DEPARTMENT OF EDUCATION

34 CFR Part 361

RIN 1820–AB13

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 regulations are needed to implement section 12(d) of the Rehabilitation Act of 1973 (Act), as amended by the Rehabilitation Act Amendments of 1992 (1992 Amendments) and the Rehabilitation Act Amendments of 1993. Section 12(d) of the Act requires that the Secretary promulgate regulations establishing requirements for the implementation of an order of selection for the receipt of vocational rehabilitation services. An order of selection is required under section 101(a)(5)(A) of the Act if a designated State unit (DSU) determines that it is unable to provide services to all eligible individuals who apply for services. If a DSU establishes an order of selection, it must first provide services to individuals with the most severe disabilities before serving other eligible individuals. The regulations are necessary to ensure the proper administration of the order of selection requirements by DSUs.

EFFECTIVE DATE: These regulations take effect on June 13, 1996.

FOR FURTHER INFORMATION CONTACT: Suzanne Tillman, U.S. Department of Education, 600 Independence Avenue, S.W., Room 3220, Mary E. Switzer Building, Washington, D.C. 20202–2735. Telephone: (202) 205–8303. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The State Vocational Rehabilitation Services Program is a State-administered program that provides individualized vocational rehabilitation (VR) services to eligible individuals with disabilities. The purpose of the program is to assist States in operating a comprehensive, coordinated, effective, efficient, and accountable program for vocational rehabilitation designed to assess, plan, develop, and provide VR services for individuals with disabilities so that they may prepare for and engage in gainful employment.

The program supports the National Education Goal that, by the year 2000, 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.

On July 16, 1993, the Secretary published a notice of proposed rulemaking (NPRM) in the Federal Register (58 FR 38482) to implement section 12(d) of the Act, as amended by the 1992 Amendments (Pub. L. 102–569) and the Rehabilitation Act Amendments of 1993 (Pub. L. 103–73), which requires that the Secretary issue regulations on the requirements for implementing an order of selection by a DSU.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 45 parties submitted comments on the proposed regulations. 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. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed. The Secretary also has not addressed comments that relate to issues that are more appropriately dealt with in other program regulations being developed to implement the 1992 Amendments.

In addition, the proposed 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. As a result of that review, several non-statutory paperwork requirements in the proposed regulations have been eliminated or modified. These changes are discussed in the following paragraphs and in the section-by-section summary.

Section 101(a)(5)(A) of the Act requires a DSU to explain how it will provide VR services to all eligible individuals or, if it cannot provide services to all these individuals, to describe and justify the order of selection the DSU will follow in serving eligible individuals, with first priority being given to individuals with the most severe disabilities. Accordingly, § 361.36(a)(1) of the final regulations requires DSUs that do not establish an order of selection to explain how, on the basis of its projected fiscal and personnel resources and its assessment of the rehabilitation needs of individuals with severe disabilities within the State, the DSU will continue to serve all individuals currently receiving services, provide assessment services to all applicants and VR services to all individuals determined to be eligible in the next fiscal year, and meet all other program requirements.

The proposed regulations would have required each DSU that does not establish an order of selection to provide detailed information to support that decision, including its projected number of applicants, eligible individuals, and qualified personnel, projected costs of services and administration, and projected revenues. The Secretary believes that requiring all DSUs to submit these projections is overly burdensome and unnecessary for those States that have not experienced problems in serving all eligible individuals in recent years. Thus, the requirements in the final regulations are more narrowly tailored to address the underlying problem of ensuring that DSUs do not improperly avoid establishing an order of selection.

The final regulations establish two different information requirements for DSUs that do not plan to establish an order of selection: one for DSUs that have demonstrated the ability to serve all eligible individuals and meet all program requirements and one for DSUs that have not demonstrated this ability. The first information requirement (§ 361.36(a)(2)) applies to DSUs whose past practice demonstrates their ability to serve all eligible individuals without an order of selection. DSUs will be subject to this requirement if they have provided assessment services to all applicants, provided the full range of services to all eligible individuals, made referral forms widely available, conducted outreach efforts to identify and serve those underserved in the past, and have not delayed the development of individualized written rehabilitation programs (IWRPs) or the provision of services for eligible individuals. This provision permits these DSUs to submit a narrative explanation of their ability in the next year to continue to serve everyone and meet all program requirements.

The second information requirement (§ 361.36(a)(3)) applies to DSUs that have not demonstrated their ability to serve all eligible individuals and meet all program requirements without an

order of selection. This more detailed information requirement would apply to DSUs that—(1) Said in their State plans for the current or past year that they could serve everyone, but, in fact, did not do so; (2) Served all eligible individuals in the current or past year by not meeting the requirements in § 361.36(a)(2); or (3) Provided services under an order of selection in the current or preceding fiscal year, but believe that they can serve all eligible individuals in the next fiscal year. These DSUs will be required to provide information, including projections, similar to the information that would have been required of all DSUs under the NPRM. Specifically, these DSUs must describe the changed circumstances that will enable them to serve all eligible individuals in the forthcoming fiscal year and must submit the projections required under § 361.36(a)(3) to support this determination, including projected numbers of applicants, eligible individuals, and qualified personnel, projected costs of services and administration, and projected revenues. In addition, § 361.36(a)(3) requires these DSUs to provide, as relevant, comparable data for the current or preceding fiscal year, or both years, of these projected costs and resources.

These changes in the final regulations are intended to reduce paperwork burdens on DSUs that have a demonstrated capacity to serve all eligible individuals and, at the same time, to ensure that if a DSU decides not to implement an order of selection, even though it has not been able to serve all eligible persons in the past, that the decision is supported in the State plan by sufficient data showing the DSU's projected costs and resources.

Section 361.36(a)—General Provisions

• *Assurance of ability to serve all eligible individuals.*

—Range of Services

Comments: Several commenters on § 361.36(a)(1)(i) of the proposed regulations requested that this provision specify that a DSU is able to provide the full range of services listed in section 103(a) of the Act. These commenters were concerned that a DSU could interpret the wording ''able to provide services'' to mean that it may avoid establishing an order of selection if it is able to provide some, but not all, of the services listed in section 103(a) of the Act.

Discussion: The Secretary agrees with these commenters. A DSU that assures that it is able to provide services to all eligible individuals must be able to provide all of the services listed in section 103(a) of the Act.

Changes: The Secretary has revised § 361.36(a)(1)(i) to provide that the State plan must contain an assurance that the DSU is able to provide the full range of services listed in section 103(a) of the Act, as appropriate, to all eligible individuals.

—Monitoring and review of assurances

Comments: Several commenters were concerned that the Secretary would not adequately monitor compliance with the assurances provided by a DSU. Several commenters recommended that the Secretary thoroughly examine a DSU's decision not to implement an order of selection and approve or disapprove that decision, as appropriate.

One commenter feared that, in order to avoid implementing an order of selection, DSUs may expand counselor caseload sizes beyond the capacity of counselors to serve eligible individuals in a meaningful way. Caseload sizes could continue to grow but might not trigger an order of selection.

One commenter suggested adding factors to measure a DSU's compliance with these regulations. This commenter also suggested that if a DSU is found in substantial noncompliance and fails to take corrective action, it should be subject to financial sanctions.

Several commenters stated that a DSU should be required to evaluate the impact of its order of selection to determine if there are any unintended consequences or exclusions of specific groups of individuals with disabilities.

Discussion: The Secretary ensures that a DSU is complying with its assurances through annual reviews and periodic on-site monitoring of State vocational rehabilitation programs required by sections 107(a)(3)(A) and 107(a)(4)(B) of the Act. Section 107(a)(3)(A) of the Act requires the Secretary, as part of the monitoring process, to conduct on-site visits, including on-site reviews of records, to verify that a DSU is following requirements regarding order of selection. Section 107(a)(4)(B) requires the Secretary to examine, in conducting the review and monitoring, a DSU's provision of services, including, if applicable, order of selection requirements.

Section 101(a)(7) of the Act requires a DSU to ensure, as part of its comprehensive system of personnel development, that it has an adequate supply of qualified personnel to provide vocational rehabilitation services. The regulations require DSUs that do not establish an order of selection to satisfy all VR program requirements, including those relating to the comprehensive system of personnel development. The Secretary also reviews and monitors compliance with section 101(a)(7) of the Act.

The Secretary does not believe it is necessary to add factors to measure a DSU's compliance with the order of selection requirements of the State plan. A DSU's compliance with the order of selection requirements will be monitored like any other State plan requirement, and a DSU's noncompliance with these requirements will be dealt with like any other finding of noncompliance with the State plan requirements.

The Secretary believes that a DSU (along with the State Rehabilitation Advisory Council (Council), if the DSU has a Council), should evaluate the impact of its order of selection as part of its administration of the program and would expect a discussion of this impact in its annual evaluation of the program.

Changes: None.

• *Explanation of how a DSU will serve all eligible individuals.*

—Detailed nature of explanation

Comments: Several commenters opposed the proposed requirement that a DSU provide a detailed explanation of the methods by which it will provide services to all eligible individuals because they believe it is overly burdensome. One commenter believed that the required projections in § 361.36(a)(1)(ii) of the proposed regulations might prevent closer cooperation between consumer groups and DSUs because consumer groups might believe that the incidence and prevalence of their disability is greater than indicated in the statistical data used by the DSU.

Several commenters believed that there is no practical way for a DSU to make the required projections because of the uncertainty of future funding levels and of the effect of the revised eligibility requirements under the Act.

One commenter stated that if projections are required, the Secretary should keep documentation to a minimum. This commenter requested that a DSU be able to use existing data, e.g., Federal census and population data, to make its projections.

Discussion: The legislative history accompanying the 1992 Amendments to the order of selection requirement indicates an expectation on the part of the Congress that the Secretary will promulgate regulations that will obligate States wishing to avoid establishing an order of selection to prove that they are indeed able to serve all eligible individuals. Nevertheless, the data

projections required in the proposed regulations have been significantly reduced in accordance with the Department's principles for regulating. Application of the remaining documentation requirements is limited to—(1) Those DSUs that were unable to serve all eligible individuals (including DSUs that established an order of selection) in the current or preceding fiscal year, but contend they will be able to do so in the next fiscal year; and (2) Those DSUs that were able to serve all eligible individuals in the current or preceding fiscal year only by not meeting the requirements in § 361.36(a)(2). The Secretary believes that the documentation requirements remaining in the regulations to support a DSU's conclusion that it is able to serve all eligible individuals, even though it has been unable to serve all eligible persons in the past, is fully consistent with congressional intent.

The Secretary believes that the required explanation will not impose any additional data collection burdens on a DSU. The Secretary believes that existing information in a DSU's required statewide studies and annual evaluations, comprehensive statewide assessments of the rehabilitation needs of individuals with severe disabilities, comprehensive system of personnel development, and budget data would enable a DSU to provide the required explanation without any need for additional data collection.

The Secretary believes that a DSU should be able to predict funding levels for the program during the upcoming fiscal year through use of State and Federal budget data.

The Secretary believes that Federal census and population data alone are not sufficient for a DSU to make the required projections. These data are not updated often enough for a DSU to rely solely on these sources in making its projections, but may be useful in conjunction with information from a DSU's statewide studies, comprehensive statewide assessments, comprehensive system of personnel development, and budget data.

Changes: The Secretary has revised § 361.36(a)(1)(ii) of the proposed regulations to reduce the data projections that a DSU must provide as part of its explanation of how it is able to serve all eligible individuals. This provision has been relocated to § 361.36(a)(3) of the final regulations and applies only to—(1) DSUs that were unable to serve all eligible individuals during the current or preceding fiscal year; and (2) DSUs that contend that they served all eligible individuals in the preceding and current fiscal years, but cannot attest to meeting the program requirements listed in § 361.36(a)(2) for both those years.

—*Projections for serving all eligible individuals with disabilities*

Comments: Several commenters suggested that the Secretary require a DSU to provide separate projections for serving individuals with non-severe, severe, and the most severe disabilities in providing the data in § 361.36(a)(1)(ii)(A) and (B) of the proposed regulations. These commenters believed that the approach taken in the proposed regulations would allow a DSU to average the costs of serving all populations, and the commenters recommended that a DSU be required to break out the costs of serving individuals with severe and the most severe disabilities. Commenters contended that the average projected cost of serving all individuals is substantially less than the cost of serving the subgroup of individuals with the most severe disabilities because of the variety of services and supports that individuals in this category require. One of these commenters also believed that providing specific data on each of these populations would help to determine the extent to which a DSU has engaged in aggressive outreach efforts to serve a greater number of individuals with the most severe disabilities.

One commenter requested that, in making its projections, a DSU be required to take into consideration the likelihood that more individuals will be applying for services as a result of the revised eligibility requirements established under the 1992 Amendments and that more of these individuals will be individuals with the most severe disabilities because of the expanded requirements to provide personal assistance and rehabilitation technology services.

Discussion: As discussed previously, the Secretary has significantly revised the proposed regulations to require DSUs to submit projections as part of their State plan only in limited circumstances. Specifically, § 361.36(a)(3) requires DSUs that were unable to serve all eligible individuals during the current or previous fiscal year, but believe that they do not need to establish an order of selection in the next fiscal year, to include in their State plans the projected numbers of eligible individuals, the projected costs of serving those individuals, the projected revenues, and the projected number of qualified personnel. (These State plan requirements also apply to DSUs that do not establish an order of selection but cannot provide the assurances in § 361.36(a)(2).) However, any DSU that does not establish an order of selection must still consider the rehabilitation needs of individuals with severe disabilities as part of its explanation under § 361.36(a)(1)(i), even though the final regulations do not require separate projections for individuals with non-severe, severe, and most severe disabilities under § 361.36(a)(3).

The Secretary agrees that averaging the costs of serving all eligible individuals would not provide an accurate estimate of the costs of serving individuals with severe and the most severe disabilities if a State relied solely on cost data for years prior to the enactment of the 1992 Amendments in making its projections. The Secretary believes that in making projections with respect to the cost of serving all eligible individuals, a DSU must consider the costs of serving individuals with severe disabilities.

The Secretary agrees that more individuals with severe disabilities and individuals with the most severe disabilities have become eligible to receive services under the revised eligibility requirements in the 1992 Amendments. However, the Secretary believes that any significant expansion in the number of eligible individuals that is attributable to the revised eligibility criteria has already taken place. Consequently, the Secretary believes there is no need to require DSUs under § 361.36(a)(3) to provide separate projections for serving individuals with non-severe, severe, and most severe disabilities as long as the projected number of all eligible individuals and the projected costs of serving those individuals is provided.

Changes: The Secretary has revised § 361.36(a)(1)(ii) of the proposed regulations to reduce the amount of data and related explanations that must be submitted as part of the State plan. In addition, the regulations require that this data be included as part of the State plan only if—(1) The DSU was unable to serve all eligible individuals in the current or preceding fiscal year; or (2) The DSUs did not meet the requirements in § 361.36(a)(2) in serving all eligible individuals in the current and preceding fiscal years. This provision has been relocated to § 361.36(a)(3) in the final regulations.

—*Cost-containment*

Comments: Several commenters suggested that a DSU be required to control costs before implementing an order of selection. One commenter suggested adding a new requirement to the regulations that a DSU, prior to

implementing an order of selection, implement methods to control costs, including, but not limited to, rigorous administrative controls and oversight, aggressively pursuing comparable services and benefits, paying vendors based on performance outcomes, developing equitable financial need policies, and establishing collaborative program funding through interagency agreements that will enable the DSU to provide services to all eligible persons.

Another commenter requested that a DSU that is unable to secure its full Federal allotment for the program due to insufficient State match be required to demonstrate efforts to obtain the full match in order to be able to implement an order of selection. This commenter also requested that the Secretary question or not approve a DSU's decision to implement an order of selection if it is unable to fill vacant counselor positions due to a statewide freeze on hiring, since counselor salaries are primarily funded by Federal funds.

On the other hand, several commenters requested that a DSU be prohibited from establishing inappropriate, arbitrary, or groundless policy restrictions on the provision of services that are intended to avoid implementation of an order of selection. Some of these commenters recommended that the Secretary establish an appeal process to the Rehabilitation Services Administration (RSA) Regional Offices so that parties may challenge these types of restrictions.

Discussion: The Secretary agrees that a DSU should undertake all efforts to control costs before it opts to establish an order of selection. Some of the means suggested by commenters for controlling costs are already Federal requirements (e.g., program costs must be reasonable and necessary and DSUs must pursue comparable services and benefits before providing most services), while others are State options (e.g., paying vendors based on performance outcomes, developing equitable financial need policies, and establishing collaborative program funding through interagency agreements). The Secretary encourages DSUs to use these State options whenever possible to contain costs.

In conjunction with a DSU's determination of whether it needs to establish an order of selection, a DSU should consider whether the adoption of certain cost containment measures would enable the DSU to serve all eligible individuals. Adoption of cost containment measures, therefore, should be considered both at the time the DSU develops its State plan submission on order of selection prior to the beginning of the fiscal year and whenever changed circumstances during the fiscal year warrant reevaluation of the need to establish an order of selection in accordance with § 361.36(b). If a DSU undertakes cost containment strategies and is still unable to serve all eligible individuals, it is required to establish an order of selection for services.

The Secretary does not believe there is authority to establish a link between a DSU's ability to meet its full matching requirement—and therefore earn its entire allotment—and its right to implement an order of selection. In fact, the inability of a DSU to obtain its full matching contribution may be a factor in its need to establish an order of selection, since a DSU would have fewer program funds available because of insufficient State dollars and the loss of some Federal funds.

As previously noted, the Secretary agrees that DSUs need to proceed carefully in establishing an order of selection. Therefore, the Secretary requires, under § 361.36(e)(1), that a DSU consult with and seriously consider the advice of the Council regarding the need to establish an order of selection. The Secretary does not believe it is necessary or advisable to establish an appeal process that is specifically for order of selection compliance issues. Section 107(c) of the Act provides a general appeals process for substantial noncompliance with any State plan requirement under this program.

Changes: None.

—*Assessment of rehabilitation needs of individuals with severe disabilities*

Comments: One commenter requested that the provision in § 361.36(a)(1)(ii)(B)(1) of the proposed regulations requiring a DSU to assess the rehabilitation needs of ''individuals with severe disabilities'' within the State be changed to require a DSU to assess the needs of ''individuals with the most severe disabilities.'' The commenter believed that this change would be consistent with section 101(a)(5)(A) of the Act.

Discussion: Section 101(a)(5)(A) of the Act provides that the State plan shall contain the plans, policies, and methods to be followed in carrying out the State plan and in its administration and supervision, including the results of a comprehensive, statewide assessment of the rehabilitation needs of ''individuals with severe disabilities'' residing within the State. Therefore, § 361.36(a)(1)(i) of the final regulations correctly tracks the language in section 101(a)(5)(A) of the Act. The Secretary notes, however, that the broad category of ''individuals with severe disabilities'' would include as a subcategory ''individuals with the most severe disabilities.''

Changes: None.

—*Interagency cooperative agreements*

Comments: One commenter requested that the provision in § 361.36(a)(1)(ii)(B)(4) of the proposed regulations, which highlighted or emphasized the consideration of cooperative agreements serving certain groups of individuals with disabilities, be changed to read ''including individuals served by the Individuals with Disabilities Education Act, * * * and any other cooperative agreements'' in order to ensure that equal weight is given to all cooperative arrangements.

One commenter recommended that the Secretary require a DSU to include in its projections estimates of the number of individuals with severe disabilities that will be provided services under the interagency cooperative arrangement with programs that rely on Javits-Wagner-O'Day Act (JWOD Act) set-asides.

Discussion: The Secretary believes that requiring in the State plan separate estimates of the number of individuals with disabilities to be served under interagency cooperative arrangements is overly burdensome. As long as the DSU considers these agreements when ascertaining the projected numbers of eligible individuals and the projected costs of administering its program, there is no need to provide a separate breakdown of the number of applicants or eligible individuals receiving services under each type of agreement.

Changes: In accordance with the Department's principles for regulating, the Secretary has revised the proposed regulations to eliminate the requirement that the DSU include estimates of the number of individuals to be served under interagency cooperative agreements as part of its projected costs of administering the program.

—*Development of order of selection as a contingency plan*

Comments: Several commenters requested that a DSU be required to develop an order of selection regardless of whether it needs to be implemented in the current fiscal year. These commenters believed it is important for each DSU to have an order of selection available as a contingency measure.

Discussion: There is no statutory authority to require a DSU to develop an order of selection if a DSU determines it is presently able to serve all eligible individuals and will be able to do so throughout the fiscal year. Section 101(a)(5)(A) of the Act requires a DSU

to establish an order of selection only if it is unable to serve all eligible individuals.

A DSU could, however, choose to develop the priority categories in an order of selection in anticipation of possible future need, but would still be required at the time of implementation of the order of selection to meet the public participation requirements of section 101(a)(23) of the Act, including consultation with the Council.

Changes: None.

• *Order of selection.*

—*Applicability of order of selection to funds not included in State match or Federal allotment*

Comments: One commenter requested that the order of selection requirement not apply to service funds that are not included in the State match or Federal allotment.

Discussion: The order of selection requirement applies to all expenditures under the State plan, including expenditures made with Federal funds and DSU expenditures made with non-Federal funds that are necessary to meet a DSU's matching and maintenance-of-effort requirements.

Changes: None.

—*Outcome and service goals*

Comments: One commenter suggested adding a paragraph to § 361.36(a)(2) of the proposed regulations requiring a DSU to show the outcome and service goals and the time in which they may be achieved for individuals. The commenter believed that this reporting requirement should be added to ensure that the Secretary will know with specificity the types of services and service outcomes being provided, either if a DSU elects to establish and implement an order of selection or if a DSU assures that it is able to serve all eligible individuals. According to the commenter, if a DSU establishes an order of selection for services, it will be very important for evaluation purposes to define the mix of services, goals, and timelines for providing services to individuals with the most severe disabilities.

Discussion: The Secretary agrees with the change suggested by the commenter. Section 101(a)(5)(A) of the Act requires a DSU to show the outcomes and service goals, and the time within which they may be achieved, for individuals provided services under an order of selection established by a DSU. Section 101(a)(10)(A) of the Act requires a DSU to include in its State plan the outcomes, service goals, and service costs for individuals under each priority category in a DSU's order of selection.

Changes: The Secretary has revised § 361.36(a)(2) of the proposed regulations to provide that a DSU's order of selection must include 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 for individuals with disabilities in each priority category within the order and the time within which these goals may be achieved. This provision has been relocated to § 361.36(a)(1)(ii) of the final regulations.

Section 361.36(b)—Time for Determining Need for and Implementation of an Order of Selection

—*Implementation of an order of selection and opening and closing of priority categories during the fiscal year*

Comments: One commenter recommended requiring a DSU to periodically review whether it needs to establish an order of selection. This commenter also recommended requiring a DSU to periodically update its projections under § 361.36(a)(1) of the proposed regulations so that the DSU, with advice and input from the Council (if the DSU has a Council), can make decisions with current information.

One commenter recommended that the regulations require a DSU to reevaluate its decision not to establish an order of selection at some regular interval identified in the regulations, rather than permit the DSU to determine the timing of its reevaluation. Otherwise, the commenter feared that many DSUs would delay reevaluation and likely be forced to implement an order of selection on an emergency basis.

One commenter suggested that a DSU submit reports to the Secretary and to the Council comparing the actual costs and numbers of individuals served with its projections under § 361.36(a)(1) of the proposed regulations and any adjustments to the projections.

Other commenters suggested that a DSU be required, no later than 45 days after the end of each quarter, to submit a report on how service and expenditure levels for that quarter and cumulatively for the fiscal year compare to the projections made by the DSU under § 361.36(a)(1) of the proposed regulations. These commenters believed that this type of reporting would allow the Secretary to track the accuracy of a DSU's projections. Other commenters recommended requiring a DSU to submit quarterly reports to the Secretary on the accuracy of a DSU's projections and the need to establish an order of selection.

One commenter inquired whether a DSU may implement an order of selection during the fiscal year, rather than at the beginning of the fiscal year. This commenter believed that requiring a DSU to establish an order of selection at the beginning of each fiscal year might cause a DSU to be overly conservative and to close more priority categories than is necessary.

One commenter inquired whether a DSU may adjust, during the fiscal year, which priority categories are open and closed.

Discussion: The Secretary considers DSU reevaluation of the need to establish an order of selection necessary to the proper management of the program. However, the Secretary does not believe that requiring reevaluation at regular intervals during the course of each fiscal year is necessary. A requirement of this type would be overly burdensome and would apply an inflexible standard to determinations that are best governed by a DSU's individual circumstances. The regulations, therefore, require a DSU to reevaluate its decision not to implement an order of selection for services, in consultation with the Council, whenever changed circumstances, such as a decrease in its fiscal or personnel resources or an increase in program costs, indicate that it may no longer be able to provide the full range of services to all eligible individuals. In addition, documentation related to reevaluations is to be provided to the Council, as well as to the Department during RSA's monitoring and review of the order of selection requirement under sections 107(a)(3)(A) and 107(a)(4)(B) of the Act.

A DSU is required to determine the need for an order of selection prior to the beginning of the fiscal year and to reevaluate that need during the year under § 361.36(b) if circumstances change after the beginning of the fiscal year. If changed circumstances warrant establishing an order of selection during the fiscal year, a DSU may implement an order of selection at that time. The Secretary prefers, however, for a DSU to implement an order of selection at the beginning of the fiscal year if it foresees any circumstances that may affect its ability to serve all eligible individuals throughout the year. The preparations needed to establish and implement an order of selection take time. During this time, resources may be further strained. Thus, the Secretary believes that a conservative approach toward implementing an order of selection and opening priority categories is preferable so that sufficient resources are available

throughout the year to serve all individuals with severe disabilities, including individuals with the most severe disabilities.

If a DSU implements an order of selection during the fiscal year, rather than at the outset, and thereafter cannot serve all individuals with severe and the most severe disabilities, it would be out of compliance with the order of selection requirement.

The Secretary believes that a DSU may use its discretion as to the timing for opening and closing priority categories as long as the order of categories is maintained. When considering whether to open a category, a DSU should evaluate not only current resources but also the impact that continuing to serve these eligible individuals under this category will have on resources expected to be available in the next fiscal year, or possibly beyond.

Changes: The Secretary has revised § 361.36(e)(1) to provide that the DSU shall consult with and seriously consider the advice of the Council regarding the need to establish an order of selection, including any reevaluation of the need to establish an order of selection under § 361.36(b)(2).

Section 361.36(c)—Establishing an Order of Selection.

—Further guidance on factors to be considered in establishing an order of selection

Comments: Several commenters recommended that the Secretary provide further guidance on what factors a DSU should use in establishing an order of selection. One of these commenters suggested adding five factors that a DSU should consider in establishing an order of selection: Lower levels of educational achievement; longer lengths of unemployment, under-employment, or lower level jobs; lower levels of self-esteem and self-worth; need for two or more services; and need for services for a longer length of time.

One commenter requested that a statement be added to § 361.36(c) indicating that the criteria for determining which individuals are individuals with the most severe disabilities must be equally applicable to, and not lead to the exclusion of, transitioning students. This commenter was concerned that a DSU may define an ''individual with the most severe disability'' by using factors, such as an employment history of repeated failures, that may exclude youth with severe disabilities.

Discussion: In establishing an order of selection a DSU can only consider severity of disability. The Secretary believes that an order of selection must be based on the factors or criteria contained in the definition of an ''individual with a severe disability'' in section 7(15)(A) of the Act. An ''individual with a severe disability'' is defined as an individual with a disability (1) 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 employment outcome; (2) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and (3) who has one or more physical or mental disabilities, as identified in section 7(15)(A) of the Act, or any other disability or disabilities that cause comparable substantial functional limitation.

In determining which individuals with severe disabilities are individuals with the most severe disabilities, for purposes of providing them with the highest priority in an order of selection, a DSU cannot merely apply the criteria in this definition. Because individuals with the most severe disabilities are a subgroup of individuals with severe disabilities, the Secretary believes that a DSU must refine these criteria to identify this subgroup.

A DSU may refine these factors, for example, by basing its order of selection on the number and degree of functional limitations, the amount of time vocational rehabilitation services would be needed, and the number of vocational rehabilitation services needed. When refining these factors, a DSU may choose to refine one factor or a combination of factors. The purpose of refining these factors is to link the nature and depth of the individual's functional limitations with the need for multiple and complex services that require an extended period of time for completion.

A DSU could refine the first criterion by requiring that an individual demonstrate limitations in three or more functional capacities, such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills. Alternatively, a DSU could specify the degree of functional limitations within one or more functional capacities by requiring that an individual demonstrate a minimum number of specific functional limitations, such as five specific functional limitations, within one or more functional capacities.

Possible examples of specific functional limitations within the functional capacity of self-direction include—(1) Purposeless shifting from one activity to another; (2) Inability to follow through with and complete assignments; (3) Problems related to time management; (4) Making decisions impulsively without consideration for previous plans or experience; (5) Limitations in gathering, organizing, and analyzing information; (6) Difficulties in adapting to changing work requirements; and (7) Inability to monitor work performance and to adjust behaviors and activities if the current performance is not adequate.

A DSU could refine the second criterion by specifying the minimum number of vocational rehabilitation services required by the individual or by specifying the extended period of time required for the provision of services. For example, in order to link the complexity or substantiality of the services provided to the severity of functional limitations, a DSU could establish a criterion that an individual require 2 or more major services that will be at least 12 months in duration. Major services could be defined as those services described in section 103(a) of the Act, excluding diagnostic services; supportive services, such as maintenance and transportation, that complement the provision of major services; and the counseling, guidance, and service coordination provided to every eligible individual.

A DSU could base the minimum time period required for the provision of multiple vocational rehabilitation services on a DSU's experience with the length of time necessary for individuals with severe disabilities to achieve an employment outcome. This extended period of time could be defined as the period of time at the upper end of the range required for individuals with severe disabilities to achieve an employment outcome, after eliminating any exceptional cases.

Socioeconomic factors, such as levels of educational achievement or length of unemployment or underemployment, and personal traits, such as levels of self-esteem, however, cannot be used in establishing an order of selection because these factors are not measures of severity of disability or even measures of disability. For example, using a factor such as low level of educational achievement would tend to include individuals whose disabilities were acquired at birth or during the developmental years while excluding individuals whose disabilities were acquired after having completed high levels of education, even though both groups of individuals might demonstrate equal substantial

functional limitations and have an equal need for multiple services over an extended period of time. Using a factor such as an employment history of repeated failures would have the effect of excluding youth who may have little or no employment history.

Changes: The Secretary has revised § 361.36(c) by adding a new paragraph (1) that states that 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.

• *Priority for individuals with the most severe disabilities.*

—*Federal criteria for defining individuals with the most severe disabilities*

Comments: Several commenters expressed concern about the potential for an individual to be denied services if the individual moves to a State in which the DSU uses different criteria for determining which individuals have the most severe disabilities. One commenter inquired as to whether there will be a consistent procedure for determining severity of disability, and other commenters requested that the regulations include appropriate criteria for defining ''most severe.''

Discussion: There is no statutory authority for the Secretary to establish Federal criteria to determine which individuals are individuals with the most severe disabilities. Section 101(a)(5) of the Act mandates that each DSU has the responsibility to develop its own criteria in this regard.

Changes: None.

—*Functional limitations*

Comments: One commenter requested that the Secretary clarify that a DSU may base an order of selection on limitations of functional capacities in addition to those listed in the statutory definition of ''individual with a severe disability'' in section 7(15)(A)(i) of the Act.

Another commenter suggested that the Secretary encourage DSUs to determine which individuals are the most severely disabled based on the types of functional limitations specified in the definition of ''developmental disability'' in section 6001(5) of the Developmental Disabilities and Bill of Rights Act (DD Act). ''Developmental disability'' is defined, in part, as a severe, chronic disability that results in substantial functional limitations in three or more of the following areas of major life activity: (1) Self-care. (2) Receptive and expressive language. (3) Learning. (4) Mobility. (5) Self-direction. (6) Capacity for independent living. (7) Economic self-sufficiency.

Discussion: A DSU may base an order of selection on limitations of functional capacities in addition to those functional capacities listed in section 7(15)(A)(i) of the Act. This listing is not all-inclusive because it is preceded by the words ''such as.'' However, functional limitations under this program must affect the achievement of an employment outcome. The DD Act definition specifies functional limitations that affect major life activities. Under The State Vocational Rehabilitation Services Program, some of the functional areas specified in the DD Act, such as economic self-sufficiency and capacity for independent living, would not necessarily be considered a functional limitation that impedes the achievement of an employment outcome, but rather would be considered a potential outcome or benefit of the VR program. Therefore, they could not be used as a factor in determining severity of disability under the VR program. As part of a review of a DSU's criteria for identifying individuals with the most severe disabilities, the Secretary would assess the appropriateness of using particular different functional capacities.

Changes: None.

• *Factors that cannot be used in determining order of selection of eligible individuals.*

—*Applying eligibility restrictions to order of selection decisions*

Comments: Several commenters opposed applying eligibility restrictions to order of selection decisions. These commenters stated that the eligibility and order of selection requirements are intended to stand alone under the Act.

Discussion: The Secretary agrees that the eligibility requirements and the order of selection requirements are separate requirements. Eligibility determinations can be based only on the statutory eligibility criteria in section 102(a)(1) of the Act. Determinations of the order of serving eligible individuals can be based only on severity of disability in accordance with section 101(a)(5)(A) of the Act. Neither determination can be based on any of the factors in § 361.36(c)(2).

Changes: None.

—*Residency prohibition*

Comments: One commenter believed that the residency prohibition needed to be clarified because, as worded in the NPRM, it would encourage individuals who live in one State to apply for services in another State.

Discussion: The Secretary's intention was to prohibit an order of selection from being based on any particular durational residency requirement as long as the individual is present in the State and can complete a program of services. The Secretary did not intend to address the issue of the ability of residents of one State to receive VR services in another State.

Changes: The Secretary has revised § 361.36(c)(1)(i) of the proposed regulations to prohibit an order of selection from being based on any duration of residency requirement, provided the individual is present in the State. This provision has been relocated to § 361.36(c)(2)(i) of the final regulations.

—*Type of disability prohibition*

—*Individuals who are blind or visually-impaired*

Comments: One commenter urged the Secretary to ensure that State rehabilitation agencies that serve only individuals who are blind or visually impaired be permitted to continue to serve these individuals if those agencies are operating under an order of selection. In addition, this commenter recommended that State rehabilitation agencies that serve all individuals with disabilities be required to recognize blindness as a severe disability for purposes of order of selection.

Discussion: If a DSU that serves only individuals who are blind or visually impaired is unable to serve all eligible individuals, it must prioritize according to severity of disability.

An individual who is blind or visually impaired must be assessed like all other eligible individuals with disabilities according to the three criteria in the definition of an ''individual with a severe disability'' in section 7(15)(A) of the Act. A DSU may not determine that an individual who is blind or visually impaired automatically meets this definition, i.e., that every individual who is blind or visually impaired is an individual with a severe disability or an individual with a most severe disability. An individual who is blind, however, would automatically satisfy the third element in the definition because ''blindness'' is included among the listing of physical or mental disabilities that the Act recognizes as causing substantial functional limitation.

In addition, if an individual is determined blind pursuant to Title II or Title XVI of the Social Security Act, section 102(a)(2) of the Rehabilitation Act considers that individual to have a severe physical or mental impairment that seriously limits one or more functional capacities in terms of an employment outcome, thus satisfying the first criterion in the definition of an

''individual with a severe disability.'' There is no basis in the Act, however, for automatically determining that an individual who is blind or visually impaired would require multiple vocational rehabilitation services over an extended period of time.

Changes: None.

—*Individuals with disabilities of alcoholism and other drug abuse*

Comments: One commenter was concerned that individuals with disabilities of alcoholism and other drug abuse would not receive fair consideration under an order of selection. In order to ensure fair consideration for these individuals, the commenter requested that criteria be added that require a DSU to include among individuals with the most severe disabilities those individuals with chronic relapsing conditions.

Discussion: Section 105(a)(5)(A) requires a DSU, not the Secretary, to establish criteria for determining which individuals with severe disabilities are individuals with the most severe disabilities. Any criteria established by a DSU for identifying individuals with the most severe disabilities should apply equally to individuals with chronic and individuals with acute disabling conditions. Many individuals with chronic relapsing conditions, such as alcohol or drug abuse, may experience substantial functional limitations and require multiple vocational rehabilitation services over an extended period of time. However, an assessment of whether a particular individual with a disability meets these criteria, including an assessment of an individual who is disabled because of alcohol or drug abuse, must be done on a case-by-case basis.

Changes: None.

—*Source of referral prohibition*

Comments: One commenter inquired whether the emphasis on interagency cooperative arrangements in the Act allows a DSU to establish a priority under an order of selection for eligible individuals referred by school systems under the Individuals with Disabilities Education Act (IDEA) or the Carl D. Perkins Vocational and Applied Education Act (Perkins Act).

Discussion: A DSU may not establish a priority under an order of selection for eligible individuals referred by school systems under IDEA or the Perkins Act because the source of referral is not necessarily an indicator of severity of disability. While some of these individuals might be individuals with severe or the most severe disabilities, all individuals referred by schools under these programs may not necessarily meet these criteria. This determination must be made on an individual basis.

Changes: None.

—*Prohibition against using type of expected employment outcome*

Comments: Several commenters opposed this prohibition. Several commenters contended that the purpose of the Title I program is to assist individuals with disabilities to enter into gainful employment, and, therefore, the type of expected employment outcome should be used as a factor in establishing an order of selection. One commenter contended that one of the evaluation standards for the program to be developed by the Secretary under section 106(a)(2) of the Act may relate to the achievement of competitive employment outcomes and an increase in post-placement earnings. The commenter believed it is unfair to evaluate a DSU on the level of earnings of the individuals it places in employment if it cannot use type of employment and amount of earnings as a factor in establishing an order of selection.

Finally, one commenter inquired whether, given the increased emphasis in the Act on supported employment, a DSU should be permitted to establish a priority in its order of selection for eligible individuals whose employment outcome is in a supported employment setting.

Discussion: Individuals with multiple functional limitations and a need for multiple services over an extended period of time will have varying expected employment outcomes, including competitive employment, supported employment, and other types of employment. Thus, type of expected employment outcome and level of post-placement earnings are not indicative of severity of disability and cannot be used as criteria for determining the level of severity of disability.

Although an individual whose employment outcome is in a supported employment setting would be included in the group of individuals with the most severe disabilities because supported employment services under the Act can only be provided to individuals with the most severe disabilities, a DSU cannot give individuals whose employment outcome is in a supported employment setting priority over other individuals with the most severe disabilities who have different employment outcome goals.

Changes: None.

—*Prohibition against considering the particular service needs of an individual or anticipated cost of services required by an individual*

Comments: Several commenters opposed these prohibitions. Several commenters questioned the logic of prohibiting consideration of service needs when establishing an order of selection because the need for multiple services is part of the definition of ''individual with a severe disability.'' One commenter also pointed out that this restriction is contrary to previous RSA sub-regulatory guidance that has allowed DSUs to use service needs and costs in establishing priority categories for individuals with non-severe disabilities. Finally, one commenter inquired whether it is consistent with the Act for a DSU to establish a priority in its order of selection for eligible individuals who require rehabilitation technology devices and services.

Several commenters believed that the Secretary should revise the regulations to allow a DSU to develop an IWRP for only non-purchased services if resources are not available to also provide purchased services. These commenters requested that a DSU that has established an order of selection for services be allowed to provide a priority to persons who do not have a severe or most severe disability and who need only non-purchased services as long as adequate resources are available to serve first those individuals who are the most severely disabled.

Discussion: The Secretary agrees that clarification is needed. This provision is intended to prohibit a DSU from giving priority to an individual who has one or more specific service needs over another individual who has different service needs. For example, a DSU is prohibited from giving priority to individuals who require physical restoration services over individuals who require vocational training. A DSU is also prohibited from giving priority to individuals who require rehabilitation technology devices and services, as raised by one commenter, over any other individual who requires a different service.

One of the examples provided in the preamble to the proposed regulations to illustrate this provision may have caused confusion. The example stated that a DSU is prohibited from establishing an order of selection that gives priority to individuals who require short-term services over individuals who require long-term services. Since a DSU is required to consider, in establishing its order of selection, an individual's need for vocational rehabilitation services over an extended period of time under the second factor of the definition of ''individual with a

severe disability,'' the use of the words ''short-term'' and ''long-term'' was inappropriate. The example was intended to illustrate the principle that the cost of services cannot be a factor in an order of selection and that DSUs cannot give priority to individuals who need short-term, less costly services over individuals who need longer term and more costly services.

The Secretary believes that there is no basis under the Act for exempting from the order of selection requirement the provision of non-purchased services. The Act does not draw any distinction between the provision of purchased and non-purchased vocational rehabilitation services with respect to a DSU's determination of the order in which it will provide services to eligible individuals if it cannot serve all eligible individuals. The order must be predicated, as section 101(a)(5)(A) requires, on severity of disability: Individuals with the most severe disabilities must be served first.

This means, for example, that if a DSU has established three service categories for serving eligible individuals (i.e., individuals with the most severe disabilities, individuals with severe disabilities, and individuals with non-severe disabilities), then it must be able to provide all needed services, whether purchased or not, to all individuals with the most severe disabilities before serving any individuals with severe disabilities. In addition, it must be able to provide all needed services to all individuals with severe disabilities before serving any individuals in the last category who have less than severe disabilities. An individual's need for only non-purchased services cannot override this order.

Thus, the Secretary believes that a DSU cannot establish a priority category anywhere in its order of selection that provides solely for the provision of non-purchased services, even among individuals with non-severe disabilities. This interpretation represents a policy reversal by RSA of its position in subregulatory guidance (RSA-MT–92–17, March 20, 1992), which permitted a DSU to give a service priority to non-severely disabled individuals whose rehabilitation needs do not require the expenditure of case service funds (i.e., individuals who need only counseling, guidance, and placement services that can be provided by DSU staff) over other non-severely disabled individuals.

To address the concern of some DSUs on this issue, the Secretary has proposed regulations for this program in 34 CFR 361.37(c) that were published in the Federal Register on December 15, 1995 (60 FR 64476) and that would provide a limited exception to this prohibition. These proposed regulations would authorize any DSU that has implemented an order of selection to establish an expanded information and referral program that includes the provision of job referral services to eligible individuals who are not being served under a DSU's order of selection, provided that certain State plan requirements are met. These requirements include a description in the State plan of the level of commitment of staff and other resources for this purpose and an assurance that funds to carry out this program will supplement and not supplant funds available for providing VR services to eligible individuals who are able to be served under the DSU's order of selection.

Changes: The Secretary has clarified § 361.36(c)(1)(vi) of the proposed regulations by providing that the need for specific services by an individual cannot be the basis for an order of selection. This provision has been relocated to § 361.36(c)(2)(vi) of the final regulations.

—*Income level of the individual or the individual's family*

Comments: Several commenters recommended that a DSU be permitted to give priority to persons on public assistance in its order of selection because these individuals have a greater need for services than those who have larger incomes.

Discussion: A DSU may not give priority to persons on public assistance under its order of selection because use of public assistance is a socioeconomic factor that may not necessarily be related to the presence of a disability or to the severity of that disability. Individuals who are on public assistance and who are included in a priority category currently being served by a DSU can receive services. As noted in the preamble to the NPRM, however, the income level of an individual or the individual's family can be a factor only in determining whether an individual is required by a DSU to pay part of the cost of a service. This is a State option permitted under current regulations in 34 CFR 361.47(a).

Changes: None.

—*Transitioning students*

Comments: One commenter believed the intent of section 101(a)(24)(A) (i), (ii), and (iii) of the Act is to ensure that all eligible students receive services in a timely manner and to ensure that there is no gap in services between the school system and the vocational rehabilitation system.

One commenter inquired how a DSU will handle transitioning special education students if an order of selection is implemented. Specifically, the commenter inquired whether a student who is receiving vocational rehabilitation services would continue to receive services if the student falls outside of the priority categories being served under an order of selection established by a DSU.

Another commenter was concerned that transitioning students would be placed on waiting lists for services. This commenter recommended requiring a DSU operating under an order of selection to include in its State plan the plans, policies, and procedures to identify how the DSU will work with education officials and others to meet the needs of transitioning youth and to otherwise fulfill their obligations under the Act concerning the provision of transition services.

Discussion: Even though section 101(a)(24)(A) (i), (ii), and (iii) of the Act strengthen the provisions for transition services to students with disabilities, a student who is determined eligible for services after a DSU implements an order of selection will be served only if the student is among those individuals included in a priority category that is currently being served under the DSU's order of selection.

Section 361.36(d)(3), however, provides that a DSU must ensure that it will continue to provide all needed services under an IWRP to any eligible individual who has begun to receive services prior to the effective date of the order of selection, irrespective of the severity of the individual's disability. Thus, for example, if a transitioning student with severe disabilities is receiving vocational rehabilitation services under an IWRP prior to the effective date of the order of selection, the student will continue to receive all needed services even if the DSU is able under its order of selection to initiate services only to individuals with the most severe disabilities.

Transitioning students who are not included in a priority category that is currently being served under a DSU's order of selection will be placed on a waiting list unless services were begun prior to the implementation of the order of selection.

Changes: None.

—*Individuals with less severe disabilities*

Comments: One commenter inquired whether individuals with less severe disabilities will be systematically left out of the process in those DSUs that implement an order of selection. This

commenter feared that the proposed regulations permit a DSU to refuse services to an individual because his or her disability is not severe enough.

One commenter inquired whether a DSU may limit the number of individuals with non-severe disabilities who may be served under an order of selection so that there will be funds available to serve individuals with a severe disability who may apply for services.

Discussion: The order of selection requirement mandates that services be provided first to individuals with the most severe disabilities before serving other eligible individuals. This means that individuals with the most severe disabilities are served before individuals with severe disabilities and individuals with non-severe disabilities. A DSU that implements an order of selection may be unable to serve eligible individuals with non-severe disabilities.

The Secretary urges DSUs operating under an order of selection to be conservative in assessing their ability to serve individuals other than those with the most severe disabilities before opening additional priority categories. This approach is needed to ensure that sufficient resources are available throughout the year to serve individuals under higher priority categories (i.e., individuals with most severe disabilities and individuals with severe disabilities) who apply for services and become eligible after the beginning of the fiscal year. As stated previously, the Secretary prefers this conservative approach since a potential increase in the number of applicants with severe disabilities might affect the DSU's ability to comply with the order of selection requirements throughout the year.

Changes: None.

Section 361.36(d)—Administrative Requirements

—Identify the order of selection as a State-imposed requirement

Comments: One commenter recommended deleting this requirement. The commenter stated that the only legally permissible reason for implementing an order of selection policy is resource limitations. Since funding for the program is a shared responsibility of State and Federal governments, the commenter believed there was no reason to attribute resource shortfalls exclusively to a State.

Discussion: The Secretary believes that the commenter misinterpreted this provision of the proposed regulations. The intent of the provision was for a DSU to identify its particular order of selection policy as a State-imposed requirement (not the order of selection requirement itself, which is a Federal requirement) since this policy is a State rule or policy relating to the administration or operation of the program under section 17 of the Act. Nevertheless, the Secretary believes that there is no reason to particularly highlight this one State-imposed requirement in the regulations over other State-imposed requirements, such as a State's financial needs test. The Secretary intends to address State-imposed requirements in general in other regulations for this program.

Changes: The Secretary has deleted the requirement in § 361.36(d)(2) of the proposed regulations that a DSU identify its order of selection policy as a State-imposed requirement.

—Written policies

Comments: Several commenters suggested that written policies for an order of selection include requirements that the policies must provide that affected individuals are notified of the State's particular order of selection, the priority category to which they have been assigned, and their right to appeal assignment to a particular priority category.

One commenter suggested revising § 361.36(d)(3) of the proposed regulations to provide that a DSU must establish written policies related to the development, establishment, and administration of the order of selection that should include, but not be limited to, the following: (1) Consultation with the Council. (2) Staff orientation and training. (3) Notification to individuals applying for services, or in an appropriate case, the parent, family member, guardian, advocate, or authorized representative of such an individual. (4) Monitoring procedures. (5) Caseload management. (6) Evaluation of effectiveness of the order of selection. The commenter believed that these policies should be required since they include important accountability elements.

Discussion: The Secretary agrees that a DSU must ensure that each eligible individual is informed of the priority categories that have been established in a DSU's order of selection, of the particular priority category to which he or she has been assigned, and of his or her right to appeal assignment to a particular priority category under the State's procedures for reviewing rehabilitation counselor or coordinator determinations. The Secretary believes these are basic procedural rights that eligible individuals have under this program. These notification requirements are specified in § 361.36(d)(2).

In accordance with the Department's principles for regulating, however, the Secretary has eliminated the requirement in the proposed regulations that DSUs establish written policies related to the development, establishment, and administration of its order of selection. The Secretary believes that requiring DSUs to establish written policies covering all aspects of the implementation of an order of selection is overly burdensome. Nevertheless, the Secretary encourages a DSU to develop policies, as needed, to ensure proper administration of its order of selection, including policies in areas such as staff orientation and training, monitoring procedures, caseload management, and evaluation and management of the order of selection.

Changes: The Secretary has revised § 361.36(d)(3) of the proposed regulations to require a DSU to notify all eligible individuals of the priority categories in a DSU's order of selection, their assignment to a particular category, and their right to appeal assignment to a particular priority category. This provision has been relocated to § 361.36(d)(2) of the final regulations.

—Continuity of services

Comments: One commenter requested clarification of this provision. The commenter noted that a person could have a completed and signed IWRP, but not yet have begun to receive services under the IWRP. This commenter requested that the regulations be revised to provide that anyone with a completed and signed IWRP must continue to receive services in accordance with their approved IWRP, irrespective of the severity of their disability. Another commenter inquired whether the continuity of services requirement entitles an individual who is receiving services under one DSU's order of selection to receive services from a DSU in another State if that individual moves and falls outside of the priority categories being served by the DSU in the second State.

Discussion: The continuity of services requirement ensures that an eligible individual who has begun to receive services under an IWRP prior to the effective date of a DSU's order of selection will continue to receive all needed services, including services that may be necessary because of amendments to the IWRP, irrespective of the severity of that individual's disability.

An eligible individual who has a completed IWRP, but who has not begun to receive services under that

IWRP, would not be covered by this requirement. This means that the continuity of services requirement does not apply to any services provided in developing an eligible individual's IWRP. This requirement takes effect at the point in the rehabilitation process when services leading to an employment outcome have been initiated under an IWRP. Finally, the continuity of services requirement is DSU-specific and does not entitle an individual who is receiving services under one DSU's order of selection to receive services under another DSU's order of selection if the individual is not included among the individuals being served under the second DSU's order of selection.

Changes: The Secretary has revised § 361.36(d)(4) of the proposed regulations to ensure that a DSU continues to provide all services needed by 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. This change is necessary to clarify that it is the receipt of services under an IWRP that triggers the continuity of services requirement. This provision has been relocated to § 361.36(d)(3) of the final regulations.

—Third-party funding arrangements

Comments: One commenter recommended that the Secretary permit third-party funding arrangements that conflict with a DSU's order of selection if these arrangements reflect priorities in national or State policy. Another commenter feared that requiring DSUs to renegotiate third-party arrangements will result in a considerable reduction in resources to serve individuals with disabilities.

One commenter recommended that the Secretary provide a further explanation of how a DSU can ensure that its third-party arrangements are ''consistent'' with its order of selection for services. This commenter also requested that the Secretary take into consideration the practical difficulties for a provider of renegotiating a contract midstream. Another commenter inquired whether cooperative arrangements, like third-party arrangements, must be consistent with a DSU's order of selection.

One commenter questioned whether a DSU may select a category of individuals for priority under its order of selection because that category is funded by targeted funds from another agency.

Discussion: The Secretary believes that a DSU's funding arrangements for providing services, such as third-party arrangements and cooperative arrangements, cannot override its order of selection if those funds are used under the State plan. For example, a DSU that receives third-party funding to serve individuals with mental illness may not serve individuals with mental illness who fall outside of the priority categories being served under the order of selection. This is necessary to ensure that an order of selection is applied fairly and evenly to all individuals regardless of whether funding arrangements are in place to serve individuals from particular disability groups. If a funding arrangement is inconsistent with a DSU's order of selection, a DSU must renegotiate these arrangements so that individuals are served in a manner consistent with the DSU's order of selection.

Changes: The phrase ''under the State plan'' has been added to § 361.36(d)(4) to clarify that any funding arrangements that are used by a DSU to provide services under the State plan must be consistent with a DSU's order of selection.

—Other requirements

Comments: Several commenters were concerned that there is an inadequate number of counselors qualified to properly evaluate severity of disability. These commenters suggested that the Secretary ensure that qualified counselors are available to evaluate individuals to determine whether they will receive services under an order of selection.

Discussion: Section 101(a)(7) of the Act requires a DSU to develop a comprehensive system of personnel development to ensure that an adequate supply of qualified State rehabilitation professional and paraprofessionals is available in the State. The Secretary believes that this provision mandates that staff in sufficient numbers be qualified to properly evaluate functional limitations for purposes of determining severity of disability. The Secretary believes that all DSUs operating under an order of selection must provide staff with appropriate training to be able to make these determinations.

Changes: None.

Section 361.36(e)—State Rehabilitation Advisory Council

Comments: One commenter recommended that the Secretary highlight the responsibility of the DSU to seek and seriously consider the advice of the Council on DSU criteria for determining which individuals are individuals with the most severe disabilities.

Several commenters suggested that a DSU that has implemented an order of selection be required to consult other advisory boards, service providers, advocacy organizations, consumers, family members, and rehabilitation vendors, in addition to the Council, regarding the content of the order of selection. One of these commenters stated that this consultation is necessary because the composition of the Council may not ensure sufficient or equal representation by persons of different disabilities, such as persons with mental illness.

Several commenters recommended that the Secretary add a new § 361.36(f) stating that the client assistance program and other parties must be consulted, under section 101(a)(23)(C) of the Act, before revisions are made to a DSU's order of selection.

Discussion: The Secretary does not believe that it is necessary to further highlight the responsibility of a DSU to seek and seriously consider the advice of the Council when developing the criteria for determining which individuals are the most severely disabled. The Secretary believes that § 361.36(e)(3) sufficiently highlights this responsibility.

The Secretary agrees with the commenters who suggest that advisory boards, other than the Council, service providers, advocacy organizations, consumers, family members, rehabilitation vendors, and the director of the client assistance program (CAP) are valuable sources of information and should be consulted by a DSU in determining the content of its order of selection. The Secretary believes that consultation with these and other groups as to the content of the DSU's order of selection is sufficiently addressed under sections 101(a)(18), 101(a)(23), and 105(b)(1) of the Act. These statutory provisions provide for broad public participation in the development of the State plan and of policies governing the provision of vocational rehabilitation services under the plan.

Changes: None.

Additional comment

—Development of IWRP

Comments: Several commenters requested that a DSU not be required to develop an IWRP for all individuals eligible for vocational rehabilitation services under the Act if the DSU cannot serve all eligible individuals and is providing services under an order of selection. These commenters stated that requiring a DSU that has implemented an order of selection to develop IWRPs for all eligible individuals, regardless of

whether the individual could currently be served, would result in unnecessary work for vocational rehabilitation counselors and would give false hope to individuals who fall outside of the categories being served.

Discussion: The Secretary understands the concern expressed by these commenters and is addressing this issue in other vocational rehabilitation program regulations. The proposed regulations concerning development of an IWRP for this program published in the Federal Register on December 15, 1995 (60 FR 64476, proposed § 361.45(a)) would require a DSU that has implemented an order of selection to develop an IWRP only for each eligible individual that it is able to serve.

Changes: None.

Executive Order 12866

Assessment of Costs and Benefits

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 to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the 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 Benefits Relative to Potential Costs of the Regulatory Provisions Discussed Previously in This Preamble

The Secretary believes that the final regulations represent the least burdensome way to implement the statutory requirement that a DSU explain the methods by which it will serve all eligible individuals for VR services or, in the alternative, establish and justify the order of selection it shall follow in serving first those individuals with the most severe disabilities. In addition, the Secretary believes that the regulations present the most effective means of ensuring that DSUs do not improperly avoid establishing an order of selection (i.e., failing to establish an order of selection even though the DSU cannot serve all eligible individuals). Reduction of burden on DSUs and other benefits resulting from the final regulations are discussed in the following paragraphs of this section and throughout the analysis of comments and changes section of the preamble.

Reduction of Paperwork Burden on Grantees

As stated previously in this preamble, review of the final regulations in accordance with the Department's principles for regulating resulted in two major, burden-reducing changes from the proposed regulations. First, under the final regulations, DSUs that have successfully served all eligible individuals in the past are not required to include detailed projections (e.g., projected number of eligible individuals, projected program costs and revenues) as part of their explanation of how they will continue to serve everyone and meet all other program requirements in the next year. As long as a DSU can provide the assurances required in the regulations to confirm its past ability to serve all eligible individuals, the DSU's explanation under § 361.36(a)(1) is not subject to minimum content requirements. Second, the regulations reduce the number of data projections and related demonstrations that must be included as part of the explanation for DSUs that have been unable to serve all eligible individuals in the past. The remaining projections are needed to indicate whether a DSU that has been unable to serve all eligible individuals previously can serve everyone in the next year.

Evaluation of Need to Establish an Order of Selection

Once a DSU decides, prior to the beginning of the fiscal year, that it does not need to establish an order of selection, the final regulations require the DSU to reevaluate this decision whenever changed circumstances indicate that it may no longer be able to serve all eligible individuals. DSUs, therefore, are responsible for determining whether they need to implement an order of selection after the start of the year. The Secretary prefers this flexible approach rather than imposing in the regulations a specific time when all DSUs must reevaluate the need to establish an order of selection, as some commenters on the proposed regulations suggested.

Instructions for Establishing an Order of Selection

Section 361.36(c) provides, for DSUs unable to serve all eligible individuals, clear directives on how to establish an order of selection for providing services. In addition, this section includes specific factors that cannot be used in developing an order of selection. Many commenters on the proposed regulations had requested clarification as to whether these factors could be considered in formulating specific priority categories under an order of selection.

Additional Benefits

The final regulations include provisions intended to enhance the protection of individuals with disabilities by DSUs operating under an order of selection. For example, the regulations require DSUs to notify all eligible individuals of the priority categories in the State's order of selection, as well as their assignment to a particular category. Additionally, the regulations require DSUs to continue to serve 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.

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 collection of information in these final regulations is displayed at the end of the affected section 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 Secretary'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 in 34 CFR Part 361

Administrative practice and procedures, Grant programs—education, Grant programs—social programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

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

Dated: March 4, 1996.

Richard W. Riley,

Secretary of Education.

The Secretary amends Part 361 of Title 34 of the Code of Federal Regulations as follows:

PART 361—THE STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

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

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

2. Section 361.36 is revised to read as follows:

§ 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: Secs. 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))

[FR Doc. 96–11808 Filed 5–13–96; 8:45 am]

BILLING CODE 4000–01–P