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Janet LaBreck
U.S. Department of Education,
400 Maryland Avenue SW., Room 5086,
Potomac Center Plaza (PCP)
Washington, DC 20202-2800.

RE: Comments on proposed rulemaking under the Workforce Innovation and Opportunity Act

Dear Ms. LaBreck:

This letter is sent on behalf of the Public Interest Law Center in formal response to the Office of Special Education and Rehabilitative Services's notice of request for comments on the proposed regulations to implement the Workforce Innovation and Opportunity Act. We appreciate the opportunity to comment on the proposed rulemaking. The Public Interest Law Center has advocated for many years to assist Pennsylvanians with disabilities to live and work in the community.

At the outset, we would like to applaud the Office of Special Education and Rehabilitative Services (RSA) for creating a detailed definition of what constitutes integrated competitive employment. § 361.5(9). The descriptive definition of "integrated" is a model our state of Pennsylvania has looked to.

Some requirements in the new regulations are less clear. We will address each section in turn.

Section 397.50: Requiring documentation to show Section 511 compliance

Section 511 requires entities holding a 14(c) certificate to maintain documentation that transition-age youth obtained the requisite vocational services or were covered by an exemption. 29 U.S.C. § 794g(d)(e)(1). In addition, the covered entity must also maintain documentation that each adult receiving subminimum wage received career counseling and information on services and opportunities to work in the community on an annual basis before continuing with subminimum wage work. 29 U.S.C. § 794g(d)(e)(2). However, under proposed Section 397.50, it is unclear if there are any consequences for an entity's failure to maintain documentation as required under the proposed law.

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We urge the RSA to adopt regulations that provide clear and significant consequences for failure to provide the requisite documentation. The lack of any enforcement mechanism renders Section 511 virtually toothless. The most appropriate remedy is to revoke the 14(c) certificate to any facility that fails to maintain the required documentation for youth aged 24 and younger participating in a subminimum wage program.

Section 397.50: Enforcement

The statute gives clear authority to the Department of Labor and to the Designated State Unit (DSU) to demand documentation required for all individuals entering subminimum wage work. 29 U.S.C. § 794g(e)(2)(B). But it is unclear whether the DSU may make a blanket request for documentation on *all* youth under age 24 in a given facility, or if requests must be made on an individual basis. We strongly suggest Section 397.50 be amended to clarify that the DOL or the DSU may require a facility to produce documentation for all individuals with disabilities in its subminimum wage program.

We also urge the regulations explicitly task the DOL and not the DSU with enforcing this central provision to the WIOA. First, the DOL is experienced in requesting and reviewing employee documentation, unlike the state VR agencies which do not conduct this kind of enforcement action. The DOL already regulates these facilities and remedies the Fair Labor Standard Act (FLSA) violations it identifies. In fact, the DOL regularly investigates and remedies violations at facilities with 14(c) waivers. *See, e.g.*, Investigation Procedures Under FLSA Section 14(c) *available at* http://www.dol.gov/elaws/esa/flsa/14c/20a.htm.

Second, the DOL issues and regulates the 14(c) certificates under the FLSA. If the RSA adopts our proposed remedy for failure to maintain the required documentation -- revoking the noncompliant facility's 14(c) certificate -- the DOL has the capacity to implement that remedy upon a finding of a violation.

Finally, the DSUs are tasked with serving more individuals than ever before, without additional resources. Imposing an enforcement obligation on the DSUs will be burdensome, and likely result in no enforcement at all. Without a robust enforcement mechanism, Congress's intent in enacting Section 511 to limit the use of subminimum wage will go unfulfilled. We urge the RSA to work with the DOL and add enforcement procedures to give effect to this central provision.

The DOL's proposed rulemaking fails to address this entirely. While the DOL and the Department of Education (DOE) issued a joint Notice of Proposed Rulemaking (NPRM), none of the proposed rules address DOL enforcement of the documentation requirements for subminimum wage employment. The DOL's individual NPRM also does not mention Section 511 enforcement.

Section § 397.31: Subminimum wage work in schools

Section 397.31 prohibits schools from contracting with an entity providing subminimum wage work. But what happens when the school itself employs youth in subminimum wage

work? We have at least one 14(c) certificate holder here in Pennsylvania that runs its own subminimum wage facility on its grounds. Is the employment of youth with disabilities who have not yet received VR services or been found ineligible permissible under these regulations? We recommend the RSA clarify the regulations to prohibit schools from employing youth with disability at subminimum wages, in addition to prohibiting contracting with such facilities.

Section 397.40(a)(1): State unit's responsibilities to all individuals with disabilities in subminimum wage work

Section 397.40 requires the DSU to provide all individuals with disabilities employed at subminimum wage with career counseling, information, and referral services. This is a very important provision of Section 511. We know that in Pennsylvania and across the country adults with disabilities engaged in subminimum wage work want to earn competitive wages in the community, but are unable to transition out of subminimum wage work. We commend the RSA for issuing this important regulation.

We suggest Section 397.40 require information be provided to family members and/or caregivers as appropriate, in addition to the individual. Section 397.40 currently states information should be provided to the individual "or the individual's representative as appropriate." Numerous studies have documented the significant impact family members and other caregivers have on a person's choice of subminimum wage work. Alberto Migliore, et al., *Integrated employment or sheltered workshops: Preferences of adults with intellectual disabilities, their families, and staff*, 26 J. VOC. REHAB. 5-19 (2007). Both the individual and his or her family or caregivers, if applicable, should be provided with accessible and relevant information about the opportunities, services, and benefits of competitive integrated employment.

We also suggest the career counseling and information be required to include information about maintaining benefits while working. Individuals often misunderstand the rules about maintaining benefits and thus this becomes a perceived barrier to engaging in competitive employment. It is imperative that any career counseling provide participants with information on federal and state programs that continue healthcare and income supports to individuals with disabilities who engage in the workforce.

Section 397.40(a)(2): Counseling and information

Section 397.40(a)(2) could be read to imply that it only applies to individuals who have been through the VR process or who have been referred by the Client Assistance Program (CAP) insofar that it explains that a DSU may know of individuals with disabilities who are working for subminimum wage through the VR process or from the CAP. This language is concerning for several reasons.

To the extent that this language may unnecessarily limit the scope of individuals who need these services to only those who have been able to access the VR system, it is misleading because the statute does not impose such limitations. Rather, WIOA mandates that *all* individuals in subminimum wage receive career counseling and information before continuing

to be paid below minimum wage. Section 511(c). Accordingly, the regulations fall short of implementing the broader requirements under the statute and should be revised.

Moreover, this language is largely duplicative, because those who have been through the VR process and ended up in subminimum wage work will already be covered by the mandatory review services provided under Section 361.55.

Section 397.40(d): Documentation timeliness

The DSU is required to provide "timely documentation to the individual upon completion of the activities required under this section." We suggest the RSA stipulate a time period in which documentation must be provided. Failing to articulate a time period will likely result in resource-intensive disputes and inconsistencies in interpreting timeliness.

Section 397.20: Responsibilities to youth with disabilities who are known to be considering subminimum wage employment

The language "known to be considering" subminimum wage employment appears to substantially limit the impact of Section 511. WIOA seeks to address the need for DSUs to coordinate with each school district operating in a state, as well as workforce initiatives and the state welfare agency. How is a DSU presumed to be informed that a youth with disabilities is considering subminimum wage work? This regulation should specify more clearly how the coordinating agreements should address this process. While Section 361.42(b)(1) requires the agreements to address this issue, there is no requirement that schools or the state welfare agencies report to the state unit every instance when a person with disabilities expresses an interest in subminimum wage work.

First, we suggest defining the term "known." Is constructive knowledge sufficient? Second, we suggest adding language requiring the coordinating agreements address not only how they will implement the documentation, but how they will identify and inform the state unit when a youth with disabilities is contemplating subminimum wage work.

Section 361.24: Interagency cooperative agreements

The interagency agreements are crucial to the effective implementation of WIOA. As the RSA's comments suggest, one of the reasons transition age youth have not accessed VR services is due to agency disputes over responsibilities and a general failure to communicate. Fed. Reg. at 21079. This is also true of the entities administering the HCBS waivers. All these parties must work proactively and cooperatively at both the policy level, and on the individual level. Yet, the proposed regulations merely require there to be an agreement, without specifying some minimum contents of those agreements.

We strongly suggest the RSA provide more specific requirements for how interagency agreements will coordinate services at the policy level and at the individual level. First, at the policy level, the interagency agreement should be required to specify which agency will pay for

what services. The IDEA provides that the local educational agency is the default payor, 20 U.S.C. 1412(a)(12)

Second, each state should be required to include within its interagency agreement that VR career counselors must attend both student IEP meetings (for ages 16-21) and adult Individual Support Plan meetings to ensure individuals with disabilities obtain access to employment services.

Third, the regulations should require all cooperating agencies to notify program participants about the CAP in each state. The Client Assistance Program is a required component of every VR program because it serves an important enforcement function. Students and individuals in the Medicaid system need to be informed of its existence and how to access its services.

Section 361.41(5)(b): Interim eligibility

We strongly support the interim eligibility provisions of the new regulations. Many individuals with intellectual and developmental disabilities in Pennsylvania wait for 18 months to receive an eligibility determination. Many of these same individuals are also social security recipients.

Our only concern is that few states will take advantage of this provision. Given the extensive new requirements under WIOA and the lack of additional funding to support these services, it is dubious that any of the state agencies will immediately have the resources to implement new and optional services. For this reason, we suggest creating incentives for states to implement interim eligibility determinations. For example, the adoption of interim eligibility could be tied to the State Supported Employment Grant funding. We suggest making the implementation of interim eligibility a prerequisite to applying for the grant.

Section 361.54(b): Cost considerations

Permitting the DSU to consider the financial need and cost of providing services could lead to less services for those who are most in need. We appreciate the need to maximize services. However, considering the cost of providing services may result in excluding those who are most in need of vocational rehabilitation.

We believe this undermines the priority of service mandate to first serve those with the most severe disabilities. Indeed, the current case closure data measurements already create a disincentive for the DSU to truly serve those with the most severe disabilities, since such individuals may require more extensive services. While the DSU in Pennsylvania purports to only serve individuals with significant disabilities, we have repeatedly heard or have anecdotal information that establish that this is not necessarily the case. Explicitly authorizing the DSU to consider such costs will only exacerbate this significant problem.

Section § 361.45(e): We support the maximum time limit to receive services.

In Pennsylvania, individuals wait as long as 18 months for a determination of whether they are eligible for services. Individuals with intellectual disabilities who are at risk of being excluded from the workforce are often funded through the Medicaid Waiver system. However, they cannot access their waiver funds for supported employment until after they receive services or a determination from the DSU. The problem is two-fold: 1. individuals do not receive employment services for 18 months and as a result often end up in a sheltered workshop or adult day program because those services are available right away; 2. individuals receive notice that they are unable to work and are discouraged from pursuing Medicaid-funded employment services.

We suggest that the cooperative agreements between the state Medicaid agency and the VR agency address this dilemma. It would be particularly helpful if the RSA suggested possible solutions to which the agencies could agree. For example, DSUs could agree to provide employment services to a person being evaluated in trial work, and Medicaid could fund the cost of those services if the person is ultimately found unable to benefit by VR. This would provide a seamless transition from the VR system to the Medicaid system, and ensure that the correct agency alone was funding the services. Indeed, the proposed regulations provide for interim determination of eligibility for Social Security recipients. Section 361.42(b). This provision is not mandatory, but could be used in conjunction with the interagency agreement to support full employment opportunities.

Section 361.42(e)(2)(1): Trial work settings

We express concern that the proposed regulations continue to permit trial work experiences in a segregated setting. The regulation states "trial work experiences, [] must be provided in competitive integrated employment settings to the maximum extent possible." We strongly suggest removing the language "to the maximum extent possible."

A person cannot demonstrate their ability to work in competitive employment if their assessment is conducted in a segregated environment. Indeed, studies show that behavioral and emotional problems that occur in segregated settings can abate after a person is supported in integrated settings. Accordingly, we urge the RSA to prohibit trial work in segregated settings.

Section 361.42: Eliminating extended evaluations

We applaud the agency's decision to eliminate the extended evaluations exception to trial work experiences. We believe this furthers the Act's purpose of supporting work for all people with disabilities.

Section 361.43: Eliminate referral to subminimum wage work

We strongly believe Section 361.43(d)(2) should be eliminated from the new regulations. Section 361.43(d)(2) requires the VR agency to refer individuals found ineligible due to an inability to benefit to extended employment. As the agency explains elsewhere in the

commentary, the "new statutory requirements [were created to] ensure individuals with disabilities do not languish in subminimum wage employment or extended employment." Fed. Reg. 21084. Indeed, the entire thrust of the statute is to serve individuals outside of subminimum wage work. Although the DSU may not be able to serve that individual, he or she can receive employment services through Medicaid funds. In fact, Medicaid is the principal source of funding for subminimum wage work. Accordingly, we suggest this regulation be changed to refer the individual to their Medicaid service coordinator to identify what employment services the person may need.

This is particularly important because many individuals who receive a notice of inability to benefit mistakenly believe that they are incapable of working or receiving any employment supports. It is essential that individuals are referred to other sources of funding for employment supports rather than relegating them to subminimum wage work. The WIOA emphasizes competitive integrated employment for all, and this section of the regulations undermine that goal. "Embedded throughout the provisions of WIOA and the amendments to the Act is the principle that individuals with disabilities, including those with the most significant disabilities, are capable of achieving competitive integrated employment when provided the necessary skills and supports." Fed. Reg. at 21062.

Section 361.47(a) Record of services

Documenting that an individual has obtained employment at the wages and benefits customarily paid by the employer is an essential component in successfully implementing the Section 511 provisions. We strongly suggest the RSA require states to furnish such information in the aggregate, and make it available to the public. Enhancing transparency will increase the efficacy of WIOA.

Section 361.47(a) (10): Documenting an individual's input

Documenting the results of annual reviews is essential for two reasons. First, it ensures that reviews are in fact conducted. To that extent, we strongly suggest the RSA require DSUs to furnish data on the number and date of reviews, and the date of the individuals' exit from the DSU to ensure compliance.

Second, documenting the individual's input compels the DSU to focus on the individual's choices and needs. While person-centered planning has long been the standard for Individual Support Plans and Individual Employment Plans, in practice we know that the person is not always heard or consulted. Anecdotally, there have been instances where a service decision was made without even asking the person receiving services about her needs and preferences. We believe mandating this documentation will remind career counselors of their obligations to engage with the person to whom they are providing services. This provision can be made more robust by adding reporting requirements: requiring aggregate data be made available to the RSA and to the public.

Section § 361.55: Semi-annual review

Section 361.55 adds important services for individuals who may be under the misimpression that they are forever incapable of working and unable to access supported employment services. We know that many DSU offices in Pennsylvania have failed to contact individuals in subminimum wage work who were found ineligible. One office just began to track such individuals in the fall of 2014, and has yet to conduct an annual review with any of them.

We recommend the RSA require DSUs to conduct reviews for all individuals in subminimum work or extended employment who have previously been found ineligible to benefit, retroactively. The RSA might consider how far to reach back. However, there are hundreds of individuals who have been found ineligible to benefit, and will never receive the review mandated in this statute, because they have been discouraged from seeking services to support them in competitive integrated employment.

We appreciate the opportunity to provide these comments. Please do not hesitate to contact us if we may be of further assistance.

Sincerely,

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