaluation option in the regulations, while others suggested that since trial work experiences were available to most individuals with significant disabilities, the extended evaluation authority is no longer necessary or is inconsistent with the Act's preference for finding most applicants eligible for the VR program. In contrast, a number of commenters supported retaining the extended evaluation requirements.

Discussion: We agree that the professional opinion of the VR counselor is critical in assessing an individual's eligibility and priority for services. Both the Act and the regulations specify that qualified personnel must conduct assessments under the VR program. Although we suspect that most States develop written assessments, we do not think it is necessary to require by rulemaking that the assessment itself be in writing. Thus, State units may continue to require written eligibility assessments, or otherwise attest to an individual's eligibility and priority of service category under an existing order of selection, as they deem appropriate. We do note, however, that the DSU is required to document, in some fashion, support for determinations of eligibility as part of the record of services required under § 361.47 of the regulations. Whether that documentation is the assessment itself or some other combination of information, again, lies with the discretion of the DSU.

We believe that proposed § 361.42(a)(1)(i) and (ii) and the references to ''qualified personnel'' in each of the provisions are consistent with the Act. We interpret the requirements in section 103(a)(1) of the Act (requiring assessments for determining eligibility and rehabilitation to be conducted by ''qualified personnel'') and section 102(a)(6) of the Act (requiring eligibility determinations to be conducted by the designated State unit) the same as we have historically since neither statutory provision changed in the 1998 Amendments. Specifically, the Act authorizes qualified professionals, both DSU and non-DSU employees, to determine the existence of an impairment and to determine whether the impairment results in a substantial impediment to employment (*i.e.,* whether the first two eligibility criteria have been met.) The requirement in section 102(a)(4)(B) of the Act regarding the use of determinations made by officials of other agencies also supports this position. Assuming the DSU can confirm that a qualified professional has determined that the individual has met those criteria, the DSU counselor then assesses whether the individual requires VR services to obtain and retain work in the individual's chosen field that is appropriate to his or her abilities (*i.e.,* the third criterion of eligibility.) The individual is presumed to have met the fourth criterion—that the individual can benefit from VR services under § 361.42(a)(1)(iv). This framework, which we believe is required by the Act, is intended to ensure that the DSU controls the eligibility process at the same time that it facilitates more timely assessments that allow for existing information from other sources to be taken into account.

The 1998 Amendments specify that those who qualify for SSI or SSDI are presumed eligible for the VR program. As we discussed extensively in the preamble to NPRM (65 FR 10625 and 10626), we believe that this change was adopted in the 1998 Amendments to streamline eligibility and expedite necessary VR services for those Social Security recipients since each category of recipients already has met stringent disability criteria under the Social Security Act and clearly needs VR services in order to achieve appropriate employment. We do not believe that this presumption will be misconstrued as changing the nature of the VR program to a program under which individuals are entitled to services without pursuing a job. In fact, section 102(a)(3)(B) of the Act and § 361.42(a)(5) of these final regulations specify that nothing in the presumptive eligibility requirement creates an entitlement to VR services, meaning that individuals with disabilities are not automatically entitled to VR services but, rather, must expect to achieve an employment outcome as a result of receiving those services. The final regulations implement that expectation by ensuring that all applicants, including those receiving SSI or SSDI, are informed of the employment-related nature of the VR program during the application process.

We also disagree with the assertion that a categorical presumption of eligibility for individuals receiving SSI or SSDI will lead to categorical eligibility for other groups and undermine the individualized nature of the VR program. Prior to the 1998 Amendments, disabled SSI recipients were statutorily presumed to have a physical or mental impairment that constituted a substantial impediment to employment (*i.e.,* were presumed to have met the first two eligibility criteria in § 361.42(a)(1) of the regulations), as well as a severe disability. Section 102(a)(3) of the 1998 reauthorized Act expanded this presumption by giving presumptive VR program eligibility (*i.e.* a presumption that individuals meet all of the eligibility criteria under the VR program) to this same population. The presumption applies only to these persons and is not written to broadly cover other groups that do not qualify under the stringent disability-related criteria applied by the Social Security Administration. Also, the individualized nature of the VR program (*i.e.,* that services are provided under an IPE to meet an individual's rehabilitation needs and assist an individual to achieve an employment outcome) is unaffected by this requirement that only addresses eligibility for services.

As section 102(a)(3)(A)(ii) of the Act makes clear, a DSU can rebut the presumption that an SSI or SSDI recipient is eligible under the VR program if it can demonstrate by clear and convincing evidence that the individual is incapable of benefiting in terms of an employment outcome from VR services due to the severity of the individual's disability. In response to the commenter's contentions, we maintain that a presumption of eligibility can be rebutted only on this basis.

We also do not believe that presumptive eligibility for SSI or SSDI recipients should be restricted to those seeking certain types of employment outcomes. As we have long required, eligibility requirements are not to be applied with regard to the type of expected employment outcome that the applicant seeks (see § 361.42(c)(2)(ii)(B) of these final regulations). Thus, whether an individual seeks a self-employment, another wage-earning employment, a homemaker, or other outcome cannot be used as a factor in determining the individual's eligibility for VR services or affect the presumptive eligibility of an individual receiving SSI or SSDI.

We believe that completion of the application process after the DSU has informed the individual that he or she must seek an employment outcome to receive VR services is sufficient evidence that any individual, including SSI and SSDI recipients, ''intends to achieve an employment outcome,'' as section 102(a)(3)(ii) specifies. While we understand that some commenters are concerned that disabled Social Security recipients in particular will seek VR services without intending to work, we find that concern unfounded. We referred in the preamble to the NPRM to an obvious fact—that all applicants for VR services, not only those who qualify for SSI or SSDI, must intend to work to receive VR services. Thus, ensuring that the DSU explains the employment-related nature of the VR program as part of the application process ensures that applicants understand what is expected of them before participating in the program. Thus, the proposed regulatory method of ensuring an individual's intent to work fulfills an expectation that applies to all applicants for VR services and streamlines, rather than hinders, the eligibility process for SSI and SSDI recipients, as the Act intends.

Additionally, we disagree with the contention that an individual's intent to

achieve an employment outcome constitutes an additional eligibility-related criterion that must be applied throughout the VR process. Eligibility is assessed at the outset of the rehabilitation process, at a point when the final regulations require that the DSU apprise individuals of the nature of the program. As always, if an individual becomes too severely disabled to achieve an employment outcome (as supported by clear and convincing evidence) or, for whatever reason, stops participating in the VR program, then the DSU need not continue serving that individual. That approach applies no less to SSI recipients or SSDI beneficiaries than it does to any other participant in the VR program. Yet, as long as the individual continues to participate in the program, there exists a presumption that the individual intends to work.

We agree with those commenters who supported proposed § 361.42(b) that would allow DSUs to make interim determinations of eligibility for individuals who the DSU reasonably believes will be eligible for VR services at the end of the statutory 60-day period for making eligibility decisions. We emphasize that this provision is an option for DSUs to expedite further the delivery of services to individuals while the DSU awaits information to permit a final eligibility determination. DSUs are not required to implement provisions for interim determinations of eligibility.

We also agree with the commenters who stressed the importance of language in section 101(a)(12) of the Act that prohibits a State from establishing any residence requirement that excludes from services any individual who is present in the State. However, we believe that the proposed regulatory language sufficiently tracks the statutory requirement that was not changed by the 1998 Amendments. Again, we believe it is important to clarify, as explained in the Senate Committee Report on the Rehabilitation Act Amendments of 1998, that the requirement for an individual to be present in the State in order to be eligible to receive services should not be interpreted in any way to circumvent an individual's choice of an out-of-State provider (Senate Report 105–166, p. 13). The committee further stated that, with regard to out-of-State placements, the requirement that an individual be present in the State must be imposed at the time of the eligibility determination and may not be used as a means of denying the continuation of services that are being provided in an out-of-State setting.

As we explained more fully in the preamble to the NPRM (65 FR 10626 and 10627), the Act specifies that DSUs must explore an individual's abilities, capabilities, and capacity to perform in work settings through the use of trial work experiences before it can demonstrate that an individual is too severely disabled to benefit from VR services in terms of an employment outcome and, consequently, is ineligible under the program. We believe that this requirement establishes the fairest standard for assessing whether an individual with a significant disability is in fact capable of achieving employment. We also appreciate the trial work examples that commenters shared and note that these types of work options (*e.g.,* supported employment, on-the-job training, internships, job shadowing, structured volunteer experiences in real work settings, and community-based work assessments with appropriate supports) should be considered by others as they seek to expand the scope of trial work experiences available to applicants with significant disabilities. Nevertheless, we believe that § 361.42(e)(2)(ii) of the regulations is sufficiently broad to encompass each of these examples and that a change to that provision is not necessary.

In addition, we interpret the Act to clearly require DSUs to give individuals trial work experiences before deciding that an individual is ineligible under the VR program due to the severity of the individual's disability. Accordingly, a DSU cannot meet the requirement that it use trial work to assess eligibility by simply securing documentation that addresses the individual's success in performing work previously. Using documentation in that regard runs the risk of violating the scope of the mandate in section 102(a)(2)(B) of the Act, specifically that trial work options be sufficiently varied and take place over a sufficient period of time for the DSU to either conclude that the individual is eligible for VR services or (based on clear and convincing evidence) that the individual is incapable of benefiting from the provision of VR services in terms of an employment outcome. Given the State units' expertise in conducting assessments, and without knowing the validity of the documentation that exists or the circumstances that might have changed since the time the individual previously worked, we believe that it is appropriate to require that, before determining that an individual cannot benefit from VR services, the DSU give the individual a variety of trial work options regardless of the individual's past work history or assessments.

We do not believe that the written plan for providing trial work experiences as required in § 361.42(e)(2)(i) of the regulations is inconsistent with the Act or will cause delays in service delivery. On the contrary, we believe that requiring a written plan to assess an individual's abilities, capabilities, and capacities to perform in realistic work settings is a logical means of fulfilling the requirements in section 102(a)(2)(B) of the Act. The written plan will ensure that the assessment process is conducted in a deliberate and well-formulated manner, thus giving an individual a full opportunity to demonstrate his or her capabilities and enabling the DSU to accurately gauge whether the individual can achieve employment. Also, we feel that any burden or minor delay associated with developing the written plan is clearly justified given that the individual risks being found ineligible, and precluded from receiving services altogether, if trial work options are not well-planned and prove unsuccessful.

We recognize the concerns of those commenters who requested that time limits be included in the regulations to ensure that trial work opportunities do not extend beyond a reasonable length. Yet, we believe the timeframes that are the most reasonable and appropriate already were built into the proposed regulations. Specifically, § 361.42(e)(2)(iii) of the regulations requires that the DSU assess the individual's capacity to work in realistic work settings through the use of trial work experiences that are provided over a sufficient period of time for the DSU to determine either that the individual is eligible for VR services or that there exists clear and convincing evidence that the individual cannot benefit from VR services in terms of an employment outcome due to the severity of the individual's disability. Because trial work is intended to result in either a determination of eligibility or a determination of ineligibility that is sufficiently supported, trial work opportunities must be provided until the point that the DSU can reach one of these two conclusions. Thus, specific time periods that would serve to discontinue trial work requirements before the DSU has reached either result would serve to undermine the purpose behind those very same requirements.

We do not believe that the requirement in § 361.42(e)(2)(iv) of the regulations that the DSU provide individuals with appropriate support services, such as assistive technology devices and services and personal assistance services, during trial work falls beyond the scope of the Act. Section 102(a)(2)(B) of the Act states explicitly that trial work experiences are to be afforded ''with appropriate supports provided by the designated State unit.'' Clearly, assistive technology devices and services and personal assistance services are authorized services available to individuals pursuing employment, including supported employment, through the VR program (see *e.g.,* section 102(b)(3)(B)(i)(I) of the Act). Accordingly, we believe it is entirely appropriate to interpret the DSU's responsibility to provide ''necessary supports'' during the trial work period to cover these same services.

We also disagree that the authority concerning extended evaluations should be deleted in the final regulations. Although the Act clearly places a priority on using trial work experiences in the course of assessments, Congress recognized the need to allow for extended evaluations in those limited instances in which a real work test is impossible or the State unit has exhausted its trial work options without reaching a determination of eligibility. That point is reflected in the legislative history to the trial work provisions in the Act, specifically in Senate Report 105–166, pages 9 and 10.

Changes: None.

Section 361.45 Development of the Individualized Plan for Employment

Comments: Several commenters recommended that the final regulations clarify that the DSU is not required to pay for the costs of technical assistance in IPE development that is provided by sources other than DSU personnel. On the other hand, other commenters suggested that the DSU be required to pay for the costs of the technical assistance provided by non-DSU sources, asserting that such a requirement

would be consistent with the individual's opportunity to exercise informed choice in selecting DSU or non-DSU assistance for purposes of developing the individual's IPE.

Many commenters sought more explanatory information in the final regulations that details the role of the qualified VR counselor employed by the DSU in developing and approving the IPE and IPE amendments and in reviewing the IPE annually. These commenters indicated that the ''diminished role for the DSU counselor'' in the proposed regulations was inconsistent with the Act and other regulatory requirements. The commenters also stated that a DSU-employed counselor must conduct the required annual review of the IPE and assess the individual's progress toward achieving the identified employment outcome since the DSU is responsible for the proper delivery of services and the outcome of the individual's participation in the program. Other commenters suggested that we distinguish between the roles of the ''qualified vocational rehabilitation counselor'' and the ''qualified vocational rehabilitation counselor employed by the designated State unit'' by defining each term in the final regulations.

Some commenters suggested that this section of the proposed regulations be revised to prohibit VR counselors employed, or previously employed, by an agency or organization that may provide services under an individual's IPE from assisting the individual in developing the IPE. These commenters urged that a prohibition of this type be implemented in order to guard against conflicts of interest on the part of the counselor that could otherwise jeopardize the individual's ability to exercise informed choice in selecting services and service providers included in the IPE.

In addition, a number of commenters opposed § 361.45(e) of the proposed regulations, which required the DSU to establish and implement standards, including timelines, for the prompt development of IPEs. These commenters viewed this proposed section as beyond the scope of the Act. Other commenters recommended either requiring by regulations a specific time period governing IPE development and implementation (*e.g.,* 30 days from the date eligibility is determined) or defining the term ''timely'' as it applies to IPE development.

Discussion: Pursuant to section 102(b) of the Act and § 361.45(c) of the final regulations, the DSU must inform eligible individuals of the range of available options in obtaining assistance for purposes of developing the IPE (*e.g.,* developing the IPE with DSU assistance, with non-DSU assistance, or on one's own). Since IPE development assistance from non-DSU sources is authorized, the regulations do not prohibit the DSU from supporting the costs of that assistance. At the same time, however, we agree that the DSU need not pay the costs of assistance provided by non-DSU sources if it so chooses. Thus, it falls within the discretion of the DSU to determine whether, and under what circumstances, it will pay for technical assistance in IPE development from sources other than the DSU.

We believe that the proposed regulations accurately reflected the scope of functions that the Act reserves to the DSU, as well as the broad authority for non-DSU counselors to assist in the development and review of IPEs at the individual's discretion. As some commenters pointed out, a qualified VR counselor who is employed by the DSU must approve and sign the IPE and any amendments to the IPE (see section 102(b)(2)(C)(ii) and (b)(2)(E) of the Act). The proposed regulations followed the framework established by the Act, *i.e.,* by enabling individuals to receive assistance in IPE development from whichever source (if any) that they choose and ensuring that the DSU maintains final IPE approval authority as the Act requires. We do not believe that additional regulatory provisions in this area, including definitions, are needed.

While we note, as we did in the preamble to the NPRM, that the DSU also is responsible for ensuring that the individual's IPE is reviewed annually, we do not agree that that review must necessarily be conducted by a DSU counselor. As discussed in greater detail in the NPRM preamble (65 FR 10626 and 10627), Congress intended to distinguish between IPE functions that *must* be performed by a qualified VR counselor employed by the DSU and related functions that *may* be performed by a qualified VR counselor or other person who is not employed by the State unit. Thus, in addition to enabling individuals to secure assistance from outside the DSU in developing the IPE and IPE amendments, the DSU can meet its responsibility to ensure that the IPE is reviewed at least annually with the individual by conducting the review itself or, at the individual's discretion, by approving the results of a review appropriately conducted by a qualified VR counselor from outside the DSU.

At the same time, however, we do appreciate the commenters concerns regarding the potential conflicts of interest, including potential limits on the exercise of informed choice, that may arise if the counselor or other person assisting the individual in developing (or amending) the IPE is employed or otherwise affiliated with an organization that may provide services to the individual under that IPE. However, without information indicating whether that problem exists or the resulting effects that an existing problem has on participants in the program, we are not inclined to restrict, through these final regulations, the individual's choice of assistants in developing the IPE. Nonetheless, we emphasize that DSUs must ensure that individuals are given full opportunities to exercise informed choice in the selection of services and service providers consistent with the requirements of section 102(d) of the Act and § 361.52 of these final regulations. Accordingly, we would expect DSUs to address any situation, if it arises, in which it believes that a counselor employed by a service provider is unduly influencing an individual during IPE development to obtain services through that counselor's employer without providing the individual with sufficient choices.

We maintain that requirements in § 361.45(e) regarding DSU standards, including timelines, for the prompt development of IPEs are entirely consistent with the Act. In particular, section 101(a)(9) of the Act requires that the individual's IPE be developed and implemented ''in a timely manner'' subsequent to the determination of eligibility. In fact, both this regulatory requirement and the statutory provision on which it is based precede the 1998 Amendments. We continue to believe that the regulatory standards and timelines called for under § 361.45(e) of the regulations are necessary to guard against delays in service delivery that are, in turn, caused by delays in the IPE development process. We emphasize that DSUs need not meet this requirement by establishing an arbitrary time limit to apply to the development of all IPEs. Instead, State units are expected to develop general standards to guide the timely development of IPEs and, as part of those standards, flexible timelines that take into account the specific needs of the individual.

Changes: None.

Section 361.47 Record of Services

Comments: Some commenters generally supported the modifications to record of services requirements that we proposed in the NPRM. One commenter supported the new flexibility given to DSUs in determining the sources of documentation it will use to meet the required components of the record of services, but asked that RSA identify minimum documentation types in the final regulations. Several commenters opposed the expansion of the service record requirements beyond those in the previous regulations.

Several other commenters asked that we clarify the scope of § 361.47(a)(7) of the proposed regulations, which required documentation in the service record describing the extent to which the applicant or eligible individual exercised informed choice regarding assessment services and regarding the employment outcome, VR services, and other components of the IPE. Some commenters suggested that this proposed requirement be replaced by a provision requiring simply that the DSU document that the individual was provided an opportunity to exercise informed choice. Other commenters stated that it would be difficult to meet the proposed requirement in instances in which the DSU is not directly involved in the development of the IPE.

Many commenters opposed the newly proposed § 361.47(b), which would require that the DSU consult with the State Rehabilitation Council in determining the type of documentation that it will maintain for each applicant and eligible individual. These commenters believed that the proposed provision would expand the functions of the Council beyond those functions required by the Act. Due to the voluntary nature of the Council, the commenters asserted, it would be inappropriate to expect members of the Council to be involved in the DSU's day-to-day operations, including the setting of documentation requirements. Other commenters supported requiring the Council to be involved in establishing the DSU's documentation requirements.

Discussion: We revised § 361.47(a) of the previous regulations to identify minimum

documentation standards that will enable DSUs to demonstrate that certain service delivery requirements, as they apply to applicants and eligible individuals participating in the VR program, have been met. While we identified in this proposed section those critical service delivery requirements that must be documented, we sought to provide greater flexibility to DSUs in determining the manner in which they would comply (*i.e.,* determining the types of documentation each would use to comply) with the stated requirements. We believe that the proposed regulations provided that flexibility, while identifying only those requirements of the rehabilitation process that are most necessary to address in the record of services. Those proposed requirements that were not drawn from the previous regulations represented important aspects of the 1998 Amendments that we believe the DSU, and we, must monitor to ensure the proper implementation of the program.

In addition, we believe that § 361.47(a)(7) of the proposed regulations established an appropriate standard for DSUs to meet in documenting compliance with a most critical aspect of the VR program—giving individuals the opportunity to exercise informed choice throughout the rehabilitation process. Accordingly, we do not believe that a simple statement that the applicant or eligible individual was provided an opportunity to exercise informed choice reflects either the scope or the importance of the choice-related requirements in the Act. Among those requirements, section 102(d) of the Act and § 361.52 of the final regulations specify that applicants and eligible individuals must be given opportunities to exercise informed choice in selecting assessment services and in selecting an employment outcome, the VR services needed to achieve that outcome, the entities providing services, and the methods used to secure the services. Thus, given the emphasis accorded choice under the Act, we believe it is appropriate and prudent to require documentation describing the extent to which the applicant or eligible individual exercised informed choice in accordance with the Act's requirements. As for those instances in which an individual elects to develop an IPE without the DSU's assistance, we would expect the DSU to inform individuals about the availability and opportunities to exercise informed choice (as it is required to do under section 102(d)(1) of the Act), obtain information from the individual on the extent to which he or she exercised choice during IPE development, and supplement that information with additional information available to the DSU in order to meet the documentation requirement in § 361.47(a)(7).

As we stated in the preamble to the NPRM, we think it is necessary that the DSU consult with the Council, if it has a Council, in determining the type of documentation that the DSU will maintain in the record of services for each applicant and eligible individual. Section 101(a)(16)(B)(v) of the Act requires the State unit to take into account, in connection with matters of general policy arising in the administration of the State plan, the views of the Council and other specified groups. The document types that will comprise the records of services maintained by the DSU relate directly to the DSU's ability to demonstrate its compliance with important service provision requirements in the law, as well as its ability to justify its decisions (e.g., eligibility determinations) regarding the individual's participation under the VR program. We maintain, therefore, that the DSU's documentation standards for fulfilling the record of services requirements in this section of the regulations constitute a policy of general applicability on which the Council's input is required. Moreover, we do not believe that the consultation required under this section of the regulations expands the Council's functions beyond the scope of the statute, particularly the broad scope of review, analysis, and advisory functions carried out by the Council under section 105(c)(1) of the Act.

Changes: None.

Section 361.48 Scope of Vocational Rehabilitation Services for Individuals With Disabilities

Comments: Several commenters requested that we revise § 361.48(j) of the proposed regulations to more clearly describe the type of interpreter and other communication access services that are authorized under the program. Other commenters requested clarification regarding the scope of assistance for eligible individuals seeking self-employment, telecommuting, or business ownership outcomes that is authorized under proposed § 361.48(s). One of these commenters requested guidance on how these services relate to the entrepreneurial services available through the State workforce investment system.

Discussion: We agree with the suggestion that the scope of authorized interpreter services under proposed § 361.48(j) needs to be clarified in the final regulations. In particular, we believe that we need to clarify that sign language interpreter and oral interpreter services are authorized under that section.

Regarding § 361.48(s), we have received several inquiries, in addition to the noted comments, asking us to clarify the scope of resources that are authorized to be provided through the statewide workforce investment system in order to clarify the extent of the State unit's obligation under proposed § 361.48(s). This provision restates section 103(a)(13) of the Act.

Section 112 of Title I of WIA requires that each participating State submit to the Department of Labor a State plan that describes its statewide workforce investment system and the employment and training activities that it will support with WIA Title I funds. The specific employment and training activities included in the plan are determined individually by each State, depending on the needs and economic conditions in that State. Therefore, the scope of resources authorized under the VR program for self-employed persons, telecommuters, and small business owners will depend on the extent to which the State's workforce development system, as described in the State plan under section 112 of WIA, provides support to individuals pursuing that type of work. Given the variances in workforce investment systems across the States, we do not believe that it is practical to revise the language in proposed § 361.48(s) that aligned the resources authorized under the VR program with those that the State makes available under WIA.

Finally, we believe it is important to note that the list of authorized services in this section of the regulations is not exhaustive and that § 361.48(t) specifically authorizes ''other goods and services'' that the DSU and individual determine to be necessary for the individual to achieve an employment outcome.

Changes: We have revised § 361.48(j) of the proposed regulations by referring specifically to sign language interpreter and oral interpreter services as included within the scope of authorized services for individuals who are deaf or hard of hearing.

Section 361.50 Written Policies Governing the Provision of Services for Individuals With Disabilities

Comments: One commenter requested changes to § 361.50(b)(1) of the proposed regulations, which authorized States to establish preferences for in-State services under certain conditions. The commenter contends that this provision, which was included in the previous regulations, has been subject to misuse and misinterpretation. In response, the commenter suggests restricting DSU preferences for in-State services to instances in which the in-State service is equivalent to and likely to have the same results as an out-of-State service.

Discussion: Section 361.50(b)(1) authorizes a DSU to establish a preference for in-State services in instances in which necessary services are available both within and outside the State. The preference (*i.e.,* the State not taking responsibility for the costs of an out-of-State service that exceeds the costs of the same service provided in-State) is dependent on the in-State service meeting the individual's rehabilitation needs. For that reason, we believe that the provision establishes an appropriate standard, one that has the same effect as that of requiring equivalency between in-State and out-of-State services.

Changes: None.

Section 361.51 Standards for Facilities and Providers of Services

Comments: Many commenters expressed concern about the omission in the proposed regulations of the designated State unit's current regulatory responsibility to issue minimum standards for facilities and service providers. The commenters believed that omitting these requirements from the final regulations will have the effect of holding community providers and facilities to a lower standard than that which must be met by the State agency administering the VR program. The concern was that VR program participants receiving services from private providers would be adversely affected. These commenters encouraged us to maintain the current regulatory standards in the final regulations.

The commenters on this section were concerned mostly about the proposed

removal of the previous regulatory provisions requiring providers of vocational rehabilitation services to use qualified personnel. For example, one party stated that financial constraints on community facilities may reduce a facility's capacity to maintain the same qualified personnel standards that section 101(a)(7) of the Act imposes on State agencies; nevertheless, this commenter believed that regulatory requirements should be developed to ensure a reasonable level of professional qualifications at provider facilities. Other commenters stated that individuals who are blind or visually impaired in particular, and all individuals with disabilities generally, must be assured that private facilities and providers of services under the VR program have proper qualifications beyond native language skills and the ability to use appropriate modes of communication (two current standards that were retained in the proposed regulations). In addition, many of the commenters expressed concern that the proposed regulations, unlike the previous regulations, did not require VR service providers to have adequate and appropriate policies and procedures to prevent fraud, waste, and abuse.

Discussion: We had proposed to remove the regulatory requirements governing personnel and other standards for providers of VR services on the basis that the explicit statutory authority supporting those requirements was removed by the 1998 Amendments. Specifically, the 1998 Amendments removed provisions previously contained in section 12(e) of the Act that had required the Secretary to promulgate regulations pertaining to the selection of VR services and VR service providers. In accordance with the prior Act, § 361.51 of the previous regulations included procedures to prevent fraud, waste, and abuse among service providers and procedures to ensure that service providers complied with applicable standards, such as those related to qualified personnel. The requirements in § 361.51 of the proposed regulations that were retained from the previous regulations relating to the accessibility of facilities, affirmative action for qualified individuals with disabilities, and special communication needs personnel also were retained in the 1998 Amendments.

We have interpreted Congress' removal of standards governing personnel and fraud, waste, and abuse from the Act as intended to give States greater discretion in determining how best to ensure that service providers used by the DSU are capable of providing necessary VR services and meeting the needs of VR program participants. In other words, Congress determined that States could ensure the quality of personnel and administrative efficiency among the service providers it uses by following applicable State rules. We want to emphasize that removing this particular requirement from the final regulations does not absolve State units from ensuring that entities providing services under the VR program meet applicable State laws that impose personnel standards and other safeguards on parties providing services under State-administered programs. We believe that this responsibility of the DSU, as well as the DSU's general responsibilities under OMB Circular A–87 and the Education Department General Administrative Regulations (EDGAR) to administer the VR program and the expenditure of VR program funds efficiently and effectively, ensures that the removal of previous regulatory standards for service providers will not have an adverse impact on the program.

Changes: None.

Section 361.52 Informed Choice

Comments: As with proposed § 361.5(b) discussed previously, a number of commenters requested that we define the term ''informed choice'' in this section of the final regulations.

Another commenter suggested that this section of the proposed regulations be revised to ensure that participants in the VR program are able to exercise informed choice in selecting their vocational rehabilitation counselor. Specifically, the commenter suggested that participants, prior to selecting a counselor, be given a list of counselors in the local office of the State unit, a statement of the counselors' qualifications, and the opportunity to interview a number of counselors.

Other commenters suggested that DSUs make available to individuals information concerning the outcomes that individuals achieve in working with specific service providers. The commenters asked that this information be included in the scope of information that DSUs must provide individuals under § 361.52(c). Other commenters proposed revisions to § 361.52(d), which identifies sample methods or sources of information that the DSU may use to make available required information on services and service providers. Specifically, one commenter requested that DSUs make available to individuals information on nationwide services and service providers, as well as service-related information issued by national consumer groups.

Discussion: We have long been asked to define the term ''informed choice'' in regulations and have refrained on the basis that the current regulations establish appropriate guidelines governing the informed choice process, while leaving some discretion to DSUs, in conjunction with their Councils, if they have Councils, to determine how best to secure information and make that information available to participants so that they may exercise choice. The 1998 Amendments give even greater emphasis to informed choice, specifically in section 102(d), which identifies each of the stages at which choices must be given (essentially all stages of the rehabilitation process), requires the DSU to inform individuals about the availability of and the opportunity to exercise informed choice, and requires that the DSU assist individuals as is necessary so that they may make informed choices. We believe that this proposed section of the regulations sufficiently reflected the significant scope of the choice provisions in the Act and retained a number of key portions from the previous regulations that serve to guide DSUs in developing their choice-related policies. We again emphasize the crucial role that the Council must play in that regard.

Although we maintain that, at this point, defining ''informed choice'' in the regulations would not be appropriate, we have established additional guidance materials designed to facilitate the choice process, most notably as part of the RSA Monitoring Guide for FY 2000. We intend to develop additional policy directives that will also assist in that effort.

Section 361.45 of the regulations, which implements section 102(b)(1) of the Act, specifies the range of options available to individuals in securing assistance in developing their IPEs, including assistance provided by DSU or non-DSU counselors or from other sources. However, neither that provision nor the broad choice requirements in section 102(d) of the Act establish a basis for requiring DSUs to provide individuals with their choice of VR counselors. At the same time, we note that the Act and the final regulations do not prevent a State from giving individuals the opportunity to exercise informed choice in selecting counselors. RSA guidance to the States (Program Assistance Circular 88–03, dated June 7, 1988) underscores the importance of an effective counseling relationship between the applicant or eligible individual and the DSU counselor. Thus, we would urge DSUs, taking into account caseload levels and other staffing considerations, to assign counselors to individuals in a manner that they believe will result in a most effective match. Given the obvious effect that that match has on the successful rehabilitation of the individual, we also indicate in the guidance that, if an individual requests a change in counselor and the request is denied, the individual can appeal the determination through the DSU's due process procedures.

Section 361.52(c) of the proposed regulations listed the minimum scope of information that State units were required to provide to individuals, or assist the individual in acquiring, to enable the individual to make informed choices about the services, service providers, and outcome identified in the IPE. We agree with the commenter that the minimum information related to services and service providers specified in this section (e.g., cost, consumer satisfaction, qualifications, degree of integration, etc.) also should mention the types of outcomes that individuals have achieved in working with certain providers.

Section 361.52(d) identifies specific methods and sources of information that the DSU may use to provide individuals with sufficient information about services and service providers. Since this provision is not a comprehensive listing of methods and sources, we note that DSUs and individuals may use any other methods and sources of information that are available to enable the individual to exercise choice. We agree that participants and State units may benefit greatly by securing information from national consumer groups or other national organizations with specialized expertise in particular disabilities, rehabilitation methods, and services. In addition, methods involving experiences that participants may use to gain information about types of employment outcomes, services, and service providers may prove helpful. We encourage

DSUs to assist individuals in obtaining useful information from many other appropriate sources.

Changes: We have revised § 361.52(c) of the proposed regulations to clarify that information and assistance provided under that section also must assist individuals in exercising informed choice among assessment services. In addition, we have included service provider outcomes in the scope of information relating to the selection of vocational rehabilitation services and service providers. We have deleted the terms ''local'' and ''state and regional'' from § 361.52(d) and have added references to methods involving visiting or experiencing various settings to the list of potential methods or sources of obtaining information.

Section 361.53 Comparable Services and Benefits

Comments: One commenter expressed concern that the requirement in the proposed regulations that DSUs provide services to an individual while waiting for identified comparable services and benefits to become available may serve as a disincentive for individuals to pursue the alternative benefits or services at the appropriate time. The commenter recommended that DSUs be able to discontinue services if an individual refuses to pursue the comparable benefits or services.

Another commenter noted that the proposed regulations did not include the statutory exemption in section 101(a)(8)(A)(ii) of the Act that states that awards and scholarships based on merit are not considered comparable services and benefits under the program.

Discussion: Both section 102(b)(3)(E)(ii) of the Act and § 361.46(a)(6)(ii)(C)) of the regulations require that the IPE identify the individual's responsibilities with regard to applying for and securing comparable services and benefits. Thus, the law anticipates that State units and individuals will work out the extent of those responsibilities through the IPE development process. For that reason, we do not believe that § 361.53(c)(2), which is unchanged from the previous regulations, would create the disincentive envisioned by the commenter as long as the individual is fully apprised of, and is assisted in fulfilling, his or her responsibilities in securing other services once they become available.

We recognize that this section of the proposed regulations did not refer to the statutory exception to comparable services and benefits for scholarships and awards based on merit. However, this exemption is addressed in the definition of the term ''comparable services and benefits'' in § 361.5(b)(10). We think the exception is best addressed in the definition itself since it is the definition that specifies the scope of comparable services and benefits under the program.

Changes: None.

Section 361.54 Participation of Individuals in Cost of Services Based on Financial Need

Comments: Many commenters supported the proposed expansion of those services that would be exempt from State financial needs tests, meaning that individuals could not be required to contribute to the cost of those services. One commenter suggested that the proposed exemption of interpreter services, reader services, and personal assistance services from financial needs tests be limited to the provision of those services during the assessment phase of the VR process. Another commenter supporting the proposal asked that we also emphasize that the DSU still must seek and use comparable services and benefits to pay for exempted services.

In addition, in response to our request for comments on the appropriate scope of services that should be exempted from financial needs tests, a number of commenters requested that the proposed listing be expanded to specifically include assistive communication devices, rehabilitation engineering services, and other access-type services.

Other commenters strongly opposed the proposed expansion of the list of services exempted from financial needs tests under the prior regulations. Some of these commenters stated that the proposed expansion would undermine the DSU's longstanding option of considering the financial need of program participants and would weaken the DSU's ability to conserve VR program funds.

In addition, many commenters supported the proposed prohibition in the NPRM on applying financial needs tests to eligible individuals receiving SSI or SSDI. Other commenters supported prohibiting the application of financial needs tests only to individuals receiving SSI since SSI eligibility is based on the individual's financial need as opposed to SSDI beneficiaries who may have assets that they could contribute to the cost of vocational rehabilitation services.

A significant number of commenters opposed the proposed exemption of SSI recipients and SSDI beneficiaries from the DSU's financial needs assessments on the basis that DSUs often consider the resources of the individual's entire household, as opposed to those of the individual only, in determining the level of resources the individual must contribute to the program of VR services. While these commenters agreed that DSUs could disregard an individual's actual SSI or SSDI cash payment, the commenters recommended that DSUs be able to consider the overall financial status of the individual and the individual's household when assessing the individual's financial need under the VR program.

Discussion: In the NPRM, we proposed to expand the scope of services exempt from State financial needs tests under the prior regulations to include certain services (*i.e.,* interpreter, reader, and personal assistance services) needed to participate in the VR program, as well as any service needed by a recipient of SSI or SSDI.

The purpose of the proposal to exempt from State financial needs tests interpreter, reader, and personal assistance services was to ensure *access* to the VR program. As we discussed in the preamble to the NPRM (65 FR 10629), the additional services that we proposed excluding from State financial needs tests enable individuals to participate in training or employment-related services that they are seeking through the VR program. Typically, individuals do not apply, nor are they determined eligible, under the VR program solely to receive these access-type services. Rather, these services are provided in conjunction with employment and training services sought by the individual participating in the VR program. In fact, the distinguishing feature of these access services is that participation in the VR program is not possible without these services being afforded. Thus, placing an additional burden on the individual to participate in the cost of accessing the VR program, in our view, is inappropriate and contrary to both the purpose of the VR program and the principles in section of 504 of the Act and the ADA, which safeguard participation by persons with disabilities in federally funded (under section 504) or public (under the ADA) programs.

As many of the commenters pointed out, we realize that access-type services other than the three additional services that the NPRM would have exempted from financial needs tests (*i.e.,* interpreter, reader, and personal assistance services) clearly exist and that individuals might need those services in order to participate in the VR program. In light of the extensive public comment we received on that point, and the fact that the limited scope of exempted services in the proposed regulations would not ensure that persons with certain disabilities are able to participate in the VR program, we have modified the proposed regulations to more clearly reflect the DSU's responsibility to ensure that all persons with disabilities do not incur the disability-related costs of accessing the VR program. Specifically, the final regulations prohibit the application of State financial needs tests to the provision of any auxiliary aid or service that would be necessary under section 504 of the Act or the ADA in order for an individual with a disability to participate in the VR program. Thus, the final regulations, in effect, ensure that individuals are able to receive, at no additional cost to themselves, aids and services to which they are already entitled under section 504 or the ADA.

We note that interpreter and reader services—two services proposed to be exempt from financial needs tests in the NPRM—generally would be covered under the section 504- and ADA-based standard in the final regulations if those services are needed in order for the individual to access other VR services. In addition, the final regulations, like the NPRM, identify personal assistance services as a separate category of services exempt from financial needs tests. While personal assistance services, as defined in the VR program regulations, might not necessarily be provided by public programs under section 504 or the ADA, those services are often critical for individuals with significant disabilities to be able to access employment and training under the VR program. As we indicated in the preamble to the NPRM, we believe it is important to exempt these services from financial needs tests as well. We also believe that retaining from the NPRM the exemption for personal assistance services will remove a significant disincentive toward pursuing

employment for those with the most significant disabilities.

We also note, however, that the final regulations do not alter the State unit's responsibility to seek comparable services and benefits that can meet the individual's interpreter, reader, personal assistant, or other access needs. Nor does it affect entities outside of the DSU from meeting their responsibilities under section 504 of the Act, the ADA, or other laws. In fact, we expect that some of those entities are likely to be public agencies with which the State unit is required to enter into an interagency agreement in order for both parties to fulfill their responsibilities toward individuals with disabilities (see § 361.53(d) of the final regulations).

With regard to the proposed prohibition on applying financial needs tests to individuals who receive SSI or SSDI, we continue to believe that it is appropriate to exempt those persons from DSU financial needs tests given the Act's emphasis on streamlining access to VR services for disabled Social Security recipients. Moreover, as we discussed in the preamble to the NPRM (65 FR 10629), this change to the prior regulations facilitates the primary goal behind referring SSI recipients and SSDI beneficiaries to the VR program—supporting their efforts (and reducing disincentives) to pursue gainful employment and no longer require Social Security support.

Our rationale for exempting individuals receiving SSI benefits, or a combination of SSI and SSDI benefits, from State-imposed financial needs tests is further supported by the fact that these persons already have gone through a rigorous, federally mandated financial needs test that is typically more restrictive than those tests employed at the State level. To qualify for SSI, individual recipients must have very limited, if any, monthly income—individual or household—or other assets. These individuals generally live at or below the federally established poverty level. Consequently, SSI recipients clearly have a limited ability to contribute to the costs of VR services. Requiring these same persons to undergo an additional financial needs test at the State level would serve only to unnecessarily delay the provision of VR services.

On the other hand, the rationale behind exempting from DSU financial needs tests individuals receiving SSDI benefits alone is based on three critical points. First, SSA, as a matter of policy, has deemed it necessary to award SSDI beneficiaries monthly cash assistance due to their inability to work. While it is true that SSDI benefits are awarded on the basis of earnings and years worked as opposed to extreme financial need, SSA has determined that these individuals can no longer work due to their disabilities and, therefore, cannot earn income to support themselves or their families. SSDI payments are intended to cover a person's living expenses. Once a person achieves an employment outcome earning sufficient wages, as determined by SSA, the individual would be removed from the SSDI rolls.

Second, many State and Federal agencies currently are working to remove as many disincentives as possible for individuals with disabilities, including individuals with significant disabilities receiving Social Security benefits, to return to work. For example, Congress has adopted changes to Social Security laws not to penalize persons (*i.e.*, not to eliminate or reduce Social Security benefits, including health care coverage) for working since individual's wages are often insufficient to cover costly medical and other living expenses. Previously, many individuals with disabilities chose to remain on SSDI, at Federal expense, rather than risk losing health care coverage. Imposing a financial needs test on this same population that is seeking VR services in order to achieve an employment outcome, in effect, creates an additional disincentive to work and could adversely affect the results sought through the revised Social Security laws and other reforms.

Third, it is important to note that SSA reimburses State VR agencies for the costs incurred in serving an SSI or SSDI recipient when that individual achieves an employment outcome (*i.e.*, substantial gainful activity under Social Security laws) for a specified period of time. Thus, as far as those SSI and SSDI recipients who successfully achieve employment outcomes under the VR program are concerned, there is ultimately little financial burden on the DSU in serving these persons to justify transferring that burden to individuals.

Changes: We have amended the proposed regulations to exempt from DSU financial needs tests any service that constitutes an auxiliary aid or service afforded the individual under section 504 of the Act or the ADA in order for the individual to participate in the VR program.

Section 361.56 Requirements for Closing the Record of Services of an Individual Who Has Achieved an Employment Outcome

Comments: Several commenters expressed concern about proposed § 361.56(a), which required, as a condition of closing the individual's record of services, that the employment outcome achieved by the individual be the same as that described in the individual's IPE. These commenters viewed the provision as inappropriate since amending the IPE to specify a new employment outcome is not always possible, for example when the individual is unavailable to sign an amended IPE.

Other commenters questioned § 361.56(c) of the proposed regulations, which required an agreement between the individual and the DSU counselor that the employment outcome is satisfactory and that the individual is performing well in the employment before the DSU can close the individual's record of services. These commenters suggested that the proposed provision might lead to differences of opinion between the counselor and the individual as to whether the outcome is ''satisfactory'' and thus preclude the State unit from appropriately closing the service record.

Discussion: We agree that in very limited instances it may be impractical for the DSU and the individual, together, to amend the individual's IPE to reflect the ultimate employment outcome that the individual obtains while participating in the VR program. Yet, we believe that in most instances necessary amendments to the IPE can be accomplished since the DSU and the individual need not approve and sign the amended IPE simultaneously. Moreover, the required consistency between the IPE and the individual's outcome, in our view, is warranted in order to preserve the usefulness of the IPE development process.

With respect to the comments on proposed § 361.56(c), we note that this provision in the NPRM was substantially the same as the previous regulatory provision. In addition, we are not aware of any reported problems regarding the implementation of this provision through RSA monitoring activities, referrals to the Client Assistance Program, or due process hearings. More importantly, given that employee and counselor satisfaction is a critical factor toward assessing the stability of the individual's job, we believe that the provision should be retained in the final regulations.

Changes: None

Section 361.57 Review of Determinations Made by Designated State Unit Personnel

Comments: One commenter suggested revising § 361.57(a) of the proposed regulations to require the State unit to provide in writing all agency decisions that result in a suspension, termination, or denial of services. This commenter explained that requiring written notification of service denials would be consistent with procedural safeguards in other Federal programs.

We received several comments regarding proposed § 361.57(b), the general requirements governing State due process procedures. Specifically, commenters expressed dissatisfaction with proposed § 361.57(b)(3)(ii) regarding representation during mediation sessions and formal due process hearings. One commenter suggested revising that paragraph to exclude the use of attorneys during mediation and to require the use of attorneys during the formal hearing process. The commenter expressed concern that the use of attorneys during mediation would alter the informal nature of that process. Conversely, the commenter explained, individuals who are not represented by attorneys during the formal hearing are at a distinct disadvantage since the State unit, in general, is represented in hearings by an attorney.

At least one commenter questioned whether mediation should be voluntary on the part of the State unit. The commenter suggested revising proposed § 361.57(d)(2)(i) to require the State unit to participate in good faith in the mediation process whenever mediation is requested by the individual.

Commenters suggested that § 361.57(d)(2)(ii) of the proposed regulations be modified to allow the mediator, in addition to the parties to the mediation, to terminate the mediation process. The commenters stated that it is common practice to give mediators that authority.

A few commenters raised concerns about proposed § 361.57(d)(2)(iii), which governs the manner in which mediators are assigned to a particular case and lists of qualified and

impartial mediators are maintained. One commenter described the meticulous and thoughtful steps used in one State to assign the mediator who is most appropriate to each case. Another commenter suggested that the regulations require that the State unit and the Council agree to the list of mediators as they do for impartial hearing officers.

The final set of comments regarding the proposed mediation procedures pertain to the requirements governing mediation agreements under proposed § 361.57(d)(4). One commenter stated that mediators do not ''issue'' mediation agreements as that provision suggests. Several commenters urged us to make mediation agreements binding on all parties in order to create greater incentive to pursue mediation.

We received many comments regarding the requirement in proposed § 361.57(e)(1) that hearings generally be conducted within 45 days of an individual's request for review of a State unit decision that affects the provision of services to the individual. With one exception, all commenters indicated that it is overly burdensome to require the State unit to conduct informal reviews, mediation, and the formal hearing within the same 45-day period. Some suggested that the 45-day clock not begin until after an informal review and, if applicable, the mediation process are completed. Others suggested that the time period be extended by a certain number of days (e.g., 10 days) to allow for mediation to occur. Still others suggested that the regulations allow separate time periods for each phase of dispute resolution and that the time periods run consecutively.

Several commenters suggested that § 361.57(g)(3)(iii) of the proposed regulations be modified to eliminate the 30-day deadline by which a reviewing official must render a decision.

Finally, we received several comments asking that the final regulations include a time limit (e.g., 30 days) for the filing of civil actions under § 361.57(i) of the proposed regulations.

Discussion: The issue concerning requiring that all agency decisions that result in a suspension, termination, or denial of services be provided in writing has been brought to our attention many times since the adoption of the 1998 Amendments. Section 361.57(a) conforms to the statutory requirements in section 102(c) of the Act. The Act does not require a written decision in order for an individual to initiate an appeal under this section. An individual may appeal ''any determination.'' Therefore, we do not require designated State unit personnel to issue decisions pertaining to the provision of services in writing, but we encourage the use of written decisions whenever practicable.

With respect to the comments pertaining to legal representation, we share the concern that individuals sometimes are at a disadvantage if they are not represented by an attorney during the formal hearing process, especially if the designated State unit is represented by an attorney. However, we do not share the concern that attorneys used during the mediation process necessarily change the nature of mediation. Nonetheless, the proposed requirements regarding representation during the mediation and hearing stages reflect the broad authority in section 102(c)(3)(B) of the Act for individuals to select the representative of their choice.

The 1998 Amendments to the Act added mediation as a new method of resolving disputes between individuals and the State unit. Thus, it is not surprising that many commenters sought further clarification of the requirements in the proposed regulations that impact the States' implementation of mediation procedures.

Section 361.57(d)(2)(i) conforms to the statutory language of section 102(c)(4)(B)(i) of the Act, which requires that the DSU's mediation procedures ensure that the mediation process ''is voluntary on the part of the *parties*. . . . '' (emphasis added). Therefore, Congress intended the mediation process to be voluntary on the part of both parties rather than giving only the individual the discretion to participate in mediation as one commenter suggested. We also believe that allowing mediation to be voluntary on the part of both parties is necessary since mediation is successful only if both parties participate willingly in an effort to resolve their dispute. We do note, however, that the State unit's decision to agree to pursue mediation should be made on a case-by-case basis. It is neither appropriate nor consistent with the intent of the Act for a DSU to follow a general policy of never participating in mediation.

Our intent behind § 361.57(d)(2)(ii) of the proposed regulations was to ensure that either party may change its mind about participating in mediation, even after the mediation process has begun, and at that point pursue a due process hearing. We sought to ensure that individuals in particular are never locked into a less formal dispute resolution process that they believe to be futile. Consistent with this approach, we also agree with the suggestion that mediators should be allowed to terminate the mediation process and that amending the regulations to reflect that point would not alter the intended effect of this proposed section.

We proposed a process in § 361.57(d)(2)(iii) of the proposed regulations that is similar to that which the Act applies to the selection of impartial hearing officers. In particular, we sought to ensure the same neutrality on the part of the mediators that exists for hearing officers. However, we believe that States with established processes for assigning mediators to a case should be allowed to continue appointing mediators in that fashion, provided that the process used ensures neutrality.

In response to the comments on proposed § 361.57(d)(2)(iii) and the development of the State's list of available mediators, we note that section 102(c)(4)(C) of the Act does not require the State to develop the list of mediators through the joint efforts of the State unit and the Council. Many States have developed an ''Office of Dispute Resolution'' or similar office to handle all mediations across multiple State agencies. These offices typically employ mediators or contract with private mediators to conduct mediations involving State-administered programs. The proposed regulations were intended to give States as much flexibility as possible in establishing mediation policies and using existing mediation processes.

Many individuals representing CAPs and DSUs have urged us to interpret section 102(c)(4) of the Act to require that a mediation agreement be binding on all parties. We believe that, if the outcome of mediation (i.e., a mediation agreement) were binding, then conceivably neither party could pursue a formal hearing afterward. That type of restriction would be contrary to the scope of due process procedures that are available under the Act.

In light of the overwhelming support for extending the 45-day period for holding due process hearings under proposed § 361.57(e)(1), we agree that the period should be extended to 60 days in the final regulations. We do not believe that the time period should be extended any longer since section 102(c) of the Act clearly envisions a due process system that is timely, quick, and equitable.

We believe that the 30-day period for an appropriate official to review a hearing officer's decision under proposed § 361.57(g)(3)(iii) is reasonable. This is the same time period that applied to the review of hearing decisions by the State unit director under the previous regulations. Although State-level review of hearing decisions, if established by the State, now must be conducted by an official of an entity overseeing the DSU, we see no reason for modifying the current time period.

We consider it inappropriate for us to establish a time limit for the filing of civil actions in disputes arising under the VR program. The State's Rules of Civil Procedure or the Federal Rules of Civil Procedure, depending on the appropriate forum, dictate the applicable deadline for filing an action in civil court.

Changes: We have made the following modifications to proposed § 361.57(d): authorizing mediators to terminate mediations (§ 361.57(d)(2)(ii)); authorizing States with an established method of assigning mediators to use that process in assigning mediators for the VR program provided the process ensures neutrality on the part of mediators (§ 361.57(d)(2)(iii)); and, in adopting a technical but important revision suggested by some commenters, clarifying that mediators assist in developing rather than ''issue'' mediation agreements (§ 361.57(d)(4)). We also have modified proposed § 361.57(e)(1) to require that hearings be conducted within 60, rather than 45, days from the individual's request for review of a DSU decision.

Section 361.60 Matching Requirements

Comments: One commenter wrote in support of the proposed change in § 361.60(b)(3)(ii) that would authorize a State to use funds that are earmarked for a particular geographic area within the State as part of its non-Federal share without obtaining a waiver of statewideness if the State determines and informs the RSA Commissioner that it cannot provide the full amount of its non-Federal share without using the earmarked funds. This commenter indicated that the provision was needed

since many State legislatures appropriate most, but not all, of the funds needed to match the full amount of Federal funds available under the program.

Discussion: Although section 101(a)(4)(B) of the Act is intended to assist some States in meeting their matching obligations, we wish to reemphasize that statewideness requirements still apply to the Federal VR program funds that the State receives in return for contributing geographically limited earmarked funds to its non-Federal share. For further discussion of the effect of this change from the previous regulations, please refer to the preamble to the NPRM (65 FR 10630).

Changes: None.

Sections 361.80–361.89 Evaluation Standards and Performance Indicators

Comments: None.

Discussion: The Evaluation Standards and Performance Indicators for the VR program were published in the **Federal Register** on June 5, 2000 (65 FR 35792) and became effective on July 5, 2000. Because these performance measures are part of the regulations implementing the VR program (34 CFR 361), we have added the measures and their corresponding requirements to the final regulations in this publication. The Evaluation Standards and Performance Indicators are located in §§ 361.80 through 361.89 of Subpart E. For guidance in implementing the performance measures, we suggest you consult the preamble to the prior **Federal Register** publication of the measures (65 FR 35792).

Changes: We have amended the proposed regulations to include Subpart E, ''Evaluation Standards and Performance Indicators,'' and the corresponding provisions in §§ 361.80 through 361.89 that were previously published. The requirements in these sections are the same as those published in the **Federal Register** on June 5, 2000.

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