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**Part IV**

## **Department of Education**

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

**DEPARTMENT OF EDUCATION****34 CFR Part 361**

RIN 1820-AB14

**The 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 (VR program). These amendments are needed to implement changes in the Rehabilitation Act of 1973, as amended (Act). These changes establish evaluation standards and performance indicators for the VR program.

**DATES:** These regulations are effective July 5, 2000.

**FOR FURTHER INFORMATION CONTACT:** Beverlee Stafford, Policy, Planning and Evaluation Service, Rehabilitation Services Administration, U.S. Department of Education, 400 Maryland Avenue, SW., room 3014 Mary E. Switzer Building, Washington, DC 20202-2550. Telephone: (202) 205-8831.

Individuals with disabilities may obtain this document in an alternate format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to Katie Mincey, Director of the Alternate Format Center, at (202) 205-8113.

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**SUPPLEMENTARY INFORMATION:** The VR program is authorized by Title I of the Act (29 U.S.C. 701-751). This program provides support to assist States in operating a comprehensive, coordinated, effective, efficient, and accountable program to assess, plan, develop, and provide vocational rehabilitation (VR) services to individuals with disabilities to enable them to prepare for and engage in gainful employment, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, and informed choice. Section 106 of the Act requires that the Secretary establish and publish evaluation standards and performance indicators for the program. These final regulations implement that requirement.

Pursuant to section 106(a)(3) of the Act and Executive Order 12866, which encourages Federal agencies to facilitate meaningful participation in the regulatory development process, the Secretary, through the Rehabilitation Services Administration (RSA) of the U.S. Department of Education (Department)—(1) consulted with the rehabilitation community during the development of the evaluation standards and performance indicators; (2) published a “notice of intent to regulate” to solicit comments on the development of the proposed evaluation standards and performance indicators; (3) held a public meeting to discuss several issues related to the development of proposed evaluation standards and performance indicators; (4) discussed the development of the proposed indicators on numerous occasions with various members of the rehabilitation community; and (5) published for review and comment a notice of proposed rulemaking (NPRM) for this program in the **Federal Register**, 63 FR 55292 (October 14, 1998). In response to the NPRM, we received 62 comments, each of which we reviewed and considered in the development of the final regulations. These final regulations reflect the input received through these efforts.

These final regulations amend 34 CFR part 361, which contains the VR program regulations, by adding a Subpart E entitled “Evaluation Standards and Performance Indicators.” These final regulations implement certain requirements of the Rehabilitation Act Amendments of 1992 (1992 Amendments), Pub. L. 102-569 (October 29, 1992), and the Rehabilitation Act Amendments of 1998 (1998 Amendments), which are in Title IV of the Workforce Investment Act of 1998 (WIA), Pub. L. 105-220 (August 7, 1998). The 1992 Amendments added section 106 to part A of Title I of the Act, which requires the Secretary to establish and publish evaluation standards and performance indicators. The 1998 Amendments modified section 106 of the Act to require that, to the maximum extent practicable, the VR standards and indicators be consistent with the core indicators of performance (Core Indicators) established under section 136(b) of WIA.

Section 106 of the Act also includes, among other things, the following requirements: (1) The Secretary establishes and publishes in the **Federal Register** evaluation standards and performance indicators for the VR program. (2) The evaluation standards and performance indicators must include outcome and related measures

of program performance that facilitate the accomplishment of the purpose and policy of the VR program. (3) The Secretary develops the evaluation standards and performance indicators with input from State VR agencies (or the designated State unit), related professional and consumer organizations, recipients of VR services, and other interested parties. (4) Each designated State unit (DSU) must report to the Secretary after the end of each fiscal year the extent to which it is in compliance with the evaluation standards and performance indicators. (5) The Secretary provides technical assistance to any DSU that performs below the established evaluation standards and develops jointly with the DSU a program improvement plan outlining the specific actions to be taken by the DSU to improve program performance. (6) If a DSU that performs below the established evaluation standards fails to enter into a program improvement plan, or is not complying substantially with the terms and conditions of such a program improvement plan, the Secretary reduces or makes no further payments under the VR program to the DSU until the DSU has entered into an approved program improvement plan or is complying substantially with the terms and conditions of such a program improvement plan. (7) The Secretary provides an annual report to Congress containing an analysis of program performance, including relative State performance, based on the evaluation standards and performance indicators.

The NPRM contained two evaluation standards, each of which had at least two or more implementing performance indicators by which to measure DSU performance. The NPRM also contained specific proposed performance levels for each indicator that identified the minimum level of performance that a DSU would need to achieve to pass a given indicator. Under the NPRM, a DSU would have had to pass a minimum of five of the seven proposed performance indicators, including at least two of the three proposed primary indicators, for Evaluation Standard 1 and both proposed performance indicators for Evaluation Standard 2.

These final regulations contain a limited number of significant changes to what we proposed in the NPRM. These changes are based on both public comment and interdepartmental review. A detailed description of these changes is contained in the “Analysis of Comments and Changes” section. In addition, we reviewed and revised the final regulations in accordance with the Department’s “Principles for

Regulating,” which were developed as part of the Administration’s regulatory reinvention initiative under the “National Performance Review II.” The principles are designed to ensure that we regulate in the most flexible, most equitable, and least burdensome way possible.

### Analysis of Comments and Changes

In response to our invitation in the NPRM, we received 62 comments on the proposed regulations. Our analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

We group major issues according to subject under appropriate sections of the regulations. We discuss other 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 the law does not authorize the Secretary to make. Please note also that, in the NPRM, we requested comments on several issues regarding performance standards and indicators that are currently under consideration for regulatory development, including draft proposed Evaluation Standard 3 (Consumer Satisfaction), draft proposed Evaluation Standard 4 (Retention of Employment and Earnings), and draft proposed Evaluation Standard 5 (Adequate Use of Resources). We received many comments on these draft proposed evaluation standards and will give each comment serious consideration during the development of additional standards and indicators. We thank all individuals and organizations for their input.

#### Section 361.81 Applicable Definitions

##### Definition of “Full-time Employment”

*Comments:* Five commenters stated that requiring a minimum of 35 hours per week for a position to be considered “full time” is not realistic and recommended that the number of hours be lowered to 30 or 32 hours as a more accurate reflection of existing workplace conditions. Other commenters objected to any minimum for the number of hours worked per week required to constitute “full-time employment” and stated that the determination of whether the work is “full time” should be consistent with the implementation of the individual’s Individualized Plan for Employment (IPE).

*Discussion:* The proposed definition of “full-time employment” applied only to proposed Performance Indicator 1.7, which would have measured the percentage of individuals in “full-time,” competitive employment who would

have been eligible to enroll in a medical insurance program. Because we have deleted proposed Performance Indicator 1.7 (for reasons discussed later in this preamble), a definition of the term “full-time employment” is no longer necessary.

*Changes:* We have deleted the proposed definition.

##### Definition of “Individuals From a Minority Background”

*Comments:* None.

*Discussion:* We have adopted the designations mandated by the Office of Management and Budget (OMB) for reporting and recording race and ethnicity, as mandated in the “Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity” (Revisions), 62 FR 58, 781–85, and 790 (October 30, 1997). These designations are mandatory for all new and revised recordkeeping or reporting requirements that include racial or ethnic information after the publication date of the “Revisions.”

*Changes:* Because OMB designates “individuals from a minority background” differently from the definition included in the NPRM, we have changed the proposed regulatory definition to conform to OMB’s designation.

##### Definition of “Non-minority Individual”

*Comments:* Eight commenters disagreed with the proposed definition of “non-minority individual” and recommended that the term be defined as those individuals whose ethnicity or race is reported as White who are non-Hispanic.

*Discussion:* As we previously discussed, we have adopted the race and ethnicity designations mandated by OMB for recording and reporting race and ethnicity. The NPRM proposed to identify as “non-minority individuals” those individuals who designate themselves as both non-Hispanic and White using the OMB-mandated designations.

The “Revisions” mentioned previously—(a) require the data collector to request that the individual identify himself or herself; and (b) explicitly allow the individual to identify as many race or ethnicity designations as the individual believes apply. The data collector is to accept the individual’s designation or designations and may not make any independent judgment regarding the individual’s choice.

*Changes:* We have revised the definition of “non-minority individuals” to be consistent with OMB’s definition.

##### Definition of “Service Rate”

*Comments:* Two commenters requested clarification of this term. These commenters stated that it was not clear whether the computation would be based on the rate services are accessed or the rate employment outcomes are achieved.

*Discussion:* The term “service rate” reflects the rate at which services were received by individuals who exited the VR program and is not based on the rate at which the individuals achieve employment. (The response to comments regarding Performance Indicator 2.1 includes an expanded discussion of this issue.)

The numerator for the service rate calculation is the number of individuals whose records are closed after they have received services under an IPE, whether or not they achieved an employment outcome. The denominator of the ratio is the number of all individuals whose records are closed after they had applied for services, whether or not they had an IPE. The denominator includes those individuals who—(1) applied for VR services but were not accepted into the program for any reason (including failure to cooperate, moved, etc.); (2) had been accepted for VR services but did not receive services for any reason (including those individuals who withdrew from the program while on a waiting list where the DSU is under an order of selection for services); (3) received services under an IPE but did not achieve an employment outcome; and (4) received services under an IPE and achieved an employment outcome. RSA will calculate the service rate for both minority and non-minority VR consumers.

*Changes:* None.

#### Section 361.82 Evaluation Standards

*Comments:* Two commenters expressed concern that the evaluation standards and performance indicators do not assess whether the employment outcome is consistent with the individual’s informed vocational choice.

*Discussion:* While these final regulations do not contain a performance indicator for measuring informed choice, we want to emphasize our commitment to ensuring that each individual applicant and eligible individual is able to exercise informed choice throughout the VR process. We also want to emphasize that we expect to develop an indicator to measure the extent to which informed choice is part of the provision of services. As discussed in the preamble to the NPRM, we have proposed development of an evaluation standard for consumer

satisfaction (draft proposed Evaluation Standard 3 (Consumer Satisfaction)) that, in part, would measure the level of informed choice given to consumers during the VR process. We are in the process of reviewing the comments received on draft proposed Evaluation Standard 3. However, until an evaluation standard for measuring informed choice is formally proposed through the regulatory process, the requirement for informed choice will continue to be enforced through the monitoring and review process mandated in section 107 of the Act.

*Changes:* None.

*Section 361.84(c) Performance Indicators*

*Section 361.84(c)(1)(i) Performance Indicator 1.1*

*Comments:* One commenter suggested that Performance Indicator 1.1 be changed to measure the number of people who “enter employment” to make this indicator consistent with Core Indicator I under section 136(b) of WIA. The commenter notes that Core Indicator I measures the extent to which individuals “enter unsubsidized employment,” while Performance Indicator 1.1 will measure the extent to which individuals “exiting the VR program \* \* \* achieved an employment outcome.” The commenter questioned the need for the differences between the two measures and also questioned whether Performance Indicator 1.1—under which individuals with disabilities must maintain employment for at least 90 days to be considered to have “achieved an employment outcome”—establishes a more restrictive standard for the VR program than that which applies to programs under Title I of WIA.

*Discussion:* As the commenter correctly points out, the Act requires that the standards and indicators for the VR program be consistent, to the maximum extent practicable, with the four Core Indicators established under section 136(b) of WIA. To that end, Performance Indicator 1.1 is consistent with the general objective of the WIA Core Indicators, which is to examine the success in achieving employment outcomes for individuals receiving services, but also accounts for the range of employment outcomes available under the VR program. “Employment outcomes” under the VR program include the full scope of employment options available to persons receiving VR services (e.g., competitive employment, employment in non-integrated settings, homemaker, and unpaid family worker), whether those

“employment outcomes” are “subsidized” or “unsubsidized.” Thus, in assessing success in achieving employment outcomes under the VR program, it is necessary to consider the full range of outcomes contemplated by the Act.

Performance Indicator 1.1 also reflects other requirements that are specific to the VR program. In addition to making VR services available to individuals with disabilities entering the job market, the VR program authorizes VR services for eligible individuals who need those services to retain their current job. Thus, measuring only the number of individuals “entering” employment under the VR program, as done under WIA Core Indicator I, would not account for those individuals who receive VR services to maintain or continue their employment.

More generally, determining whether a VR program participant has successfully achieved an employment outcome depends on many factors in addition to the individual’s ability to start or enter a job. For example, under the VR program regulations, the individual’s employment must be consistent with the individual’s strengths, resources, priorities, concerns, abilities, capabilities, and informed choice, and the individual must be performing well on the job. Success in meeting these requirements cannot be accurately measured at the time the individual enters employment. Therefore, the determination of whether a VR program participant has successfully achieved an employment outcome is best made at a later point. The 90-day retention period from the time the individual begins working or no longer receives VR services is designed to ensure that the particular job is appropriate to the individual and has at least some measure of stability. We believe that using this and the other requirements for achieving an employment outcome under 34 CFR 361.56 to measure whether an individual’s participation in the VR program was successful is much more accurate than focusing solely on the ability of an individual to enter employment. Thus, the differences between proposed Performance Indicator 1.1 and WIA Core Indicator I are necessary, and further alignment of the two measures would not result in an accurate measure of the extent to which States are successful in assisting people with disabilities achieve employment outcomes under the VR program.

Nevertheless, we recognize that the WIA Core indicators represent important measures for all programs, including the VR program, that are part

of the One-Stop service delivery system established under Title I of WIA. Section 136(b)(2)(A)(i)(II) and (III) of WIA (WIA Core Indicators II and III) measure retention of unsubsidized employment 6 months after entry into employment and earnings 6 months after entry into employment, respectively. Consequently, we developed Draft Proposed Evaluation Standard 4 and its attendant draft performance indicators and presented those draft measures for public comment in the preamble to the proposed regulations, in an effort to ensure that future measures for the VR program reflect Core Indicators II and III. Since the proposed regulations were published, however, we have been working with the Department of Labor to further modify that draft Standard and its Indicators to better align those measures with each of the first *three* Core Indicators under Title I of WIA (the fourth WIA core indicator—attainment of a recognized credential—is not reflected in our drafts since the success of the VR program is judged solely on the basis of achievement of employment outcomes, particularly high-quality outcomes).

The new draft Standard, which we would implement through a separate rulemaking effort (*i.e.*, an NPRM seeking public comment and final regulations) would measure the extent to which participants in the VR program: (1) achieve an employment outcome with wages after receiving VR services (analogous to WIA Core Indicator I—entry into unsubsidized employment), (2) retain their employment 6 months after exiting the VR program with a job (WIA Core Indicator II), and (3) increase their earnings from the time they enter the VR program to the point 6 months after they exit the program with a job (WIA Core Indicator III). We are also working closely with the Department of Labor to adopt a common data base, specifically, the Unemployment Insurance (UI) Wage Data system maintained by State Employment Security Agencies, for purposes of measuring performance under the new draft Standard.

Consequently, this new measure under the VR program would be very closely aligned with the performance measures under WIA on key performance items that are common to all employment programs, *i.e.*, helping unemployed persons become employed, working to ensure that participants are able to retain their jobs, and assisting persons to obtain or maintain employment in which their earnings increase over time. We expect to publish this new Standard and supporting

indicators for public comment once we have completed our assessment of the extent to which State VR units can obtain and use UI wage record information in support of the draft Standard and have determined the types of assistance State VR units might need to complete those tasks. We are giving a high priority to these efforts in order to better streamline the systems for measuring performance across partner programs of the One-Stop delivery system.

Available data collection methods and instruments enable us to implement only Standards 1 and 2 of the final regulations at this time. However, once we have confirmed that State VR agencies are able to report on the draft standard, we will determine what combination of evaluation standards and performance indicators (e.g., adding the draft Standard and indicators to the performance measures in these final regulations, using the draft Standard as a substitute for one or more of the final regulatory measures, or implementing some other combination of measures) should be implemented in the future. Therefore, the future performance system for the program will include that combination of measures that best accounts for the uniqueness of the VR program and the need for a universal system for measuring performance of the State One-Stop system.

*Changes:* None.

#### *Section 361.84(c)(1)(ii) Performance Indicator 1.2*

*Comments:* Twelve commenters recommended that Performance Indicator 1.2 should measure only the percentage of individuals who obtain employment after the individual is determined eligible and an IPE has been established. These commenters further recommended that Performance Indicator 1.2 should not measure the percentage of individuals whose cases were closed (either as ineligible or after an eligibility determination was made) before any services were received.

*Discussion:* We agree with the comments and want to clarify that those individuals whose cases were closed (either as ineligible or after an eligibility determination) before any services were received will not be included in the percentage of individuals measured by Performance Indicator 1.2. As recommended by the commenters, Performance Indicator 1.2 will measure only the percentage of individuals who exit the VR program after they have been determined eligible and an IPE has been implemented.

*Changes:* None.

#### *Section 361.84(c)(1)(iii) Performance Indicator 1.3*

*Comments:* Five commenters recommended that those individuals who achieve an employment outcome of “self-employment” be eliminated from consideration under Performance Indicator 1.3 until a means to measure the true wages of self-employed individuals is developed. These commenters believe that the concept of “wages” is not applicable to self-employed individuals because wages apply to what one person must pay another and not what someone may be willing to earn if they are self-employed.

*Discussion:* Performance Indicator 1.3 is not dependent on measuring “wages” per se. The measure is of an individual’s “earnings” and whether those “earnings” are equivalent to at least the minimum wage. Although self-employed individuals may not earn “wages” per se, they do have “earnings,” and their “earnings” can be calculated on an hourly basis.

In addition, “self-employment” is specifically included within the definition of “employment outcome” in section 7(11) of the Act. Congress has recognized the importance of including all possible employment outcomes for individuals with disabilities. The VR program regulations and these indicators should be consistent with the Act and congressional intent. Therefore, we believe that self-employment outcomes for individuals with earnings comparable to at least the minimum wage should be included in the percentage of individuals who exit the VR program with earnings comparable to at least the minimum wage.

*Changes:* None.

#### *Section 361.84(c)(1)(v) Performance Indicator 1.5*

*Comments:* Some commenters were concerned about comparing the earnings of VR consumers exiting the VR program to the State’s average hourly earnings. Their concern was based on their belief that most VR consumers achieve employment outcomes that are at the level of workers newly entering the work force while the State’s average hourly wage is computed for all workers in the State, including workers with years of employment. These commenters believed that a more appropriate comparison would be to the average entry level worker in the State’s work force.

*Discussion:* The assumption that most VR consumers achieve only employment comparable to that of new workers is inconsistent with the available data. The “Third Interim

Report” of the “Longitudinal Study of the Vocational Rehabilitation Service Program,” published in August 1998 (“Third Interim Report”), reported that over 96 percent of VR consumers who achieved employment outcomes had prior work experience. Specifically, the report stated the following: 36.9 percent of VR consumers were working at the time they applied for VR services; 37.8 percent of VR consumers had worked in the 2 years prior to applying for VR services; and 21.7 percent of VR consumers had worked previously, but not in the 2 years prior to applying for VR services. Additionally, the performance indicator includes only those individuals earning at least the minimum wage (necessarily excluding those individuals who earn less than the minimum wage at placement and whose inclusion would lower the ratio), and the minimum performance level is set at a ratio of less than .6 (an earnings level for VR consumers of less than 60 percent of the “State Average Annual Pay”). We believe the performance level for Performance Indicator 1.5 is consistent with the Act’s emphasis on high-quality employment outcomes. Therefore, we do not believe a change is needed in this performance indicator.

*Changes:* None.

#### *Section 361.84(c)(1)(vii) Performance Indicator 1.7*

*Comments:* Fourteen commenters expressed concern that proposed Performance Indicator 1.7 was not a fair measure of DSU performance because the provision of medical insurance by the employer is outside the DSU’s control. In addition, they felt that this proposed measure does not account for variability among States with regard to the availability of insurance programs and the changing nature of the labor market where employment-related benefits are less available. Three commenters were concerned that this proposed indicator would negatively impact VR consumers obtaining jobs with small employers who are less likely to provide medical insurance as a benefit option.

*Discussion:* Performance Indicator 1.7 would have addressed what research indicates is a major impediment to individuals with disabilities entering the workforce—the unavailability of adequate health insurance. The growing number of employers that do not provide health insurance worsens this problem. If this trend continues, DSUs will have reduced opportunities to place individuals with disabilities into jobs that provide health insurance. This would cause their performance on Indicator 1.7 to erode.

However, many individuals are covered by Medicaid, Medicare, and private insurance provided by their spouses, families, or other means. Also, all employees are covered by workers' compensation for injuries and illnesses that occur while on the job. In addition, the "Ticket-to-Work and Work Incentives Improvement Act of 1999," Pub. L. 106-170 (December 17, 1999), allows Medicaid recipients to keep their coverage even if they find employment. Because approximately one quarter of all individuals served by the VR program receive Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI), we expect that a growing number of individuals served by the DSUs will be eligible to retain Medicaid after they find employment. This will reduce the need for employer-provided health insurance for individuals served by DSUs.

Despite this limited availability of health insurance for some individuals served by DSUs, the problem persists. Of the nearly 34.67 million poor people in the U.S., only approximately 14 million are covered by Medicaid. Of the remaining 20.67 million poor, only approximately 9.47 million have health insurance. The remaining 11.2 million poor do not have health insurance and will not be helped by the new law.

In proposing this indicator, we assumed that health insurance was evenly distributed across the income spectrum and was reasonably available at all levels of income. However, further examination of the data provided in the "Third Interim Report" indicates the difficulty in finding jobs that offer health insurance at the wages earned by the majority of individuals with disabilities who are served by VR agencies.

For example, nearly 31.5 percent of individuals who are placed in competitive employment by a VR agency make \$5 or less per hour. However, only 13 percent of jobs that pay \$5 or less per hour offer health insurance.

In addition, nearly 31 percent of individuals who are placed in competitive employment by a VR agency make more than \$5 but less than \$7 per hour. However, only 35 percent of jobs that pay more than \$5 but less than \$7 per hour offer health insurance.

For slightly higher paying jobs, the percentage that offer health insurance increases significantly, although the percentage is still barely more than 50 percent. For example, 52.1 percent of jobs that pay more than \$7 but less than \$9 per hour offer health insurance. However, only 16.6 percent of individuals who are placed in

competitive employment by a VR agency make more than \$7 but less than \$9 per hour.

The increase in jobs that offer health insurance is not as dramatic as wages increase. Only 54.9 percent of jobs that pay more than \$9 but less than \$11 per hour offer health insurance. However, only 8.8 percent of individuals who are placed in competitive employment by a VR agency make more than \$9 but less than \$11 per hour.

Finally, at the highest wage level for which we have data, 65 percent of jobs that pay more than \$11 per hour offer health insurance. However, only 12.1 percent of individuals who are placed in competitive employment make more than \$11 per hour.

The data show that nearly 62.5 percent of individuals who achieve competitive employment earn \$7 or less per hour and that only a small percentage of jobs at these low wage levels offer health insurance. Therefore, we believe that the burden associated with satisfying this proposed indicator does not justify the extra resources, time, and effort DSUs would have to devote to finding those few jobs that offer health insurance for the majority of individuals served by DSUs.

In addition, even if we did believe finding the few jobs with health insurance was worth the extra burden, we believe that this proposed indicator would not have encouraged DSUs to assist individuals with disabilities to acquire health insurance from other sources, even though those other sources may be more appropriate for many individuals with disabilities. This proposed indicator also would have served as a disincentive to recruiting and accepting individuals with little or no education or work experience. Instead, this proposed indicator would have provided an incentive for recruiting and accepting those individuals with disabilities who already are well-educated, have extensive job experience, or are more likely to be candidates for community college or university training. We do not believe this would be a desirable result.

The data from the "Third Interim Report" also indicate that part-time workers, who are a significant percentage of individuals with disabilities who are employed, are less likely to find jobs that offer health insurance. Finally, the data indicate that firms with fewer than 25 employees are least likely to offer health insurance. These data show the difficulty in finding jobs that offer health insurance for individuals with disabilities, who are more likely to end up in low-paying, part-time jobs with smaller employers.

We believe DSUs should make every reasonable effort to find those employers who will provide health insurance to their employees who are not covered by Medicaid or some other health insurance. However, we recognize the difficulty in finding those employers. For this reason we believe this proposed indicator is not appropriate at this time.

*Changes:* We have deleted proposed Performance Indicator 1.7.

#### *Section 361.84(c)(2)(i) Performance Indicator 2.1*

*Comments:* One commenter suggested that Performance Indicator 2.1 does not include enough variables to adequately assess DSU services to individuals from minority backgrounds. This commenter suggested that comparing minority versus non-minority numbers by type of closure would be more statistically significant. Another commenter suggested that a better measurement than service rate would be to compare the employment outcome rate of individuals from minority backgrounds to the employment outcome rate of non-minority individuals. Still another commenter suggested that this indicator should compare the employment outcome rate, the average hourly wages, and availability of medical insurance benefits of individuals from minority backgrounds to those of non-minority individuals. One commenter questioned the need for this indicator if it can be satisfied through an examination of the DSU's policies and procedures.

*Discussion:* At this time, we do not have any data on which to compare the employment outcome rates, the average hourly wages, types of closures, or availability of medical insurance benefits of individuals from minority backgrounds to those of non-minority individuals. We believe that the comparison of service rates between individuals from minority backgrounds and individuals from non-minority backgrounds as the performance indicator for this evaluation standard is the appropriate starting point to determine whether individuals with disabilities from minority backgrounds have equal access to VR services. As we continue to collect additional data, we may determine in the future that comparing minorities and non-minorities by the type of closure, rate of employment outcomes, average hourly wages, or availability of medical insurance benefits is also necessary. Until we collect that additional data, we will not be able to develop an indicator to measure these factors.

We believe that requiring a DSU to describe the policies it has adopted and

the steps it has taken to ensure that individuals with disabilities from minority backgrounds have equal access to VR services is the best performance indicator for this evaluation standard. The two-step approach in § 361.86(b)(2)(i) and (ii) for measuring compliance with Performance Indicator 2.1 ensures that DSUs will make appropriate efforts to ensure equal access to services for minority individuals.

*Changes:* None.

*Section 361.84(c)(2)(ii) Performance Indicator 2.2*

*Comments:* Nine commenters suggested that proposed Performance Indicator 2.2 should be eliminated because it is invalid to compare individuals with significant disabilities who self-report to the Census a disability that prevents them from working to individuals with significant disabilities who are eligible to receive VR services. Four commenters recommended deleting this proposed indicator if the 2000 Census does not include the data necessary to measure how to comply with it. Three commenters suggested that comparing the percentage of DSU consumers who are from minority backgrounds to the percentage of minority individuals in the general population is a more valid and reliable indicator. One commenter suggested that data on SSDI beneficiaries and SSI recipients may be used as an alternative to Census data.

*Discussion:* In addition to the comments opposed to this proposed indicator, the Bureau of the Census has decided not to continue to collect the data necessary to perform the proposed comparison. We will give serious consideration to the comments on the proposed indicator in the development of a new indicator.

*Changes:* We have deleted proposed Performance Indicator 2.2.

*Section 361.86 Performance Levels*

*Comments:* Three commenters stated that establishing different performance levels for agencies that serve only blind or visually impaired individuals implied incorrectly that those individuals were more significantly disabled than individuals served by general or combined DSUs. Two commenters were concerned that the lower performance levels for agencies serving only blind or visually impaired individuals were in conflict with the Act's commitment to competitive employment outcomes above the minimum wage. These two commenters recommended raising the level of performance for these agencies over a

reasonable period of time so that they are eventually at the same performance level as general and combined DSUs.

One commenter suggested that we create a separate performance level for combined DSUs because many States are considering creating a separate agency serving blind and visually impaired individuals. The commenter also suggested that the transition for those combined DSUs will be easier if different performance levels are in effect when the transition occurs.

*Discussion:* We believe that agencies serving only individuals who are blind or visually impaired should continue to have different levels of performance from combined DSUs (those agencies that serve individuals who are blind or visually impaired and individuals with other disabilities) and general DSUs (those agencies that do not serve individuals who are blind or visually impaired). Individuals served by agencies for the blind are, in many (if not most) cases, totally blind. Total blindness is a significant disability that often places more limitations on an individual than other types of disabilities. As a result, the services provided by agencies that serve individuals who are blind or visually impaired are generally more comprehensive and take longer to provide than the services provided to many individuals who receive VR services from a general or combined DSU. In addition, because of the significance of their disability, a much smaller number of individuals who are blind or visually impaired achieve a competitive employment outcome. The greater significance of their disability also results in generally lower wage levels for the majority of individuals served by agencies that serve individuals who are blind or visually impaired. These factors and the challenges faced by individuals who are blind or have visual impairments require that we establish different performance levels for agencies serving these individuals.

The performance levels established in these final regulations are only the first step in ensuring improved DSU performance. The Act requires that the standards and indicators be reviewed every 3 years. Section 361.86(a)(2) of these final regulations allows us to establish new performance levels through the regulatory process, which includes the opportunity for public comment. We intend to adjust performance levels in the future to ensure that all agencies—general DSUs, combined DSUs, and agencies serving individuals who are blind and visually

impaired—provide the highest quality of services to eligible individuals.

*Changes:* None.

*Comments:* Five commenters recommended that the availability of resources and whether a DSU is operating under an order of selection for services under section 101(a)(5) of the Act be included as factors in determining minimally acceptable levels of performance.

*Discussion:* We agree that the availability of resources belongs in the performance equation. However, we do not agree that the availability of resources should be included in measuring whether a DSU has achieved a minimally acceptable level of performance. Given that DSUs with the same amount of resources may perform quite differently, the proper criterion for measuring performance under an outcome-based standards and indicators system is whether a DSU is successfully assisting individuals with disabilities to achieve employment outcomes. If a DSU fails to meet the indicator for achieving a minimally acceptable level of performance (e.g., achieving employment outcomes), the Act and the regulations require that the Secretary and DSU jointly develop a program improvement plan that outlines the specific actions the DSU will take to improve program performance. In developing the program improvement plan, we will consider, pursuant to the Act and these final regulations, all available and relevant data and information related to the DSU's performance. Because the availability of resources greatly affects what actions may be taken to improve performance, we believe that the time to properly consider the availability of resources will be during the development of the program improvement plan.

In reviewing data concerning the past performance of all DSUs, we found that the performance of DSUs operating under an order of selection did not, overall, vary significantly from the performance of DSUs not operating under an order of selection. Thus, whether or not a DSU is operating under an order of selection should not be a factor in determining a minimally acceptable level of performance. However, the yearly analysis of program performance based on the standards and indicators (to be included in the Annual Report to Congress) will indicate whether a DSU is operating under an order of selection.

*Changes:* None.

*Comments:* Two commenters were concerned that meeting the performance level for Performance Indicator 2.1 may

result in quotas because the level is set too high.

*Discussion:* We disagree that Performance Indicator 2.1 requires a DSU to impose quotas. If the service rate for minority individuals is less than 80 percent of the service rate for non-minority individuals or if fewer than 100 individuals from a minority population have exited the VR program during the reporting period, the DSU only needs to 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. In these instances, RSA will examine a DSU's existing or proposed policies and the steps it has taken or proposes to take to determine their effectiveness in achieving equal access for minority individuals with disabilities.

A greater than 20 percent racial disparity in service rates will trigger a review of a DSU's seemingly neutral practices to determine whether they are having the effect of racial discrimination. This approach is well-established within the Department and in desegregation case law. Its use in the education context dates to the early 1970's when the Department of Health, Education, and Welfare, the predecessor to the Department of Education, was actively involved in the desegregation of public school districts pursuant to the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 91 S.Ct. 1267 (1971). In that case, the Court held that a "substantial disproportion" in the racial composition of schools warranted an examination of the school district's policies and practices to determine if remedial action was necessary. In adopting this measure of performance, and in response to the commenters' concern that the measure may require quotas, we are guided by the Federal case-law established pursuant to *Swann*. Courts have held that the law does not require a racial balance reflecting the composition of the community. However, courts have ruled that limited use of mathematical ratios may serve as a starting point in identifying whether a racial imbalance is the result of racial discrimination that requires remedial action.

*Changes:* None.

#### *Section 361.88 Reporting Requirements*

*Comments:* None.

*Discussion:* Our decision to delete proposed Performance Indicators 1.7 and 2.2 (discussed previously) eliminates a DSU's need to report data

measuring its performance on those indicators.

*Changes:* We have deleted the requirements to report the number of individuals exiting the VR program in full-time, competitive employment (proposed § 361.88(a)(7)); health insurance data (proposed § 361.88(a)(8)); and the number of individuals from minority backgrounds with significant disabilities who exit the program after receiving VR services under an IPE (proposed § 361.88(a)(13)).

Therefore, we have correspondingly renumbered the remaining reporting requirements (numbered (9), (10), (11) and (12) in the NPRM) as §§ 361.88(a)(7) through (10), respectively.

#### **Goals 2000: Educate America Act**

The Goals 2000: Educate America Act (Goals 2000) focuses the Nation's education reform efforts on the eight National Education Goals and provides a framework for meeting them. Goals 2000 promotes new partnerships to strengthen schools and expands our capacities for helping to exchange ideas and obtain information needed to achieve the goals.

These final regulations address the National Education Goal that every adult American will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship. The regulations further the objectives of this Goal by implementing a program that affords individuals with disabilities opportunities for job training, job placement, placement in competitive employment, and career advancement.

#### **Executive Order 12866**

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of this 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. This preamble identifies and explains any burdens that may be specifically associated with information collection requirements.

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 summarized the potential costs and benefits of these final regulations in the preamble to the NPRM under the following headings: Executive Order 12866 (1. Potential Costs and Benefits) and Paperwork Reduction Act of 1995. (63 FR 55292 and 55301) We include additional discussion of potential costs and benefits in the section of this preamble titled Analysis of Comments and Changes.

We believe the changes in these final regulations will improve the VR program and will yield substantial benefits in terms of improved accountability and performance. We also believe the final regulations will improve accountability by focusing on the most critical areas of DSU performance. Therefore, we have determined that the potential benefits of these changes justify the potential costs.

#### **Paperwork Reduction Act of 1995**

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control number assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

#### **Intergovernmental Review**

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

In accordance with the order, we intend this document to provide early notification of our specific plans and actions for this program.

#### **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 on 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 The 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: March 6, 2000.

**Richard W. Riley,**  
*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary amends Title 34, Chapter III, part 361, of the Code of Federal Regulations as follows:

1. The authority citation for Part 361 continues to read as follows:

**Authority:** 29 U.S.C. 711(c), unless otherwise noted.

2. Subpart E, consisting of §§ 361.80 through 361.89, is added to read as follows:

### PART 361—THE STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

#### Subpart E—Evaluation Standards and Performance Indicators

Sec.	
361.80	Purpose.
361.81	Applicable definitions.
361.82	Evaluation standards.
361.84	Performance indicators.
361.86	Performance levels.
361.88	Reporting requirements.
361.89	Enforcement procedures.

#### 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))

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