

# Federal Register

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## Part II

### Department of Education

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34 CFR Part 361 et al.  
The State Vocational Rehabilitation  
Services Program; Final Rule

**DEPARTMENT OF EDUCATION****34 CFR Parts 361, 363, 376, and 380**

RIN 1820-AB12

**The State Vocational Rehabilitation Services Program**

AGENCY: Department of Education.

ACTION: Final regulations.

**SUMMARY:** The Secretary amends the regulations governing The State Vocational Rehabilitation Services Program. These amendments are needed to implement changes to the Rehabilitation Act of 1973 (Act) made by the Rehabilitation Act Amendments of 1992, enacted on October 29, 1992, as amended by the 1993 technical amendments (hereinafter collectively referred to as the 1992 Amendments).

**EFFECTIVE DATE:** These regulations take effect March 13, 1997.

**FOR FURTHER INFORMATION CONTACT:** Beverlee Stafford, U.S. Department of Education, 600 Independence Avenue, SW., Room 3014, Mary E. Switzer Building, Washington, DC 20202-2531. Telephone (202) 205-8831. Individuals who use a telecommunications device for the deaf (TDD) may call (202) 205-5538.

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

On December 15, 1995, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the Federal Register (60 FR 64476).

Additionally, pursuant to Executive Order 12866, which encourages Federal agencies to facilitate meaningful participation in the regulatory development process, the Rehabilitation Services Administration (RSA) made available draft proposed regulations (draft regulations) in accessible formats, including an electronic format, to a broad spectrum of parties for informal review and comment prior to publishing the December 15, 1995 NPRM. RSA also gathered public input on the draft regulations through public meetings and focus groups and analyzed over 600

letters of comments on the draft regulations.

These final regulations implement changes made to the program by the 1992 Amendments with the exception of the evaluation standards and performance indicator requirements in section 106 of the Act, which are being implemented in a separate rulemaking document, and incorporate some of the burden-reducing changes previously proposed in an NPRM for this program that was published on July 3, 1991 (56 FR 30620) (1991 NPRM). The 1991 NPRM was not finalized at the request of Congress. These regulations also implement changes that the Secretary believes are important to update, consolidate, clarify, and in other ways improve the regulations for this program.

The Supplementary Information section to the NPRM includes a discussion of the major changes to Title I of the Act made by the 1992 Amendments. These changes have far-reaching implications for the program. Individuals are encouraged to refer to the NPRM (60 FR 64476-64477) for a discussion of the major themes associated with the 1992 Amendments.

These final regulations contain a limited number of significant changes to the proposed regulations based on public comment and interdepartmental review. A detailed description of these changes follows. In addition, the final regulations have been reviewed and revised 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 the Department regulates in the most flexible, most equitable, and least burdensome way possible.

The Secretary also notes that the changes to supported employment definitions included in these final regulations affect those definitions in 34 CFR parts 363, 376, and 380.

Corresponding regulatory changes to those parts follow the final regulations amending 34 CFR part 361.

**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 the Department's capacities for helping communities to exchange ideas and obtain information needed to achieve the goals.

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**

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has 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 determined by the Secretary as necessary for administering this program effectively and efficiently.

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

The Secretary has also 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**

The potential costs and benefits of these final regulations were summarized in the preamble to the NPRM under the following headings: Improved Organization of Regulations; Notes and Examples; Reduction of Grantee Burden; Enhanced Protections for Individuals with Disabilities (60 FR 64495); Increased Flexibility of Grantees to Satisfy Statutory Requirements; and Additional Benefits (60 FR 64496). Additional discussion of potential costs and benefits is included in the following Analysis of Comments and Changes section of this preamble.

**Analysis of Comments and Changes**

In response to the Secretary's invitation in the NPRM, more than 400 parties submitted comments on the proposed regulations. RSA gathered additional public input on the NPRM through a series of public meetings. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

Major issues are grouped according to subject under appropriate sections of the regulations. Other substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the

applicable statutory authority—generally are not addressed. However, some suggested changes that the Secretary is not authorized to make also raise important policy issues and, therefore, are discussed under the appropriate section of the analysis.

References in the analysis of comments to the “proposed regulations” refer to the regulatory provisions in the December 15, 1995 NPRM, whereas references to the “draft regulations” refer to provisions in the draft proposed regulations that were circulated for informal comment prior to publishing the NPRM.

#### *Section 361.5(b) Applicable definitions*

- **Administrative Costs Under the State Plan**

*Comments:* Some commenters requested that this definition be revised to specifically limit administrative costs to expenditures incurred by the Designated State Unit (DSU) in administering the VR program. One commenter recommended that the definition identify indirect costs as a type of administrative cost. Finally, one commenter sought to exclude costs incurred by DSUs in providing technical assistance to businesses and industries from the definition on the basis that those costs represent expenditures for the provision of services under § 361.49(a) of the proposed regulations.

*Discussion:* The Secretary agrees that administrative costs under the VR State plan are those costs that the DSU incurs in administering the VR program. While most indirect costs (those costs that cannot be allocated to a single cost objective and that benefit more than one program) are generally types of administrative expenditures, they need not be limited to administrative expenditures. The Secretary does not believe it is necessary to classify indirect costs in order to ensure their allowability under the program. All indirect costs that are approved under an indirect cost agreement or cost allocation plan are allowable. The Secretary emphasizes that indirect costs related to multiple State programs (e.g., operating expenses for State buildings occupied by DSU staff and staff from other State-administered programs) can be charged to the VR program only to the extent that the costs are attributable to the VR program.

In addition, the Secretary agrees that although technical assistance to businesses, in some cases, is considered an administrative cost, any technical assistance provided by a DSU to a business or industry that seeks to

employ individuals with disabilities and that is not subject to the Americans with Disabilities Act (ADA) does not constitute an administrative cost. Technical assistance provided under these circumstances is authorized by section 103(b)(5) of the Act and § 361.49(a)(4) of the regulations as a service for groups of individuals with disabilities.

*Changes:* The Secretary has revised § 361.5(b)(2) to clarify that administrative costs are expenditures that are incurred by the DSU in performing administrative functions related to the VR program. The definition also has been amended to exclude technical assistance provided to businesses and industries as a service under the conditions in § 361.49(a)(4).

- **Appropriate Modes of Communication**

*Comments:* One commenter opposed defining “appropriate modes of communication” as specialized media systems and devices that facilitate communication on the basis that not all modes of communication used by persons with disabilities are “media systems and devices.” Several commenters requested that the definition identify graphic presentations, simple language, and other modes of communication used by individuals with cognitive impairments.

*Discussion:* The Secretary agrees that “appropriate modes of communication” are not limited to specific systems, devices, or equipment, as indicated by the proposed definition, and include any type of aid or support needed by an individual with a disability to communicate with others effectively. For example, the use of an interpreter by a person who is deaf is an appropriate mode of communication, but is not typically viewed as a system or device.

The Secretary believes it would be useful for the definition of appropriate modes of communication to include examples of communication methods used by individuals with cognitive impairments. However, the Secretary emphasizes that the examples of communication services and materials listed in the definition in the final regulations are not all-inclusive and that other appropriate modes of communication not specified in the definition are also available to address the particular communication needs of an individual with a disability.

*Changes:* The Secretary has amended § 361.5(b)(5) to clarify that appropriate modes of communication include any aid or support that enables an individual with a disability to comprehend and respond to information

being communicated. In addition, the definition has been amended to include graphic presentations and simple language materials as examples of modes of communication that may be appropriate for individuals with cognitive impairments.

- **Assistive Technology Service**

*Comments:* Some commenters asked that particular services be identified in this definition as examples of permissible assistive technology services. For instance, one commenter suggested that the definition specifically identify modifications to vehicles used by individuals with disabilities as an assistive technology service.

*Discussion:* The definition of the term “assistive technology service” in both the proposed and final regulations tracks the definition of that term in the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act), as required by section 7(24) of the Act. The Tech Act defines assistive technology services generally to include any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. The definition in the regulations, therefore, is intended to address the scope of service-related needs of individuals who use assistive technology devices (e.g., the need to acquire a particular device or the need to receive training on the operation of a device) rather than to identify actual services that an individual might receive. Nevertheless, the Secretary recognizes that any modification to a vehicle that is necessary to enable an individual with a disability to use that vehicle is considered an adaptation or a customization of an assistive technology device under § 361.5(b)(7)(iii) and, therefore, constitutes an assistive technology service. This position is consistent with current RSA policy.

*Changes:* None.

- **Community Rehabilitation Program**

*Comments:* Some commenters requested that the definition of “community rehabilitation program” specify additional services, such as rehabilitation teaching services, that could be provided under a community rehabilitation program for individuals with disabilities.

*Discussion:* The definition of “community rehabilitation program” in both the proposed and final regulations is based on the statutory definition in section 7(25) of the Act. However, paragraph (i)(Q) of this definition, like section 7(25)(Q) of the Act, authorizes community rehabilitation programs that

provide services similar to the services specified in the definition. Thus, the Secretary believes that a community rehabilitation program could provide rehabilitation teaching services for individuals who are blind because those services are similar to orientation and mobility services for individuals who are blind, which are expressly authorized under paragraph (i)(K) of the definition.

*Changes:* None.

- **Comparable Services and Benefits**

*Comments:* Several commenters requested clarification of the requirement in the proposed regulations that comparable services and benefits be available to the individual within a reasonable period of time. Some commenters requested that the regulations allow DSUs to use comparable services and benefits only if they are currently available at the time the individual's Individualized Written Rehabilitation Program (IWRP) is developed. Other commenters suggested that comparable services and benefits should be available when necessary to meet the rehabilitation objectives identified in the individual's IWRP.

*Discussion:* The definition of "comparable services and benefits" is intended to support the statutory purpose of conserving rehabilitation funds, while ensuring the provision of appropriate and timely services. The proposed requirement in the NPRM that comparable services and benefits be available within a reasonable period of time was intended to enable DSUs to conserve VR funds by searching for alternative sources of funds without jeopardizing the timely provision of VR services to eligible individuals. The Secretary agrees that additional clarification in the regulations is required to ensure that VR services are provided to eligible individuals at the time they are needed.

*Changes:* The Secretary has revised § 361.5(b)(9)(ii) of the proposed regulations to require that comparable services and benefits be available to the individual at the time that the relevant service is needed to achieve the rehabilitation objectives in the individual's IWRP. This change is consistent with revisions made to § 361.53 of the proposed regulations, which are discussed in the analysis of comments to that section.

- **Competitive Employment and Integrated Setting**

*Comments:* Some commenters opposed the definition of "competitive employment" in the proposed regulations on the basis that it limited

competitive employment outcomes to those in which an individual with a disability earns at least the minimum wage. Because the proposed definition applied to supported employment placements, these commenters believed that the minimum wage requirement would restrict employment opportunities for individuals with the most severe disabilities who need supported employment services in order to work. These commenters stated that some individuals with the most severe disabilities would be unable to obtain competitive employment unless the definition permitted employers to compensate employees in accordance with section 14(c) of the Fair Labor Standards Act (FLSA) (i.e., wages based on individual productivity that would be less than the minimum wage). Other commenters supported the proposed definition and the requirement that individuals in competitive employment earn at least the minimum wage.

Several commenters opposed the requirement in the proposed regulations that individuals in competitive employment earn at least the prevailing wage for the same or similar work in the local community performed by non-disabled individuals. The commenters believed that it would be unduly burdensome for DSUs to ascertain the relevant prevailing wage given the potential differences in wages provided by employers within the same community. In addition, these commenters stated that the prevailing wage standard would dissuade some employers from hiring individuals with disabilities when the wage to be provided, although at least the minimum wage, would have to be increased to be consistent with higher wages provided by other employers in the community for the same or similar work.

Several commenters on the proposed regulations opposed the requirement that competitive employment be performed in an integrated setting. Several other commenters questioned or requested clarification of the proposed definition of integrated setting with respect to the provision of services or the achievement of an employment outcome. In light of the interrelationship between the terms "competitive employment" and "integrated setting" and the fact that the Secretary considers integration to be an essential component of competitive employment, comments on both the proposed definition of "integrated setting" and the use of the term "integrated setting" as an element of competitive employment are addressed in the following paragraphs.

Commenters who opposed limiting competitive employment to placements in integrated settings believed that requiring individuals with disabilities to interact with non-disabled persons at the work site would preclude certain kinds of employment outcomes from the scope of competitive employment. Specifically, the commenters identified self-employment, home-based employment, and various forms of telecommuting as examples of employment outcomes that are competitive but are not located in integrated settings. The commenters stated that these placement options should be available to individuals with disabilities to same extent that they are available to non-disabled persons.

Some commenters believed that the definition of "integrated setting" in the proposed regulations was too weak. These commenters recommended that the proposed definition, which defined integrated setting as ". . . a setting typically found in the community in which an applicant or eligible individual has an opportunity to interact regularly with non-disabled persons . . .," be amended to require actual interaction between the applicant or eligible individual and non-disabled individuals. Other commenters stated that individuals in competitive employment should be required to interact with non-disabled persons only to the extent that non-disabled individuals in similar positions interact with others. Finally, some commenters suggested that the definition clarify that sheltered workshops and other employment settings that are established specifically for the purpose of employing individuals with disabilities do not constitute integrated settings.

*Discussion:* The Secretary agrees with the commenters who believe that competitive employment outcomes should be limited to those in which individuals earn at least the minimum wage. Consequently, the Secretary does not consider placements in supported employment settings in which individuals receive wages below the minimum wage under section 14(c) of the FLSA to be competitive employment. This position, which would modify longstanding RSA regulatory policy, is consistent with the requirement in the 1992 Amendments (section 101(a)(16) of the Act) that DSUs annually review and reevaluate the status of each individual in an employment setting under section 14(c) of the FLSA in order to determine the individual's readiness for competitive employment. This statutory requirement indicates that supported employment

settings in which individuals are compensated below the minimum wage in accordance with the FLSA do not constitute competitive employment. The Secretary wishes to clarify that the minimum wage requirement for individuals placed in supported employment applies at the time of transition to extended services. If an individual is unable to obtain the minimum wage at this time, the individual would still be considered to have achieved an employment outcome but it would not be considered a supported employment outcome.

The Secretary agrees that requiring individuals in competitive employment to earn at least the prevailing wage for the same or similar work in the local community performed by non-disabled individuals is unduly restrictive and that requiring individuals with disabilities who achieve competitive employment outcomes to be compensated at the wage level typically paid to non-disabled individuals who perform the same or similar work for the same employer is a more reasonable standard. This standard requires that competitively employed individuals with disabilities receive the customary wage and level of benefits (e.g., insurance premiums, retirement contributions) received by non-disabled workers performing comparable jobs for the same employer. Clarification in the final regulations that comparable compensation includes both the wage and benefit level typically paid by the employer is necessary, the Secretary believes, in order to ensure that competitive employment outcomes for individuals with disabilities are truly "competitive."

A key purpose of the 1992 Amendments is to ensure that individuals with disabilities achieve employment outcomes in the most integrated settings possible, consistent with the individual's informed choice. Consequently, the Secretary believes that placement in an integrated setting is an essential component of "competitive employment."

The Secretary agrees with those commenters who believe that the definition of integrated setting in the proposed regulations did not sufficiently ensure actual interaction between individuals with disabilities and non-disabled persons. The Secretary also agrees with those commenters who contend that the best measure of integration in an employment setting for individuals with disabilities is to require parity with the integration experienced by non-disabled workers in similar positions. Consequently, the final regulations

establish a standard of integration with respect to employment outcomes that is based on ensuring the same level of interaction by disabled individuals with non-disabled persons as that experienced by a non-disabled worker in the same or similar job. An integrated setting for purposes of a job placement is one in which an applicant or eligible individual interacts with non-disabled persons, excluding service providers, to the same extent that a non-disabled worker in a comparable position interacts with others.

The Secretary believes, however, that interaction between individuals with disabilities and non-disabled persons need not be face-to-face in order to meet this standard. Persons with disabilities who are self-employed or telecommute may interact regularly with non-disabled persons through a number of mediums (e.g., telephone, facsimile, or computer). Self-employment, home-based employment, and other forms of employment in which individuals communicate regularly from separate locations, therefore, would satisfy the integration requirement of competitive employment as long as the eligible individual interacts with non-disabled persons other than service providers to the same extent as a non-disabled person in a comparable job.

The Secretary, like many of the commenters, also believes that settings that are established specifically for the purpose of employing individuals with disabilities (e.g., sheltered workshops) do not constitute integrated settings since there are no comparable settings for non-disabled individuals.

*Changes:* The Secretary has amended § 361.5(b)(10) to define "competitive employment," in part, as work for which an individual earns at least the minimum wage but not less than the customary wage and level of benefits provided by the same employer to non-disabled workers who perform the same or similar work. The Secretary also has amended § 361.5(b)(30) to define "integrated setting" with respect to an employment outcome as a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals to the same extent that non-disabled individuals in comparable positions interact with other persons. The definition of "integrated setting" with respect to the provision of services has been similarly strengthened to require actual interaction between individuals with disabilities receiving services and non-disabled individuals.

- Designated State Unit

*Comments:* Some commenters requested that the regulatory definition of "designated State unit" prohibit DSUs from administering vocational and other rehabilitation programs other than those programs authorized or funded under the Act.

*Discussion:* Sections 101(a)(1) and (a)(2) of the Act require that the State VR Services Program be administered by a State entity that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities, but does not restrict this rehabilitation focus to only programs authorized or funded under the Act. The Secretary wishes to give States as much organizational flexibility as is permitted by statute.

*Changes:* None.

- Employment Outcome

*Comments:* Several commenters opposed the definition of "employment outcome" in the proposed regulations on the basis that it failed to exclude outcomes other than competitive employment (e.g., homemaker, self-employment). Other commenters disagreed with the emphasis in the definition on competitive employment.

*Discussion:* The definition of "employment outcome" in the final regulations, like the proposed definition, elaborates on the definition in section 7(5) of the Act by incorporating into the definition the statutory concept that an employment outcome must be consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. Although the definition does not contain a full list of permissible employment outcomes, it does not exclude any employment outcomes that have been permitted in the past. Thus, for example, homemaker, extended employment, and self-employment remain acceptable employment outcomes even though they are not specifically identified in the definition. The Secretary also believes, however, that competitive employment, which is the optimal employment outcome under the program, should be considered for each individual who receives services under the program and should, therefore, be highlighted in the definition.

*Changes:* None.

- Establishment, Development, or Improvement of a Public or Nonprofit Community Rehabilitation Program

*Comments:* Some commenters opposed that part of the proposed

definition of the term "establishment, development, or improvement of a public or nonprofit community rehabilitation program" that would reduce over a four-year period Federal financial support of staffing costs associated with operating a community rehabilitation program. Some of these commenters also opposed the prohibition in the definition of Federal support for ongoing operating expenses of a community rehabilitation program. The commenters were concerned that these provisions would make it difficult or impossible to develop new community rehabilitation programs.

*Discussion:* The definition elaborates on the statutory definition of the term "establishment of a community rehabilitation program" under section 7(6) of the Act by incorporating all of the types of expenditures for which a DSU can receive Federal financial support. The limitations on staffing costs in the proposed definition are based on the authorization in section 7(6) of the Act for the Secretary to include as part of the costs of establishment any additional staffing costs that the Secretary considers appropriate. The limitations are similar to those previously proposed in the 1991 NPRM. Specifically, the proposed regulations established a limitation on staffing costs by providing, after the first 12 months of staffing assistance, for an annual decrease in the percentage of staffing costs (from 100 percent to 45 percent) for which Federal financial participation (FFP) is available. This limitation, like the staffing cost requirements proposed in the 1991 NPRM, is influenced by and in part based on the conclusions of a 1979 General Accounting Office (GAO) report (HRD-79-84). The GAO Report to Congress recommended amending the Act to provide for a gradual reduction of Federal funding for staffing costs in the establishment authority. Legislative change is unnecessary to accomplish this purpose because section 7(6) of the Act vests the Secretary with the authority to determine what staffing costs are appropriate for Federal financial participation. The Secretary believes that the GAO recommendation is still relevant and needs to be implemented. The limitation on staffing costs is intended, in part, to ensure that facilities bear an increasing share of the responsibility for running community rehabilitation programs, while preserving VR funds needed to support necessary development or expansion of community rehabilitation facilities. More generally, the limitation on staffing costs is intended to preserve the

amount of funds available to the DSU for providing VR services to eligible individuals.

The final regulations also authorize Federal support for other costs needed to establish, develop, or improve a community rehabilitation program as long as these costs are not ongoing operational expenses of the program. The Secretary believes that this prohibition is consistent with the Act, which limits Federal financial support to costs associated with setting up, renovating, converting, or otherwise improving community rehabilitation programs.

The Secretary also notes that recent audits of State agencies have indicated, in some cases, that VR funds have been used under the authority for establishing community rehabilitation programs for purposes other than providing services under the VR program. In response, the Secretary believes the proposed definition should be amended to ensure that Federal support for the establishment, development, or improvement of a public or nonprofit community rehabilitation program is provided only if the purpose of the expenditures is to provide services to applicants and eligible individuals under the VR program.

*Changes:* The Secretary has amended § 361.5(b)(16) to ensure that costs associated with the establishment, development, or improvement of a public or nonprofit community rehabilitation program must be necessary to the provision of VR services to applicants and eligible individuals. Changes to this definition and to the State plan requirements in § 361.33(b) of the regulations are intended to address the violations identified in recent audits of State agencies.

- Extended Employment

*Comments:* Several commenters requested that the definition of "extended employment" in the proposed regulations be broadened to include placements in integrated settings. Other commenters sought to expand the proposed definition to include employment with profitmaking organizations. Finally, some commenters requested that the regulations exclude extended employment from the scope of potential employment outcomes under the program.

*Discussion:* Section 101(a)(16) of the Act requires DSUs to annually review and reevaluate the status of each individual in extended employment to determine the individual's readiness for

competitive employment in an integrated setting. This statutory requirement indicates that extended employment is limited to placements in non-integrated settings. The lack of integration in extended employment placements is a key factor in differentiating between extended employment and competitive employment outcomes.

The Secretary does not believe that extended employment includes work performed on behalf of profitmaking organizations. Extended employment, according to section 101(a)(16) of the Act, means work performed in community rehabilitation programs, including workshops, or in other non-integrated employment settings in which individuals are compensated pursuant to the FLSA. The Secretary believes that employment in private, profitmaking organizations should be viewed as competitive employment in which individuals shall earn at least the minimum wage and work in integrated settings. Incorporating placements in profitmaking organizations into the definition of extended employment would expand the scope of potential extended employment placements and would be contrary to the statutory policy that promotes movement from extended employment to competitive employment, the optimal employment outcome under the program. Nevertheless, the final regulations will continue to recognize extended employment as a possible employment outcome under the program consistent with 101(a)(16) of the Act.

*Changes:* None.

- Impartial Hearing Officer

*Comments:* One commenter requested that the regulations prohibit a member of a State Rehabilitation Advisory Council from serving as an impartial hearing officer for any DSU within that State.

*Discussion:* The definition of "impartial hearing officer" in the proposed regulations specified that a member of a DSU's State Rehabilitation Advisory Council (Council) could not serve as an impartial hearing officer for that same DSU. The proposed definition, however, did allow a member of a DSU's Council to serve as an impartial hearing officer in cases involving another DSU within the same State. For example, a member of the Council for a State unit serving individuals who are blind was not precluded under the proposed regulations, solely on the basis of that membership, from serving as an impartial hearing officer in cases involving the State unit that serves

individuals with disabilities other than individuals with visual disabilities. The Secretary believes that prohibiting members of a Council from serving as impartial hearing officers in cases involving any DSU within the State would be unduly restrictive. The Secretary also believes that other impartiality requirements in the definition that apply to all impartial hearing officers, including those who are members of Councils for other DSUs (e.g., the individual has no personal, professional, or financial conflict of interest) will sufficiently ensure the absence of potential conflicts between the hearing officer and the parties to the dispute.

*Changes:* None.

- Maintenance

*Comments:* Some commenters requested that the definition of "maintenance" in the proposed regulations be expanded to include expenses other than living expenses (e.g., food, shelter, and clothing). As an example, the commenters stated that maintenance should be authorized to support costs incurred by eligible individuals who take part in enrichment activities as part of a training program in a higher education institution. Several other commenters recommended deletion of the fourth example in the note following the proposed definition, which stated that maintenance could be used to pay for food, shelter, and clothing for homeless or recently deinstitutionalized individuals until other financial assistance is secured. These commenters asserted that these costs should be supported by welfare or other public assistance agencies rather than DSUs.

*Discussion:* The Secretary agrees that maintenance may include costs other than standard living expenses (i.e., food, shelter, and clothing) as long as the expenses are in excess of the normal expenses incurred by an eligible individual or an individual receiving extended evaluation services. Limiting maintenance to additional costs incurred by individuals receiving services under an IWRP or under a written plan for providing extended evaluation services is consistent with section 103(a)(5) of the Act, which restricts the provision of maintenance to "additional costs while participating in rehabilitation."

The Secretary also agrees that the fourth example of permissible maintenance expenses in the proposed regulations was inadvisable. Permitting DSUs to support the full costs of a homeless or deinstitutionalized individual's subsistence under the

maintenance authority, until other financial assistance becomes available, is inconsistent with the policy of limiting maintenance costs to those in excess of the individual's normal expenses. In addition, the Secretary agrees that welfare and other social service agencies are better equipped to support the everyday living expenses of the homeless or deinstitutionalized. However, a DSU could choose to provide short-term emergency financial assistance to those individuals under § 361.48(a)(20) as "other" services that the DSU determines are necessary for the individual to achieve an employment outcome.

*Changes:* The Secretary has deleted the term "living" from § 361.5(b)(31) of the proposed regulations to clarify that maintenance may include expenses other than living expenses. In addition, the Secretary has deleted the fourth example in the note following the proposed definition of maintenance and replaced it with an example of a permissible maintenance cost that would not constitute a living expense.

- Ongoing Support Services

*Comments:* Some commenters recommended that the Secretary place a time limit on the provision of ongoing support services furnished by extended services providers. The commenters stated that the regulations should permit ongoing support services to "fade" once they are no longer needed to maintain an individual in supported employment.

*Discussion:* It is RSA's longstanding policy that individuals with the most severe disabilities who are placed in supported employment should require ongoing support services throughout the course of their placement. The need for ongoing support services provides a critical distinction (i.e., the provision of ongoing supports) between supported employment and other kinds of employment outcomes. The Secretary believes that if an individual in supported employment no longer requires ongoing support services that individual is no longer an appropriate candidate for supported employment.

*Changes:* None.

- Personal Assistance Services

*Comments:* Some commenters requested that the definition of "personal assistance services" in the proposed regulations be amended to more closely track the statutory definition of that term in section 7(11) of the Act. The commenters stated that revision to the proposed definition is needed to clarify that personal

assistance services need not be provided on the job site.

*Discussion:* The Secretary agrees that personal assistance services may be provided off the job site as long as they are necessary to assist an individual with a disability to perform daily living functions and achieve an employment outcome and are provided while the individual is participating in a program of VR services. The Secretary believes the proposed definition clearly authorized personal assistance services needed by an individual to perform everyday activities off the job but, nevertheless, agrees that further clarification may be helpful.

*Changes:* The Secretary has amended § 361.5(b)(34) of the proposed regulations to track the language in section 7(11) of the Act authorizing personal assistance services needed to increase the individual's control in life and ability to perform everyday activities on or off the job.

- Physical and Mental Restoration Services

*Comments:* Some commenters requested that the regulatory definition of "physical and mental restoration services" specifically include psychological services provided by qualified personnel under State licensure laws.

*Discussion:* The Secretary agrees that psychological services are a form of mental restoration services. Psychological services, however, are subsumed within the broader term "mental health services" in paragraph (xiii) of the definition and need not be identified separately. Moreover, section 103(a)(4) of the Act authorizes services, including psychological services, that are needed to diagnose and treat mental or emotional disorders only if those services are provided by qualified personnel in accordance with State licensure laws. This requirement, which was included in the proposed definition, is reflected in paragraph (ii) of the definition in the final regulations.

*Changes:* None.

- Physical or Mental Impairment

*Comments:* Some commenters requested clarification of the requirement in the proposed regulations that a physical or mental impairment will probably result in materially limiting mental or physical functioning if it is not treated. One commenter stated that the definition should be limited to conditions that cause present functional limitations so as not to unnecessarily expand the pool of eligible individuals.

*Discussion:* The Secretary agrees that clarification is needed. The proposed regulations defined "physical or mental impairment" as an injury, disease, or other condition that materially limits, or if not treated will probably result in materially limiting, mental or physical functioning. The existence of a physical or mental impairment is the first criterion for determining eligibility under the program (see § 361.42(a) of the final regulations). The proposed definition was designed to include progressive conditions that may cause functional limitations in the future even though current functional limitations may not be evident. Although a DSU may not always know with certainty whether a certain condition will limit an individual's functional abilities, the Secretary believes that the definition must account for situations in which there is a strong likelihood that functional limitations will result if treatment is not provided. On the other hand, the Secretary does not believe that accounting for progressive conditions will result in an unwarranted increase in eligible individuals since all eligible individuals, including those who do not currently experience a limitation in functioning, must meet each of the eligibility criteria in § 361.42(a).

*Changes:* The Secretary has amended § 361.5(b)(36) of the proposed regulations to clarify that a physical or mental impairment must materially limit, or if untreated must be expected to materially limit, physical or mental functioning.

- Post-Employment Services

*Comments:* Some commenters requested that the regulations specify a time limit for providing post-employment services following the achievement of an employment outcome. Other commenters opposed the availability of post-employment services for purposes of assisting an individual to advance in employment. Finally, several commenters recommended that the definition enable individuals to receive post-employment services in order to maintain, regain, or advance in employment that is consistent with the individual's informed choice.

*Discussion:* The Secretary believes that it would be inappropriate to establish an absolute time limit after which post-employment services would be unavailable. DSUs are responsible for determining on a case-by-case basis whether an eligible individual who has achieved an employment outcome requires post-employment services in accordance with the definition in the regulations. As stated in the note

following the proposed definition, post-employment services are available to meet rehabilitation needs that do not require a complex and comprehensive provision of services and, therefore, should be limited in scope and duration. If the DSU determines that an individual requires extensive services or requires services over an extended period of time, then the DSU should consider beginning a new rehabilitation effort for the individual, starting with a redetermination of whether, under current circumstances, the individual is eligible under the VR program.

The Secretary emphasizes that post-employment services are available if the DSU determines that the services are necessary to enable an individual to advance in employment consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests. Section 103(a)(2) of the Act specifically authorizes the provision of post-employment services for purposes of assisting an individual to maintain, regain, or advance in employment.

The Secretary agrees that the provision of post-employment services must be consistent with the individual's informed choice. However, the Secretary believes that it is unnecessary to add informed choice as an element in the definition of "post-employment services" because informed choice is specifically identified as a condition that applies to the provision of any VR service, including post-employment services, under § 361.48(a).

*Changes:* None.

- Substantial Impediment To Employment

*Comments:* The majority of commenters supported the definition of "substantial impediment to employment" in the proposed regulations. However, some commenters opposed the proposed definition on the basis that it requires only that an impairment hinder the individual from preparing for, entering into, engaging in, or retaining employment. These commenters recommended that the Secretary reinstate the standard from the draft regulations that an impairment must prevent the individual from employment in order for it to constitute a substantial impediment to employment.

*Discussion:* An individual's disability must result in a substantial impediment to employment for the individual to be found eligible under the VR program (see § 361.42(a)). The Secretary believes that the proposed definition establishes the appropriate standard for determining whether the individual's

impairment causes a substantial impediment to employment when read in conjunction with the remaining eligibility requirements in § 361.42(a). This standard does not extend eligibility under the program to individuals with disabilities who do not experience material functional limitation or who do not need VR services to obtain appropriate employment since these individuals would not meet the criteria in § 361.42(a). On the other hand, the Secretary believes that requiring that an impairment prevent the individual from employment is too stringent and would exclude from the program those individuals who are underemployed and who need VR services to obtain new employment that is consistent with their abilities and capabilities.

*Changes:* None.

- Supported Employment

*Comments:* One commenter suggested that, given the requirement in the proposed regulations that limits competitive employment outcomes to those in which individuals earn at least the minimum wage, competitive employment should not be a required element of supported employment. Another commenter stated that an individual in a supported employment setting should be viewed as competitively employed as long as the individual earns at least the minimum wage at the time of transition to an extended services provider rather than at the time of initial placement in supported employment.

*Discussion:* Section 7(18) of the Act defines supported employment as competitive employment in an integrated setting with ongoing support services. Thus, individuals in supported employment shall earn at least the minimum wage consistent with the definition of competitive employment in the final regulations. The Secretary agrees, however, that the minimum wage requirement applies to individuals in supported employment at the time the individual has made the transition from support provided by the DSU to extended services provided by an appropriate State or private entity.

*Changes:* None.

- Transitioning Student

*Comments:* Some commenters were concerned that omitting the term applicant from the definition of "transitioning student" would mean that students with disabilities who apply for VR services might not be evaluated for program eligibility. In addition, some commenters stated that the term "transitioning student" is confusing and is inappropriately used in



other sections of the proposed regulations, specifically § 361.22 (Cooperation with agencies responsible for transitioning students).

*Discussion:* The proposed regulations defined "transitioning student" as a student who is eligible under the VR program and is receiving transition services. The Secretary believes that transition services, which are authorized under section 103(a)(14) of the Act and defined in § 361.5(b)(47) of the final regulations, are limited to those services identified in an eligible student's IWRP that promote or facilitate the accomplishment of long-term rehabilitation goals and intermediate rehabilitation objectives. Because assessment services are provided prior to the development of an IWRP and, therefore, are not transition services, student applicants under the program were not included within the proposed definition of "transitioning student." Nevertheless, this interpretation does not alter the responsibility of DSUs to evaluate student applicants for eligibility for VR services. As with any individual with a disability, DSUs shall promptly handle a referral of a student for VR services, evaluate the student following application for services, and determine the student's eligibility under the program within 60 days after the application is submitted.

The Secretary agrees that the definition of the term "transitioning student" in the proposed regulations is confusing, as evidenced by the previous comments questioning the DSU's responsibility with regard to student applicants. Other commenters were confused by § 361.22(b) of the proposed regulations, which referred to students with disabilities who are not receiving special education services as "transitioning students."

*Changes:* The Secretary has eliminated the definition of the term "transitioning student", which is not defined in the Act, from the final regulations and has replaced that term in the regulations with the term "student with a disability," which includes students who are receiving special education services and students who are not.

- Transportation

*Comments:* One commenter requested that the regulations clarify that transportation is a support service. Other commenters opposed the example following the definition that identified the purchase and repair of vehicles as a possible transportation expense. These commenters stated that adherence to

this example would severely deplete DSU resources.

*Discussion:* "Transportation" is defined in both the proposed and final regulations as travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a VR service. The Secretary believes that it is clear from this definition that transportation is not a stand-alone service but must be tied to the provision of other services identified in an IWRP.

The Secretary emphasizes that the examples provided under this definition, like all examples throughout the regulations, are provided solely for purposes of illustration and guidance and are not intended to substitute for DSU determinations in individual cases. Accordingly, the example opposed by some commenters neither requires nor encourages DSUs to purchase or repair vehicles. The example states only that the purchase or repair of vehicles is authorized as a transportation expense in those limited circumstances in which the DSU determines that provision of this service is necessary for an individual to participate in a VR service and is consistent with DSU policies that govern the provision of services. Appropriately developed DSU policies covering the nature and scope of services dictate the extent to which any service, including transportation, can be provided.

*Changes:* None.

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

*Comments:* None.

*Discussion:* The Secretary has revised the requirements governing the duration of State plans to reflect recent amendments to section 436 of the General Education Provisions Act (GEPA). Section 436 of GEPA, which applies to Rehabilitation Act programs, authorizes the Secretary to establish a State plan period that is longer than the standard three-year period specified in section 101(a) of the Rehabilitation Act and § 361.10(e) of the proposed regulations. Although RSA will continue to require the submission of a new State plan every three years, the regulations now permit RSA to establish a State plan period other than the regular three-year period if circumstances warrant. For example, RSA used this statutory authority in FY 1996 to extend for a fourth year the State plan covering FYs 1994 through 1996 in order to allow these final regulations to become effective before requiring submission of a new State plan. The flexibility afforded RSA through this regulatory change also

obviates the need for § 361.10(h) of the proposed regulations, which would have permitted the Secretary to require an interim State plan covering less than three years following a reauthorization of the Act and prior to the publication of final regulations.

*Changes:* The Secretary has amended § 361.10(e) to state that the State plan must cover a multi-year period as determined by the Secretary. In addition, § 361.10(h) of the proposed regulations has been deleted from the final regulations.

#### § 361.13 State agency for administration

*Comments:* Some commenters opposed the elimination of the requirement from the draft proposed regulations that the State plan describe the organizational structure of the State agency and its organizational units. These commenters stated that the absence of this description in the State plan would make it impossible for RSA to determine whether each DSU operates at a level comparable to that of other organizational units within the State agency. Other commenters recommended, consistent with requirements in the draft proposed regulations, that the final regulations authorize the designated State agency to define the scope of the program and direct its administration without external administrative controls. Additionally, in response to the Secretary's request in the NPRM, some commenters identified additional program functions that were not included in the proposed regulations for which the DSU shall be responsible in order to meet the statutory requirement in section 101(a)(2)(A) that it be responsible for the VR program. The additional functions identified by the commenters (determinations of whether an individual has achieved an employment outcome; policy development; and administrative control of VR funds) were specified in the draft proposed regulations. Finally, some commenters stated that the requirement in the proposed regulations that at least 90 percent of DSU staff shall be employed full time on rehabilitation work was unduly restrictive.

*Discussion:* This section of the proposed regulations was significantly revised under the Department's Principles for Regulating in an effort to reduce the paperwork requirements imposed on State agencies. For example, the Secretary proposed to remove from current regulations the requirement that the State plan describe the organizational structure of the State agency and its organizational units

because the Secretary considered the requirement unduly burdensome. The Secretary intended to reduce the paperwork burden on State agencies in developing their State plans and to emphasize the underlying administrative responsibility of States by relying on an assurance, required by statute, that if the State agency is required to have a vocational rehabilitation unit, the unit is located at an organizational level comparable to other organizational units within the State agency. The Secretary does not believe that continuing to require by regulations that an organizational description be included in the State plan would necessarily ensure that a DSU actually operates at a level comparable to that of other units within the State agency. Moreover, the Secretary believes that determinations as to whether a State agency meets the organizational requirements in this section, including whether the State unit operates at a comparable level to that of other State entities, can be better addressed by RSA through its monitoring process.

In an effort to reduce regulatory burden and increase State flexibility in accordance with the Department's Principles for Regulating, the Secretary also proposed to remove from current regulations the requirement that a designated State agency that has as its major function vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities shall "have the authority, subject to the supervision of the Governor, if appropriate, to define the scope of the program within the provisions of State and Federal law and to direct its administration without external administrative controls." This non-statutory requirement applies under current regulations to only one of the three designated State agency options. The Secretary believes, however, that a State should have the same authority to review or oversee the administration of its VR program regardless of the option under which it chooses to organize its agency. Elimination of this requirement will enable a State to locate and administer its vocational rehabilitation program within the limits permitted by statute without being influenced by the existence or non-existence of varying levels of control outside of the DSU.

In the preamble to the proposed regulations, the Secretary solicited public comment on whether the regulations should expand or otherwise clarify essential program functions for which the DSU shall be responsible in order to meet the statutory requirement in section 101(a)(2)(A) of the Act that it be responsible for the VR program.

Consistent with current regulations, the proposed regulations specified that the DSU shall be responsible for determinations of eligibility, development of IWRPs, and decisions regarding the provision of services. The Secretary interprets this non-delegation provision to mean that the DSU shall carry out these functions or activities using its own staff. While some commenters believed that States should have the flexibility to delegate responsibility for other programmatic functions to State entities other than the DSU, the overwhelming majority of commenters stated that the additional functions that were identified in the draft regulations (determinations that service recipients have achieved appropriate employment outcomes, the formulation and implementation of program policy, and the allocation and expenditure of program funds) must be carried out by the DSU to ensure that the program is administered properly. In light of the public comment received, the Secretary agrees that responsibility for these additional functions must be retained by the DSU to ensure that State agencies that consolidate staff to administer multiple State and federally funded programs do not entrust these key VR programmatic decisions to individuals who lack experience in meeting the needs of individuals with disabilities. Moreover, the Secretary believes that the benefits derived from DSU retention of these functions—enhanced program efficiency and effectiveness—outweigh any costs that may be associated with the non-delegation requirements in the final regulations.

The Secretary does not believe that the proposed requirement that at least 90 percent of the designated State unit staff shall work full time on the rehabilitation work of the organizational unit is unduly restrictive. This provision means that if the organizational unit provides other rehabilitation services, in addition to vocational rehabilitation, the 90 percent staffing requirement applies to all unit staff providing rehabilitation services, not to just the vocational rehabilitation staff. "Other rehabilitation" includes, but is not limited to, other programs that provide medical, psychological, educational, or social services to individuals with disabilities. Although some commenters believed the 90 percent staffing requirement sets too restrictive a standard, the Secretary believes that this requirement is consistent with the statutory requirement in section 101(a)(2)(A)(iii) of the Act that "substantially all" of the

DSU's staff shall work on rehabilitation and with RSA's longstanding interpretation of "substantially all" to mean 90 percent.

*Changes:* The Secretary has revised § 361.13(c) by adding three functions—determination that an individual has achieved an employment outcome, formulation and implementation of program policy, and allocation and expenditure of program funds—that must be carried out by the DSU.

#### § 361.15 Local administration

*Comments:* One commenter requested clarification of the requirement that each local agency administering the program be "under the supervision of the DSU."

*Discussion:* Section 7(9) of the Act defines the term "local agency" as a local governmental unit that has an agreement with the designated State agency to conduct the VR program in accordance with the State plan. Accordingly, the requirement in this section that each local agency is subject to the supervision of the DSU means that the DSU is responsible for ensuring that the program is administered in accordance with the State plan. This provision does not require the DSU to supervise the day-to-day operations of each local agency's program staff.

*Changes:* For purposes of clarification, the Secretary has revised § 361.15 to add a cross-reference to the regulatory definition of "sole local agency." The Secretary has also made technical changes to the citations of authority for this section.

#### § 361.16 Establishment of an independent commission or a State Rehabilitation Advisory Council

*Comments:* One commenter requested clarification of the scope of the proposed requirement that the State plan summarize annually the advice provided by the Council.

*Discussion:* Section 101(a)(36)(A)(iii) of the Act requires the DSU to include in its State plan or amendment to the plan a summary of advice provided by the Council. Accordingly, § 361.16(a)(2)(iv) of the regulations requires that the State plan "annually summarize the advice provided by the Council." This "annual" requirement means that any State plan submission, whether a new three-year plan or an annual amendment to an existing plan, must include, as appropriate, a summary of the advice provided by the Council on the new plan or the plan amendment. Thus, a summary of the advice provided by the Council on the entire plan must be submitted once every three years in conjunction with

the DSU's new, three-year State plan. During the interim between new plans, the DSU shall summarize the advice provided by the Council on the amendments to the existing plan and submit that summary in conjunction with its annual submission of amendments to the plan. Annual amendments to the plan include any amendment generated by a change to a State policy or practice that is reflected in the current State plan, as well as those amendments that are required by the Act or these regulations. Consistent with the general requirement in section 101(a)(36)(A)(iii), this section also requires the DSU to annually summarize the advice provided by the Council on matters other than those addressed in the State plan. A summary of the advice provided by the Council on these issues should be included also in the annual summaries.

*Changes:* None.

### *§ 361.18 Comprehensive system of personnel development*

*Comments:* Some commenters questioned the authority for requiring the involvement of the State Rehabilitation Advisory Council in the development of the State agency's personnel standards, whereas other commenters supported a role for the Council in this area. Some commenters sought clarification of what it means for the Council to be "involved" in the development of personnel standards. Additional commenters sought an expanded role for the Council that would involve it in the formulation of other aspects of the State agency's comprehensive system of personnel development in addition to the State agency's personnel standards.

Some commenters stated that the data collection requirements in paragraph (a) of this section are unduly burdensome and should be eliminated.

A number of commenters opposed the authorization of State personnel requirements as comparable requirements upon which a State agency could develop its personnel standards under paragraph (c) of this section. These commenters stated that a State agency's personnel standards should be based solely on the licensing and certification requirements applicable to the profession in which DSU employees provide VR services in order to ensure that DSU personnel are "qualified" within the meaning of the Act. Similarly, several commenters opposed the use of "equivalent experience" as a substitute for academic degrees in the definition of "highest requirements in the State\* \* \*" under paragraph (c) of this section. One commenter stated that

the personnel standards developed by State agencies under this section should be prospective only and that agencies should be permitted to retain current DSU personnel who do not meet the "highest requirements in the State." In addition, some commenters recommended that the regulations specifically provide for DSU employment for individuals who, due to the existence of their disability, are unable to satisfy certification or licensure standards applicable to a particular profession. As an example, these commenters stated that, historically, individuals who are blind have been excluded on the basis of their disability from obtaining necessary certification to teach orientation and mobility to other blind individuals even though they are fully qualified to work in that profession.

Some commenters believed that the regulations should require that DSU staff receive mandatory training in all of the areas identified in paragraph (d)(2) of this section. Paragraph (d)(2) listed examples of training areas (e.g., the Americans with Disabilities Act and the Individuals with Disabilities Education Act (IDEA)) that State agencies, at their discretion, may incorporate into their staff development systems.

Several commenters opposed the statement in the preamble to the proposed regulations that supported a DSU's use of family members and community volunteers for purposes of communicating in an applicant's or eligible individual's native language. The commenters believed that the availability of family members or volunteers should not relieve the State agency of its responsibility to hire qualified personnel who are able to meet the communication needs of individuals with disabilities. One commenter asked whether the State agency's responsibility to employ persons who can address the communication needs of applicants and eligible individuals means that the State agency shall include sign-language interpreters among its personnel.

Finally, one commenter stated that the number of individuals that a rehabilitation counselor assists in achieving an employment outcome should not be considered as a factor in the evaluation of the rehabilitation counselor's performance under paragraph (f) of this section.

*Discussion:* The Act requires that the Council generally advise the State unit in connection with the carrying out of its responsibilities. In addition, the Council is required to advise the State agency on issues affecting the development of the State plan. Because

an effective system of personnel development is an essential part of the State plan and a critical element to the success of The State Vocational Rehabilitation Services Program, the Secretary believes it is necessary for the Council to be involved in the development of key aspects of the State agency's personnel development system. Specifically, the Secretary agrees with the commenters who stated that the Council should provide advice to the State agency in connection with the development of the recruitment, preparation, and retention plan under paragraph (b) of this section; staff development policies and procedures under paragraph (d) of this section; and the performance evaluation system under paragraph (f) of this section; as well as in the development of personnel standards under paragraph (c) of this section, as was stated in the proposed regulations.

The Secretary emphasizes that this section of the regulations is not intended to expand or alter the role of the Council beyond the advisory role contemplated by the Act, but only to identify those areas of personnel development in which the Council must be involved in an advisory capacity. The Secretary believes that to fulfill its advisory role, the Council, at a minimum, must be afforded an opportunity to review and comment on relevant plans, policies, and procedures prior to their implementation. This "opportunity for review and comment" is necessary to ensure that the Council plays a meaningful, although advisory, role in the development of a system that ensures an adequate supply of qualified DSU personnel.

The data system and data collection requirements specified in paragraph (a) of this section are statutorily required. However, the Secretary emphasizes that the regulations require only that the State plan include a description of the system used to collect the data on personnel needs and personnel development and do not require the State to submit the actual data to the Secretary.

The Secretary agrees with those commenters who stated that the State agency's personnel standards must be based solely on existing licensing or certification requirements applicable to the profession in which DSU employees provide VR services. The Secretary interprets section 101(a)(7)(B) of the Act to permit DSUs to base their personnel standards on other "comparable" requirements only if certification or licensing requirements applicable to a particular profession do not exist. This interpretation is consistent with the

statute's emphasis on qualified personnel and with the requirement in the Act that State agencies develop personnel standards that are based on the "highest requirements in the State." State personnel requirements may be used as "comparable requirements" by the State agency only in those very limited instances in which there is no national or statewide certification or license that applies to the professional or paraprofessional providing VR services (e.g., case aides). Under those circumstances, State personnel requirements may, in fact, represent the highest requirements in the State for the particular profession.

The proposed regulations authorized States to base the highest personnel standards in the State on equivalent experience, as well as on academic degrees, in an effort to stress the significance of relevant work experience and to expand the pool from which qualified personnel can be selected. The overwhelming majority of commenters on this issue, however, asserted that the use of "equivalent experience" as a substitute for academic degrees for purposes of meeting the "highest requirements in the State \* \* \*" significantly weakened the Act's focus on qualified personnel. In light of these comments, the Secretary agrees that the "highest requirements in the State" should be limited to the highest entry-level academic degree needed for a national or State license or certification in order to ensure that the DSU employs those professionals who are most capable of assessing the specialized needs of individuals with disabilities and addressing those needs through an appropriate provision of VR services. The Secretary recognizes the extent to which the qualified personnel standard in the Act would be undermined if States chose to ignore widely recognized, nationally approved or State-approved licensing standards and to employ less qualified individuals on the basis of "equivalent experience."

The Secretary interprets the Act and regulations to permit State agencies to retain current DSU personnel who do not meet the "highest requirements in the State." This position is consistent with paragraph (c)(1)(ii) of this section, which requires the State agency to describe the steps it plans to take to retrain or hire personnel to meet standards that are based on the highest requirements in the State if the State's current standards are not based on the highest requirements in the State.

The Secretary recognizes the concerns of those commenters who sought to safeguard DSU employment opportunities for individuals who,

because of their disability, are prohibited from obtaining the license or certification applicable to their particular profession. To the extent that certification and licensing requirements are discriminatory on the basis of disability, these issues should be addressed as compliance issues under section 504 of the Act and the ADA. Nevertheless, the Secretary is cognizant of the particular difficulty experienced by blind individuals who, historically, have been excluded on the basis of their disability from becoming certified as orientation and mobility instructors. The Secretary emphasizes that these regulations do not inhibit DSUs or other VR service providers from hiring blind individuals as orientation and mobility teachers even though those individuals may not meet current certification requirements. To the extent that a DSU employs blind individuals who do not meet the "highest requirements in the State" applicable to the orientation and mobility profession, the State agency's plan under paragraph (c)(1)(ii) of this section must identify the steps the agency plans to take to assist employees in meeting those requirements. In this regard, the Secretary is supporting a national project to develop alternative certification standards for orientation and mobility instructors in order to ensure that individuals who are blind can meet necessary certification standards within the timeframe outlined in the DSU's plan under paragraph (c)(1)(ii) of this section.

The Secretary does not believe it is prudent to make the training areas identified in paragraph (d) of this section mandatory for all staff employed by each DSU. The Secretary believes that the specific training areas for staff development adopted by a State unit must be based on the particular needs of that State unit. Thus, the final regulations, like the proposed regulations, identify specific training areas as examples that State agencies may incorporate into their staff development systems in light of the DSU's needs.

Paragraph (e) of this section requires the State unit to describe in the State plan how it includes among its personnel or obtains the services of—(1) Individuals able to communicate in the native languages of applicants and eligible individuals who have limited English speaking ability; and (2) Individuals able to communicate with applicants or eligible individuals in appropriate modes of communication. Personnel under the first requirement may include State agency staff, family members of an applicant or eligible individual, community volunteers, and

other individuals able to communicate in the appropriate native language. However, the Secretary agrees that a DSU cannot institute an across-the-board policy of using family members or volunteers as a substitute for addressing the communication needs of individuals with limited English proficiency through the use of DSU staff or contract personnel. DSUs shall be prepared to address the individual communication needs of each applicant or eligible individual it serves. In addition, the Secretary believes that the DSU is responsible for employing or obtaining the services of sign-language interpreters, which fall within the definition of "appropriate modes of communication" in § 361.5(b)(5), to the extent necessary to meet the communication needs of individuals who are deaf.

The Secretary believes that in evaluating a rehabilitation counselor's performance, States should not focus primarily on the number of individuals that the counselor has assisted in achieving an employment outcome. At most, the number of employment outcomes for which the counselor is responsible should be considered as one of many factors in the assessment of the counselor's performance. The Act requires that the State's performance evaluation system facilitate the accomplishment of the policies and procedures outlined in the statute, including the policy of serving, among others, individuals with the most severe disabilities. Thus, counselors should be evaluated on the basis of their efforts in advancing the purposes of the program and, more precisely, on the basis of their performance in serving the most severely disabled. The Secretary notes the following passage from the report of the Senate Committee on Labor and Human Resources, which was also referenced in the preamble to the proposed regulations, to further support this position: "The Committee is concerned that in some States, procedures used for evaluating performance of counselors may have the unintended consequence of providing a disincentive to serve individuals with the most severe disabilities and those clients requiring complex services." The performance evaluation system required under the Act and included in the regulations is designed to address these disincentives.

*Changes:* The Secretary has amended § 361.18 to require that the State Rehabilitation Advisory Council must be afforded an opportunity to review and comment on the following aspects of the State agency's comprehensive system of personnel development: The

plan for recruitment, preparation, and retention of qualified personnel. Personnel standards. Staff development. The performance evaluation system. In addition, the Secretary has clarified paragraph (c) of this section to permit DSUs to base their personnel standards on comparable requirements (including State personnel requirements) only if national or State-approved or -recognized certification, licensing, or registration requirements applicable to a particular profession do not exist. Finally, the term "equivalent experience" has been deleted from the definition of "highest requirements in the State" under paragraph (c) of this section.

*§ 361.22 Cooperation with agencies responsible for students with disabilities*

*Comments:* Some commenters questioned whether this section requires DSUs to develop policies that enable transitioning students to live independently before leaving school. The commenters stated that the proposed regulations appeared to require DSUs to assist students in living independently while the student continues to receive special education services from an educational agency. Other commenters recommended that the regulations be revised to require the development and completion of the IWRP for a special education student who is eligible for VR services before the student leaves the school system.

Several commenters believed that the elements of formal interagency agreements between State units and educational agencies identified in the proposed regulations should be mandatory for all interagency agreements developed under this section. Another commenter asked whether the regulations require DSUs to enter into formal interagency agreements with each local educational agency within the State.

One commenter opposed the distinction in the proposed regulations between those students who receive special education services and those who do not receive special education services and argued that the requirements governing coordination between educational agencies and State units should apply for both groups of students. Finally, some commenters recommended that the term "transitioning student" be replaced by the term "student with a disability" for purposes of referring to students who do not receive special education services from an educational agency.

*Discussion:* The proposed regulations required the DSU to develop plans, policies, and procedures designed to

facilitate the transition of special education students from the school setting to the VR program. Specifically, the regulations stated these policies must be designed to facilitate the development and accomplishment of long-term rehabilitation goals, intermediate rehabilitation objectives, and goals and objectives related to enabling a transitioning student to live independently before leaving school. Although these regulatory requirements largely track the statutory requirements in section 101(a)(24) of the Act, the Secretary agrees that clarification is needed.

The Secretary does not believe that the Act places on the DSU the responsibility for assisting a student with a disability to become independent prior to leaving school. However, the Secretary interprets the Act to require that, before a student with a disability who is in a special education program leaves school, the DSU shall plan for that student's transition to the VR program in order to ensure that there is no delay in the provision of VR services once special education services end. This means that the IWRP for each student determined to be eligible under the VR program or, if the designated State unit is operating under an order of selection, the IWRP for each eligible student able to be served under the order, must be completed before the student leaves school and must, at a minimum, be consistent with the rehabilitation goals and objectives, including goals and objectives related to enabling the student to live independently, that were previously identified in the student's individualized education program. The Secretary believes that this position is further supported by the legislative history to the Act, particularly the Report of the Senate Committee on Labor and Human Resources, portions of which are restated in the note following this section of the regulations. Furthermore, the Secretary believes that requiring the development of the IWRP before a VR-eligible student leaves school does not impose any additional costs on the DSU since DSUs are already required to develop IWRPs for eligible individuals, including students with disabilities, if those individuals can be served. More importantly, the Secretary believes that this requirement will improve coordination between the State's special education and VR programs and will ensure that services are not interrupted after an eligible student leaves school.

In the proposed regulations, the Secretary attempted to lessen the paperwork burden on State units by

reducing the mandatory content requirements that the draft regulations made applicable to all formal interagency agreements between State units and educational agencies. Accordingly, the proposed regulations required only that interagency agreements identify provisions for determining State lead agencies and qualified personnel responsible for transition services and identify policies and practices that can be coordinated between the agencies. The remaining elements under the draft regulations (identification of available resources, financial responsibilities of each agency, dispute resolution procedures, and other necessary cooperative policies) were discretionary under the proposed regulations. However, most commenters on this section opposed the reduction in required elements and stated that each component is essential for ensuring the appropriate transition of special education students from the school setting to the VR program. Without detailed agreements, the commenters argue, resources may be wasted and key processes may not be delineated, resulting in delays in services once the special education student leaves school. Consequently, each identified element of formal interagency agreements is mandatory for all agreements developed under this section of the final regulations. The Secretary believes this position is consistent with the statutory requirements governing formal interagency agreements in section 101(a)(11) and (a)(24) of the Act.

In reviewing the regulations since publication of the NPRM, the Secretary identified an additional mandatory element of formal interagency agreements that was inadvertently omitted from the proposed regulations. This additional element implements the requirement in section 101(a)(11)(B) of the Act, which specifies that interagency cooperation between the DSU and other agencies, including educational agencies, must include training for staff of the agencies as to the availability, benefits of, and eligibility standards for vocational rehabilitation services, to the extent practicable.

The Secretary notes that, although the regulations require the DSU to enter into a formal agreement with the State educational agency, it is within the discretion of each State to determine which local educational agencies should be parties to agreements with the DSU.

The Secretary agrees that classifying students who do not receive special education services as "transitioning students" is confusing. As stated previously in the preamble analysis of comments on § 361.5(b)(49), the

Secretary believes that replacing all references to "transitioning students" in the final regulations with the term "students with disabilities" and eliminating the definition of "transitioning student" from the final regulations will enable DSUs and educational agencies to more easily refer to, and differentiate between, students with disabilities who are receiving special education services and students with disabilities who are not receiving special education services. Moreover, these changes are consistent with the reference to "students who are individuals with disabilities" in section 101 (a)(24) and (a)(30) of the Act.

The Secretary also notes that section 101(a)(30) of the Act warrants the separate treatment that is afforded students with disabilities who are not in special education programs as opposed to those who receive special education services. Paragraph (b) of this section implements this statutory provision by requiring DSUs to develop and implement policies for providing VR services to students with disabilities who do not receive special education services.

*Changes:* The Secretary has revised § 361.22 to clarify that DSU policies must provide for the development and completion of the IWRP for each student with a disability determined to be eligible for vocational rehabilitation services before the student leaves the school setting. This section has been revised further to expand the number of mandatory elements, including staff training to the extent practicable, that must be included in formal interagency agreements between DSUs and educational agencies. The Secretary also has revised this section by replacing the term "transitioning student" with the term "student with a disability." Finally, the Secretary has expanded the note following this section in order to highlight the emphasis in the Act on the timely provision of VR services to special education students.

#### § 361.23 Cooperation with other public agencies

*Comments:* None.

*Discussion:* The Secretary wishes to clarify the requirements governing interagency cooperation between State units and other public agencies that provide rehabilitation services to individuals with disabilities. Section 361.23(b)(3) of the proposed regulations would have required that all types of interagency cooperative initiatives developed pursuant to this section meet certain requirements. However, consistent with section 101(a)(11) of the Act, the Secretary wishes to clarify that

the requirements specified in paragraph (b)(3) of this section (e.g., identification of policies that can be coordinated between agencies, description of financial responsibility of each agency, and procedures for resolving disputes) apply only if the State unit chooses to enter into formal interagency cooperative agreements with other agencies. It is within the discretion of the State to determine how the State unit will cooperate with agencies other than agencies responsible for students with disabilities and to determine whether the requirements identified in paragraph (b)(3) of this section should be addressed if the State adopts cooperative methods other than formal interagency agreements (e.g., interagency working groups).

*Changes:* The Secretary has revised § 361.23 to clarify that the mandatory policies, practices, and procedures specified in paragraph (b)(3) apply only to formal interagency cooperative agreements developed under this section.

#### § 361.27 Shared funding and administration of joint programs

*Comments:* One commenter supported the proposal to no longer require written agreements for joint programs. The majority of commenters, however, stated that written agreements are necessary to ensure that joint programs are administered consistent with the purposes of the VR program.

*Discussion:* The proposed regulations removed the current regulatory requirements relating to written agreements for programs involving shared funding and administrative responsibility as part of the effort to reduce paperwork burden on State units and increase State flexibility. The Secretary maintains that it is within the discretion of the State to determine whether the public agencies administering a joint program for providing services to individuals with disabilities shall enter into a formal written agreement. However, the Secretary agrees with the commenters who indicated that DSUs should be accountable for the proper administration of joint rehabilitation programs authorized under section 101(a)(1)(A) of the Act. Accountability will be based on the extent to which joint programs are carried out consistent with the State plan description required by the final regulations. This limited description is much less extensive, and therefore less burdensome to DSUs, than the State plan requirements in the current regulations related to joint programs.

*Changes:* The Secretary has amended § 361.27 to require that the State plan describe the nature and scope of any joint program to be entered into by the DSU, including the services to be provided, the respective roles of each participating agency in the provision of services and in the administration of the services, and the share of the costs to be assumed by each agency.

#### § 361.29 Statewide studies and evaluations

*Comments:* One commenter requested that DSUs be required to conduct a comprehensive assessment of the rehabilitation needs of individuals with severe disabilities every five years rather than every three years as was specified in the proposed regulations. Another commenter asked whether the review of outreach procedures to identify and serve underserved populations and the review of the provision of VR services to individuals with the most severe disabilities required under paragraph (a) of this section are to be conducted on an annual or triennial basis. In addition, one commenter questioned the statutory basis for requiring the DSU to analyze the characteristics of individuals determined to be ineligible for VR services and the reasons for the ineligibility determinations.

One commenter stated that requiring the DSU to analyze, as part of its annual evaluation under paragraph (b) of this section, the extent to which the State has achieved the objectives of the strategic plan is unnecessary and duplicative of the requirements in § 361.72. Other commenters stated that it is unduly burdensome to require the submission of summaries or copies of the statewide studies and annual evaluations as attachments to the State plan. Finally, one commenter asked whether the DSU must provide copies of the statewide studies and annual evaluations to the State Rehabilitation Advisory Council.

*Discussion:* The Secretary believes it is appropriate and necessary that a comprehensive assessment of the rehabilitation needs of individuals with severe disabilities be conducted every three years. This time period is intended to ensure that the DSU conducts the assessment and reviews its results in connection with the development of a new State plan which, in most instances, must be submitted every three years. Moreover, the Secretary believes that each review or assessment identified in the regulations as a minimum component of the DSU's continuing statewide studies must be conducted on a triennial basis in

conjunction with the development of the State plan.

Section 101(a)(9)(D) of the Act requires that the State agency annually provide to the Secretary an analysis of the characteristics of those individuals determined to be ineligible for VR services and the reasons for the ineligibility determinations. This requirement, however, was mischaracterized in the proposed regulations as a statewide study component and should have been identified as an annual reporting requirement to be submitted in the State plan.

The Secretary agrees that the proposed annual evaluation requirement related to the State's achievement of the objectives in its strategic plan is duplicative of the requirements in § 361.72(e) and that the requirement should be deleted from paragraph (b) of this section.

In recognition of the paperwork burden associated with including summaries or copies of the statewide studies and annual evaluations as attachments to the State plan, the Secretary intends to require only that DSUs maintain copies of the studies and evaluations and provide copies to the Secretary upon request. Copies of the studies and evaluations, however, should be provided to the State Rehabilitation Advisory Council so that the Council can meaningfully fulfill its advisory role in connection with the development of those documents as is required under section 105(c) of the Act. Additionally, although this program reporting requirement has been revised, the Secretary notes that, pursuant to section 635 of the Act, State agencies shall submit as part of the supported employment supplement to their State plan a summary of the results of the comprehensive, statewide assessment on the rehabilitation and career needs of individuals with severe disabilities and the need for supported employment services.

*Changes:* The Secretary has amended § 361.29 to clarify that each mandatory assessment and review identified in paragraph (a) as part of the DSU's continuing statewide studies must be conducted triennially in conjunction with the development of the State plan. In addition, paragraph (a)(3) of this section of the proposed regulations (annual analysis of ineligible individuals and ineligibility determinations) has been changed to a reporting requirement in the State plan and relocated to paragraph (c)(3) in the final regulations. The Secretary also has deleted the analysis of the State's progress in achieving the objectives in

the strategic plan from the annual evaluation requirements in paragraph (b) of this section. Finally, the Secretary has revised paragraph (c)(3) of this section to require that the DSU maintain copies of its statewide studies and annual evaluations and make those copies available upon the request of the Secretary. This provision has been relocated to paragraph (c)(4) in the final regulations.

#### *§ 361.33 Use, assessment, and support of community rehabilitation programs*

*Comments:* Some commenters opposed the requirement that vocational rehabilitation services received through community rehabilitation programs must be provided in the most integrated settings possible. Other commenters requested that this section be revised to require the development of a plan for improving existing community rehabilitation programs.

*Discussion:* Section 102(b)(1)(B) of the Act requires that vocational rehabilitation services, including those provided by community rehabilitation programs, be provided in the most integrated settings possible. Thus, the standard of integration specified in this section is consistent with the Act and with other sections of the regulations governing the provision of services.

The Secretary recognizes that the proposed regulations did not adequately address each statutory requirement in section 101(a) of the Act related to community rehabilitation programs. Consequently, the Secretary believes that this section of the final regulations should be reorganized, revised, and retitled in an effort to more accurately reflect all of these statutory requirements, including the requirement that DSUs develop plans for improving existing programs.

In addition, the Secretary believes that DSUs should be required to describe in the State plan the need to use Federal funds in support of new or existing community rehabilitation programs in light of recent program audit findings indicating that some States have used Federal funds received under the authority for establishing, developing, or improving community rehabilitation programs for purposes other than providing VR services to applicants and eligible individuals. Any paperwork burden or cost associated with this description, the Secretary believes, is significantly outweighed by the need to ensure that program funds used to support community rehabilitation programs are properly expended.

*Changes:* The Secretary has revised § 361.33 to require that the State plan

contain plans for improving existing community rehabilitation programs. In addition, the Secretary has revised this section to require States to describe in the State plan the need to establish, develop, or improve, as appropriate, a community rehabilitation program to provide VR services to applicants and eligible individuals. This requirement is consistent with revisions made to the definition of "establishment, development, or improvement of a public or nonprofit community rehabilitation program" in § 361.5(b)(16) to clarify that Federal support of community rehabilitation programs is limited to the provision of services to applicants and eligible individuals under the VR program. Finally, this section has been retitled "use, assessment, and support of community rehabilitation programs" and has been reorganized to reflect these three types of requirements.

#### *§ 361.34 Supported employment plan*

*Comments:* One commenter opposed the requirement in the proposed regulations that the DSU submit annual revisions to its supported employment plan as a supplement to its State plan.

*Discussion:* The Secretary does not intend to require DSUs to annually revise each provision of its supported employment plan and submit those revisions to RSA every year. Section 635(a) of the Act requires that each State submit a State plan supplement for providing supported employment services and "annual revisions [to] the plan supplement as may be necessary." Pursuant to section 635(b)(3) of the Act, however, RSA requires that each year the DSU explain how it will expend its annual allotment of supported employment funds received under section 632 of the Act. Thus, at a minimum, the DSU is required to submit an annual revision to its State plan attachment that describes its plans for distributing section 632 funds for purposes of providing supported employment services to individuals with the most severe disabilities. In addition, the State unit shall provide, on an annual basis, any revisions to its supported employment plan that are necessary to reflect corresponding changes in State policies or practices regarding the provision of supported employment services.

*Changes:* The Secretary has revised § 361.34(b) to clarify that the DSU is required to submit "any needed" annual revisions to its supported employment plan.

*§ 361.35 Strategic plan*

*Comments:* Two commenters opposed the requirement that the strategic plan be submitted as a supplement to the State plan.

*Discussion:* Section 120 of the Act requires that each State develop a strategic plan for developing, expanding, and improving VR services and submit the plan to RSA. In addition, section 101(a)(34)(A) of the Act requires that the State plan include an assurance that the State has developed and implemented a strategic plan. The statute, however, does not authorize the Secretary to approve or disapprove the strategic plan. Consistent with these requirements, the Secretary does not consider the strategic plan to be part of the State plan that is subject to the approval of the Secretary, but is requiring the DSU to submit the strategic plan and the State plan at the same time for purposes of administrative efficiency.

*Changes:* The Secretary has amended § 361.35(b) to require that the DSU submit the strategic plan at the same time that it submits the State plan.

*§ 361.37 Establishment and maintenance of information and referral programs*

*Comments:* The majority of commenters on this section of the proposed regulations supported the new provision that would authorize State units operating under an order of selection to establish an expanded information and referral program for eligible individuals who do not meet the order of selection criteria for receiving VR services. Some commenters did seek additional clarification as to whether counseling and guidance services are authorized or whether an IWRP is to be developed for individuals served under the expanded program. One commenter requested that the Secretary define the term "referral for job placement." Other commenters requested that DSUs be permitted to count as successful outcomes those individuals who obtain employment following a referral by the DSU. A limited number of commenters believed the expanded program to be inconsistent with the order of selection requirements in the Act.

*Discussion:* The expanded information and referral program authorized in this section is intended to address the concerns of some State units operating under an order of selection. These State units believe they should be permitted to provide limited non-purchased services to eligible individuals who do not qualify for services under the State unit's priority

categories. An order of selection is required under section 101(a)(5)(A) of the Act if a State unit determines that it is unable to provide services to all eligible individuals. Authorization of an expanded information and referral program under this section is consistent with the Act as long as the DSU, in carrying out the expanded program, does not use funds needed to provide VR services to eligible individuals who are able to be served under the State unit's order of selection. An assurance to this effect is a key condition to operating an expanded program. In addition, the Secretary expects a DSU to expend a limited level of resources (e.g., staff time and equipment) in support of its referral program. For example, a DSU staff member can administer the expanded program only to extent that the staff person is not needed to provide VR services to eligible individuals who qualify for services. This limited commitment of resources must be reflected in the DSU's description of its program under paragraph (c)(2) of this section.

The Secretary agrees that it is appropriate to provide counseling and guidance services under the expanded referral program. Authorization of these services further distinguishes the expanded program from the general information and referral functions performed by the DSU for any individual with a disability. However, DSUs are not expected to develop IWRPs for eligible individuals receiving expanded information and referral services since these individuals do not meet the DSU's criteria for receiving services under its order of selection and, therefore, cannot receive the full range of services under section 103(a) of the Act to address their rehabilitation needs.

The Secretary believes that the term "referral for job placement" is self-explanatory. The expanded program authorizes DSUs to refer individuals to various public and private placement agencies in the community that may be able to assist the individual in obtaining employment.

Although the proposed regulations had required DSUs to track the results of its expanded information and referral program, the final regulations make this a State option. For those DSUs that choose to track and report on individuals who obtain employment following their participation in the expanded information and referral program, the final regulations require that the DSU report to RSA the number of individuals served and the number who obtain employment. However, the Secretary emphasizes that the number of

individuals who are assisted, in part, under the expanded information and referral program and who subsequently obtain employment must be identified separately from those individuals who receive full services under an IWRP and achieve an employment outcome under the VR program. Individuals who obtain employment following their receipt of limited counseling, guidance, and referral services through the expanded program are not considered to have achieved an employment outcome under § 361.56 of the regulations.

*Changes:* The Secretary has revised § 361.37(c) to authorize counseling and guidance services under the DSU's expanded information and referral program. In addition, paragraph (c) of this section has been amended to give the DSU the discretion to determine whether to track the results of its expanded information and referral program.

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

*Comments:* One commenter questioned whether the regulations authorize the release of personal information to the State Rehabilitation Advisory Council for purposes of evaluating program effectiveness and consumer satisfaction. Other commenters stated that this section should permit applicants or eligible individuals to examine, as well as receive copies of, the information in their record of services.

Some commenters argued that determinations as to whether information is harmful under paragraph (c)(2) of this section should be made by objective third parties rather than DSUs. These commenters were concerned that a conservative interpretation of the term "harmful" by a State unit would result in limited access to important information.

Additional commenters requested that applicants and eligible individuals be given unrestricted access to personal information obtained by the DSU from other agencies and organizations. Other commenters sought authorization in this section for the removal of inaccurate or misleading information from the record of services. Finally, some commenters requested clarification of the term "judicial officer" in paragraph (e)(4) of this section, which is used in connection with the release of information in response to a judicial order.

*Discussion:* Paragraph (d) of this section authorizes the release of personal information to entities that evaluate the VR program as long as the evaluation is directly related to the



administration of the program or to the improvement of the quality of life for applicants and eligible individuals. State Rehabilitation Advisory Councils are responsible for evaluating the effectiveness of, and consumer satisfaction with, the State agency and VR services. Because the Council's evaluations are designed to facilitate improvement in the administration of the VR program and in the provision of VR services, personal information may be released to the Council for purposes of carrying out its evaluative functions, provided that the Council safeguards the confidentiality of the information consistent with the requirements in paragraph (d).

The Secretary recognizes that, in some instances, an applicant or eligible individual may need ready access to the information in his or her case record, in addition to copies of the information. The proposed regulations were not intended to foreclose the current regulatory option that permits applicants and eligible individuals to examine the information in their record of services.

The Secretary believes it would be unduly burdensome to require that an objective third party rather than the DSU determine whether information requested by an applicant or eligible individual is "harmful" to that individual. Moreover, the Secretary regards any inconvenience resulting from the individual's inability to directly receive "harmful" information as minimal since the relevant information must still be provided to the individual, except that it shall be provided through a third party chosen by the applicant or eligible individual. The Secretary also notes that the individual's right under paragraph (c)(2) of this section to choose the person to whom harmful information is released supersedes any conflicting State confidentiality policy developed under paragraph (a)(1) that designates a specific individual to receive harmful information (e.g., medical professional). Nevertheless, if a representative has been assigned by a court to represent the applicant or eligible individual, the harmful information must be released to the individual through the court-appointed representative. This exception is particularly applicable if the applicant or eligible individual is a minor or has limited cognitive capacity.

The Secretary does not believe that there is a basis for requiring that applicants and eligible individuals be given unrestricted access to personal information obtained by the DSU from other agencies and organizations. Release of information developed or

compiled by another agency or organization is subject to the conditions established by that entity in accordance with paragraph (c)(3) of this section.

The Secretary recognizes that any applicant or eligible individual would prefer that inaccurate or misleading information be removed from the individual's record of services. On the other hand, the Secretary also believes it would be unduly burdensome to impose, through these regulations, costly and time-consuming due process procedures that would enable an individual to legally challenge the accuracy of the information in his or her file. It is within the discretion of the DSU to determine the extent to which an individual may challenge the information in that individual's record of services. However, the Secretary believes, at a minimum, that applicants and eligible individuals should be given an opportunity to question the accuracy of the information in the individual's record of services and, if unsuccessful in having the information removed, should be permitted to include a statement in the record that identifies the information that the individual considers to be inaccurate.

The Secretary emphasizes that DSUs are not authorized to release personal information in response to a subpoena or other document issued by a party to a dispute or an attorney. Release is authorized only if a judge or other judicial officer orders the State unit to release the information. The term "judicial officer" in the proposed regulations was intended to mean any judge, magistrate, or other official who is authorized to decide the merits of, and issue, a court order. The Secretary has clarified this intention in the final regulations.

*Changes:* The Secretary has expanded paragraph (c)(1) of § 361.38 to require that the DSU make the information in the record of services available for inspection by the applicant or eligible individual. In addition, paragraph (c)(2) has been amended to clarify that if a court has appointed a representative to represent an applicant or eligible individual, then any requested information that is considered harmful to the individual shall be provided to the individual through the court-appointed representative. The Secretary also has expanded paragraph (c) to authorize applicants and eligible individuals to request that misleading or inaccurate information in the individual's record of services be amended and to have the request documented in the individual's file. Finally, paragraph (e)(4) has been clarified to require the release of

information in response to an order issued by a judge, magistrate, or other authorized judicial officer.

#### *§ 361.41 Processing referrals and applications*

*Comments:* Some commenters opposed the proposed requirement that the DSU develop timelines for informing individuals referred to the DSU for VR services of its application requirements and for gathering information necessary to assess the individual's eligibility and priority for services. While these commenters viewed the timeline requirements as unduly burdensome, other commenters supported the provision and emphasized the need for DSUs to respond timely to individuals during the pre-application stage.

One commenter stated that authorized extensions of the 60-day time period for determining eligibility should be limited in duration. Other commenters stated that all individuals should be required to complete the DSU's formal application form before the 60-day time period begins to run. Finally, one commenter requested clarification as to whether all individuals must provide information necessary to conduct an assessment for determining eligibility and priority for services before being considered "to have submitted an application."

*Discussion:* The Secretary believes that it is important to retain in the final regulations the requirement that DSUs develop timelines for making good faith efforts to inform individuals referred to the VR program of the DSU's application requirements and to obtain information needed to assess the individual's eligibility and priority for services. The Secretary agrees with those commenters who indicated that these timelines are necessary to ensure that there is no unreasonable delay between the individual's referral and application for VR services. Moreover, this requirement is unlikely to cause DSUs undue burden since many States already have in place timelines for handling referrals. However, the Secretary believes that the development of an appropriate, good faith timeline for processing referrals is a matter of State discretion and that it would be inappropriate to impose in the final regulations a specific Federal time period for this purpose.

Section 102(a)(5)(A) authorizes extensions of the 60-day time period for determining eligibility if (1) exceptional or unforeseen circumstances arise or (2) an extended evaluation of the individual is necessary, which may not exceed 18 months. The Secretary agrees,

however, that extensions due to exceptional or unforeseen circumstances cannot be open-ended but must be limited to a specific time period that is mutually agreed upon by the individual and the DSU.

The Secretary believes it would be unduly restrictive to require in all instances that an individual with a disability complete the DSU's application form before the DSU initiates an assessment for determining eligibility and priority for services. This limitation would be particularly burdensome for individuals in rural areas who may not have ready access to a DSU application form. Although the regulations require the DSU to make its application form widely available throughout the State, the Secretary considers it inappropriate to penalize individuals who are unable to secure an application. Thus, the Secretary maintains that the 60-day time period for determining eligibility begins once the individual (1) has either completed and signed an agency application form or has otherwise requested services and (2) has provided information necessary for the DSU to initiate the assessment. Once an individual or the individual's representative, as appropriate, requests services, it is expected that State units will make good faith efforts to obtain the assessment information as quickly as possible. The Secretary also notes that information needed to initiate the assessment must be provided before the 60-day timeline begins to run, whether the individual has completed an agency application form or has otherwise requested services. Of course, it is essential that the individual remain available during this period to complete the assessment process.

*Changes:* The Secretary has amended § 361.41 to require that extensions of the 60-day time period for determining eligibility due to exceptional or unforeseen circumstances be limited in duration and that a specific time period be agreed to by the individual and the DSU. In addition, the Secretary has revised this section to clarify that all individuals who have requested VR services, whether through the completion of an agency application or otherwise, shall be available to complete the assessment before the individual is considered to have submitted an application for VR services.

#### *§ 361.42 Assessment for determining eligibility and priority for services*

*Comments:* With respect to the first eligibility criterion, several commenters opposed the standard in the proposed regulations that required qualified personnel "licensed or certified in

accordance with State law and regulation" to determine the existence of a physical or mental impairment. The commenters further recommended that the regulations permit DSU employees who meet requirements that are "comparable" to licensing or certification requirements to determine the existence of obvious physical impairments.

Some commenters sought clarification under the second eligibility criterion that an impairment that hinders an individual from maintaining a job placement constitutes a "substantial impediment to employment." These commenters were concerned that the proposed regulations appeared to limit "substantial impediments to employment" to impairments that prevent unemployed individuals from obtaining jobs.

Other commenters recommended that the term "determine" be replaced by the statutory term "demonstrate" in paragraph (a)(2) of this section, in connection with rebutting the presumption that an individual who has a substantial impediment to employment can benefit in terms of an employment outcome from VR services. Finally, one commenter requested clarification as to whether individuals who qualify for Social Security benefits are presumed eligible for VR services.

Several commenters recommended specific clarifying changes to some of the examples following this section, whereas other commenters opposed the use of examples under this section altogether.

*Discussion:* The Secretary believes that the personnel standard proposed in connection with the first eligibility criterion is consistent with the Act. The proposed standard was based on the requirement in section 103(a)(1) of the Act, which states that the assessment for determining an individual's eligibility and VR needs must be conducted by qualified personnel. The Secretary interprets the term "qualified personnel" under section 103(a)(1) of the Act to refer to personnel who meet the DSU's personnel standards under § 361.18(c) of these final regulations (i.e., national or State-approved certification, licensing, or registration requirements or, if none of these requirements exist, other "comparable requirements" that apply to the profession in which the individual provides VR services). Thus, a determination that an individual has a physical or mental impairment, or meets any of the other eligibility criteria in § 361.42(a), must be made by personnel who meet existing licensure, certification, or registration

requirements applicable to their profession. Moreover, because DSUs are required under § 361.18(c) to develop personnel standards based on existing certification or licensure requirements, it is expected that DSU personnel who determine the existence of impairments, including obvious physical impairments, will be qualified within the meaning of the Act.

The Secretary agrees that an individual does not have to be unemployed to have a "substantial impediment to employment." A "substantial impediment to employment," as defined in § 361.5(b)(44), includes any impairment that hinders the individual from entering into, engaging in, or retaining employment consistent with the individual's abilities and capabilities. Given that the regulatory definition of the term "substantial impediment to employment" clearly recognizes that currently employed individuals may qualify for VR services for purposes of "retaining" their employment, the Secretary does not believe it is necessary to revise the second eligibility criterion in paragraph (a)(1)(ii) as the commenters recommended.

Section 102(a)(4)(A) of the Act requires the DSU to presume that an individual can benefit in terms of an employment outcome, unless the DSU can "demonstrate," based on clear and convincing evidence, that the individual is incapable of benefitting in terms of an employment outcome from VR services. The Secretary did not intend to weaken this statutory presumption by using the term "determine" in place of the term "demonstrate" in the proposed regulations and agrees that the regulations should be changed to track the stronger statutory language.

In addition, the Secretary emphasizes that Social Security beneficiaries are not automatically eligible to receive VR services, but are presumed under section 102(a)(2) of the Act to meet only the first two eligibility criteria under paragraph (a)(1) of this section (i.e., the individual has a physical or mental impairment that constitutes or results in a substantial impediment to employment). Eligibility for services under the Social Security Act also means that the individual is presumed to meet the first element in the definition of "individual with a severe disability" under § 361.5(b)(28). The Secretary believes that these limited presumptions were clearly reflected in the proposed regulations.

Although the Secretary believes that most of the examples in the regulations represent useful guidance material, the Secretary agrees that the examples

following this section of the proposed regulations, which had identified six potential applications of the fourth eligibility criterion (an individual requires VR services), should be removed from the final regulations in light of the confusion expressed by commenters and in recognition of the fact that eligibility determinations are highly individualized. The commenters' confusion, the Secretary believes, stems from the possibility that the application of the fourth eligibility criterion may result in different outcomes for individuals with disabilities who face apparently similar circumstances. By removing these examples, the Secretary seeks to avoid causing similar confusion on the part of individual counselors charged with making individual eligibility determinations. Because the examples used elsewhere in the regulations (e.g., permissible expenses under the definitions of "maintenance" and "transportation") are straightforward applications of clear issues and do not create similar confusion among commenters, the Secretary believes that those examples should be retained in the final regulations.

*Changes:* The Secretary has amended § 361.42(a)(2) of this section to require a "demonstration," based on clear and convincing evidence, that an individual is incapable of benefitting from VR services in order for the DSU to overcome the presumption that an individual can benefit from VR services. A technical change also has been made to paragraph (a)(1)(iii) to identify more accurately the third eligibility criterion as a "presumption" of benefit, not a "determination" of benefit. In addition, the Secretary has removed from the final regulations the examples that had followed this section in the proposed regulations of how an individual may or may not meet the final eligibility criterion.

#### § 361.43 Procedures for ineligibility determination

*Comments:* Several commenters stated that DSUs should be required, in all instances, to inform individuals in writing of the DSU's ineligibility determination. These commenters were concerned that the proposed regulations authorized DSUs to inform individuals of ineligibility determinations through an appropriate mode of communication without a written record.

In addition, several commenters indicated that it is unduly burdensome to require DSUs to review all ineligibility determinations within 12 months. These commenters stated that the review of ineligibility

determinations should be limited to those determinations that are based on a finding that the individual is incapable of achieving an employment outcome. Other commenters asked that the regulations specify additional bases for not reviewing ineligibility determinations (e.g., that the individual's disability is rapidly progressive or terminal).

*Discussion:* The proposed regulations incorrectly indicated that DSUs have the option of providing ineligibility notices in writing or through an appropriate mode of communication. The Secretary agrees that, at a minimum, notice of an ineligibility determination and other required information should be provided to the individual in writing and supplemented, as necessary, by other appropriate modes of communication in accordance with the individual's informed choice.

The Secretary agrees with the suggestion to modify the requirements in paragraph (d) of this section governing the review of ineligibility determinations in light of the views expressed by public commenters. The proposed regulations required DSUs to review all ineligibility determinations at least once within 12 months and to review annually thereafter if requested by the individual determinations based on a finding that the individual cannot achieve an employment outcome. In order to reduce the process burden and associated costs on DSUs, however, the Secretary believes that DSUs should be required to review within 12 months, and annually thereafter if requested by the individual, only those ineligibility determinations that are based on a finding that the individual is incapable of achieving an employment outcome. Moreover, an additional exception to this review requirement, which is authorized under the current regulations, should be permitted for situations in which the individual's medical condition is rapidly progressive or terminal. The Secretary believes this narrower interpretation of the review requirements is supported by sections 101(a)(9)(D) and 102(c) of the Act and notes that this position is consistent with the current regulations in 34 CFR 361.35(d). The Secretary also notes that the requirements of this section apply both to ineligibility determinations following an extended evaluation and to ineligibility determinations made after an individual has begun to receive services under an IWRP.

*Changes:* The Secretary has revised § 361.43 to specify that notice of ineligibility determinations must be provided in writing and must be supplemented, as necessary, by other

appropriate modes of communication consistent with the individual's informed choice. For example, a DSU could meet these requirements by providing an ineligibility notice in braille or large print form to an applicant who has a visual impairment. In addition, the Secretary has revised this section to require DSUs to review only ineligibility determinations that are based on a finding that the individual is incapable of achieving an employment outcome. The final regulations also clarify that this review of ineligibility determinations need not be conducted if the individual's medical condition is rapidly progressive or terminal.

#### § 361.44 Closure without eligibility determination

*Comments:* One commenter requested that this section be amended to state that a DSU "shall not close" (rather than "may not close") an applicant's case prior to making an eligibility determination in order to clarify that the prohibition under this section is mandatory.

*Discussion:* The Secretary emphasizes that State units are prohibited from closing an applicant's record of services prior to making an eligibility determination unless certain circumstances are evident (e.g., the applicant declines to participate in the assessment, and the DSU has made a reasonable number of attempts to encourage the applicant's participation). The Secretary interprets the phrase "may not close" to signify a mandatory prohibition.

*Changes:* None.

#### § 361.45 Development of the individualized written rehabilitation program

*Comments:* Several commenters stated that the regulations should be strengthened to ensure that the eligible individual's employment goal is consistent with that individual's informed choice. In addition, some commenters opposed requiring DSUs to develop timelines for the prompt development of IWRPs, whereas other commenters supported the timeline requirement as a necessary protection for eligible individuals. Commenters also stated that the DSU should not be required to revise an individual's IWRP to reflect minor changes to services that are already identified in the IWRP.

*Discussion:* The Secretary agrees that the informed choice of the individual, as well as the individual's strengths, priorities, concerns, abilities, capabilities, and interests, should be considered in determining the individual's employment goal. Addition

of the term "informed choice" to the list of factors to be considered under paragraph (a) of this section is also consistent with the consideration of informed choice in connection with the provision of services under § 361.48 and in connection with the achievement of an employment outcome under § 361.56.

The Secretary believes that the proposed requirement that DSUs establish and implement timelines for the prompt development of IWRPs should be retained in the final regulations. The Secretary agrees with those commenters who indicated that these timelines are necessary to guard against unreasonable delays in the development of the IWRP once an individual is determined eligible for VR services. It should also be noted that this section does not require DSUs to apply an arbitrary time limit to the development of all IWRPs, as some commenters had questioned. Instead, DSUs are required to develop general standards that ensure the timely development of IWRPs as long as the standards include timelines that take into account the specific needs of the individual.

Changes in an individual's vocational goal, intermediate objectives, or VR services must be documented through a revision in the IWRP after obtaining the agreement and signature of the individual. The Secretary believes that changing the reference from "VR needs" to "VR services" will help clarify this provision.

In addition, the Secretary agrees that minor changes to an individual's program of services do not have to be recorded in a revision to the IWRP. This means, for example, that a slight change in the cost of a previously authorized VR service would not warrant a revision to the IWRP. On the other hand, a substantive change to an existing service (e.g., a change in service provider) or the addition of a new service must be documented by a revision. Regardless of whether a particular change to an individual's program necessitates a revision to the IWRP, however, the Secretary expects that the DSU will obtain the agreement of the individual before the change is implemented.

*Changes:* The Secretary has revised § 361.45 to clarify that the informed choice of the individual must be considered in the development of the IWRP and the identification of a vocational goal. The Secretary also has amended this section to require the DSU to incorporate into the IWRP any revisions necessary to reflect changes to the individual's goal, objectives, or VR services and to obtain the individual's

agreement and signature to the revisions.

#### *§ 361.46 Content of the IWRP*

*Comments:* Some commenters on the proposed regulations questioned certain required elements of the IWRP, contending they were inconsistent with the Act and unnecessarily burdensome. Specifically, several commenters questioned the basis for requiring that the long-term vocational goal identified in the IWRP be "specific." Similarly, other commenters stated that intermediate rehabilitation objectives need not be "measurable." Additional commenters opposed requiring a projected date for the achievement of the vocational goal. Several commenters recommended that the record of the DSU's evaluations of individual progress be removed from the IWRP and added to the record of services under § 361.47. Finally, some commenters opposed the requirement that the individual be provided with information concerning the availability and qualifications of alternative service providers.

*Discussion:* The Secretary believes that the long-term vocational goal must be stated with some specificity in the IWRP in order for it to be meaningful. The Secretary does not intend that the IWRP identify the exact job that the individual intends to obtain, but expects, at a minimum, that the vocational goal be described in terms of a particular type of profession or occupation. For example, "clerical work" is a sufficiently detailed vocational goal under this requirement, whereas a vocational goal of "supported employment" or "self-employment" would be impermissibly vague.

The requirement in the proposed regulations that the intermediate rehabilitation objectives must be "measurable" was misplaced and has been eliminated from the final regulations. The use of this term was based on the requirement in section 102(b)(1)(B)(vii) of the Act that the DSU shall develop procedures for evaluating the individual's progress toward meeting the intermediate rehabilitation objectives. The final regulations also clarify that the progress of the individual in satisfying the objectives must be measured periodically by the DSU, but a record of the reviews and evaluations need not be included in the IWRP. These reviews and evaluations, the Secretary agrees, should be maintained as part of the individual's record of services under § 361.47, as some commenters suggested.

The Secretary does not expect DSUs to specify a date certain on which an

employment outcome shall be achieved. Thus, the term "projected date" for the achievement of the individual's vocational goal in paragraph (a)(4) of this section in the proposed regulations has been replaced by the term "projected timeframe" in the final regulations. This provision is intended to ensure that the individual understands how long the rehabilitation process is expected to take.

The Secretary believes that the requirement in this section concerning the individual's description of how information was provided about the availability and qualification of alternative service providers should be removed from the final regulations since it is duplicative of the choice requirements in § 361.52. Section 361.52(b) specifies that the DSU shall provide the individual, or assist the individual in acquiring, information necessary to make an informed choice about VR services and service providers, including information about the qualifications of potential service providers.

*Changes:* The Secretary has revised § 361.46 by removing the term "measurable" from paragraph (a)(2). The Secretary also has replaced the term "projected date" in paragraph (a)(4) of this section with the term "projected timeframe" in connection with the achievement of the individual's vocational goal. Additionally, the record of reviews and evaluations of individual progress has been removed from paragraph (a)(5) of this section as an IWRP requirement and relocated to § 361.47(h) as a record of services requirement. Finally, the reference in the individual's statement to the availability and qualifications of alternative service providers has been removed from paragraph (a)(6).

#### *§ 361.47 Record of services*

*Comments:* None.

*Discussion:* In the proposed regulations, the Secretary proposed to delete from the record of services a number of requirements that were considered burdensome or were adequately addressed in other regulatory provisions. In particular, several requirements that were duplicative of IWRP content requirements in § 361.46 were proposed for removal from this section. For the same reason, the Secretary believes that proposed § 361.47(h) should be deleted from the final regulations. This provision would have required documentation in the record of services of the DSU's reasons for terminating services to an individual and, if appropriate, documentation of the

DSU's basis for determining that the individual has achieved an employment outcome under § 361.56. The Secretary believes that further reducing the paperwork burden on DSUs by removing proposed § 361.47(h) is appropriate given that this requirement is adequately addressed by § 361.46(a)(10).

However, in order to ensure that individuals in competitive employment are compensated in accordance with the definition of "competitive employment" in § 361.5(b)(10), the Secretary believes that the record of services for those individuals must include documentation that the individual is compensated at or above the minimum wage and receives at least the customary wage and benefit level paid to non-disabled persons performing similar work for the same employer.

*Changes:* The Secretary has removed from § 361.47 the documentation requirements relating to the termination of services and the achievement of an employment outcome and has added a cross-reference in § 361.46(a)(10) to § 361.56 for additional clarification. In addition, this section has been amended to require that the DSU verify in the record of services that an individual with a disability in competitive employment is compensated at or above the minimum wage and that the individual's wage and level of benefits are not less than that paid by the employer for the same or similar work performed by non-disabled individuals. This new requirement is located in paragraph (i) of this section.

*§ 361.48 Scope of vocational rehabilitation services for individuals with disabilities*

*Comments:* Some commenters recommended that this section of the final regulations identify assessment services, counseling and guidance, and rehabilitation technology as mandatory services that the DSU shall provide to all individuals in need of these services. Other commenters opposed limiting counseling and guidance services authorized under this section to "vocational counseling and guidance." Two commenters requested that the final regulations clarify that it is the joint responsibility of the DSU and the individual to secure grant assistance from sources other than VR program funds to pay for training in institutions of higher education. Other commenters recommended that language be added to paragraph (a)(13) of this section to ensure that job search and placement services are not discontinued before an individual achieves the employment outcome specified in the individual's

IWRP. One commenter opposed the requirement in paragraph (b) that the State plan descriptions related to the provision of rehabilitation technology and personal assistance services be provided on an annual basis. Another commenter stated that the description of the DSU's strategies for expanding the availability of personal assistance services under § 361.48(b)(3) of the proposed regulations is unduly burdensome and is not required by the Act. Finally, several commenters recommended that the final regulations require, consistent with the Act, a description in the State plan of how assistive technology devices are provided or worksite assessments are made as part of the assessment for determining eligibility and VR needs of the individual.

*Discussion:* Section 361.48, which implements section 103(a) of the Act, authorizes specific vocational rehabilitation services necessary to address the rehabilitation needs of individuals with disabilities. These services must be included in each DSU's program of VR services and, consistent with § 361.45(a) and § 361.46(a), must be provided to an eligible individual if the service is needed to achieve the intermediate rehabilitation objectives or vocational goal included in the individual's IWRP. In addition, § 361.42 requires DSUs to conduct an assessment for determining eligibility and priority for services for each applicant and to provide rehabilitation technology devices and services during the assessment if needed to determine eligibility. In light of these requirements, the Secretary does not believe it is necessary to identify assessment services, counseling and guidance, and rehabilitation technology as mandatory services under this section of the regulations, as some commenters had recommended. The commenters correctly noted that section 101(a)(8) of the Act exempts these services from the required search for comparable service and benefits. Regardless of whether a particular service is subject to the comparable service and benefits requirements, however, the regulations clearly require DSUs to conduct an assessment for determining eligibility and priority for services for each applicant and to ensure that each eligible individual receives needed VR services in accordance with the individual's IWRP.

Those commenters who opposed changing the term "counseling and guidance" to "vocational counseling and guidance" in the proposed regulations were concerned that the change would limit the scope of

counseling and guidance currently provided under the program. Specifically, the commenters were concerned that this term would prohibit the provision of personal adjustment counseling and other related counseling services currently provided by vocational rehabilitation counselors—services that are necessary to address issues confronted by individuals with disabilities seeking employment, including issues associated with adjusting to environmental barriers, medical issues, family and social issues, and other related issues that are not considered "vocational." However, the use of the term "vocational counseling and guidance" in the proposed regulations was not intended to limit the scope of the counseling and guidance that an individual may need in order to achieve a vocational goal. Rather, the term "vocational counseling and guidance" was intended merely as a means of distinguishing discrete, therapeutic counseling and guidance services that are necessary for an individual to achieve an employment outcome from the general supportive role that the VR counselor performs throughout the rehabilitation process in connection with any service. Discrete, therapeutic counseling and guidance services include personal adjustment counseling, counseling that addresses medical, family, or social issues, vocational counseling, and any other form of counseling and guidance that is necessary for an individual with a disability to achieve an employment outcome. The Secretary agrees that changing the term "vocational counseling and guidance" to "vocational rehabilitation counseling and guidance" in the final regulations, as some commenters suggested, better reflects this broad interpretation. Like the term used in the proposed regulations, this change does not affect the general counseling and guidance relationship that exists between the counselor and the individual during the entire rehabilitation process.

The Secretary agrees that the DSU and the individual share a joint responsibility to secure grant assistance from sources other than VR program funds in order to pay for training in institutions of higher education. This position is consistent with RSA's longstanding policy relating to the requirement that available comparable services and benefits be located and used before a DSU expends program funds to pay for VR services. Under this policy, DSUs are responsible for identifying providers of comparable services and benefits and for assisting

eligible individuals in obtaining those resources. The individual, on the other hand, is responsible for applying for appropriate comparable services and benefits identified by the DSU. The Secretary believes that this policy is equally applicable to the requirement in section 103(a)(3) of the Act that maximum efforts be made to secure alternative sources to pay for training in institutions of higher education. Accordingly, it is expected that DSUs will locate alternative funding sources to support the cost of training in colleges and universities and, to the extent necessary, assist eligible individuals in obtaining this assistance. It is further expected that an individual in need of training in a higher education institution will pursue and apply for alternative funding sources identified by the DSU.

Commenters on § 361.48(a)(13) of the proposed regulations were concerned that DSUs could terminate job placement services anytime an eligible individual obtains a job even if the job is inconsistent with the vocational goal identified in the individual's IWRP. As a result, these commenters recommended that this section specifically authorize job search and placement assistance until the individual achieves an employment outcome that is consistent with his or her abilities, capabilities, interests, and informed choice. The Secretary believes, however, that the commenters' concerns are fully addressed by § 361.56 of the regulations. That section contains the requirements for determining whether an individual has achieved an employment outcome, including the requirement in § 361.56(b) that the employment outcome be consistent with the individual's abilities, capabilities, interests, and informed choice. Thus, termination of services on the basis that the individual has achieved an employment outcome is dependent, in part, upon whether the job placement is appropriate for the individual in accordance with § 361.56(b). If an eligible individual receiving VR services is underemployed (i.e., placed in a job that is not consistent with the individual's abilities, capabilities, interests, and informed choice), the DSU may not discontinue services, including job search and placement assistance, that the individual needs in order to achieve the vocational goal specified in the individual's IWRP.

In an effort to further reduce the paperwork burden and associated costs on DSUs, the Secretary has made two regulatory changes to paragraph (b) of this section that were recommended by commenters on the proposed

regulations. First, the final regulations require the DSU to submit descriptions related to the provision of rehabilitation technology and personal assistance services triennially as part of its new State plan. The proposed regulations would have required submission of these descriptions annually as revisions to the State plan. Second, the proposed State plan description of the DSU's strategies for expanding the availability of personal assistance services has been removed from the final regulations because it is not required by statute and could be more appropriately addressed in a DSU's strategic plan. Additionally, the Secretary has added to § 361.48(b) of the final regulations a requirement that the State plan describe how assistive technology devices are provided or worksite assessments are made as part of the assessment for determining eligibility and VR needs of the individual. This State plan component, which is required under section 101(a)(31) of the Act, was inadvertently omitted from the proposed regulations.

*Changes:* The Secretary has revised § 361.48 of the proposed regulations by changing the term "vocational counseling and guidance" under paragraph (a)(3) of this section to "vocational rehabilitation counseling and guidance." The Secretary also has revised this section by clarifying under paragraph (a)(6) that it is the joint responsibility of the DSU and the individual to secure grant assistance from other sources before using VR funds to pay for training in institutions of higher education. In addition, the term "annually" has been removed from paragraph (b) of this section. The description in the State plan regarding the DSU's strategies for expanding the availability of personal assistance services that would have been required under § 361.48(b)(3) of the proposed regulations also has been removed from the final regulations. Finally, the Secretary has added to this section the requirement that the State plan describe the manner in which assistive technology devices are provided or worksite assessments are made as part of the assessment for determining eligibility and VR needs of the individual.

*§ 361.49 Scope of Vocational Rehabilitation Services for Groups of Individuals With Disabilities*

*Comments:* None.

*Discussion:* Because the final regulations limit § 361.50 to written policies that cover the nature and scope of services provided to individuals under § 361.48, the Secretary believes that the requirement regarding written

policies for services to groups properly belongs in § 361.49(b)(2) of the final regulations. This provision is intended to ensure that if a DSU chooses to provide services to groups under § 361.49, then the DSU develops and maintains written policies covering each service and the criteria under which each service is provided.

*Changes:* The Secretary has revised § 361.49 by relocating the requirement regarding written policies for services to groups from § 361.50 of the proposed regulations to § 361.49(b)(2).

*§ 361.50 Written Policies Governing the Provision of Services for Individuals With Disabilities*

*Comments:* One commenter stated that it is inappropriate for this section to require DSUs to develop written policies governing the provision of VR services to groups since these services are not included in the individual's IWRP. Several commenters recommended requiring that the written policies developed under this section must ensure that the provision of services to each individual is consistent with the individual's informed choice. Finally, one commenter questioned whether DSUs can prohibit verbal authorization for services in all instances.

*Discussion:* The Secretary recognizes the inconsistency in requiring the DSU to develop written policies that cover the scope of VR services for groups under § 361.49 and, at the same time, ensure that the provision of services is based on the needs of the individual as identified in the individual's IWRP. The commenter on the proposed regulations who raised this issue correctly noted that group services under § 361.49 are not necessarily included in the IWRP to address a rehabilitation need of the individual. The Secretary intends that the policies developed under § 361.50 will ensure that the provision of services to any eligible individual will be based on that individual's needs and that no arbitrary limits, including limits pertaining to the location, cost, or duration of a particular service, will be placed on an individual's receipt of VR services.

The Secretary agrees that the provision of VR services must be consistent with the informed choice of the individual. This position is clearly reflected in § 361.48 of the regulations. Consequently, the final regulations specify that the DSU's written policies developed under § 361.50 must ensure that the provision of VR services is based on the individual's rehabilitation needs and is consistent with the individual's informed choice.

Consistent with the proposed regulations, § 361.50(d) of the final regulations requires DSUs to establish policies related to the timely authorization of services, including any conditions under which it allows verbal authorization. Although the Secretary expects that, in most instances, the DSU will provide written authorization of services before or at the same time that the services are provided, the Secretary agrees that DSUs should have the flexibility to determine the circumstances under which verbal authorization for services is permitted. The Secretary recognizes, however, that some States prohibit verbal authorization under all circumstances. This provision is not intended to infringe on this State prerogative and requires only that the DSU specify the conditions, if any, under which verbal authorization can be given.

*Changes:* The Secretary has amended § 361.50 by clarifying that this section applies only to the provision of services to individuals with disabilities under § 361.48. This section also has been retitled to reflect this change. A corresponding requirement regarding written policies for services to groups has been added to § 361.49(b) of the final regulations. In addition, the Secretary has revised § 361.50 to specify that the DSU's written policies must ensure that the provision of services is consistent with the individual's informed choice. Finally, paragraph (d) of this section has been clarified to require that the DSU's policies regarding the timely authorization of services identify any conditions under which verbal authorization can be given.

#### *§ 361.51 Written Standards for Facilities and Providers of Services*

*Comments:* None.

*Discussion:* The Secretary believes it is necessary to revise the requirements relating to qualified personnel in paragraph (b)(1) of this section to reflect corresponding changes to the personnel standards included in the State agency's comprehensive system of personnel development under § 361.18(c) of these regulations. A change is necessary to clarify that individuals who provide VR services shall meet existing national or State-approved certification, licensing, or registration requirements that apply to the discipline in which that rehabilitation professional provides VR services. Individuals who meet "comparable requirements," such as State personnel requirements, developed by the DSU under § 361.18(c) would be authorized to provide VR services only if there are no existing licensing, certification, or registration

requirements applicable to their particular profession. As stated in the analysis of comments on § 361.18(c), the Secretary believes that the Act precludes the use of less rigorous "comparable requirements" in place of existing national or statewide certification, licensing, or registration requirements that apply to the discipline in which a rehabilitation professional provides VR services.

*Changes:* The Secretary has revised § 361.51(b) consistent with § 361.18(c) to clarify that individuals who provide VR services shall meet applicable certification, licensing, or registration requirements or, if none exist, other "comparable requirements" developed by the DSU under its comprehensive system of personnel development.

#### *§ 361.52 Opportunity To Make Informed Choices*

*Comments:* Some commenters requested clarification of the meaning of the term "informed choice." Other commenters stated that the DSUs should be required to inform individuals of their right to make informed choices and to explain how informed choice may be exercised. Additional commenters recommended requiring DSUs to provide through appropriate modes of communication information that is necessary for an individual to make an informed choice and to assist individuals with cognitive disabilities in exercising choice.

Some commenters opposed the requirement that DSUs provide, or assist individuals in obtaining, information related to the level of consumer satisfaction with each service. These commenters stated that information pertaining to consumer satisfaction may not be available to the DSU in all instances. In addition, several commenters questioned whether the sources of information specified in paragraph (c) of this section must be used by DSUs to ensure that individuals have sufficient information to make informed choices.

*Discussion:* "Informed choice" is a decisionmaking process in which the individual analyzes relevant information and selects, with the assistance of the rehabilitation counselor or coordinator, a vocational goal, intermediate rehabilitation objectives, VR services, and VR service providers. Accordingly, this section of the regulations requires each DSU, in consultation with its Council if it has one, to develop its own policies and procedures that enable individuals with disabilities to make informed choices throughout their participation in the VR program. In addition, the regulations

identify minimum types of information that must be provided to the individual by the DSU or through the DSU's assistance in connection with the development of the IWRP (e.g., information pertaining to cost, accessibility, and duration of services, qualifications of service providers, and degree of integration associated with a service). Beyond these limited informational requirements, the Secretary believes it would be inappropriate to impose, through these regulations, an across-the-board definition of "informed choice," as some commenters suggested. It is within the discretion of the DSU to develop appropriate policies that facilitate access to, at a minimum, the types of information specified in the regulations and that enable each individual to make informed choices.

However, the Secretary agrees that individuals must be appropriately informed of their opportunity to make informed choices throughout the rehabilitation process and that requirements should be added to the final regulations that are designed to ensure that individuals are aware of their right to make an informed choice about their vocational goal, rehabilitation objectives, services, and service providers and that they understand how to exercise that right. In addition, the Secretary believes that requiring DSUs to apprise eligible individuals of their statutory right to informed choice is an essential protection for individuals with disabilities that significantly outweighs any additional burden associated with the information requirements in this section.

The Secretary recognizes that, in some instances, DSUs may not have access to information regarding the level of consumer satisfaction with a particular service and that DSUs should be required to provide, or assist the individual in acquiring, this information to the extent that it is available.

In addition, the Secretary emphasizes that the information sources and methods of obtaining information identified in paragraph (c) of this section are intended to serve only as examples. A DSU can assist individuals in making informed choices by using the identified methods (e.g., referring individuals to local consumer groups or disability advisory councils), by providing the listed sources of information (e.g., State or regional lists of services and services providers), or by using other methods or information sources that it considers appropriate.

*Changes:* The Secretary has revised § 361.52(a) to require DSUs to develop

policies that ensure that each individual receives, through appropriate modes of communication, information concerning the availability and scope of informed choice, the manner in which informed choice may be exercised, and, consistent with section 12(e)(2)(F) of the Act, the availability of support services for individuals with cognitive or other disabilities who require assistance in exercising informed choice. In addition, the Secretary has clarified in paragraph (b) that the DSU shall provide the individual, or assist the individual in acquiring, information regarding consumer satisfaction with relevant services to the extent that that information is available.

**§ 361.53 Availability of Comparable Services and Benefits**

*Comments:* Several commenters requested clarification of the proposed requirement that comparable services and benefits must be available within a reasonable period of time. Other commenters sought clarification of proposed paragraph (b) of this section, which identifies those services for which a DSU is not required to determine whether comparable services and benefits are available. Some commenters recommended that the regulations direct DSUs to provide the services specified in paragraph (b) in all instances. Other commenters asked whether a DSU, although not required, has the discretion to search for and use comparable services and benefits in connection with the provision of the services identified in paragraph (b).

*Discussion:* The proposed regulations required DSUs to use comparable services and benefits for all non-exempt services if available to the eligible individual within a reasonable period of time so that the intermediate rehabilitation objectives in the individual's IWRP can be met. The proposed regulations were intended to require DSUs to determine what constitutes a reasonable period of time on a case-by-case basis according to the services and rehabilitation objectives identified in each individual's IWRP. However, in light of the confusion expressed by commenters about both this section of the regulations and the proposed definition of "comparable services and benefits," the Secretary believes that requiring comparable services and benefits to be available at the time that the service is needed to accomplish the rehabilitation objectives in the individual's IWRP represents a clearer standard for DSUs to follow.

The proposed regulations also were intended to exempt specific services from the comparable services and

benefits requirement consistent with section 101(a)(8) of the Act. The statute requires DSUs to provide certain services (e.g., rehabilitation technology) as mandatory services without determining the availability of comparable services and benefits as is required for the remaining VR services. The Secretary agrees that the statement in proposed paragraph (b) of this section that a comparable services and benefits determination "is not required" prior to the provision of the services identified in section 101(a)(8) of the statute is unclear and that the final regulations should clarify that the exempted services are not subject to a prior comparable services and benefits determination, i.e., the DSU has the affirmative responsibility to provide these services without determining the availability of alternative funding sources. Nevertheless, the Secretary agrees that, if an exempted service such as an assistive technology device is known to be readily available from an alternative source at the time the service is needed to accomplish a rehabilitation objective in the individual's IWRP, it is prudent for the DSU to use those sources in order to conserve funds provided under this program. The Secretary notes, however, that projects supported by the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act) are not alternative sources to the VR program for purposes of providing rehabilitation technology. Tech Act projects are designed to assist States in developing and implementing effective systems for securing from other programs technology-related assistance for individuals with disabilities. These projects do not provide actual assistive technology devices or services to individuals.

*Changes:* The Secretary has revised paragraph (a)(2) of § 361.53 to require DSUs to use comparable services and benefits that are available to the individual at the time the services are needed to achieve the rehabilitation objectives in the individual's IWRP. This change is consistent with the changes made to the proposed definition of "comparable services and benefits" discussed previously in the preamble analysis of comments under § 361.5(b). In addition, the Secretary has revised this section to clarify that the services listed in paragraph (b) are exempt from a determination of the availability of comparable services and benefits.

**§ 361.54 Participation of Individuals in Cost of Services Based on Financial Need**

*Comments:* None.

*Discussion:* The Secretary believes it is necessary to clarify that State policies governing individual participation levels in the cost of VR services must take into consideration the disability-related expenses born by an individual when determining the individual's financial need. Although the Secretary presumes that DSUs already consider the individual's disability-related expenses when determining financial need, the Secretary seeks to emphasize the importance of disability-related expenses given the significant impact that they may have on an individual's ability to contribute to the cost of VR services.

*Changes:* The Secretary has revised § 361.54 by requiring in paragraph (b)(2)(v)(C) that an individual's disability-related expenses be considered in determining the extent to which an individual shall contribute toward the cost of VR services.

**§ 361.55 Review of extended employment in community rehabilitation programs or other employment under section 14(c) of the Fair Labor Standards Act**

*Comments:* Some commenters requested that DSUs be permitted to limit the number of annual reviews of individuals in extended employment that DSUs are required to conduct. In addition, some commenters requested that the regulations specify that the annual review requirement in this section applies to individuals in supported employment who earn less than the minimum wage.

*Discussion:* Section 101(a)(16) of the Act requires DSUs to review annually the status of each eligible individual in extended employment in order to determine the individual's needs and interests related to competitive employment. The Act does not provide for any exceptions to this annual review requirement. Thus, the Secretary interprets section 101(a)(16) of the Act to prohibit DSUs from discontinuing annual reviews of individuals who remain in extended employment for extensive periods. This position represents a modification to the policy in the RSA Manual, which had permitted States to place limitations on the number of annual reviews of those in extended employment. Given the expanded scope of competitive employment, supported employment, and other integrated employment opportunities that may become available



to individuals in extended employment in future years, the Secretary believes that discontinuing annual reviews would be inconsistent with the emphasis that the statute places on competitive and integrated employment.

In addition to conducting reviews of individuals in extended employment, section 101(a)(16) of the Act requires DSUs to review annually the job status of individuals employed in "other employment settings" in which the individual is compensated under section 14(c) of the FLSA. This review requirement applies to any eligible individual employed in an integrated setting who earns below the minimum wage, including individuals in supported employment settings who are unable to earn the minimum wage at the time of transition to extended services. In each case, the DSU is required to review the individual's employment status and determine his or her needs and interests in becoming competitively employed.

*Changes:* None.

#### *§ 361.56 Individuals determined to have achieved an employment outcome*

*Comments:* Several commenters responded to the Secretary's request in the NPRM for comments on the potential effect of the proposed time standard for maintaining a job placement in order to achieve an employment outcome. Many of the commenters questioned the proposed standard—the duration of the employer's probationary period or 90 days if the employer does not have an established probationary period—by stating that reliance on employer probationary periods would be too burdensome for DSUs to administer or would not ensure job stability in instances in which the probationary period is very short (e.g., two weeks). Some commenters supported the proposed standard, while others suggested that the regulatory time period be 90 days or the employer's probationary period, whichever is longer. However, a large majority of the commenters recommended that the regulations establish a uniform time period applicable to all job placements. Some commenters suggested retaining the 60-day time period required under the current regulations, whereas other commenters recommended that the current standard be increased to 90 or 180 days.

*Discussion:* The requirement in the proposed regulations that an individual maintain a job placement for the employer's probationary period or, if the employer does not have a probationary period, for at least 90 days was intended

to better reflect whether an individual has successfully achieved an employment outcome. Like many of the commenters on the proposed regulations, the Secretary believes that the 60-day standard under the current regulations is too short a period to determine whether the individual will be able to successfully maintain the job placement over time. The proposed regulations were designed both to strengthen the existing standard and to base the decision that an individual has achieved an employment outcome, in part, on the individual's ability to satisfy the requirements imposed by the employer on any employee. If the employer did not have a probationary period in place, the 90-day period was considered an adequate safeguard to ensure that the individual is performing well and is likely to maintain the employment outcome.

Nevertheless, the Secretary understands the concerns of many commenters that the proposed standard may cause DSUs to avoid placing individuals with employers who have lengthy probationary periods, thereby shrinking the pool of potential job placements, or may be inconsistent with the informed choice of an individual who seeks to cease contact with the DSU prior to the end of the relevant probationary period. In addition, it is clear that most commenters prefer a fixed time period that applies equally to each individual who receives VR services. At the same time, however, the Secretary recognizes that in some instances 90 days may be too short a period to ensure job stability. For these reasons, the final regulations contain a uniform, minimum 90-day standard that applies to all individuals who obtain employment under the VR program. This uniform standard, the Secretary expects, enables DSU staff to conserve time and work more efficiently than would be possible under an individual employer-based standard and also affords DSUs the flexibility to increase the 90-day minimum time period whenever circumstances warrant. For example, a DSU may decide to extend the period to conform to an employer's longer probationary period if at the end of 90 days it is uncertain whether the individual will be able to successfully satisfy the probationary period without DSU support. Similarly, a DSU should extend the job-retention period if requested by the individual. The Secretary also emphasizes that paragraph (e) precludes DSUs from ceasing contact with an individual who obtains employment unless at the end of the appropriate retention period (90

days or longer), the individual and the rehabilitation counselor or coordinator consider the employment outcome satisfactory and agree that the individual is performing well on the job.

Additional safeguards that were specified in the proposed regulations also are retained in the final regulations, including the requirement that the employment outcome be consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual and that the employment outcome be located in the most integrated setting possible.

*Changes:* The Secretary has revised § 361.56 to require in all instances that an individual shall maintain employment for a period of at least 90 days in order to be considered to have achieved an employment outcome.

#### *§ 361.57 Review of rehabilitation counselor and coordinator determinations*

*Comments:* One commenter requested that the prohibition in paragraph (b)(2) of this section against suspending services being provided under an IWRP pending resolution of a dispute be broadened to cover assessment services. Another commenter stated that this prohibition should apply to any service identified in an IWRP, including those services that the individual has yet to receive.

Two commenters stated that State policies used as a basis for an impartial hearing officer's decision under paragraph (b)(4) of this section, or for a DSU director's decision under paragraph (b)(9) of this section, must be consistent with Federal requirements. Other commenters recommended that paragraph (b)(7) of this section identify specific Federal standards of review for determining whether a DSU can review the decision of a hearing officer. In addition, one commenter stated that, anytime the DSU director reverses the decision of an impartial hearing officer, the director should be required to inform the individual of the statutory, regulatory, or policy basis for the reversal.

Several commenters opposed the removal of the current regulatory timelines governing key stages of the review process. These commenters asserted that the timelines in the current regulations represent essential protections for individuals with disabilities and are critical to the timeliness of appeal procedures. These commenters also stated that the current timelines are reasonable, do not pose significant difficulties for DSUs, and are necessary to ensure that issues related to

the provision of VR services are resolved in a timely fashion.

Finally, some commenters recommended that the regulations require DSUs to inform individuals at each stage of the rehabilitation process of their right to appeal a counselor's determination.

*Discussion:* The Secretary believes that it is necessary to clarify in the final regulations that time extensions for informally resolving an individual's appeal of a counselor's determination under paragraph (a) of this section must be agreed to by both parties and must be specific in length. This change is necessary to ensure the timely resolution of disputes through formal review procedures.

Section 102(d)(5) of the Act, which is implemented by paragraph (b)(2) of this section, states that the DSU may not institute a suspension, reduction, or termination of services being provided under the individual's IWRP pending final resolution of an individual's challenge to a determination of a rehabilitation counselor unless the individual so requests or the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual. This statutory prohibition does not apply to assessment or other services that are not included in the IWRP. Similarly, the statutory reference to services "being provided under the IWRP" means that the DSU is prohibited from suspending only those services in the IWRP that the individual has begun to receive prior to requesting a review of a counselor's determination. However, the Secretary notes that the DSU cannot discontinue a service during a regular interruption in that service (e.g., between semesters at an institution of higher education in which training is provided) as long as the service is included in the IWRP and has been initiated.

The Secretary agrees that any State policy used as a basis for an impartial hearing officer's decision under paragraph (b)(4) of this section or for a modification of that decision by the director of the DSU under paragraph (b)(9) of this section must be consistent with Federal statutory and regulatory requirements.

Section 361.57(b)(7) of the proposed and final regulations requires that any decision by a DSU director to review the decision of an impartial hearing officer must be based on standards of review established under written State policy. Although DSUs have the discretion to establish appropriate standards of review, the Secretary intends that standards developed under paragraph

(b)(7) of this section be consistent with RSA policy, specifically Chapter 0545 of the *Rehabilitation Services Manual* (Clients' Rights to Appeal Decisions), which specifies a number of fundamental issues that should be addressed in connection with determining whether to review a hearing officer's decision (e.g., Is the initial decision arbitrary, capricious, an abuse of discretion or otherwise unreasonable? Is the initial decision consistent with the facts of the case and applicable Federal and State policies?).

Section 361.57(b)(10) of the proposed regulations provided that if the DSU director decided to review the decision of an impartial hearing officer, the director would provide to the individual a full report of the director's final decision and of the findings and grounds for the decision. The Secretary intended the term "grounds" to include any applicable law or policy on which the decision was based and believes that changing that term in the final regulations to "statutory, regulatory, and policy grounds" will clarify this intention. As stated previously, any State policy that is used to support the director's decision must be consistent with Federal statutory and regulatory requirements.

The proposed regulations would have afforded DSUs the discretion to develop timelines for the prompt handling of appeals instead of specifying Federal timelines for certain stages of the appeals process. However, there was near-unanimity among commenters in opposing this change from current regulations. The commenters stressed the importance of protecting individuals from delays in the resolution of issues affecting an individual's receipt of VR services and vigorously asserted that Federal timelines are the best means of ensuring that State appeal procedures are conducted in a timely fashion.

For the reasons stated by the commenters, the Secretary agrees that the current regulatory timelines should be retained in the final regulations. State units have not indicated that the Federal timelines are unreasonable or unnecessarily burdensome. Moreover, commenters on the proposed regulations indicated that a number of DSUs have failed to meet the current timelines in the past. In light of these comments, the Secretary believes that at this time affording DSUs the additional flexibility to develop their own timelines for handling appeals is neither warranted nor appropriate and that retaining the current timelines does not impose additional costs on DSUs.

Finally, the Secretary agrees that individuals must be informed of their

appeal rights during key stages of the rehabilitation process. Section 361.46 (a)(8) and (a)(9) requires that these rights, as well as the availability of representation through the Client Assistance Program (CAP) under 34 CFR part 370, be clearly delineated in the IWRP. Moreover, § 361.43(c) requires DSUs to provide individuals with information concerning the CAP whenever an individual is found ineligible to receive VR services. The Secretary believes that these provisions sufficiently ensure that individuals are apprised of their right to challenge any determination made by a counselor regarding the provision or denial of services.

*Changes:* The Secretary has revised § 361.57 to clarify that time extensions for informally resolving an individual's request for review of a counselor's determination under paragraph (a) must be specific and agreed upon by both parties. In addition, paragraphs (b)(4) and (b)(9) of this section have been revised to clarify that any State policy on which the decision of an impartial hearing officer or DSU director is based must be consistent with applicable Federal requirements. Paragraph (b)(10) of this section also has been amended to clarify that the director's decision and corresponding report must specify the statutory, regulatory, or policy grounds for the decision. Finally, the Secretary also has revised this section by applying specific timelines to certain stages of the appeals process. Like the current regulations, the final regulations require that an impartial hearing officer conduct a formal hearing within 45 days of an individual's request for review; that the hearing officer render a decision within 30 days of the completion of the hearing; and that the DSU director issue a final decision within 30 days of notifying the individual of the director's intent to review the initial decision. The requirement that the individual be notified of the director's intent to review the initial decision within 20 days of its issuance is specified in the Act and is implemented by § 361.57(b)(5) of the regulations. Because the current regulatory timelines have been reinserted into this section of the final regulations, the Secretary has removed from the final regulations the requirement under paragraph (c) of the proposed regulations that the DSU develop timelines applicable to these stages of the review process.

#### § 361.60 Matching Requirements

*Comments:* Two commenters opposed the prohibition in this section against using third party in-kind contributions to meet the non-Federal share under the

VR program. Another commenter expressed concern about the impact of this prohibition on the use, as non-Federal match, of funds provided by other public agencies under third-party cooperative arrangements.

*Discussion:* "Third party in-kind contributions," which are a permissible source of State matching funds under the Education Department General Administrative Regulations (EDGAR), are defined in 34 CFR 80.3 as "property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee. \* \* \*" However, it is RSA's policy to not allow the use of third-party in-kind contributions to meet the State matching requirement under the VR program in the absence of specific statutory authority. Where the Act permits the use of in-kind expenditures as match for certain programs, that authority is expressed (e.g., the State Independent Living Program under section 712(b)(2) of the Act). Thus, § 361.60(b)(2) specifies that these contributions may not be used as part of the DSU's non-Federal share under the program. This provision is consistent with the definition of "State and local funds" under § 361.76 of the current regulations and with the current regulatory prohibition on the use of in-kind contributions as match in § 361.24(c).

Nevertheless, this prohibition has no effect on a DSU's ability to enter into third-party cooperative arrangements under § 361.28 of the regulations for providing VR services with another public agency that is furnishing part or all of the non-Federal share under the program. As long as the third party is contributing funds to support VR services, those dollars may be used as part of the DSU's non-Federal share (e.g., staff salaries paid by the third party that are allowable matching expenditures). If, on the other hand, the DSU enters into an arrangement under which a third party provides equipment or property used in the administration of the VR program, the costs associated with those items cannot be used as non-Federal matching funds.

*Changes:* None.

#### § 361.62 Maintenance of Effort Requirements

*Comments:* One commenter suggested that recoveries of State maintenance of effort deficits should always be deducted from the State's allotment in a future fiscal year.

*Discussion:* Section 111(a)(2)(B)(ii) of the Act, which is implemented by § 361.62(a)(1) of the regulations, requires the Department to recover

maintenance of effort deficits through a deduction in the State's allotment for the following Federal fiscal year. However, there is no statutory authority to deduct an allotment other than in the year immediately following a maintenance of effort shortfall. Thus, § 361.62(a)(2) of the regulations specifies that when a maintenance of effort deficit is discovered too late to adjust the allotment for the following year, then the deficit will be recovered through an audit disallowance.

*Changes:* None.

#### § 361.71 Procedures for Developing the Strategic Plan

*Comments:* Two commenters recommended that the DSU be required to consult the State Client Assistance Program prior to developing its strategic plan. Other commenters recommended that DSUs be required only to review rather than to revise the strategic plan on an annual basis under paragraph (c) of this section.

*Discussion:* Section 122(b) of the Act specifies that, prior to developing the strategic plan, the DSU shall hold public forums and solicit recommendations specifically from the State Rehabilitation Advisory Council and the Statewide Independent Living Council. The Secretary agrees that the views of the CAP also should be considered in connection with the development of the strategic plan. The public participation requirements in § 361.71(a) afford the CAP and other interested parties the opportunity to provide the DSU with its comments and recommendations. The annual revision requirement under paragraph (c) of this section is based on section 122(a) of the Act, which states that the strategic plan must be updated on an annual basis to reflect actual experience over the previous year and input from the Council and other interested parties. The Secretary believes that merely requiring an annual review would be inconsistent with this statutory requirement.

*Changes:* None.

#### Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number assigned to the collections of information in these final regulations is displayed 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, this document is intended to provide early notification of the Department's specific plans and actions for this program.

#### Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed regulations and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

#### List of Subjects

##### 34 CFR Part 361

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

##### 34 CFR Part 363

State-administered grant program—education, Supported employment.

##### 34 CFR Part 376

Special projects and demonstrations, Transitional rehabilitation services.

##### 34 CFR Part 380

Special projects and demonstrations, Supported employment, Technical assistance.

Dated: December 1, 1996.

Richard W. Riley,  
Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.126 The State Vocational Rehabilitation Services Program; 84.187 The State Supported Employment Services Program; 84.235 Special Projects and Demonstrations for Providing Transitional Rehabilitation Services to Youth with Disabilities; 84.128 Special Projects and Demonstrations for Providing Supported Employment Services to Individuals with the Most Severe Disabilities and Technical Assistance Projects)

The Secretary amends Title 34, Chapter III, of the Code of Federal Regulations as follows:

1. Part 361 is revised to read as follows:

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

**Subpart A—General**

Sec.

- 361.1 Purpose.
- 361.2 Eligibility for a grant.
- 361.3 Authorized activities.
- 361.4 Applicable regulations.
- 361.5 Applicable definitions.

**Subpart B—State Plan for Vocational Rehabilitation Services**

- 361.10 Submission, approval, and disapproval of the State plan.
- 361.11 Withholding of funds.

State Plan Content: Administration

- 361.12 Methods of administration.
- 361.13 State agency for administration.
- 361.14 Substitute State agency.
- 361.15 Local administration.
- 361.16 Establishment of an independent commission or a State Rehabilitation Advisory Council.
- 361.17 Requirements for a State Rehabilitation Advisory Council.
- 361.18 Comprehensive system of personnel development.
- 361.19 Affirmative action for individuals with disabilities.
- 361.20 State plan development.
- 361.21 Consultations regarding the administration of the State plan.
- 361.22 Cooperation with agencies responsible for students with disabilities.
- 361.23 Cooperation with other public agencies.
- 361.24 Coordination with the Statewide Independent Living Council.
- 361.25 Statewideness.
- 361.26 Waiver of statewideness.
- 361.27 Shared funding and administration of joint programs.
- 361.28 Third-party cooperative arrangements involving funds from other public agencies.
- 361.29 Statewide studies and evaluations
- 361.30 Services to special groups of individuals with disabilities.
- 361.31 Utilization of community resources.
- 361.32 Utilization of profitmaking organizations for on-the-job training in connection with selected projects.
- 361.33 Use, assessment, and support of community rehabilitation programs.
- 361.34 Supported employment plan.
- 361.35 Strategic plan.
- 361.36 Ability to serve all eligible individuals; order of selection for services
- 361.37 Establishment and maintenance of information and referral programs.
- 361.38 Protection, use, and release of personal information.
- 361.39 State-imposed requirements.
- 361.40 Reports.

State Plan Content: Provision and Scope of Services

- 361.41 Processing referrals and applications.
- 361.42 Assessment for determining eligibility and priority for services.

- 361.43 Procedures for ineligibility determination.
- 361.44 Closure without eligibility determination.
- 361.45 Development of the individualized written rehabilitation program.
- 361.46 Content of the individualized written rehabilitation program.
- 361.47 Record of services.
- 361.48 Scope of vocational rehabilitation services for individuals with disabilities.
- 361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.
- 361.50 Written policies governing the provision of services for individuals with disabilities.
- 361.51 Written standards for facilities and providers of services.
- 361.52 Opportunity to make informed choices.
- 361.53 Availability of comparable services and benefits.
- 361.54 Participation of individuals in cost of services based on financial need.
- 361.55 Review of extended employment in community rehabilitation programs or other employment under section 14(c) of the Fair Labor Standards Act.
- 361.56 Individuals determined to have achieved an employment outcome.
- 361.57 Review of rehabilitation counselor or coordinator determinations.

**Subpart C—Financing of State Vocational Rehabilitation Programs**

- 361.60 Matching requirements.
- 361.61 Limitation on use of funds for construction expenditures.
- 361.62 Maintenance of effort requirements.
- 361.63 Program income.
- 361.64 Obligation of Federal funds and program income.
- 361.65 Allotment and payment of Federal funds for vocational rehabilitation services.

**Subpart D—Strategic Plan for Innovation and Expansion of Vocational Rehabilitation Services**

- 361.70 Purpose of the strategic plan.
- 361.71 Procedures for developing the strategic plan.
- 361.72 Content of the strategic plan.
- 361.73 Use of funds.
- 361.74 Allotment of Federal funds.

Authority: 29 U.S.C. 711(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 a comprehensive, coordinated, effective, efficient, and accountable program that is designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, and informed choice, so that they may

prepare for and engage in gainful employment.

(Authority: Sec. 12(c) and 100(a)(2) of the Act; 29 U.S.C. 711(c) and 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: Sec. 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;

(b) Administrative costs under the State plan; and

(c) The costs of developing and implementing the strategic plan.

(Authority: Sec. 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 to Institutions of Higher Education, Hospitals, and Nonprofit 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-Free Schools and Campuses).

(b) The regulations in this part 361.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(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 (29 U.S.C. 701 *et seq.*), as amended.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(2) *Administrative costs under the State plan* means expenditures incurred in the performance of administrative functions under the vocational rehabilitation program. Administrative costs include expenses related to program planning, development, monitoring, and evaluation, including, but not limited to, quality assurance; budgeting, accounting, financial management, information systems, and related data processing; providing information about the program to the public; technical assistance to other State agencies, private nonprofit organizations, and businesses and industries, except for technical assistance and support services described in § 361.49(a)(4); the State Rehabilitation Advisory Council and other advisory committees; professional organization membership dues for State unit employees; the removal of architectural barriers in State vocational rehabilitation agency offices and State-operated rehabilitation facilities; operating and maintaining State unit facilities, equipment, and grounds; supplies; administration of the comprehensive system of personnel development, including personnel administration, administration of affirmative action plans, and training and staff development; administrative salaries, including clerical and other support staff salaries, in support of these functions; travel costs related to carrying out the program, other than travel costs related to the provision of services; costs incurred in conducting reviews of rehabilitation counselor or coordinator determinations under § 361.57; and legal expenses required in the administration of the program.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

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

(Authority: Sec. 7(20) of the Act; 29 U.S.C. 706(20))

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

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(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: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(6) *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: Sec. 7(23) of the Act; 29 U.S.C. 706(23))

(7) *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: Sec. 7(24) and 12(c) of the Act; 29 U.S.C. 706(24) and 711(c))

(8) *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.

(Authority: Sec. 7(25) and 12(c) of the Act; 29 U.S.C. 706(25) and 711(c))

(9) *Comparable services and benefits* means services and benefits that are—

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

(ii) Available to the individual at the time needed to achieve the intermediate rehabilitation objectives in the individual's Individualized Written Rehabilitation Program (IWRP) in accordance with § 361.53; and

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

(Authority: Sec. 12(c) and 101(a)(8) of the Act; 29 U.S.C. 711(c) and 721(a)(8))

(10) *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: Sec. 7(5), 7(18), and 12(c) of the Act; 29 U.S.C. 706(5), 706(18), and 711(c))

(11) *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 acquisition of existing buildings;

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

(iv) The construction of new buildings and expansion 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: Sec. 7(1) and 12(c) of the Act; 29 U.S.C. 706(1) and 711(c))

(12) *Designated State agency or State agency* means the sole State agency, designated in accordance with § 361.13(a), to administer, or supervise 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: Sec. 7(3)(A) and 101(a)(1)(A) of the Act; 29 U.S.C. 706(3)(A) and 721(a)(1)(A))

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

(i) The State agency 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 independent State commission, board, or other agency that has vocational rehabilitation, or vocational and other rehabilitation, as its primary function.

(Authority: Sec. 7(3)(B) and 101(a)(2)(A) of the Act; 29 U.S.C. 706(3)(B) and 721(a)(2)(A))

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

(Authority: Sec. 7(8)(a) and 102(a)(1) of the Act; 29 U.S.C. 706(8) and 722(a)(1))

(15) *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 that is consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(Authority: Sec. 7(5), 12(c), 100(a)(2), and 102(b)(1)(B)(i) of the Act; 29 U.S.C. 706(5), 711(c), 720(a)(2), and 722(b)(1)(B)(i))

(16) *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)(17) 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 four 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: Secs. 7(6) and 12(c) of the Act; 29 U.S.C. 706(6) and 711(c))

(17) *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 one year prior to the date of acquisition and the Federal share of the cost of the 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: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(18) *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: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(19) *Extended services*, as used in the definition of "Supported employment," means ongoing support services and other appropriate services that are needed to support and maintain an individual with a most severe 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, 34 CFR part 363, 34 CFR part 376, or 34 CFR part 380, after an individual with a most severe disability has made the transition from support provided by the designated State unit.

(Authority: Sec. 7(27) of the Act; 29 U.S.C. 706(27))

(20) *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: Secs. 12(c) and 101(a)(8) of the Act; 29 U.S.C. 711(c) and 721(a)(8))

(21) *Family member*, for purposes of receiving vocational rehabilitation services in accordance with § 361.48(a)(9), 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: Secs. 12(c) and 103(a)(3) of the Act; 29 U.S.C. 711(c) and 723(a)(3))

(22) *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 Advisory Council for the designated State unit;

(C) Has not been involved in previous decisions regarding 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 may not be 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: Sec. 7(28) of the Act; 29 U.S.C. 706(28))

(23) *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: Sec. 7(21) of the Act; 29 U.S.C. 706(21))

(24) *Individual who is blind* means a person who is blind within the meaning of the applicable State law.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(25) *Individual with a disability*, except in §§ 361.17 (a), (b), (c), and (j), 361.19, 361.20, and 361.51(b)(2), 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: Sec. 7(8)(A) of the Act; 29 U.S.C. 706(8)(A))

(26) *Individual with a disability*, for purposes of §§ 361.17 (a), (b), (c), and (j), 361.19, 361.20, and 361.51(b)(2), 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: Sec. 7(8)(B) of the Act; 29 U.S.C. 706(8)(B))

(27) *Individual with a most severe disability* means an individual with a severe disability who meets the designated State unit's criteria for an individual with a most severe disability. These criteria must be consistent with the requirements in § 361.36(c)(3).

(Authority: Sec. 101(a)(5) of the Act; 29 U.S.C. 721(a)(5))

(28) *Individual with a severe 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: Sec. 7(15)(A) of the Act; 29 U.S.C. 708(15)(A))

(29) *Individual's representative* means any representative chosen by an applicant or eligible individual, 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: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(30) *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: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

(31) *Maintenance* means monetary support provided to an eligible individual or an individual receiving extended evaluation services for those 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 a program of vocational rehabilitation services.

(Authority: Secs. 12(c) and 103(a)(5) of the Act; 29 U.S.C. 711(c) and 723(a)(5))

Note: The following are examples of expenses that would meet the definition of maintenance. The examples are purely illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgement.

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

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

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

(32) *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 1954.

(Authority: Sec. 7(10) of the Act; 29 U.S.C. 706(10))

(33) *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 severe disability in supported employment;

(B) Identified based on a determination by the designated State unit of the individual's needs as specified in an individualized written rehabilitation program; 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 special circumstances, especially at the request of the individual, the individualized written rehabilitation program 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 this part;

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

(C) Job development and placement;

(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: Sec. 7(33) and 12(c) of the Act; 29 U.S.C. 706(33) and 711(c))

(34) *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: Sec. 7(11) and 103(a)(15) of the Act; 29 U.S.C. 706(11) and 29 U.S.C. 723)

(35) *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, orthotic, or other assistive devices, including hearing aids;

(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: Sec. 12(c) and 103(a)(4) of the Act; 29 U.S.C. 711(c) and 723(a)(4))

(36) *Physical or mental impairment* means an injury, disease, or other condition that materially limits, or if not treated is expected to materially limit, mental or physical functioning.

(Authority: Sec. 7(8)(A) and 12(c) of the Act; 29 U.S.C. 706(8)(A) and 711(c))

(37) *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, and interests.

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

Note: Post-employment services are intended to ensure that the employment outcome remains consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests. 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 written rehabilitation program; 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, and interests.

(38) *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: Secs. 7(13) and 12(c) of the Act; 29 U.S.C. 706(13) and 711(c))

(39) *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: Sec. 7(13) of the Act; 29 U.S.C. 706(13))

(40) *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: Sec. 130(c) of the Act; 29 U.S.C. 750(c))

(41) *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: Sec. 7(9) of the Act; 29 U.S.C. 706(9))

(42) *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: Sec. 7(16) of the Act; 29 U.S.C. 706(16))

(43) *State plan* means the State plan for vocational rehabilitation services or the vocational rehabilitation services part of a consolidated rehabilitation plan under § 361.10(c).

(Authority: Secs. 12(c) and 101 of the Act; 29 U.S.C. 711(c) and 721)

(44) *Substantial impediment to employment* means that a physical or mental impairment (in light of attendant medical, psychological, vocational, educational, 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: Secs. 7(8)(A) and 12(c) of the Act; 29 U.S.C. 706(8)(A) and 711(c))

(45) *Supported employment* means—

(i) Competitive employment in an integrated setting with ongoing support services for individuals with the most severe 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 severe 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 in order to perform this work; or

(ii) Transitional employment for individuals with the most severe disabilities due to mental illness.

(Authority: Sec. 7(18) of the Act; 29 U.S.C. 706(18)(A))

(46) *Supported employment services* means ongoing support services and other appropriate services needed to support and maintain an individual with a most severe 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 in order to achieve the rehabilitation objectives identified in the individualized written rehabilitation program; 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: Sec. 7(34) and 12(c) of the Act; 29 U.S.C. 706(34) and 711(c))

(47) *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 accomplishment of long-term rehabilitation goals and intermediate rehabilitation objectives identified in the student's IWRP.

(Authority: Section 7(35) and 103(a)(14) of the Act; 29 U.S.C. 706(35) and 723(a)(14))

(48) *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 severe 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: Secs. 7(18) and 12(c) of the Act; 29 U.S.C. 706(18) and 711(c))

(49) *Transportation* means travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a vocational rehabilitation service.

(Authority: Secs. 12(c) and 103(a)(10) of the Act; 29 U.S.C. 711(c) and 723(a)(10))

Note: 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 judgement.

*Example:* 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:* Short-term travel-related expenses, such as food and shelter, incurred by an applicant participating in evaluation or assessment services that necessitates travel.

*Example:* 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.

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

(50) *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: Sec. 103 (a) and (b) of the Act; 29 U.S.C. 723 (a) and (b))

## Subpart B—State Plan for Vocational Rehabilitation Services

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

(a) *Purpose.* In order for a State to receive a grant under this part, the designated State agency shall 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 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 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) *Consolidated rehabilitation plan.* The State may choose to submit a consolidated rehabilitation plan that includes the State plan for vocational rehabilitation services and the State's plan for its program for persons with developmental disabilities. The State planning and advisory council for developmental disabilities and the agency administering the State's program for persons with developmental disabilities must concur in the submission of a consolidated rehabilitation plan. A consolidated rehabilitation plan must comply with, and be administered in accordance with, the Act and the Developmental Disabilities Assistance and Bill of Rights Act, as amended.

(d) *Public participation.* The State shall develop the State plan with input from the public, through public meetings, in accordance with the requirements of § 361.20.

(e) *Duration.* The State plan must cover a multi-year period to be determined by the Secretary.

(f) *Submission of the State plan.* The State shall submit the State plan to the Secretary for approval—

(1) No later than July 1 of the year preceding the first fiscal year for which the State plan is submitted; or

(2) With the prior approval of the Secretary, no later than the date on which the State is required to submit a State plan under another Federal law.

(g) *Revisions to the State plan.* The State shall submit to the Secretary for approval revisions to the State plan in accordance with the requirements of this part and 34 CFR 76.140.

(h) *Approval.* The Secretary approves a State plan and 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 a 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 a 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.

(Approved by the Office of Management and Budget under control number 1820-0500.

(Authority: Sec. 6, 101 (a) and (b), and 107(d) of the Act; 20 U.S.C. 1231g(a); and 29 U.S.C. 705, 721 (a) and (b), and 727(d))

### § 361.11 Withholding of funds.

(a) *Basis for withholding.* The Secretary may withhold or limit payments under sections 111, 124, or 632(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 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: Secs. 101(b), 107(c), and 107(d) of the Act; 29 U.S.C. 721(b), 727(c)(1) and (2), and 727(d))

State Plan Content: 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: Sec. 101(a)(6) of the Act; 29 U.S.C. 721(a)(6))

### § 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 an independent State commission, board, or other agency that has as its major function vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities.

(ii) The State agency administering or supervising the administration of education or vocational education in the State, provided that it includes a vocational rehabilitation unit as provided in paragraph (b) of this section.

(iii) A State agency that includes a vocational rehabilitation unit, as provided in paragraph (b) of this section, and at least two other major organizational units, each of which administers one or more of the State's major programs of public education, public health, public welfare, or labor.

(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 of the type specified in paragraph (a)(1)(ii) or (a)(1)(iii) of this section, or if the designated State agency specified in paragraph (a)(3) of this section does not have as its major function 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, including those responsibilities specified in paragraph (c) of this section;

(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 or, in the case of an agency described in paragraph (a)(1)(ii) of this section, is so located and has that status or has a director who is the executive officer of the State 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) The State plan must assure that, 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 that an individual has achieved an employment outcome under § 361.56.

(iii) Policy formulation and implementation.

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

(2) This responsibility may not be delegated to any other agency or individual.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 101(a)(1) and 101(a)(2) of the Act; 29 U.S.C. 721(a)(1) and 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 shall 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.

(Approved by the Office of Management and Budget under control number 1820-0500.)

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

**§ 361.15 Local administration.**

(a) If the State plan provides for local administration, it must—

(1) Identify each local agency;

(2) Assure 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)(41) that is responsible for the administration of the program within the political subdivision that it serves; and

(3) Describe the methods 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.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 7(9) and 101(a)(1)(A) of the Act; 29 U.S.C. 706(9) and 721(a)(1)(A))

**§ 361.16 Establishment of an independent commission or a State Rehabilitation Advisory 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 State agency is an independent State commission that—

(i) 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;

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

(iv) Conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers in the State, in accordance with the provisions in § 361.17(h)(3).

(2) An assurance that—

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

(ii) The designated State unit seeks and seriously considers, on a regular and ongoing basis, advice from the Council regarding the development, implementation, and amendment of the State plan, the strategic plan, and other policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services in the State;

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

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

(B) Copies of all written policies, practices, and procedures of general applicability provided to or used by rehabilitation personnel; and

(C) Copies of due process hearing decisions in a manner that preserves the confidentiality of the participants in the hearings; and

(iv) The State plan summarizes annually the advice provided by the Council, including recommendations from the annual report of the Council, the survey of consumer satisfaction, and other reports prepared by the Council, and the State agency's response to the advice and recommendations, including the manner in which the State will modify its policies and procedures based on the survey of consumer satisfaction and explanations of reasons for rejecting any advice or recommendations 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 plan must contain one of the following four assurances:

(1) An assurance that an independent commission in accordance with paragraph (a)(1) of this section is responsible under State law for operating or overseeing the operation of the vocational rehabilitation program of both the State agency that administers the part of the State plan under which vocational rehabilitation services are provided to individuals who are blind and the State agency that administers the remainder of the State plan.

(2) An assurance that—

(i) An independent commission that is consumer-controlled by, and represents the interests of, individuals who are blind and conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with the provisions of § 361.17(h)(3), is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State for individuals who are blind; and

(ii) An independent commission that is consumer-controlled in accordance with paragraph (a)(1)(i) of this section and conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with § 361.17(h)(3), is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State for all individuals with disabilities, except individuals who are blind.

(3) An assurance that—

(i) An independent commission that is consumer-controlled by, and represents the interests of, individuals who are blind and that conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with § 361.17(h)(3), is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State for individuals who are blind; and

(ii) The State has established a State Rehabilitation Advisory Council that meets the criteria in § 361.17 and carries out the duties of a Council with respect to functions for, and services provided to, individuals with disabilities, except for individuals who are blind.

(4) An assurance that—

(i) An independent commission that is consumer-controlled in accordance

with paragraph (a)(1)(i) of this section and conducts a review and analysis of the effectiveness of and consumer satisfaction with vocational rehabilitation services and providers, in accordance with the provisions of § 361.17(h)(3), is responsible under State law for operating or overseeing the operation of the vocational rehabilitation services for all individuals in the State, except individuals who are blind; and

(ii) The State has established a State Rehabilitation Advisory Council that meets the criteria in § 361.17 and carries out the duties of a Council with respect to functions for, and services provided to, individuals who are blind.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 101(a)(32) and 101(a)(36) of the Act; 29 U.S.C. 721(a)(32) and 721(a)(36))

**§ 361.17 Requirements for a State Rehabilitation Advisory Council.**

If the State plan contains an assurance that the State has established a Council under § 361.16(a)(2), (b)(3)(ii), or (b)(4)(ii), the State plan must also contain an assurance that the Council meets the following requirements:

(a) *Appointment.* (1) The members of the Council shall be—

(i) Appointed by the Governor; or  
(ii) If State law vests appointment authority in an entity other than, or in conjunction with, the Governor (such as one or more houses of the State legislature or an independent board that has general appointment authority), appointed by that entity or entities.

(2) The appointing authority shall 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.

(b) *Composition.*—(1) *General.* Except as provided in paragraph (b)(3) of this section, the Council shall be composed of at least 13 members, including—

(i) At least one representative of the Statewide Independent Living Council, who shall be the chairperson of, or other individual recommended by, the Statewide Independent Living Council;

(ii) At least one representative of a parent training and information center established pursuant to section 631(e)(1) of IDEA;

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

(iv) At least one vocational rehabilitation counselor with knowledge

of and experience with vocational rehabilitation programs who serves as an ex officio, nonvoting member 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) Parents, family members, guardians, advocates, or authorized representatives of individuals with disabilities who have difficulty representing themselves due to their disabilities;

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

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

(2) *Employees of the designated State agency.* Employees of the designated State agency may serve only as nonvoting members of the Council.

(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 shall—

(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 parent, family member, guardian, advocate, or authorized representative of an individual who is blind, has multiple disabilities, and has difficulty representing himself or herself due to disabilities.

(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 13 members, the separate Council is deemed to be 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.* A majority of the Council members shall be individuals with disabilities who are not employed by the designated State unit.

(d) *Chairperson.* The chairperson shall 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) If the Governor does not have veto power pursuant to State law, selected by the Governor, or by the Council if required by the Governor, from among the voting members of the Council.

(e) *Terms of appointment.* (1) Each member of the Council shall be appointed for a term of no more than three years and 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 shall be appointed for the remainder of the predecessor's term.

(3) The terms of service of the members initially appointed must be 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.

(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 shall—

(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 to achieve rehabilitation goals and objectives under this part;

(2) Advise, and at the discretion of the State agency assist, the State unit in the preparation of applications, the State plan, the strategic plan, and amendments to the plans, reports, needs assessments, and evaluations required by this part;

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

(i) The functions performed by State agencies and other public and private

entities responsible for serving individuals with disabilities; and

(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 from funds made available under the Act or through other public or private sources;

(4) Prepare and submit to the Governor, or appropriate State entity, 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;

(5) Coordinate with other councils within the State, including the Statewide Independent Living Council established under 34 CFR part 364, the advisory panel established under section 613(a)(12) of IDEA, the State Planning Council described in section 124 of the Developmental Disabilities Assistance and Bill of Rights Act, and the State mental health planning council established under section 1916(e) of the Public Health Service Act;

(6) Advise the designated State agency and 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

(7) Perform other comparable functions, consistent with the purpose of this part, that the Council determines to be appropriate.

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

(2) In implementing the resources plan, the Council shall rely on existing resources to the maximum extent possible.

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

(4) The Council shall, 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 shall—

(1) Convene at least four meetings a year to conduct Council business that are publicly announced, open and accessible to the 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 130 of the Act, may be used to compensate and reimburse the expenses of Council members in accordance with section 105(g) of the Act.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 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 Advisory 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) and paragraph (f) 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 five years based on projections of the number of individuals to be served, including individuals with severe 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 professional and paraprofessional personnel needed within the 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.

(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 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; 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 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, including procedures for providing training regarding the amendments to the Rehabilitation Act of 1973 made by the Rehabilitation Act Amendments of 1992.

(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, training with respect to the requirements of the Americans with Disabilities Act, IDEA, and Social Security work incentive programs, training to facilitate informed choice under this program, and training to improve the provision of services to culturally diverse populations.

(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) *Performance evaluation system.* The State plan must describe how the system for evaluating the performance of rehabilitation counselors, coordinators, and other personnel used in the State unit facilitates, and in no way impedes, the accomplishment of the purpose and policy of the program as described in sections 100(a)(2) and 100(a)(3) of the Act, including the policy of serving, among others, individuals with the most severe disabilities.

(g) *Coordination with personnel development under IDEA.* 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 IDEA.

(Approved by the Office of Management and Budget under control number 1820-0500.) (Authority: Sec. 101 (a)(7) and (a)(35) of the Act; 29 U.S.C. 721(a) (7) and (35))

Note: Under the Act and the regulations in this part, the State agency is required to collect and analyze data regarding personnel needs by type or category of personnel. The personnel data must be collected and analyzed according to personnel category breakdowns that are based on the major categories of staff in the State unit. Similarly, the data from institutions of higher education must be broken down by type of program to correspond as closely as possible with the personnel categories of the State unit.

**§ 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.

(Approved by the Office of Management and Budget under control number 1820-0500.) (Authority: Sec. 101(a)(6)(A) of the Act; 29 U.S.C. 721(a)(6)(A))

**§ 361.20 State plan development.**

(a) *Public participation requirements.*—(1) *Plan development and revisions.* The State plan must assure that the State unit conducts public meetings throughout the State to provide all segments of the public, including interested groups, organizations, and individuals, an opportunity to comment on the State plan prior to its development and to comment on any revisions to the State plan.

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

(i) State law governing public meetings; or

(ii) In the absence of State law governing public meetings, procedures developed by the State unit in consultation with the State Rehabilitation Advisory Council.

(3) *Revisions based on consumer satisfaction surveys.* The State plan must describe the manner in which the State's policies and procedures will be revised based on the results of consumer satisfaction surveys conducted by the State Rehabilitation Advisory Council under § 361.17(h)(3) or by the State agency if it is an independent commission in accordance with the requirements of § 361.16.

(b) *Special consultation requirements.* The State plan must assure that, as appropriate, the State unit actively consults in the development and revision of the State plan with the CAP director, the State Rehabilitation Advisory Council, and, as appropriate, those Indian tribes, tribal organizations, and native Hawaiian organizations that represent significant numbers of individuals with disabilities within the State.

(c) *Summary of public comments.* The State plan must include a summary of the public comments on the State plan, including comments on revisions to the State plan and the State unit's response to those comments.

(d) *Appropriate modes of communication.* The State unit shall provide, through appropriate modes of communication, the notices of the public meetings, any materials furnished prior to or during the public meetings, and the approved State plan.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 101(a)(20), 101(a)(23), 101(a)(32), and 105(c)(2) of the Act; 29 U.S.C. 721(a)(20), (23), and (32) and 725(c)(2))

**§ 361.21 Consultations regarding the administration of the State plan.**

(a) The State plan must assure that, in connection with matters of general policy development and implementation arising in the administration of the State plan, the State unit seeks and takes into account the views of—

(1) Individuals who receive vocational rehabilitation services or, as appropriate, the individuals' representatives;

(2) Personnel working in the field of vocational rehabilitation;

(3) Providers of vocational rehabilitation services;

(4) The CAP director; and

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

(b) The State plan must specifically describe the manner in which the State unit will take into account the views regarding State policy and administration of the State plan that are expressed in the consumer satisfaction surveys conducted by the State Rehabilitation Advisory Council under § 361.17(h)(3) or by the State agency if it is an independent commission in accordance with the requirements of § 361.16(a)(1).

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 101(a)(18), 101(a)(32), and 105(c)(2) of the Act; 29 U.S.C. 721(a)(18), 721(a)(32), and 725(c)(2))

**§ 361.22 Cooperation with agencies responsible for students with disabilities.**

(a) *Students with disabilities who are receiving special education services.*—

(1) *General.* The State plan must contain plans, policies, and procedures that are designed to facilitate the transition of students who are receiving special education services from the provision of a free appropriate public education under the responsibility of an educational agency to the provision of vocational rehabilitation services under the responsibility of the designated State unit. These plans, policies, and procedures must provide for the development and completion of the IWRP before the student leaves the school setting for each student determined to be eligible for vocational rehabilitation services or, if the designated State unit is operating under an order of selection, for each eligible student able to be served under the order. The IWRP must, at a minimum, identify the long-term rehabilitation goals, intermediate rehabilitation

objectives, and goals and objectives related to enabling the student to live independently, to the extent these goals and objectives are included in the student's individualized education program.

(2) *Formal interagency agreement.*

The State unit enters into formal interagency agreements with the State educational agency and, as appropriate, with local educational agencies, that are responsible for the free appropriate public education of students with disabilities who are receiving special education services. Formal interagency agreements must, at a minimum, identify—

(i) Policies, practices, and procedures that can be coordinated between the agencies, including definitions, standards for eligibility, policies and procedures for making referrals, procedures for outreach to and identification of youth who are receiving special education services and are in need of transition services, and procedures and timeframes for evaluation and follow-up of those students;

(ii) The roles of each agency, including provisions for determining State lead agencies and qualified personnel responsible for transition services;

(iii) Procedures for providing training for staff of State and local educational agencies as to the availability, benefits of, and eligibility standards for vocational rehabilitation services, to the extent practicable;

(iv) Available resources, including sources of funds for the development and expansion of services;

(v) The financial responsibility of each agency in providing services to students with disabilities who are receiving special education services, consistent with State law;

(vi) Procedures for resolving disputes between the agencies that are parties to the agreement; and

(vii) All other components necessary to ensure meaningful cooperation among agencies, including procedures to facilitate the development of local teams to coordinate the provision of services to individuals, sharing data, and coordinating joint training of staff in the provision of transition services.

(b) *Students with disabilities who are not receiving special education services.* The State plan must contain plans, policies, and procedures, including cooperation with appropriate agencies, designed to ensure that students with disabilities who are not receiving special education services have access to and can receive vocational

rehabilitation services, if appropriate, and to ensure outreach to and identification of those students.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 101(a)(11)(C), 101(a)(24) and 101(a)(30) of the Act; 29 U.S.C. 721(a)(11), (a)(24), and (a)(30))

Note: The following excerpt from page 33 of Senate Report No. 102-357 further clarifies the provision of transition services by the State vocational rehabilitation agency:

The overall purpose of this provision is to ensure that all students who require vocational rehabilitation services receive those services in a timely manner. There should be no gap in services between the education system and the vocational rehabilitation system \* \* \*. The committee intends that students with disabilities who are eligible for, and who need, vocational rehabilitation services will receive those services as soon as possible, consistent with Federal and State law. These provisions are not intended in any way to shift the responsibility of service delivery from education to rehabilitation during the transition years. School officials will continue to be responsible for providing a free and appropriate public education as defined by the IEP. The role of the rehabilitation system is primarily one of planning for the student's years after leaving school. (S. Rep. No. 357, 102d Cong., 2d Sess. 33 (1992))

**§ 361.23 Cooperation with other public agencies.**

(a) *Coordination of services with vocational education and Javits-Wagner-O'Day programs.* The State plan must assure that specific arrangements or agreements are made for the coordination of services for any individual who is eligible for vocational rehabilitation services and is also eligible for services under the Carl D. Perkins Vocational and Applied Technology Education Act or the Javits-Wagner-O'Day Act.

(b) *Cooperation with other Federal, State, and local public agencies providing services related to the rehabilitation of individuals with disabilities.* (1) The State plan must assure that the State unit cooperates with other Federal, State, and local public agencies providing services related to the rehabilitation of individuals with disabilities, including, as appropriate, establishing interagency working groups or entering into formal interagency cooperative agreements with, and using the services and facilities of—

(i) Federal agencies providing services related to the rehabilitation of individuals with disabilities, including the Social Security Administration, the Office of Workers' Compensation Programs of the Department of Labor,



and the Department of Veterans Affairs;  
and

(ii) State and local public agencies providing services related to the rehabilitation of individuals with disabilities, including State and local public agencies administering the State's social services and financial assistance programs and other State programs for individuals with disabilities, such as the State's developmental disabilities program, veterans programs, health and mental health programs, education programs (including adult education, higher education, and vocational education programs), workers' compensation programs, job training and placement programs, and public employment offices.

(2) Interagency cooperation under paragraph (b)(1) of this section, to the extent practicable, must provide for training for staff of the agencies as to the availability, benefits of, and eligibility standards for vocational rehabilitation services.

(3) If the State unit chooses to enter into formal interagency cooperative agreements developed under paragraph (b)(1) of this section, the agreements must—

(i) Identify policies, practices, and procedures that can be coordinated among the agencies (particularly definitions, standards for eligibility, the joint sharing and use of evaluations and assessments, and procedures for making referrals);

(ii) Identify available resources and define the financial responsibility of each agency for paying for necessary services (consistent with State law) and procedures for resolving disputes between agencies; and

(iii) Include all additional components necessary to ensure meaningful cooperation and coordination.

(c) *Reciprocal referral services with a separate agency for individuals who are blind.* If there is a separate State unit for individuals who are blind, the State plan must assure that the two State units 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: Secs. 101(a)(11) and 101(a)(22) of the Act; 29 U.S.C. 721(a)(11) and 721(a)(22))

**§ 361.24 Coordination with the Statewide Independent Living Council.**

The State plan must assure that the State unit will coordinate and establish working relationships with the Statewide Independent Living Council established under 34 CFR Part 364 and with independent living centers within the State.

(Authority: Sec. 101(a)(33) of the Act; 29 U.S.C. 721(a)(33))

**§ 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) The State includes in its State plan, and the Secretary approves, a request for 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.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 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 a joint program involving shared funding and administrative responsibility with another State agency or a local public agency to provide services to individuals with disabilities, the plan must include a description of the nature and scope of the joint program, the services to be provided, the respective roles of each participating agency in the provision of services and in their administration, and the share of the costs to be assumed by each agency.

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

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Section 101(a)(1)(A) of the Act; 29 U.S.C. 721(a)(1)(A))

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

(a) If the designated State unit enters 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, the State plan must assure 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 shall obtain a waiver of statewideness, in accordance with § 361.26.

(Authority: Sec. 101(a)(1)(A) of the Act; 29 U.S.C. 721(a)(1)(A))

**§ 361.29 Statewide studies and evaluations.**

(a) *Statewide studies.* The State plan must assure that the State unit conducts continuing statewide studies to determine the current needs of individuals with disabilities within the State and the best methods to meet those needs. As part of the development of the State plan, the continuing statewide studies, at a minimum, must include—

(1) A triennial comprehensive assessment of the rehabilitation needs of individuals with severe disabilities who reside in the State;

(2) A triennial review of the effectiveness of outreach procedures used to identify and serve individuals with disabilities who are minorities and individuals with disabilities who are unserved and underserved by the vocational rehabilitation system; and

(3) A triennial review of a broad variety of methods to provide, expand, and improve vocational rehabilitation services to individuals with the most severe disabilities, including individuals receiving supported employment services under 34 CFR part 363.

(b) *Annual evaluation.* The State plan must assure that the State unit conducts an annual evaluation of the effectiveness of the State's vocational rehabilitation program in providing vocational rehabilitation and supported employment services, especially to individuals with the most severe disabilities. The annual evaluation must analyze the extent to which—

(1) The State has achieved the goals and priorities established in the State plan and annual amendments to the plan; and

(2) The State is in compliance with the evaluation standards and performance indicators established by the Secretary pursuant to section 106 of the Act.

(c) *Reporting requirements.* (1) The State plan must describe annually those changes that have been adopted in policy, in the State plan and its amendments, and in the strategic plan and its amendments as a result of the statewide studies and the annual program evaluation.

(2) The State plan must contain an annual description of the methods used to expand and improve vocational rehabilitation services to individuals with the most severe disabilities, including the State unit's criteria for determining which individuals are individuals with the most severe disabilities.

(3) The State plan must contain an annual analysis of the characteristics of

individuals determined to be ineligible for services and the reasons for the ineligibility determinations.

(4) The State unit shall maintain copies of the statewide studies and the annual evaluations and shall make the copies available to the Secretary upon request.

(d) *Role of the State Rehabilitation Advisory Council.* The State plan must assure that the State unit seeks the advice of the State Rehabilitation Advisory Council, if the State has a Council, regarding the continuing statewide studies and the annual evaluation and, at the discretion of the State agency, seeks assistance from the Council in the preparation and analysis of the studies and evaluation.

(Approved by the Office of Management and Budget under control number 1820-0500.) (Authority: Sections 101(a)(5) (A) and (B), 101(a)(9)(D), 101(a)(15) (A), (C), and (D), 101(a)(19), and 105(c)(2) of the Act; 29 U.S.C. 721(a) (5), (9), (15), and (19) and 725(c)(2))

**§ 361.30 Services to special groups of individuals with disabilities.**

(a) *Civil employees of the United States.* The State plan must assure that vocational rehabilitation services are available to civil employees of the U.S. Government who are disabled in the line of duty, under the same terms and conditions applied to other individuals with disabilities.

(b) *Public safety officers.* (1) The State plan must assure that special consideration will be given to those individuals with disabilities whose disability arose from an impairment sustained in the line of duty while performing as a public safety officer and the immediate cause of that impairment was a criminal act, apparent criminal act, or a hazardous condition resulting directly from the officer's performance of duties in direct connection with the enforcement, execution, and administration of law or fire prevention, firefighting, or related public safety activities.

(2) For the purposes of paragraph (b) of this section, *special consideration* for States under an order of selection means that those public safety officers who meet the requirements of paragraph (b)(1) of this section must receive priority for services over other eligible individuals in the same priority category of the order of selection.

(3) For the purposes of paragraph (b) of this section, *criminal act* means any crime, including an act, omission, or possession under the laws of the United States, a State, or a unit of general local government that poses a substantial threat of personal injury, notwithstanding that by reason of age,

insanity, intoxication, or otherwise, the person engaging in the act, omission, or possession was legally incapable of committing a crime.

(4) For the purposes of paragraph (b) of this section, *public safety officer* means a person serving the United States or a State or unit of local government, with or without compensation, in any activity pertaining to—

(i) The enforcement of the criminal laws, including highway patrol, or the maintenance of civil peace by the National Guard or the Armed Forces;

(ii) A correctional program, facility, or institution if the activity is potentially dangerous because of contact with criminal suspects, defendants, prisoners, probationers, or parolees;

(iii) A court having criminal or juvenile delinquent jurisdiction if the activity is potentially dangerous because of contact with criminal suspects, defendants, prisoners, probationers, or parolees; or

(iv) Firefighting, fire prevention, or emergency rescue missions.

(c) *American Indians.* (1) The State plan must assure that vocational rehabilitation services are provided to American Indians with disabilities residing in the State to the same extent that these services are provided to other significant groups of individuals with disabilities residing in the State.

(2) The State plan also must assure that the designated State unit continues to provide vocational rehabilitation services, including, as appropriate, services traditionally used by Indian tribes, to American Indians with disabilities who reside on reservations and are eligible for services by a special tribal program under 34 CFR part 371.

(Authority: Secs. 7, 101(a)(13), 101(a)(20), and 130(b)(3) of the Act; 29 U.S.C. 706, 721(a)(13), 721(a)(20), and 750(b)(3))

**§ 361.31 Utilization of community resources.**

The State plan must assure that, in providing vocational rehabilitation services, public or other vocational or technical training programs or other appropriate community resources are used to the maximum extent feasible.

(Authority: Sec. 101(a)(12)(A) of the Act; 29 U.S.C. 721(a)(12)(A))

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

The State plan must assure that the State unit has the authority to enter into contracts with profitmaking organizations for the purpose of providing on-the-job training and related programs for individuals with

disabilities under the Projects With Industry program, 34 CFR part 379, if it has been determined that they are better qualified to provide needed services than nonprofit agencies, organizations, or programs in the State.

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

**§ 361.33 Use, assessment, and support of community rehabilitation programs.**

(a) The State plan must contain a description of how the designated State unit uses community rehabilitation programs to the maximum extent feasible to provide vocational rehabilitation services in the most integrated settings possible, consistent with the informed choices of the individuals. This description must—

(1) Include the methods the designated State unit uses to ensure the appropriate use of community rehabilitation programs;

(2) Provide, as appropriate, for entering into agreements with the operators of those community rehabilitation programs;

(3) Specify the manner in which the designated State unit will establish cooperative agreements with private nonprofit vocational rehabilitation service providers;

(4) Contain the findings resulting from an assessment of the capacity and effectiveness of community rehabilitation programs, including programs under the Javits-Wagner-O'Day Act, based on the use of those programs; and

(5) Contain plans for improving community rehabilitation programs based on the assessment in paragraph (a)(4) of this section.

(b) If the State plan provides for the establishment, development, or improvement of a public or nonprofit community rehabilitation program, the State plan must contain a description of the need to establish, develop, or improve, as appropriate, the community rehabilitation program to provide vocational rehabilitation services to applicants and eligible individuals, based on the assessment and improvement plans required in paragraphs (a)(4) and (a)(5) of this section.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 101(a)(5)(A), 101(a)(12)(B), 101(a)(15)(B), 101(a)(27), 101(a)(28), and 103(b)(2) of the Act; 29 U.S.C. 721(a)(5), (12), (15), (27), and (28) and 723(b)(2))

**§ 361.34 Supported employment plan.**

(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.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 101(a)(25) and 635(a) of the Act; 29 U.S.C. 721(a)(25))

**§ 361.35 Strategic plan.**

(a) The State plan must assure that the State—

(1) Has developed and implemented a strategic plan for expanding and improving vocational rehabilitation services for individuals with disabilities on a statewide basis in accordance with subpart D of this part; and

(2) Will use at least 1.5 percent of its allotment under this program for expansion and improvement activities in accordance with § 361.73(b).

(b) The strategic plan must be submitted at the same time as the State plan.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 101(a)(34) and 120 of the Act; 29 U.S.C. 721(a)(34) and 740)

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

(a) *General provisions.* (1) The State plan must contain—

(i) An assurance that the designated State unit is able to provide the full range of services listed in section 103(a) of the Act, as appropriate, to all eligible individuals. The assurance must be supported by an explanation that satisfies the requirements of paragraph (a)(2) or (a)(3) of this section and describes how, on the basis of the designated State unit's projected fiscal and personnel resources and its assessment of the rehabilitation needs of individuals with severe disabilities within the State, it will—

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

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

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

(D) Meet all program requirements; or

(ii) The order to be followed in selecting eligible individuals to be provided services, a justification of that order of selection, and a description of the outcome and service goals and service costs to be achieved for individuals with disabilities in each category within the order and the time

within which these goals may be achieved.

(2) For those designated State units that provided assurances in their State plans for the current fiscal year and the preceding fiscal year that they are able to provide the full range of services, as appropriate, to all eligible individuals, the explanation required by paragraph (a)(1)(i) of this section must include a statement that, during the current fiscal year and the preceding fiscal year, the DSU has 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 written rehabilitation programs (IWRPs) for individuals determined eligible, or the provision of services for eligible individuals for whom IWRPs have been developed.

(3) For those designated State units unable to provide the full range of services to all eligible individuals during the current or preceding fiscal year, or unable to provide the statement required in paragraph (a)(2) of this section, the explanation required by paragraph (a)(1)(i) of this section must include—

(i) A description of the circumstances that have changed that will allow the DSU to meet the requirements of paragraph (a)(1)(i) of this section in the next fiscal year, including a description of—

(A) The estimated number of and projected costs of serving, in the next fiscal year, individuals with existing IWRPs;

(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 (a)(3)(i) (A) through (C) of this section and the resources identified in paragraph (a)(3)(i)(D) of this section and an explanation of any projected increases or decreases in these costs and resources; and

(iii) A demonstration 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 (a)(3)(i) (A) through (C) of this section so as to ensure the provision of the full range of services, as appropriate, to all eligible individuals.

(b) *Time for determining need for an order of selection.* (1) The designated State unit shall 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 shall 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.

(c) *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 severe disability" in section 7(15)(A) of the Act.

(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, creed, 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.

(3) *Priority for individuals with the most severe disabilities.* The State plan must assure that those individuals with the most severe disabilities are selected for service before other individuals with disabilities. The designated State unit shall establish criteria for determining which individuals are individuals with the most severe disabilities. The criteria must be consistent with the definition of

"individual with a severe disability" in section 7(15)(A) of the Act and the requirements in paragraphs (c) (1) and (2) of this section.

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

(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 IWRP prior to the effective date of the order of selection, irrespective of the severity of the individual's disability;

(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 shall renegotiate these funding arrangements so that they are consistent with the order of selection.

(e) *State Rehabilitation Advisory Council.* The designated State unit shall consult with and seriously consider the advice of the State Rehabilitation Advisory Council regarding the—

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

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

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

(4) Administration of the order of selection.

(Approved by the Office of Management and Budget under control number 1820-0500.) (Authority: Sec. 7(15)(A); 12(d); 17; 101(a)(4); 101(a)(5)(A); 101(a)(7); 101(a)(11)(A); 101(a)(15)(D); 101(a)(24); 101(a)(30); 101(a)(36)(A)(ii); 107(a)(4)(B); and 504(a) of the Act; 29 U.S.C. 706(15)(A), 711(d), 716, 721(a)(4), 721(a)(5)(A), 721(a)(7), 721(a)(11)(A), 721(a)(15)(D), 721(a)(24), 721(a)(30), 721(a)(36)(A)(ii), 727(a)(4)(B), and 794(a))

#### **§ 361.37 Establishment and maintenance of information and referral programs.**

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

(1) The designated State unit will establish and maintain information and referral programs adequate to ensure that individuals with disabilities within the State are given accurate information

about State vocational rehabilitation services, independent living services, vocational rehabilitation services available from other agencies, organizations, and community rehabilitation programs, and, to the extent possible, other Federal and State services and programs that assist individuals with disabilities, including client assistance and other protection and advocacy programs;

(2) The State unit will refer individuals with disabilities to other appropriate Federal and State programs that might be of benefit to them; and

(3) The State unit will use existing information and referral systems in the State to the greatest extent possible.

(b) *Appropriate modes of communication.* The State plan further must assure that information and referral programs use appropriate modes of communication.

(c) *Special circumstances.* If the State unit is operating under an order of selection for services, the State unit may elect to establish an expanded information and referral program that includes counseling, guidance, and referral for job placements for those eligible individuals who are not in the priority category or categories to receive vocational rehabilitation services under the State's order of selection.

(1) If a State unit elects to establish an expanded information and referral program under paragraph (c) of this section, the State plan must include—

(i) A description of how the expanded information and referral program will be established and how it will function, including the level of commitment of State unit staff and resources; and

(ii) An assurance that, in carrying out this program, the State unit will not use funds that are needed to provide vocational rehabilitation services under IWRPs for eligible individuals in the priority category or categories receiving services under the State unit's order of selection or for other eligible individuals who have begun to receive services prior to the effective date of the order of selection.

(2) If the designated State unit chooses to track the individuals who obtain employment through participation in an expanded information and referral program established under paragraph (c) of this section, the State plan must include a report of the number of individuals served and the number of individuals who obtain employment through this program.

(Approved by the Office of Management and Budget under control number 1820-0500.) (Authority: Sec. 101(a)(22) of the Act; 29 U.S.C. 721(a)(22))

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

(a) *General provisions.* (1) The State plan must assure that the State agency and the State unit will adopt and implement policies and procedures to safeguard the confidentiality of all personal information, including photographs and lists of names. These policies and procedures must assure that—

(i) Specific safeguards 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 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 shall 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 shall make all requested information in that individual's record of services accessible to and shall 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.

(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 shall release personal information if required by Federal law or regulations.

(4) The State unit shall 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: Secs. 12(c) and 101(a)(6)(A) of the Act; 29 U.S.C. 711(c) and 721(a)(6)(A))

**§ 361.39 State-imposed requirements.**

The State plan must assure that the designated State unit identifies upon request 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: Sect. 17 of the Act; 29 U.S.C. 716)

**§ 361.40 Reports.**

The State plan must assure that the State unit—

(a) Will submit reports in the form and detail and at the time required by the Secretary, including reports required under sections 13, 14, and 101(a)(10) of the Act; and

(b) Will comply with any requirements necessary to ensure the correctness and verification of those reports.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 101(a)(10) of the Act; 29 U.S.C. 721(a)(10))

State Plan Content: Provision and Scope of Services

**§ 361.41 Processing referrals and applications.**

(a) *Referrals.* The State plan must assure that the designated State unit has established and implemented standards for the prompt and equitable handling of referrals of individuals for vocational rehabilitation services. 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) The State plan must assure that once an individual has submitted an application for vocational rehabilitation services, an eligibility determination will be made within 60 days, unless—

(i) Exceptional and unforeseen circumstances beyond the control of the agency preclude a determination within 60 days and the agency and the individual agree to a specific extension of time; or

(ii) An extended evaluation is necessary, in accordance with § 361.42(d).

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

(i) Has completed and signed an agency application form or has otherwise requested services;

(ii) Has provided 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 shall ensure that its application forms are widely available throughout the State.

(Authority: Sec. 101(a)(6)(A) and 102(a)(5)(A) of the Act; 29 U.S.C. 721(a)(6)(A) and 722(a)(5)(A))

**§ 361.42 Assessment for determining eligibility and priority for services.**

The State plan must assure that, 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 will 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 State plan must assure that the State unit's determination of an applicant's eligibility for vocational rehabilitation services is based only on the following requirements:

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

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

(iii) 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.

(iv) A determination that the applicant requires vocational rehabilitation services to prepare for, enter into, engage in, or retain gainful employment consistent with the applicant's strengths, resources, priorities, concerns, abilities, capabilities, and informed choice.

(2) *Presumption of benefit.* The State plan must assure that the designated State unit will 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 benefitting in terms of an employment outcome from vocational rehabilitation services.

(3) *Limited presumption for Social Security beneficiaries.* The State plan must assure that, if an applicant has appropriate evidence, such as an award letter, that establishes the applicant's eligibility for Social Security benefits under Title II or Title XVI of the Social Security Act, the designated State unit will presume that the applicant—

(i) Meets the eligibility requirements in paragraphs (a)(1) (i) and (ii) of this section; and

(ii) Has a severe physical or mental impairment that seriously limits one or more functional capacities in terms of an employment outcome.

(b) *Prohibited factors.* The State plan must assure that— (1) No duration of residence requirement is imposed that excludes from services any applicant who is present in the State;

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

(3) The eligibility requirements are applied without regard to the age, gender, race, color, creed, or national origin of the applicant; and

(4) The eligibility requirements are applied without regard to the particular service needs or anticipated cost of services required by an applicant or the income level of an applicant or applicant's family.

(c) *Review and assessment of data for eligibility determination.* Except as provided in paragraph (d) of this section, the designated State unit shall base its determination of each of the basic eligibility requirements in paragraph (a) of this section on—

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

(2) 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 assistive technology devices and services and worksite assessments, that are necessary to determine whether an individual is eligible.

(d) *Extended evaluation for individuals with severe disabilities.* (1) Prior to any determination that an individual with a severe disability is incapable of benefitting from vocational rehabilitation services in terms of an employment outcome because of the severity of that individual's disability, the State unit shall conduct an extended evaluation to determine whether or not there is clear and convincing evidence to support such a determination.

(2) During the extended evaluation period, which may not exceed 18 months, vocational rehabilitation services must be provided in the most integrated setting possible, consistent with the informed choice of the individual.

(3) During the extended evaluation period, the State unit shall develop a written plan for determining eligibility and for determining the nature and scope of services required to achieve an employment outcome. The State unit may provide during this period only those services that are necessary to make these two determinations.

(4) The State unit shall assess the individual's progress as frequently as necessary, but at least once every 90 days, during the extended evaluation period.

(5) The State unit shall terminate extended evaluation services at any point during the 18-month extended evaluation period if the State unit determines that—

(i) 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

(ii) There is clear and convincing evidence that the individual is incapable of benefiting from vocational rehabilitation services in terms of an employment outcome.

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

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

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

(Authority: Secs. 7(22)(A)(ii), 7(22)(C)(iii), 101(a)(9)(A), 101(a)(14), 101(a)(31), 102(a)(1), 102(a)(2), 102(a)(3), 102(a)(4), 103(a)(4), and 103(a)(6) of the Act; 29 U.S.C. 706(22)(A)(ii), 706(22)(C)(iii), 721(a)(9)(a), 721(a)(14), 721(a)(31), 722(a)(1), 722(a)(2), 722(a)(3), 722(a)(4), 723(a)(4), and 723(a)(6))

Note: *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. Given these requirements, a review of existing information generally would not provide clear and convincing evidence. 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.

The State plan must assure that if the State unit determines that an applicant is ineligible for vocational rehabilitation services or determines that an individual receiving services under an individualized written rehabilitation program is no longer eligible for services, the State unit shall—

(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 a determination by the rehabilitation counselor or coordinator 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; and

(d) 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: Secs. 101(a)(9)(D), 102(a)(6), and 102(c) of the Act; 29 U.S.C. 721(a)(9), 722(a)(6), and 722(c))

#### § 361.44 Closure without eligibility determination.

The State plan must assure that the 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: Secs. 12(c) and 101(a)(6)(A) of the Act; 29 U.S.C. 711(c) and 721(a)(6))

#### § 361.45 Development of the individualized written rehabilitation program.

(a) *Purpose.* The State plan must assure that the State unit conducts an assessment for determining vocational rehabilitation needs 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 long-term vocational goal, intermediate rehabilitation objectives, and the nature and scope of vocational rehabilitation services to be included in the IWRP, which must be designed to achieve an employment outcome that is consistent with the individual's unique strengths, priorities, concerns, abilities, capabilities, career interests, and informed choice.

(b) *Procedural requirements.* The State plan must assure that—

(1) The IWRP is developed jointly, agreed to, and signed by the vocational rehabilitation counselor or coordinator and the individual or, as appropriate, the individual's representative within the framework of a counseling and guidance relationship;

(2) The State unit has established and implemented standards for the prompt development of IWRPs for the individuals identified under paragraph (a) of this section, including timelines that take into consideration the needs of the individual;

(3) The State unit advises each individual or, as appropriate, the individual's representative of all State unit procedures and requirements affecting the development and review of an IWRP, including the availability of appropriate modes of communication;

(4) In developing an IWRP for a student with a disability who is receiving special education services, the State unit considers the student's individualized education program;

(5) The State unit reviews the IWRP with the individual or, as appropriate, the individual's representative as often as necessary, but at least once each year to assess the individual's progress in meeting the objectives identified in the IWRP;

(6) The State unit incorporates into the IWRP any revisions that are necessary to reflect changes in the individual's vocational goal, intermediate objectives, or vocational rehabilitation services, and obtains the

agreement and signature of the individual or, as appropriate, of the individual's representative to the revisions; and

(7) The State unit promptly provides each individual or, as appropriate, the individual's representative, a copy of the IWRP and its amendments in the native language, or appropriate mode of communication, of the individual or, as appropriate, of the individual's representative.

(c) *Data for preparing the IWRP.*—(1) *Preparation without comprehensive assessment.* To the extent possible, the vocational goal, intermediate objectives, and the nature and scope of rehabilitation services to be included in the individual's IWRP must be determined based on the data used for the assessment of eligibility and priority for services under section § 361.42.

(2) *Preparation based on comprehensive assessment.* (i) If additional data are necessary to prepare the IWRP, the designated State unit shall conduct a comprehensive assessment of the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and needs, including the need for supported employment services, of an eligible individual, in the most integrated setting possible, consistent with the informed choice of the individual.

(ii) The comprehensive assessment must be limited to information that is necessary to identify the rehabilitation needs of the individual and develop the IWRP and may, to the extent needed, include—

(A) An analysis of pertinent medical, psychiatric, psychological, neuropsychological, and other pertinent vocational, educational, cultural, social, recreational, and environmental factors, and related functional limitations, that affect the employment and rehabilitation needs of the individual;

(B) An analysis of the individual's personality, career interests, interpersonal skills, intelligence and related functional capacities, educational achievements, work experience, vocational aptitudes, personal and social adjustments, and employment opportunities;

(C) An appraisal of the individual's patterns of work behavior and services needed to acquire occupational skills and to develop work attitudes, work habits, work tolerance, and social and behavior patterns suitable for successful job performance; and

(D) An assessment, through provision of rehabilitation technology services, of the individual's capacities to perform in a work environment, including in an integrated setting, to the maximum

extent feasible and consistent with the individual's informed choice.

(iii) In preparing a comprehensive assessment, the State unit shall use, to the maximum extent possible and appropriate and in accordance with confidentiality requirements, existing information, including information that is provided by the individual, the family of the individual, and education agencies.

(Authority: Secs. 7(22)(B), 102(b)(1)(A), and 102(b)(2); 29 U.S.C. 706(5), 721(a)(9), 722, and 723(a)(1))

**§ 361.46 Content of the individualized written rehabilitation program.**

(a) *General requirements.* The State plan must assure that each IWRP includes, as appropriate, statements concerning—

(1) The specific long-term vocational goal, which must be based on the assessment for determining vocational rehabilitation needs, including the individual's career interests, and must be, to the extent appropriate and consistent with the informed choice of the individual, in an integrated setting;

(2) The specific intermediate rehabilitation objectives related to the attainment of the long-term vocational goal, based on the assessment for determining vocational rehabilitation needs and consistent with the informed choice of the individual;

(3) The specific rehabilitation services under § 361.48 to be provided to achieve the established intermediate rehabilitation objectives, including, if appropriate, rehabilitation technology services and on-the-job and related personal assistance services;

(4) The projected dates for the initiation of each vocational rehabilitation service, the anticipated duration of each service, and the projected timeframe for the achievement of the individual's vocational goal;

(5) A procedure and schedule for periodic review and evaluation of progress toward achieving intermediate rehabilitation objectives based upon objective criteria;

(6) How, in the words of the individual or, as appropriate, in the words of the individual's representative, the individual was informed about and involved in choosing among alternative goals, objectives, services, providers, and methods used to procure or provide services;

(7) The terms and conditions for the provision of vocational rehabilitation services, including—

(i) The responsibilities of the individual in implementing the IWRP;

(ii) The extent of the individual's participation in the cost of services;

(iii) The extent to which goods and services will be provided in the most integrated settings possible, consistent with the informed choices of the individual;

(iv) The extent to which comparable services and benefits are available to the individual under any other program; and

(v) The entity or entities that will provide the services and the process used to provide or procure the services;

(8) The rights of the individual under this part and the means by which the individual may express and seek remedy for any dissatisfaction, including the opportunity for a review of rehabilitation counselor or coordinator determinations under § 361.57;

(9) The availability of a client assistance program established under 34 CFR part 370; and

(10) The basis on which the individual has been determined to have achieved an employment outcome in accordance with § 361.56.

(b) *Supported employment requirements.* The State plan must assure that the IWRP for individuals with the most severe disabilities for whom a vocational goal in a supported employment setting has been determined to be appropriate will also contain—

(1) A description of the supported employment services to be provided by the State unit; and

(2) A description of the extended services needed and identification of the source of extended services or, in the event that identification of the source is not possible at the time the IWRP is developed, a statement explaining the basis for concluding that there is a reasonable expectation that services will become available.

(c) *Post-employment services.* The State plan must assure that the IWRP for each individual contains statements concerning—

(1) The expected need for post-employment services, based on an assessment during the development of the IWRP;

(2) A reassessment of the need for post-employment services prior to the determination that the individual has achieved an employment outcome;

(3) A description of the terms and conditions for the provision of any post-employment services, including the anticipated duration of those services, subsequent to the achievement of an employment outcome by the individual; and

(4) If appropriate, a statement of how post-employment services will be provided or arranged through



cooperative agreements with other service providers.

(d) *Coordination of services for students with disabilities who are receiving special education services.*

The State plan must assure that the IWRP for a student with a disability who is receiving special education services is coordinated with the individualized education program (IEP) for that individual in terms of the goals, objectives, and services identified in the IEP.

(e) *Ineligibility.* The State plan must assure that the decision that an individual is not capable of achieving an employment outcome and is no longer eligible to receive services under an IWRP is made in accordance with the requirements in § 361.43. The decision, and the reasons on which the decision was based, must be included as an amendment to the IWRP.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 101(a)(9), 102(b)(1), 102(c), and 635(b)(6) of the Act; 29 U.S.C. 721(a)(9), 722, and 795n)

#### **§ 361.47 Record of services.**

The State plan must assure that the designated State unit maintains for each applicant or eligible individual a record of services that includes, to the extent pertinent, the following documentation:

(a) If an applicant has been determined to be an eligible individual, documentation supporting that determination in accordance with the requirements in § 361.42.

(b) If an applicant has been determined to be ineligible, documentation supporting that determination in accordance with the requirements of § 361.43.

(c) Documentation supporting the determination that an individual has a severe disability or a most severe disability.

(d) If an individual with a severe disability requires an extended evaluation in order to determine whether the individual is an eligible individual, documentation supporting the need for an extended evaluation, documentation supporting the periodic assessments conducted during the extended evaluation, and the written plan developed during the extended evaluation, in accordance with the requirements in § 361.42(d).

(e) The IWRP, and any amendments to the IWRP, containing the information required under § 361.46.

(f) In accordance with § 361.45(a), documentation supporting the development of the long-term vocational goal, intermediate rehabilitation objectives, and nature and scope of

services included in the individual's IWRP and, for students with disabilities who are receiving special education services, in the student's IEP.

(g) In the event that an individual's IWRP provides for services or a job placement in a non-integrated setting, a justification for that non-integrated setting.

(h) Documentation of the periodic reviews and evaluations of progress toward achieving intermediate rehabilitation objectives conducted under § 361.46(a)(5).

(i) 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)(10)(ii).

(j) Documentation concerning any action and decision resulting from a request by an individual for review of a rehabilitation counselor or coordinator determination under § 361.57.

(Authority: Secs. 101(a)(6) and 101(a)(9) of the Act; 29 U.S.C. 721(a)(6) and 721(a)(9))

#### **§ 361.48 Scope of vocational rehabilitation services for individuals with disabilities.**

(a) The State plan must assure that, as appropriate to the vocational rehabilitation needs of each individual and consistent with each individual's informed choice, the following vocational rehabilitation services are available:

(1) Assessment for determining eligibility and priority for services in accordance with § 361.42.

(2) Assessment for determining vocational rehabilitation needs in accordance with § 361.45.

(3) Vocational rehabilitation counseling and guidance.

(4) Referral and other services necessary to help applicants and eligible individuals secure needed services from other agencies and to advise those individuals about client assistance programs established under 34 CFR part 370.

(5) Physical and mental restoration services in accordance with the definition of that term in § 361.5(b)(35).

(6) 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.

(7) Maintenance, in accordance with the definition of that term in § 361.5(b)(31).

(8) Transportation in connection with the rendering of any vocational rehabilitation service and in accordance with the definition of that term in § 361.5(b)(49).

(9) Vocational rehabilitation services to family members of an applicant or eligible individual if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(10) Interpreter services for individuals who are deaf and tactile interpreting services for individuals who are deaf-blind.

(11) Reader services, rehabilitation teaching services, and orientation and mobility services for individuals who are blind.

(12) Recruitment and training services to provide new employment opportunities in the fields of rehabilitation, health, welfare, public safety, law enforcement, and other appropriate public service employment.

(13) Job search and placement assistance and job retention services.

(14) Supported employment services in accordance with the definition of that term in § 361.5(b)(46).

(15) Personal assistance services in accordance with the definition of that term in § 361.5(b)(34).

(16) Post-employment services in accordance with the definition of that term in § 361.5(b)(37).

(17) Occupational licenses, tools, equipment, initial stocks, and supplies.

(18) Rehabilitation technology in accordance with the definition of that term in § 361.5(b)(39), including vehicular modification,

telecommunications, sensory, and other technological aids and devices.

(19) Transition services in accordance with the definition of that term in § 361.5(b)(47).

(20) Other goods and services determined necessary for the individual with a disability to achieve an employment outcome.

(b) The State plan also must describe—

(1) The manner in which a broad range of rehabilitation technology services will be provided at each stage of the rehabilitation process and on a statewide basis;

(2) The training that will be provided to vocational rehabilitation counselors, client assistance personnel, and other

related services personnel on the provision of rehabilitation technology services;

(3) The manner in which assistive technology devices and services will be provided or worksite assessments will be made as part of the assessment for determining eligibility and vocational rehabilitation needs of an individual; and

(4) The manner in which on-the-job and other related personal assistance services will be provided to assist individuals while they are receiving vocational rehabilitation services.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 101(a)(5)(C), 101(a)(26), 101(a)(31), and 103(a) of the Act; 29 U.S.C. 721(a)(5)(C), 721(a)(26), 721(a)(31), and 723(a))

**§ 361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.**

(a) The State plan 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 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 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 recorded material or video description services for individuals who are blind, captioned television, films, or video cassettes for individuals who are deaf, 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, such as job site modification and other reasonable accommodations,

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 small business enterprises operated by individuals with the most severe disabilities under the supervision of the State unit, including enterprises established under the Randolph-Sheppard program, management services and supervision, acquisition of 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 the most severe 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 six months.

(iii) Costs of establishing a small business enterprise may include operational costs during the initial establishment period, which may not exceed six months.

(iv) If the State plan provides for these services, it must contain an assurance that only individuals with the most severe disabilities will be selected to participate in this supervised program.

(v) If the State plan provides for these services and the State unit chooses to set aside funds from the proceeds of the operation of the small business enterprises, the State plan also must assure that the State unit maintains 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 IWRP 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.

(b) If the State plan provides for vocational rehabilitation services for groups of individuals, the State plan must assure that the designated State unit—

(1) Develops and maintains 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) Maintains 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 benefitting from those services.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 12(c), 101(a)(6), and 103(b) of the Act; 29 U.S.C. 711(c), 721(a)(6), and 723(b))

**§ 361.50 Written policies governing the provision of services for individuals with disabilities.**

The State plan must assure that the State unit develops and maintains 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 IWRP 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:

(a) *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.

(b) *Payment for services.* (1) The State unit shall 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, provided that 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.

(c) *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 IWRP.

(d) *Authorization of services.* The State unit shall establish policies related to the timely authorization of services, including any conditions under which verbal authorization can be given.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 12(c), 12(e)(2)(A), and 101(a)(6) of the Act and 29 U.S.C. 711(c), 711(e)(2)(A), and 721(a)(6))

**§ 361.51 Written standards for facilities and providers of services.**

The State plan must assure that the designated State unit establishes, maintains, makes available to the public, and implements written minimum standards for the various types of facilities and providers of services used by the State unit in providing vocational rehabilitation services, in accordance with the following requirements:

(a) *Accessibility of facilities.* Any facility in which vocational rehabilitation services are provided must be accessible to individuals receiving services and must comply with the requirements of the Architectural Barriers Act of 1968, the Uniform Accessibility Standards and their implementing regulations in 41 CFR part 101, subpart 101-19.6, the Americans with Disabilities Act of 1990, and section 504 of the Act.

(b) *Personnel standards.* (1) *Qualified personnel.* Providers of vocational rehabilitation services shall use qualified personnel, in accordance with

any applicable 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.

(2) *Affirmative action.* Providers of vocational rehabilitation services shall take affirmative action to employ and advance in employment qualified individuals with disabilities.

(3) *Special communication needs personnel.* Providers of vocational rehabilitation services shall—

(i) Include among their personnel, or obtain the services of, individuals able to communicate in the native languages of applicants and eligible individuals who have limited English speaking ability; and

(ii) Ensure that appropriate modes of communication for all applicants and eligible individuals are used.

(c) *Fraud, waste, and abuse.* Providers of vocational rehabilitation services shall have adequate and appropriate policies and procedures to prevent fraud, waste, and abuse.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 12(e)(2) (B), (D), and (E) and 101(a)(6)(B) of the Act; 29 U.S.C. 711(e) and 721(a)(6)(B))

**§ 361.52 Opportunity to make informed choices.**

The State plan must describe the manner in which the State unit will provide each applicant, including individuals who are receiving services during an extended evaluation, and each eligible individual the opportunity to make informed choices throughout the vocational rehabilitation process in accordance with the following requirements:

(a) Each State unit, in consultation with its State Rehabilitation Advisory Council, if it has one, shall develop and implement written policies and procedures that enable each individual to make an informed choice with regard to the selection of a long-term vocational goal, intermediate rehabilitation objectives, vocational rehabilitation services, including assessment services, and service providers. These policies and procedures must ensure that each individual receives, through appropriate modes of communication, information concerning the availability and scope of informed choice, the manner in which informed choice may be exercised, and the availability of support services for

individuals with cognitive or other disabilities who require assistance in exercising informed choice.

(b) In developing an individual's IWRP, the State unit shall provide the individual, or assist the individual in acquiring, information necessary to make an informed choice about the specific services, including the providers of those services, that are needed to achieve the individual's vocational goal. This information must include, at a minimum, information relating to the cost, accessibility, and duration of potential services, the consumer satisfaction with those services to the extent that information relating to consumer satisfaction is available, the qualifications of potential service providers, the types of services offered by those providers, and the degree to which services are provided in integrated settings.

(c) In providing, or assisting the individual in acquiring, the information required under paragraph (b) of this section, the State unit may use, but is not limited to, the following methods or sources of information:

(1) State or regional lists of services and service providers.

(2) Periodic consumer satisfaction surveys and reports.

(3) Referrals to other consumers, local 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.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 12(e)(1), 12(e)(2) (C) and (F), and 101(a)(29) of the Act; 29 U.S.C. 711(e) and 721(a)(29))

**§ 361.53 Availability of comparable services and benefits.**

(a) The State plan must assure that—

(1) Prior to providing any vocational rehabilitation services to an eligible individual, or to members of the individual's family, except those services listed in paragraph (b) of this section, the State unit shall determine whether comparable services and benefits exist under any other program and whether those services and benefits are available to the individual;

(2) If comparable services or benefits exist under any other program and are available to the eligible individual at the time needed to achieve the rehabilitation objectives in the individual's IWRP, the State unit shall use those comparable services or benefits to meet, in whole or in part, the

cost of vocational rehabilitation services; and

(3) If comparable services or benefits exist under any other program, but are not available to the individual at the time needed to satisfy the rehabilitation objectives in the individual's IWRP, the State unit shall provide vocational rehabilitation services until those comparable services and benefits become available.

(b) The following services 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 priority for services.

(2) Assessment for determining vocational rehabilitation needs.

(3) Vocational rehabilitation counseling, guidance, and referral services.

(4) Vocational and other training services, such as personal and vocational adjustment training, books (including alternative format books accessible by computer and taped books), tools, and other training materials in accordance with § 361.48(a)(6).

(5) Placement services.

(6) Rehabilitation technology.

(7) Post-employment services consisting of the services listed under paragraphs (b) (1) through (6) of this section.

(c) The requirements of paragraph (a) of this section also do not apply if—

(1) The determination of the availability of comparable services and benefits under any other program would delay 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; or

(2) An immediate job placement would be lost due to a delay in the provision of comparable services and benefits.

(Authority: Sec. 101(a)(8) of the Act; 29 U.S.C. 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 during an extended evaluation 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 shall maintain written policies covering the determination of financial need;

(ii) The State plan must specify the types of vocational rehabilitation services for which the unit has established a financial needs test;

(iii) The policies must be applied uniformly to all individuals in similar circumstances;

(iv) 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

(v) 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 State plan must assure that no financial needs test is applied and no financial participation is required as a condition for furnishing the following vocational rehabilitation services:

(i) Assessment for determining eligibility and priority for services, except those non-assessment services that are provided during an extended evaluation for an individual with a severe disability under § 361.42(d).

(ii) Assessment for determining vocational rehabilitation needs.

(iii) Vocational rehabilitation counseling, guidance, and referral services.

(iv) Placement services.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Sec. 12(c) of the Act; 29 U.S.C. 711(c))

**§ 361.55 Review of extended employment in community rehabilitation programs or other employment under section 14(c) of the Fair Labor Standards Act.**

The State plan must assure that the State unit—

(a) Reviews and re-evaluates at least annually the status of each individual determined by the State unit to have achieved an employment outcome in an extended employment setting in a community rehabilitation program or other employment setting in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act. This review or re-evaluation must include input from the

individual or, in an appropriate case, the individual's representative to determine the interests, priorities, and needs of the individual for employment in, or training for, competitive employment in an integrated setting in the labor market;

(b) Makes maximum effort, including the identification of vocational rehabilitation services, reasonable accommodations, and other support services, to enable the eligible individual to benefit from training in, or to be placed in employment in, an integrated setting; and

(c) Provides services designed to promote movement from extended employment to integrated employment, including supported employment, independent living, and community participation.

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

**§ 361.56 Individuals determined to have achieved an employment outcome.**

The State plan must assure that an individual is determined to have achieved an employment outcome only if the following requirements are met:

(a) The provision of services under the individual's IWRP has contributed to the achievement of the employment outcome.

(b) The employment outcome is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(c) The employment outcome is in the most integrated setting possible, consistent with the individual's informed choice.

(d) The individual has maintained the employment outcome for a period of at least 90 days.

(e) At the end of the appropriate period under paragraph (d) of this section, the individual and the rehabilitation counselor or coordinator consider the employment outcome to be satisfactory and agree that the individual is performing well on the job.

(Authority: Secs. 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 rehabilitation counselor or coordinator determinations.**

The State plan must contain procedures, including standards of review under paragraph (b)(7) of this section, established by the director of the designated State unit to ensure that any applicant or eligible individual who is dissatisfied with any determinations made by a rehabilitation counselor or coordinator concerning the furnishing or denial of services may request, or, if

appropriate, may request through the individual's representative, a timely review of those determinations. The procedures established by the director of the State unit must be in accordance with the following provisions:

(a) *Informal resolution.* The State unit may establish an informal process to resolve a request for review without conducting a formal hearing. However, a State's informal process must be conducted and concluded within the time period established under paragraph (b)(1) of this section for holding a formal hearing. If informal resolution is not successful, a formal hearing must be conducted by the end of this same period, unless the parties agree to a specific extension of time.

(b) *Formal hearing procedures.* Except as provided in paragraph (d) of this section, the State unit shall establish formal review procedures that provide that—

(1) A hearing by an impartial hearing officer, selected in accordance with paragraph (c) of this section, must be held within 45 days of an individual's request for review, unless informal resolution is achieved prior to the 45th day or the parties agree to a specific extension of time;

(2) The State unit may not institute a suspension, reduction, or termination of services being provided under an IWRP pending a final determination of the formal hearing under this paragraph or informal resolution under paragraph (a) of this section, unless the individual or, in an appropriate case, the individual's representative so requests or the agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual;

(3) The individual or, if appropriate, the individual's representative must be afforded an opportunity to present additional evidence, information, and witnesses to the impartial hearing officer, to be represented by counsel or other appropriate advocate, and to examine all witnesses and other relevant sources of information and evidence;

(4) The impartial hearing officer shall 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 shall provide to the individual or, if appropriate, the individual's representative and to the director of the designated State unit a full written report of the findings and grounds for the decision within 30 days of the completion of the hearing;

(5) If the director of the designated State unit decides to review the decision of the impartial hearing officer, the director shall notify in writing the individual or, if appropriate, the individual's representative of that intent within 20 days of the mailing of the impartial hearing officer's decision;

(6) If the director of the designated State unit fails to provide the notice required by paragraph (b)(5) of this section, the impartial hearing officer's decision becomes a final decision;

(7) The decision of the director of the designated State unit to review any impartial hearing officer's decision must be based on standards of review contained in written State unit policy;

(8) If the director of the designated State unit decides to review the decision of the impartial hearing officer, the director shall provide the individual or, if appropriate, the individual's representative an opportunity to submit additional evidence and information relevant to the final decision;

(9) The director may not overturn or modify a decision, or part of a decision, of an impartial hearing officer that supports the position of the individual unless the director concludes, based on clear and convincing evidence, that the decision of the impartial hearing officer is clearly erroneous because it is contrary to the approved State plan, the Act, Federal vocational rehabilitation regulations, or State regulations or policies that are consistent with Federal requirements;

(10) Within 30 days of providing notice of intent to review the impartial hearing officer's decision, the director of the designated State unit shall make a final decision and provide a full report in writing of the decision, including the findings and the statutory, regulatory, or policy grounds for the decision, to the individual or, if appropriate, the individual's representative;

(11) The director of the designated State unit may not delegate responsibility to make any final decision to any other officer or employee of the designated State unit; and

(12) Except for the time limitations established in paragraphs (b)(1) and (b)(5) of this section, each State's review procedures may provide for reasonable time extensions for good cause shown at the request of a party or at the request of both parties.

(c) *Selection of impartial hearing officers.* Except as provided in paragraph (d) of this section, the impartial hearing officer for a particular case must be selected—

(1) From among the pool of persons qualified to be an impartial hearing

officer, as defined in § 361.5(b)(22), who are identified by the State unit, if the State unit is an independent commission, or jointly by the designated State unit and those members of the State Rehabilitation Advisory Council designated in section 102(d)(2)(C) of the Act, 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 individual or, if appropriate, the individual's representative.

(d) *State fair hearing board.* The provisions of paragraphs (b) and (c) of this section are not applicable if the State has a fair hearing board that was established before January 1, 1985, that is authorized under State law to review rehabilitation counselor or coordinator determinations and to carry out the responsibilities of the director of the designated State unit under this section.

(e) *Informing affected individuals.* The State unit shall inform, through appropriate modes of communication, all applicants and eligible individuals of—

(1) Their right to review under this section, including the names and addresses of individuals with whom appeals may be filed; and

(2) The manner in which an impartial hearing officer will be selected consistent with the requirements of paragraph (c) of this section.

(f) *Data collection.* The director of the designated State unit shall collect and submit, at a minimum, the following data to the Secretary for inclusion each year in the annual report to Congress under section 13 of the Act:

(1) The number of appeals to impartial hearing officers and the State director, including the type of complaints and the issues involved.

(2) The number of decisions by the State director reversing in whole or in part a decision of the impartial hearing officer.

(3) The number of decisions affirming the position of the dissatisfied individual assisted through the client assistance program, when that assistance is known to the State unit.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Secs. 102(b) and 102(d) of the Act; 29 U.S.C. 722(b) and 722(d))

### Subpart C—Financing of State Vocational Rehabilitation Programs

#### § 361.60 Matching requirements.

(a) *Federal share*—(1) *General.* Except as provided in paragraphs (a)(2) and (a)(3) of this section, the Federal share for expenditures made by the State unit under the State plan, including

expenditures for the provision of vocational rehabilitation services, administration of the State plan, and the development and implementation of the strategic 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.

(3) *Innovation and expansion grant activities.* The Federal share for the cost of innovation and expansion grant activities funded by appropriations under Part C of Title I of the Act is 90 percent.

(b) *Non-Federal share*—(1) *General.* Except as provided in paragraphs (b)(2) and (b)(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 following requirements are met:

(i) The funds are earmarked for 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) If the funds are earmarked for any other purpose under the State plan, 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: Secs. 7(7), 101(a)(3), and 104 of the Act; 29 U.S.C. 706(7), 721(a)(3) and 724)

Note: The Secretary notes that contributions may be earmarked in accordance with paragraph (b)(3)(ii) of this section 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. However, if a contribution is earmarked for a restricted geographic area, expenditures from that contribution may be used to meet the non-Federal share requirement only if the State unit requests and the Secretary approves a waiver of statewideness, in accordance with § 361.26.

**§ 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: Sec. 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 two years prior to the previous fiscal year. For example, for fiscal year 1996, a State's maintenance of effort level is based on the amount of its expenditures from non-Federal sources for fiscal year 1994. Thus, if the State's non-Federal expenditures in 1996 are less than they were in 1994, the State has a maintenance of effort deficit, and the Secretary reduces the State's allotment in 1997 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 plan 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 two 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; and

(ii) Result in—  
(A) A general reduction of programs within the State; or

(B) The State making 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: Secs. 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.* 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 rehabilitating Social Security beneficiaries, 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, the administration of the State plan, and developing and implementing the strategic plan. Program income is considered earned when it is received.

(2) Payments provided to a State from the Social Security Administration for rehabilitating Social Security beneficiaries may also be used to carry out programs under Part B of Title I of the Act (client assistance), Part C of Title I of the Act (innovation and expansion), Part C 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 may not be used to meet the non-Federal share requirement under § 361.60.

(Authority: Sec. 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 reallocated funds, that are appropriated for a fiscal year to carry out a program under this part that are not obligated by the State unit by the beginning of the succeeding fiscal year and any program income received during a fiscal year that is not obligated by the State unit by the beginning of the succeeding fiscal year must remain available for obligation by the State unit 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 unit 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: Sec. 19 of the Act; 29 U.S.C. 718)

**§ 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 reallocated 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: Secs. 110 and 111 of the Act; 29 U.S.C. 730 and 731)

**Subpart D—Strategic Plan for Innovation and Expansion of Vocational Rehabilitation Services**

**§ 361.70 Purpose of the strategic plan.**

The State shall prepare a statewide strategic plan, in accordance with § 361.71, to develop and use innovative approaches for achieving long-term success in expanding and improving vocational rehabilitation services, including supported employment services, provided under the State plan, including the supported employment supplement to the State plan required under 34 CFR part 363.

(Authority: Sec. 120 of the Act; 29 U.S.C. 740)

**§ 361.71 Procedures for developing the strategic plan.**

(a) *Public input.* (1) The State unit shall meet with and receive recommendations from members of the State Rehabilitation Advisory Council, if the State has a Council, and the Statewide Independent Living Council prior to developing the strategic plan.

(2) The State unit shall solicit public input on the strategic plan prior to or at the public meetings on the State plan, in accordance with the requirements of § 361.20.

(3) The State unit shall consider the recommendations received under paragraphs (a)(1) and (a)(2) of this section and, if the State rejects any recommendations, shall include a written explanation of the reasons for those rejections in the strategic plan.

(4) The State unit shall develop a procedure to ensure ongoing comment from the Council or Councils, if applicable, as the plan is being implemented.

(b) *Duration.* The strategic plan must cover a three-year period.

(c) *Revisions.* The State unit shall revise the strategic plan on an annual basis to reflect the unit's actual experience over the previous year and input from the State Rehabilitation Advisory Council, if the State has a Council, individuals with disabilities, and other interested parties.

(d) *Dissemination.* The State unit shall disseminate widely the strategic plan to individuals with disabilities, disability organizations, rehabilitation professionals, and other interested persons and shall make the strategic plan available in accessible formats and appropriate modes of communication.

(Approved by the Office of Management and Budget under control number 1820-0500.)  
(Authority: Sec. 122 of the Act; 29 U.S.C. 742)

**§ 361.72 Content of the strategic plan.**

The strategic plan must include—

(a) A statement of the mission, philosophy, values, and principles of the vocational rehabilitation program in the State;

(b) Specific goals and objectives for expanding and improving the system for providing vocational rehabilitation services;

(c) Specific multi-faceted and systemic approaches for accomplishing the objectives, including interagency coordination and cooperation, that build upon state-of-the-art practices and research findings and that implement the State plan and the supplement to the State plan submitted under 34 CFR Part 363;

(d) A description of the specific programs, projects, and activities funded under this subpart, including how the programs, projects, and activities accomplish the objectives of the subpart, and the resource allocation and budget for the programs, projects, and activities; and

(e) Specific criteria for determining whether the objectives have been achieved, including an assurance that the State will conduct an annual evaluation to determine the extent to which the objectives have been achieved and, if specific objectives have not been achieved, the reasons that the objectives have not been achieved and a description of alternative approaches that will be taken.

(Approved by the Office of Management and Budget under control number 1820-0500.)  
(Authority: Sec. 121 of the Act; 29 U.S.C. 741)

**§ 361.73 Use of funds.**

(a) A State unit shall use all grant funds received under Title I, Part C of the Act to carry out programs and activities that are identified under the State's strategic plan, including but not limited to those programs and activities that are identified in paragraph (b) of this section.

(b) A State unit shall use at least 1.5 percent of the funds received under section 111 of the Act to carry out one or more of the following types of programs and activities that are identified in the State's strategic plan:

(1) Programs to initiate or expand employment opportunities for individuals with severe disabilities in integrated settings that allow for the use of on-the-job training to promote the

objectives of Title I of the Americans with Disabilities Act of 1990.

(2) Programs or activities to improve or expand the provision of employment services in integrated settings to individuals with sensory, cognitive, physical, and mental impairments who traditionally have not been served by the State vocational rehabilitation agency.

(3) Programs or activities to maximize the ability of individuals with disabilities to use rehabilitation technology in employment settings.

(4) Programs or activities that assist employers in accommodating, evaluating, training, or placing individuals with disabilities in the workplace of the employer consistent with the provisions of the Act and Title I of the Americans with Disabilities Act of 1990. These programs or activities may include short-term technical assistance or other effective strategies.

(5) Programs or activities that expand and improve the extent and type of an individual's involvement in the review and selection of his or her training and employment goals.

(6) Programs or activities that expand and improve opportunities for career advancement for individuals with severe disabilities.

(7) Programs, projects, or activities designed to initiate, expand, or improve working relationships between vocational rehabilitation services provided under Title I of the Act and independent living services provided under Title VII of the Act.

(8) Programs, projects, or activities designed to improve functioning of the system for delivering vocational rehabilitation services and to improve coordination and working relationships with other State agencies and local public agencies, business, industry, labor, community rehabilitation programs, and centers for independent living, including projects designed to—

(i) Increase the ease of access to, timeliness of, and quality of vocational rehabilitation services through the development and implementation of policies, procedures, systems, and interagency mechanisms for providing vocational rehabilitation services;

(ii) Improve the working relationships between State vocational rehabilitation agencies and other State agencies, centers for independent living, community rehabilitation programs, educational agencies involved in higher education, adult basic education, and continuing education, and businesses, industry, and labor organizations, in order to create and facilitate cooperation in—

(A) Planning and implementing services; and

(B) Developing an integrated system of community-based vocational rehabilitation services that includes appropriate transitions between service systems; and

(iii) Improve the ability of professionals, advocates, business, industry, labor, and individuals with disabilities to work in cooperative partnerships to improve the quality of vocational rehabilitation services and job and career opportunities for individuals with disabilities.

(9) Projects or activities that ensure that the annual evaluation of the effectiveness of the program in meeting the goals and objectives in the State plan, including the system for evaluating the performance of rehabilitation counselors, coordinators, and other personnel used in the State, facilitates and does not impede the accomplishment of the purpose of this part, including serving individuals with the most severe disabilities.

(10) Projects or activities to support the initiation, expansion, and improvement of a comprehensive system of personnel development.

(11) Programs, projects, or activities to support the provision of training and technical assistance to individuals with disabilities, business, industry, labor, community rehabilitation programs, and others regarding the implementation of the Rehabilitation Act Amendments of 1992, of Title V of the Act, and of the Americans with Disabilities Act of 1990.

(12) Projects or activities to support the funding of the State Rehabilitation Advisory Council and the Statewide Independent Living Council.

(Authority: Secs. 101(a)(34)(B) and 123 of the Act; 29 U.S.C. 721(a)(34)(B) and 743)

**§ 361.74 Allotment of Federal funds.**

(a) The allotment and any reallocation of Federal funds under Title I, Part C of the Act are computed in accordance with the requirements of section 124 of the Act.

(b) If at any time the Secretary determines that any amount will not be expended by a State in carrying out the purpose of this subpart, the Secretary makes that amount available to one or more other States that the Secretary determines will be able to use additional amounts during the fiscal year. Any amount made available to any State under this paragraph of this section is regarded as an increase in the State's allotment for that fiscal year.

(Authority: Sec. 124 of the Act; 29 U.S.C. 744)



**PART 363—THE STATE SUPPORTED EMPLOYMENT SERVICES PROGRAM**

2. The authority citation for part 363 continues to read as follows:

Authority: 29 U.S.C. 795j-q, unless otherwise noted.

3. In § 363.6, paragraphs (c)(1), (c)(2)(i), (c)(2)(ii), and the authority citation are revised to read as follows:

**§ 363.6 What definitions apply?**

\* \* \* \* \*

(c) \* \* \*

(1) *Supported employment* means—  
(i) Competitive employment in an integrated setting with ongoing support services for individuals with the most severe 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 severe 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 in order to perform this work; or

(ii) Transitional employment for individuals with the most severe disabilities due to mental illness.

(2) As used in the definition of “Supported employment”—

(i) *Competitive employment* means work—

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

(B) For which an individual is compensated at or above the minimum

wage, but not less than the customary or usual wage paid by the employer for the same or similar work performed by individuals who are not disabled.

(ii) *Integrated setting* means a setting typically found in the community in which an individual with the most severe disabilities interacts with non-disabled individuals, other than non-disabled individuals who are providing services to that individual, to the same extent that non-disabled individuals in comparable positions interact with other persons.

\* \* \* \* \*

(Authority: 29 U.S.C. 706(18), 711(c), and 795j)

**PART 376—SPECIAL PROJECTS AND DEMONSTRATIONS FOR PROVIDING TRANSITIONAL REHABILITATION SERVICES TO YOUTH WITH DISABILITIES**

4. The authority citation for part 376 continues to read as follows:

Authority: 29 U.S.C. 777a(b), unless otherwise noted.

5. In § 376.4, paragraph (c) and the authority citation are revised to read as follows:

**§ 376.4 What definitions apply to this program?**

\* \* \* \* \*

(c) The definitions of “Competitive employment”, “Integrated setting”, “On-going support services”, “Transitional employment”, and “Time-limited services” in 34 CFR part 380.

\* \* \* \* \*

(Authority: 29 U.S.C. 711(c) and 777a(b))

**PART 380—SPECIAL PROJECTS AND DEMONSTRATIONS FOR PROVIDING SUPPORTED EMPLOYMENT SERVICES TO INDIVIDUALS WITH THE MOST SEVERE DISABILITIES AND TECHNICAL ASSISTANCE PROJECTS**

6. The authority citation for part 380 continues to read as follows:

Authority: 29 U.S.C. 711(c) and 777a(c), unless otherwise noted.

7. In § 380.9, paragraphs (c)(1)(i) and (c)(1)(ii) are revised to read as follows:

**§ 380.9 What definitions apply?**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) *Competitive employment* means work—

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

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

(ii) *Integrated setting* means a setting typically found in the community in which an individual with the most severe disabilities interacts with non-disabled individuals, other than non-disabled individuals who are providing services to that individual, to the same extent that non-disabled individuals in comparable positions interact with other persons.

\* \* \* \* \*

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