DEPARTMENT OF EDUCATION

34 CFR Part 361

RIN 1820–AB52

State Vocational Rehabilitation Services Program

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

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the State Vocational Rehabilitation Services Program (VR program) by revising the scope of employment outcomes under the VR program. These regulations redefine the term ''employment outcome'' (as it applies to the VR program) to mean outcomes in which an individual with a disability works in an integrated setting. This action is necessary to reflect the purpose of Title I of the Rehabilitation Act of 1973, as amended (Act), which is to enable individuals with disabilities who participate in the VR program to achieve an employment outcome in an integrated setting.

DATES: These regulations are effective October 1, 2001, but may be implemented by States prior to that date, as discussed in the appendix.

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

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SUPPLEMENTARY INFORMATION: The VR program provides necessary vocational rehabilitation (VR) services to enable eligible individuals with disabilities, particularly those with significant disabilities, to enter or continue to work in the integrated labor market along with the general population. Through the VR program, State agencies work with individuals with disabilities to assist those individuals in achieving employment, ideally a competitive job in an integrated setting. Integrated employment settings refer to those settings that are typically found in the community in which individuals with disabilities have the same opportunity to interact with others as is given to any other person (see 34 CFR 361.5(b)(33)(ii) for a detailed definition). Accordingly, these regulations revise the scope of employment outcomes under the VR program in order to assist program participants to attain jobs in an integrated setting.

On June 26, 2000, we published a notice of proposed rulemaking (NPRM) for this part, 34 CFR part 361, in the **Federal Register** (65 FR 39492) in which we proposed the major changes that are to take effect in these final regulations. It is important that we clarify that on January 17, 2000, we published final regulations for this part in the **Federal Register** to implement changes to the Rehabilitation Act of 1973 made by the Rehabilitation Act Amendments of 1998 contained in Title IV of the Workforce Investment Act of 1998 (WIA), as amended (1998 Amendments). The final regulations being promulgated in this present publication are pursuant to the June 26, 2000 NPRM and establish additional changes to 34 CFR part 361 that were not included in the final regulations implementing the 1998 Amendments published in the **Federal Register** on January 17, 2000.

We decided to publish these final regulations (revising the term ''employment outcome'' as it applies to the VR program) separately from the final regulations implementing the 1998 Amendments since these regulations do not take effect until fiscal year (FY) 2002 (or sooner at the discretion of each State). In contrast, the final regulations implementing the 1998 Amendments will be effective for all States 30 days after the date of publication. Moreover, we are publishing these regulations, with their delayed effective date, at this time in order to give State units, individuals with disabilities, and other service providers sufficient time to prepare for the changes that will result from these regulatory changes.

The proposed regulatory changes that we discussed in the preamble to the NPRM preceding these final regulations (65 FR 39492–39494) have been maintained in these final regulations. These changes include the following:

- Amending the regulatory definition of ''employment outcome'' under the VR program to refer to outcomes that occur in integrated settings.
- Amending the regulatory referral requirements to require the State unit to refer to local extended employment providers any individual with a disability who makes an informed choice to pursue extended employment (also referred to as ''non-integrated employment'' or ''sheltered employment'') as his or her long-term employment goal.
- Making conforming changes to the regulatory requirements concerning records of service and annual reviews of non-competitive outcomes.

As we discussed in detail in the preamble to the NPRM, the statutory authority for redefining the term ''employment outcome,'' for purposes of the VR program, is based on section 7(11) of the Act. That statutory provision defines ''employment outcome'' under the VR program as full-time or, if appropriate, part-time competitive employment in the integrated labor market, supported employment, or any other vocational outcome, as defined by the Secretary (including the vocational outcome of self-employment, telecommuting, or business ownership), that is consistent with the Act. Accordingly, the Act entrusts the Secretary to determine the scope of employment outcomes, other than competitive employment (*i.e.,* integrated work at or above minimum wage—see 34 CFR 361.5(b)(11)) and supported employment (*i.e.,* integrated work with ongoing support services—see 34 CFR 361.5(b)(53)), that individuals with disabilities may pursue under the VR program. Pursuant to this authority, the Secretary has determined that defining ''employment outcome'' under the VR program as employment that occurs in integrated settings is necessary to ensure that persons with significant disabilities are supported in pursuing competitive and supported employment. We believe this change is consistent with the Act's emphasis on the integration into society of persons with disabilities and on the ability of individuals with disabilities, including those with the most significant disabilities, to achieve employment in integrated settings if necessary services and supports are provided.

We also noted in the NPRM, and discuss at length in the Analysis of Comments and Changes in the appendix to these regulations, that the regulatory changes we are establishing do not affect the ability of State VR agencies from serving individuals in extended employment settings for purposes of preparing those individuals for employment in integrated settings. The key change is that extended employment, for purposes of participating in the VR program, represents an interim step in the

rehabilitation process rather than an end point of that process.

At the same time, we note that some persons with disabilities may prefer to work in extended employment facilities long-term. In recognition of that fact, and because we fully value the choice of work made by each person with a disability (regardless of whether that work occurs in an integrated setting), we have sought to ensure through these regulations that those wanting to work in extended employment can access the services they need directly from local extended employment facilities.

In addition, we note that many jobs obtained by individuals with disabilities under certain types of set-aside contracts authorized by the Javits-Wagner-O'Day Act (JWOD), 41 USC 46–48, satisfy the definition of ''employment outcome'' under the VR program. More specifically, those service-related and other jobs performed under JWOD contracts or other programs that satisfy the definition of ''integrated setting'' in 34 CFR 361.5(b)(33)(ii) would constitute an ''employment outcome'' (for purposes of the VR program) under these regulations. The determination as to whether any job, including those obtained under JWOD contracts, meets the regulatory definition of ''integrated setting,'' and therefore qualifies as an ''employment outcome'' (for purposes of the VR program), must be made by State units on a case-by-case basis.

These final regulations include limited changes from the NPRM. In particular, while retaining the proposed October 1, 2001, effective date, we have clarified that States may implement the changes sooner at their discretion. The purpose of this sliding effective date is to reflect the fact that some States already have implemented policies in which all VR program participants pursue employment in an integrated setting. In addition, we have amended the proposed regulations to—

- Amend the regulatory definition of ''extended employment'' to eliminate redundant language. This definition also reflects the fact that some individuals may enter extended employment for training and other job-readiness purposes through the VR program, while others may enter it for long-term employment through other resources. Therefore, we have deleted from the definition any implication that training serves as the sole purpose of extended employment. Participants in the VR program who receive VR training services on a transitional basis in an extended employment setting may receive other VR services as well, such as diagnostics and assessment services, in an extended employment setting;
- Require that, before referring to local extended employment providers an individual with a disability who chooses to pursue extended employment, the State unit must provide the individual with information concerning the VR program, integrated employment options, the circumstances in which an individual can receive VR services in an extended employment setting, and the individual's ability to return to the VR agency at any point that he or she decides to pursue employment in an integrated setting, and, as appropriate, refer the individual to the Social Security Administration in order to obtain information concerning the ability of individuals with disabilities to work while receiving benefits from the Social Security Administration;
- Require that applicants under the VR program who are unable to work in an integrated setting be referred to local extended employment providers;
- Require that individuals who were initially found eligible for VR services, but are later determined unable to work in an integrated setting, be referred to local extended employment providers; and
- Include technical amendments to other sections of the current regulations (specifically, §§ 361.45 and 361.46 concerning the individualized plan for employment and § 361.56 concerning closure of the record of services) that were not included in the NPRM but are necessary to conform to the revised definition of the term ''employment outcome'' under the VR program.

We explain more fully each of these changes in the Analysis of Comments and Changes in Appendix B at the end of these final regulations.

We also include a set of general questions and answers in Appendix A to these regulations, which will be codified in the Code of Federal Regulations. These questions and answers provide a short explanation of the changes made by these final regulations pursuant to comments received by the public.

Finally, we wish to emphasize that nothing in these final regulations is intended to alter the fact that extended employment is a legitimate and valued employment option for people with disabilities (*e.g.*, those who make an informed choice to work in an extended employment setting). Nor do these regulations have any effect on the requirements of other Federal programs that financially support extended employment facilities, including definitions of terms such as ''employment,'' ''job,'' or ''work'' used in those programs or corresponding Federal statutes. The chief purpose of these regulations is to ensure, as we believe Title I of the Act intends, that participants in the VR program, particularly those with significant disabilities, are afforded a full opportunity to integrate within their communities and participate in jobs that are available to the general population.

Analysis of Comments and Changes

In response to our invitation in the NPRM, more than 3,000 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published in Appendix B at the end of these final regulations.

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

National Education Goals

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

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

Executive Order 12866

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

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

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

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

Summary of Potential Costs and Benefits

We discussed the potential costs and benefits of these final regulations in the preamble to the NPRM (65 FR 39492–39496), including throughout the section-by-section analysis. Our analysis of potential costs and benefits generally remains the same as in the NPRM, although we include additional discussion of potential costs and benefits in Appendix B to these final regulations titled Analysis of Comments and Changes.

Paperwork Reduction Act of 1995

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

Intergovernmental Review

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

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

Federalism

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

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

Assessment of Educational Impact

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

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

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

List of Subjects in 34 CFR Part 361

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

Dated: December 18, 2000.

Richard W. Riley,

Secretary of Education.

For the reasons discussed in the preamble and the appendix to these regulations, the Secretary amends part 361 of title 34 of the Code of Federal Regulations as follows:

PART 361—STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

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

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

2. Section 361.5 is amended by revising paragraphs (b)(16) and (b)(19) to read as follows:

§ 361.5 Applicable definitions.

* * * * *

(b) * * *

(16) *Employment outcome* means, with respect to an individual, entering or retaining full-time or, if appropriate, part-time competitive employment, as defined in § 361.5(b)(11), in the integrated labor market, supported employment, or any other type of employment in an integrated setting, including self-employment, telecommuting, or business ownership, that is consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

* * * * *

(19) *Extended employment* means work in a non-integrated or sheltered setting for a public or private nonprofit agency or organization that provides compensation in accordance with the Fair Labor Standards Act.

* * * * *

3. Section 361.37 is amended by—

A. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d) respectively;

B. Adding a new paragraph (b); and

C. Revising the authority citation following the section to read as follows:

§ 361.37 Information and referral programs.

* * * * *

(b) The State unit must refer to local extended employment providers an individual with a disability who makes an informed choice to pursue extended employment as the individual's employment goal. Before making the referral required by this paragraph, the State unit must—

(1) Consistent with § 361.42(a)(4)(i) of this part, explain to the individual that the purpose of the vocational rehabilitation program is to assist individuals to achieve an employment outcome as defined in § 361.5(b)(16) (i.e., employment in an integrated setting);

(2) Consistent with § 361.52 of this part, provide the individual with information concerning the availability of employment options, and of vocational rehabilitation services, in integrated settings;

(3) Inform the individual that services under the vocational rehabilitation program can be provided to eligible individuals in an extended employment setting if necessary for purposes of training or otherwise preparing for employment in an integrated setting;

(4) Inform the individual that, if he or she initially chooses not to pursue employment in an integrated setting, he or she can seek services from the designated State unit at a later date if, at that time, he or she chooses to pursue employment in an integrated setting; and

(5) Refer the individual, as appropriate, to the Social Security Administration in order to obtain information concerning the ability of individuals with disabilities to work while receiving benefits from the Social Security Administration.

* * * * *

(**Authority:** Sections 7(11), 12(c), 101(a)(5)(D), 101(a)(10)(C)(ii), and 101(a)(20) of the Act; 29 U.S.C. 709(c), 721(a)(5)(D), 721(a)(10)(C)(ii), and 721(a)(20))

4. Section 361.43 is amended by revising paragraph (d) and revising the authority citation following the section to read as follows:

§ 361.43 Procedures for ineligibility determination.

* * * * *

(d) Refer the individual—

(1) To other programs that are part of the One-Stop service delivery system under the Workforce Investment Act that can address the individual's training or employment-related needs; or

(2) To local extended employment providers if the ineligibility determination is based on a finding that the individual is incapable of achieving an employment outcome as defined in § 361.5(b)(16).

* * * * *

(**Authority:** Sections 12(c), 102(a)(5), and 102(c) of the Act; 29 U.S.C. 709(c), 722(a)(5), and 722(c))

5. Section 361.45 is amended by revising paragraph (b)(2) to read as follows:

§ 361.45 Development of the individualized plan for employment.

* * * * *

(b) * * *

(2) The IPE must be designed to achieve a specific employment outcome, as defined in § 361.5(b)(16), that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

* * * * *

6. Section 361.46 is amended by revising paragraph (a)(1) to read as follows:

§ 361.46 Content of the individualized plan for employment.

(a) * * *

(1) A description of the specific employment outcome, as defined in § 361.5(b)(16), that is chosen by the eligible individual and is consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interests, and informed choice.

* * * * *

7. Section 361.47 is amended by revising paragraphs (a)(8) and (a)(10) to read as follows:

§ 361.47 Record of services.

(a) * * *

(8) In the event that an individual's IPE provides for vocational rehabilitation services in a non-integrated setting, a justification to support the need for the non-integrated setting.

* * * * *

(10) In the event an individual achieves an employment outcome in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act or the designated State unit closes the record of services of an individual in extended employment on the basis that the individual is unable to achieve an employment outcome consistent with § 361.5(b)(16) or that an eligible individual through informed choice chooses to remain in extended employment, documentation of the results of the annual reviews required under § 361.55, of the individual's input into those reviews, and of the individual's or, if appropriate, the individual's representative's acknowledgment that those reviews were conducted.

* * * * *

8. Section 361.55 is revised to read as follows:

§ 361.55 Annual review of individuals in extended employment and other employment under special certificate provisions of the Fair Labor Standards Act.

(a) The State plan must assure that the designated State unit conducts an annual review and reevaluation in accordance with the requirements in paragraph (b) of this section for an individual with a disability served under this part—

(1) Who has achieved an employment outcome in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act; or

(2) Whose record of services is closed while the individual is in extended employment on the basis that the individual is unable to achieve an employment outcome consistent with § 361.5(b)(16) or that the individual made an informed choice to remain in extended employment.

(b) For each individual with a disability who meets the criteria in paragraph (a) of this section, the designated State unit must—

(1) Annually review and reevaluate the status of each individual for 2 years after the individual's record of services is closed (and thereafter if requested by the individual or, if appropriate, the individual's representative) to determine the interests, priorities, and needs of the individual with respect to competitive employment or training for competitive employment;

(2) Enable the individual or, if appropriate, the individual's representative to provide input into the review and reevaluation and must document that input in the record of services, consistent with § 361.47(a)(10), with the individual's or, as appropriate, the individual's representative's signed acknowledgment that the review and reevaluation have been conducted; and

(3) Make maximum efforts, including identifying and providing vocational rehabilitation services, reasonable accommodations, and other necessary support services, to assist the individual in engaging in competitive employment as defined in § 361.5(b)(11).

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

(**Authority:** Sections 12(c) and 101(a)(14) of the Act; 29 U.S.C. 709(c) and 721(a)(14))

9. Section 361.56 is amended by revising paragraph (a) to read as follows:

§ 361.56 Requirements for closing the record of services of an individual who has achieved an employment outcome.

* * * * *

(a) *Employment outcome achieved.* The individual has achieved the employment outcome that is described in the individual's IPE in accordance with § 361.46(a)(1) and is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

* * * * *

10. Sections 361.10, 361.12, 361.13, 361.14, 361.15, 361.16, 361.17, 361.18, 361.19, 361.20, 361.21, 361.22, 361.23, 361.24, 361.25, 361.26, 361.27, 361.28, 361.29, 361.30, 361.31, 361.32, 361.34, 361.35, 361.36; 361.37, 361.38, 361.40, 361.41, 361.46, 361.47, 361.48, 361.49, 361.50, 361.51, 361.52, 361.53, 361.54, 361.57, 361.60 and 361.62 are amended by adding after the section and before the authority citation ''(Approved by the Office of Management and Budget under control number 1820–0500)''.

11. Appendix A is added to part 361 to read as follows:

Appendix A to Part 31—Questions and Answers

The following questions and answers provide a summary of some of the most

common and critical questions that we received regarding this part 361 and the applicable responses. As is evident from the responses, we maintain that redefining the term ''employment outcome'' for purposes of the VR program to mean outcomes that occur in integrated settings will promote the provision of opportunities for all VR-eligible individuals to pursue the types of jobs that generally are available to the public.

Is Extended Employment Still a Legitimate Employment Option?

Yes. Employment in a sheltered setting is a legitimate and valuable employment option for individuals with disabilities. Implementation of these regulations will not change that fact. Individuals still may choose to pursue long-term extended employment outside of the VR program, and these regulations ensure that those individuals' needs are met by requiring the VR agency to make the necessary referral to local extended employment providers.

Do the Regulations Restrict Individual Choice?

No. We interpret the concept of individual choice in the Act as a choice among the employment outcomes under the VR program specified in the statute or by the Secretary in regulations.

Extended employment (i.e., sheltered or non-integrated employment) remains both an initial step toward achieving integrated employment under the VR program and a long-term employment option through sources of support other than the VR program. In recognizing that some individuals with disabilities may wish to work in an extended employment setting, these regulations require the VR agency to ensure that these individuals are afforded the opportunity to do so by referring them to local extended employment providers. Those providers currently support the vast majority of sheltered workers through non-VR program resources. Moreover, persons wishing to prepare for integrated employment by initially working in an extended employment setting also may do so. In these cases, the VR agency cannot discontinue VR services until the individual transitions to integrated work in the community.

Can State Agencies Refuse To Serve Those With the Most Significant Disabilities?

No. Both the Act and regulations guard against that result. Persons with disabilities may not be excluded from the VR program based on an assumption or belief that the individual is incapable of working in an integrated setting. Rather, State units are required to establish clear and convincing evidence that an individual is incapable of achieving an employment outcome, for purposes of the VR program, and must conduct a trial work assessment of the individual's abilities before it can refuse services to any individual who it initially believes is incapable of working in an intergrated job setting.

Are Homemaker and Unpaid Family Worker Considered Employment Outcomes for Purposes of the VR Program?

Yes. The chief purpose of the regulations is to ensure that individuals with disabilities participating in the VR program are able to pursue the same type of employment opportunities that are available to the general public. Extended employment jobs, unlike homemakers and unpaid family workers, are primarily reserved for those with disabilities.

Will the Regulations Serve To Close Down Sheltered Workshops?

No. Sheltered workshops are primarily supported by other State, local, and private resources and rely very little on VR program funds. Persons who prefer to work in extended employment on a long-term basis are assured access to local extended employment programs through the referral requirements in the regulations. Also, those participants in the VR program who can best prepare for integrated employment by working in an extended employment setting as part of a training and assessment program are able to follow that path as well. Thus, extended employment programs and sheltered workshops continue to serve essentially the same role that they currently serve.

Appendix B

Analysis of Comments and Changes

Note: The following appendix will not appear in the Code of Federal Regulations.

§ 361.5(b)(15) Applicable Definitions; Employment Outcome

General

Comments: More than 3,000 comments were received in response to the NPRM published in the **Federal Register** on June 26, 2000 (65 FR 39492).

Many commenters voiced strong support for the proposed definition of ''employment outcome'' that would revise the scope of that term under the VR program to include only those outcomes in which an individual with a disability works in an integrated setting. Several commenters predicted that the proposed revision would result in more opportunities for individuals with disabilities to work in integrated settings (also referred to throughout this appendix as ''integrated employment'') and in the elimination of barriers to competitive jobs for individuals with significant disabilities. Other commenters noted that, consistent with the purpose of the Act, the proposed regulations supported the transition of adults with significant disabilities from extended employment settings (also referred to as sheltered or non-integrated settings) to integrated employment. Finally, several commenters, while supporting the proposed regulations, asked for additional clarification on several issues. Those issues, and any corresponding changes to the proposed regulations, are addressed in this appendix.

Many commenters strongly opposed the proposed regulations and asked that the NPRM be rescinded or that any final rulemaking be delayed for further study of the potential impact of the proposed regulations. A number of commenters believed that the proposed revision to the definition of ''employment outcome,'' for purposes of the VR program, was inconsistent with the spirit and intent of the Act, particularly the Act's emphasis on giving individuals with disabilities the opportunity to make informed choices in selecting an employment outcome under the VR program. Other commenters declared that the proposed regulations would restrict the number and variety of job options available to individuals with significant disabilities, lead to individuals being denied access to VR services, and weaken the priority the Act places on serving individuals with the most significant disabilities.

We also received many comments from individuals with disabilities, as well as their friends, family members, and advocates, who expressed the fear that the proposed regulations would lead to the elimination of extended (also referred to as sheltered) employment programs in which individuals with disabilities often participate.

Discussion: Due to the extensive detail of the previous comments on the proposed definition of ''employment outcome,'' and the significance of the issues raised in each, we address these comments, and other related comments, under applicable topical headings that follow.

Informed Choice

Comments: As previously indicated, several commenters asserted that the proposed regulations would limit choices for individuals who prefer to work in extended employment settings and, therefore, would be contrary to the Act's emphasis on informed choice of the individual.

Discussion: While we fully agree that the Act places a premium on individuals with disabilities being able to exercise informed choice throughout the rehabilitation process, we do not agree that these regulations are inconsistent with that emphasis. We interpret the statute as allowing individuals to exercise their choice among employment outcomes under the VR program that are specified in the Act or by the Secretary in regulations.

Moreover, despite the changes made by these regulations, we want to make it clear that extended employment remains both an initial step toward achieving integrated employment under the VR program and a long-term employment option through sources of support other than the VR program. These regulations continue to allow State VR agencies to provide individuals with VR services by enabling persons to work in extended employment settings in order to prepare for employment in an integrated setting. We recognize that extended employment settings offer some individuals with significant disabilities valuable training and work experience for that purpose. The key change made by these regulations is that extended employment serves as an interim step in the rehabilitation process rather than an end point to the VR process.

If an individual makes an informed choice (as will be explained in more detail later in this appendix), that he or she wants to pursue long-term employment in a non-integrated setting (*e.g.,* extended or sheltered

employment), he or she may still do so. These final regulations require the designated State unit to refer that individual to local extended employment providers who can meet the individual's needs.

Extended employment providers support the vast majority of sheltered workers through other State, local, and private resources. Currently, the VR program provides very few financial resources to extended employment providers. Given this fact, these regulations will not have the effect, as feared by some, of ending the existence of extended employment opportunities.

In addition, we have amended the referral requirements in § 361.37 of the regulations to ensure that individuals receive sufficient information concerning the scope of the VR program and integrated employment opportunities. This information will enable individuals to make a fully informed choice regarding whether to pursue integrated employment through the VR program or extended employment through other sources.

The changes made by these regulations ensure that the VR program promotes opportunities for individuals with disabilities, particularly those with significant disabilities, to pursue integrated employment options. Moreover, the regulations require each State unit to preserve individual choice in the manner in which the Act intends.

Changes: None.

Employment Options

Comments: Several commenters who supported the proposed regulations suggested that removing sheltered employment from the scope of ''employment outcomes'' under the VR program will enable counselors to assist individuals with disabilities to obtain jobs in integrated settings and with potentially better pay.

Other commenters who opposed the proposed regulations suggested that the proposed requirements would restrict the number and variety of job options for individuals with the most significant disabilities, many of whom do not have the skills or abilities to work in integrated employment settings.

Discussion: We believe, as do many of the commenters who wrote in favor of these regulations, that these regulatory changes will lead to more individuals with significant disabilities entering integrated employment. Moreover, we believe that these regulations will serve to expand job options in general for individuals with significant disabilities while, at the same time, ensuring that individuals still can access extended employment through appropriate resources.

Specifically, these regulations require VR agencies to ensure (to the extent they have not done so already) that individuals with significant disabilities are assisted in pursuing work in the integrated labor market. Prior to these final regulations, participants in the VR program sometimes have been directed toward sheltered work at the outset of entering the rehabilitation process without first having the opportunity to pursue employment in an integrated setting as they may have preferred.

We recognize that a small number of individuals with the most significant disabilities may not have, or be able to obtain, the skills and abilities to work in integrated employment settings. In those cases in which that decision is reached, it is the responsibility of the State VR agency to refer the individual to extended employment providers.

Finally, we again note that extended employment remains an interim step in the rehabilitation process leading to employment in an integrated setting. As such, extended employment represents a means of receiving support services and valuable work experience rather than a final employment outcome under the VR program.

Changes: In recognizing that some individuals with the most significant disabilities may not have, or be able to obtain, the skills and abilities to work in integrated employment settings, we have added to the final regulations, in § 361.43(d)(2), the requirement that State agencies also refer to extended employment providers any individual who the agency determines is incapable of achieving an employment outcome (*i.e.,* integrated employment) under the VR program.

Homemakers and Unpaid Family Workers

Comments: Several commenters stated that the Rehabilitation Services Administration should not eliminate from the VR program paid jobs in extended employment while continuing to accept homemakers and unpaid family workers as unpaid employment outcomes. Other commenters felt that the proposed definition of ''employment outcome,'' for purposes of the VR program, effectively eliminated homemakers and unpaid family workers from the scope of employment outcomes under the VR program.

Discussion: The definition of ''employment outcome,'' for purposes of the VR program, in these final regulations modifies the prior regulatory definition by requiring that ''employment outcomes'' under the VR program occur in integrated settings. The final regulations do not address wage issues, meaning that non-wage earning (and other sub-minimum wage) employment outcomes, as long as they occur in integrated settings, satisfy the VR program definition of ''employment outcome'' in § 361.5(b)(16). While we strongly believe that individuals with disabilities receiving VR services should pursue employment outcomes with competitive wages, the final regulations do not mandate that result.

The chief purpose of the regulations is to ensure that individuals with disabilities participating in the VR program are able to pursue the same type of outcomes that are available to the general public. Because homemaker and unpaid family worker outcomes are available in the community, homemakers and unpaid family workers are considered to occur in integrated settings, as defined in § 361.5(b)(33), and thus meet the revised definition of ''employment outcome'' under the VR program, as defined in § 361.5(b)(16).

Changes: None.

Access to VR Services for Persons With Significant Disabilities

Comments: Some commenters predicted that the proposed regulations would result in fewer individuals with significant disabilities receiving services under the VR program. These commenters expressed concern that VR counselors will be reluctant to serve individuals with significant or the most significant disabilities if they believe those individuals are less likely to achieve employment outcomes in integrated settings. The commenters believed that counselors will focus their efforts only on those who are clearly capable of integrated work.

Discussion: We recognize the commenters' concerns, yet believe that those concerns are addressed through the eligibility criteria and procedures that VR agencies must follow. Those criteria and corresponding procedures are unchanged by these regulations. We emphasize that it is critical for VR agencies to ensure that persons with significant disabilities are not excluded from the VR program based on an assumption, belief, or preliminary impression that the individual is incapable of working in an integrated setting.

The Act establishes a clear priority for serving persons with the most significant disabilities (through the order of selection requirements) and requires that the eligibility process specified in the Act be followed in determining whether an individual is to receive VR services. A discussion of that process and its application to persons with significant disabilities follows.

In accordance with section 102(a) of the Act and § 361.42 of the regulations, an individual is eligible to receive VR services if he or she is ''an individual with a disability'' (*i.e.,* the individual has an impairment that results in an impediment to employment and can benefit in terms of an employment outcome from VR services). The individual also must require VR services in order to prepare for, secure, retain, or regain employment.

In light of these criteria, a counselor's decision not to serve (but rather refer to an extended employment provider) an individual with a disability on the basis that the individual cannot achieve integrated employment would mean, in effect, that the counselor has concluded that the individual cannot benefit in terms of an *employment outcome* under the VR program (*i.e.,* integrated work) from VR services. The Act and regulations, however, state that any individual seeking VR services is ''presumed [able] to benefit in terms of an employment outcome from VR services.'' Moreover, for the State agency to overcome that statutory presumption, it must demonstrate with *clear and convincing evidence* that the individual is incapable of benefiting in terms of an employment outcome under the VR program due to the severity of the applicant's disability. Finally, in order to establish the requisite ''clear and convincing evidence,'' the agency first must explore the individual's abilities, capabilities, and capacity to perform in work situations by affording the individual trial work experiences (see section 102(a) of the Act and § 361.42 of the regulations).

Thus, in the absence of clear and convincing evidence following a trial work

assessment of the individual's abilities (or, as appropriate, an extended evaluation under § 361.42(f) of the regulations), VR agencies must consider each individual, including those with the most significant disabilities, capable of achieving integrated employment. In other words, the Act establishes the general expectation that individuals with the most significant disabilities, if given necessary services and supports, are able to work in integrated settings. These regulations ensure that every opportunity is afforded so that this expectation is realized.

In addition, because extended employment remains an interim step in the rehabilitation process, VR agencies may not refuse to serve an individual who wishes to receive services in an extended employment setting for purposes of preparing for employment in an integrated setting.

We recognize that the regulations impose heightened accountability and greater effort on the part of VR agencies. For those reasons, we intend to monitor closely State implementation of the final regulations during our annual review and periodic on-site monitoring of State VR agencies in order to ensure that persons with significant disabilities receive VR services in pursuit of integrated employment. We also want to ensure that individuals who receive initial services in an extended employment setting also receive the VR services they need to transition to integrated employment in the community.

Changes: None.

Effectiveness of Extended Employment

Comments: A number of commenters, citing relevant research over the past three decades, stated that many individuals in extended employment have not been able to transition to the competitive labor market. These commenters observed that entities that operate sheltered workshops often retain their most productive workers, thus resulting in few of these individuals transitioning to integrated employment. Consequently, the commenters urged that the proposed regulations be revised to disallow extended employment as an interim step in the rehabilitation process.

Other commenters who supported the proposed regulations asserted that nearly 90 percent of individuals with developmental disabilities and more than 65 percent of individuals who are blind earn less than the minimum wage working in extended employment.

Several commenters who opposed the revised regulatory definition of ''employment outcome,'' for purposes of the VR program, stated that ''place-and-train methodologies'' used by VR programs have left numerous people with disabilities adrift in the labor market with part-time, low-wage jobs, no peer group, and limited social outlets. These commenters further contend that extended employment programs function as a safety net for individuals with significant disabilities, providing additional opportunities for training and employment in a safe, protective work environment. Other commenters stated that the proposed regulations ''devalued'' individuals in extended employment programs and the work they perform.

Discussion: We agree that extended employment programs have traditionally served as a safety net for individuals with significant disabilities who cannot perform integrated work in the community or who choose to work only among their disabled peers. We also recognize that extended employment programs offer opportunities in which individuals with significant disabilities can obtain useful training and work experience. For these reasons, we wish to emphasize that we in no way devalue the dignity or the worth of extended employment programs or the individuals who work in those settings. Rather, we have amended the existing regulations in order to focus the VR program on the statutory purpose (*i.e.*, the purpose reflected in Title I of the Rehabilitation Act) of giving persons with disabilities, including those with significant or the most significant disabilities, the opportunity to work in the community and to achieve economic self-sufficiency.

While extended employment settings serve a useful purpose in society and benefit some VR participants, we again note that extended employment providers receive very little financial support from the VR program. As we noted in the NPRM, a relatively small number of VR program participants have achieved employment outcomes in sheltered settings in recent years—approximately 3.5 percent of VR program outcomes nationwide in 1998, according to the most current data available. Thus, it is evident that many State units already have not been treating extended employment as a final employment outcome under the VR program. Those agencies have come to realize, as is reflected through the Act's legislative history, that historically participants in the VR program too often were placed in sheltered settings as a final outcome rather than as a temporary placement from which they could transition to a job in the community. While this philosophy has evolved in many State VR agencies, and is followed nationally through these regulations, extended employment remains a safety net, and an appropriate work environment, and continues to be supported by those resources on which it has primarily relied.

We also believe that these regulatory changes will spur VR agencies to closely follow program participants in extended employment settings and assist in their transition to integrated work. Prior to these regulations, VR agencies were permitted to terminate VR services to an individual in extended employment. We expect these final regulations will cause VR agencies to increase their efforts with regard to individuals whom they serve in non-integrated settings until the individual transitions to integrated employment.

Changes: None.

Availability of Opportunities for Integrated Employment

Comments: As noted earlier, many individuals who supported the proposed regulations believed that the change would hasten the movement toward integrated employment and the elimination of barriers to integrated jobs for individuals with significant disabilities.

In contrast, a number of commenters who opposed the proposed regulations reasoned that extended employment should continue to be included as an ''employment outcome'' under the VR program because integrated employment opportunities are rarely available in rural areas or Indian reservations. These commenters stated that extended employment is often the sole work opportunity for people with significant disabilities who reside in these underserved areas.

Discussion: Extended employment, whether accessed through resources other than the VR program or used as an interim step toward integrated employment under the VR program, remains a viable opportunity for individuals in rural areas or elsewhere. As indicated previously, extended employment facilities offer some persons with disabilities important services. Accordingly, we expect that many individuals with disabilities will continue to pursue extended employment and, therefore, have ensured through these regulations that opportunities in extended employment can be accessed. At the same time, however, we do not believe that the prevalence of extended employment options in certain areas should mean that VR program participants not be given the opportunity to pursue integrated employment as is intended by the Act.

We recognize that defining ''employment outcome'' under the VR program as a job in an integrated setting will require some VR agencies to work to broaden integrated job options for program participants. Nevertheless, we fully believe, like many of the commenters, that the obligations on VR agencies resulting from the regulations are consistent with the VR program's statutory emphasis on integration. Thus, to the extent integrated employment opportunities are limited in rural, reservation, or other areas, it is incumbent on the local VR unit to work with employers to expand integrated job opportunities for individuals with significant disabilities.

Changes: None.

Continuation of Extended Employment Programs

Comments: We received many comments from individuals with disabilities, and their family members and friends, who expressed the fear that the changes to the prior regulations would lead to the elimination of extended employment programs and the closing of sheltered workshops where individuals with disabilities currently work.

Discussion: As indicated throughout this analysis of comments, the regulations do *not* eliminate extended employment programs or serve to close sheltered workshops. We again note the valuable contributions these facilities make to society and the high regard in which they are held by some of the commenters to the proposed regulations. Still, extended employment programs generally are funded by other State, local, and private resources and rely very little on VR program funds as evidenced by (1) the small percentage of VR program participants who have exited the program while in a sheltered setting, and (2) the fact that several

VR agencies already follow a policy of working with individuals in pursuit of integrated employment. Moreover, the regulations ensure that persons who choose to work in extended employment on a long-term basis are able to access local extended employment programs through the required referral process under § 361.37 of the regulations.

At the same time, individuals who choose to prepare for integrated employment under the VR program by temporarily working in an extended employment setting are able to follow that path as well. The State VR agencies will continue to provide necessary services to enable these individuals to gain valuable work experience in extended employment facilities and transition to integrated employment at a later time. If an individual chooses to remain in extended employment or if it is determined that the individual is unable to achieve employment in an integrated setting (although § 361.55 of the regulations requires the agency later to review whether the individual's choice or readiness for integrated employment has changed), the VR agency must refer that individual to the local extended employment provider to ensure that the individual's needs continue to be met. In this way, extended employment programs and sheltered workshops continue to serve the same valued role in the society as they currently serve.

Changes: None.

§ 361.37 Establishment and Maintenance of Information and Referral Programs

Comments: A few commenters viewed as unduly burdensome the proposed requirements concerning the State unit's obligation to refer to local extended employment providers any individual who chooses extended employment as their employment goal.

Some commenters stated that State, local, and private resources that support extended employment programs are insufficient to absorb the additional referrals that would result from the proposed regulations. In contrast, other commenters supported the proposed regulations, including the referral requirements, stating that extended employment programs operated by community rehabilitation programs will continue since those organizations do not rely on VR program funds to support their extended employment operations.

Discussion: As discussed previously, the proposed regulations in this section required State VR agencies to refer individuals with disabilities to local extended employment providers if the individual chooses to work in an extended employment setting on a long-term basis rather than pursue employment in an integrated setting under the VR program.

We do not believe that the limited burden associated with the referral requirements in this section are inappropriate or unjustified. While we recognize that the requirements in § 361.37 imposed additional responsibilities on VR agencies, those requirements are designed to ensure that each individual with a disability can receive services through applicable resources. As for those applicants under the VR program who choose to pursue extended employment long-term, the VR agency should ensure that those individuals are made aware of the scope of available extended employment service providers and should make referrals that are consistent with each individual's informed choice.

Section 361.37 of the final regulations requires State VR agencies to provide sufficient information to all applicants to ensure that they are making an informed choice in either applying for VR services or choosing to pursue extended employment on a long-term basis. In particular, these regulations require State agencies to inform individuals of the purpose of the VR program, the availability of VR services and employment options in an integrated setting, the availability of services in an extended employment setting as a means of assisting the individual to transition into integrated employment, the right to return to the VR program for assistance if the individual chooses later to seek employment in an integrated setting, and, when appropriate, the availability of information from the Social Security Administration concerning the ability of individuals with disabilities to work while receiving benefits from the Social Security Administration.

Many of these information requirements are consistent with the informational requirements in § 361.42. In addition, it is important that individuals with disabilities who are receiving, or have been found eligible for, Social Security benefits be informed of recent reforms that are designed to reduce a key work disincentive by enabling individuals with disabilities to work and continue receiving Social Security benefits. We believe that the need for this critical information, and its potential effect on an individual's interest in pursuing integrated work in the community, justifies requiring VR agencies to ensure that an individual with a disability can access it when appropriate. The purpose behind this requirement, as with each of the informational requirements in § 361.37(b), is to ensure that individuals make truly informed choices among the wide scope of employment options—both integrated and non-integrated—available to persons with disabilities. We do note, however, that if the individual proceeds to complete the VR agency's application, pursuant to § 361.42(a)(4), after receiving the information specified in this section of the regulations, there can be no question that the individual intends to pursue integrated employment under the VR program.

Moreover, an individual with a disability who requires VR services to achieve an employment outcome cannot be refused services unless the State unit establishes clear and convincing evidence, following a trial work assessment, that the severity of the individual's disability prevents that individual from working in an integrated setting.

Finally, in the limited instances in which the State unit establishes the requisite clear and convincing evidence that the individual is incapable of achieving integrated employment, the amended regulations also require that those persons be referred to local extended employment programs in the community that can better address their employment needs (that added referral requirement is located in § 361.43 of the final regulations).

Changes: We have amended the proposed regulations to ensure that VR agencies provide individuals with sufficient information to make a fully informed choice between pursuing integrated employment under the VR program or extended employment through other sources. Section 361.37 of these final regulations requires the State unit, prior to referring an individual with a disability who chooses to pursue extended employment to local extended employment providers, to inform the individual of the purpose of the VR program, the availability of integrated employment options, the fact that VR services can be provided to eligible individuals in an extended employment setting for purposes of training or otherwise preparing for integrated employment, and the ability of the individual to seek VR services at a later date if at that time the individual chooses to pursue employment in an integrated setting, and, as appropriate, to refer the individual to the Social Security Administration in order to obtain information concerning the ability of individuals with disabilities to work while receiving benefits from the Social Security Administration.

§ 361.43 Procedures for Ineligibility Determination

Comments: None.

Discussion: Although amendments to this section of the current regulations were not proposed in the NPRM, we have determined, based on the comments we received, that a change to this section is warranted. We believe that it is important to ensure that persons found too severely disabled to work in an integrated setting are referred to local extended employment facilities so that these individuals can still take advantage of the work opportunities that the facilities offer.

The proposed regulations, in particular § 361.37, would have applied a referral requirement only to those who initially choose to pursue extended employment as their long-term employment goal. However, we also believe that persons who seek to participate in the VR program but are found, based on clear and convincing evidence following a trial work assessment, incapable of achieving integrated employment should be given the same valuable opportunity to work in an extended employment setting with support from appropriate sources. As we indicated in the discussion under § 361.37, we also believe it is important for the VR agency to ensure that these individuals are made aware of the different extended employment service providers available in the area so that individuals can be referred to providers consistent with their informed choice.

Changes: We have amended the proposed regulations to require in § 361.43 that individuals who are found unable to work in an integrated setting be referred to local extended employment providers.

§ 361.45 Development of the Individualized Plan for Employment and § 361.46 Content of the Individualized Plan for Employment

Comments: None.

Discussion: Both § 361.45 (concerning the development of the individualized plan for employment (IPE)) and § 361.46 (concerning IPE content) require technical changes to conform to the revised definition of the term ''employment outcome'' under the VR program and have been amended accordingly.

Changes: We have revised §§ 361.45 and 361.46 to conform to the revised definition of ''employment outcome'' under the VR program.

§ 361.55 Annual Review of Individuals in Extended Employment and Other Employment Under Special Certificate Provisions of the Fair Labor Standards Act

Comments: A few commenters who opposed the proposed regulations stated that the annual review requirements in the NPRM would not be effective in identifying individuals who may be ready to transition from extended employment to integrated employment in the community, including supported employment. The commenters asserted that under existing regulations State VR agencies have not conducted annual reviews of persons in extended employment; have been reluctant to reopen service records of those in extended employment and investigate alternative work settings; and have not taken into consideration advances in rehabilitation technology and the availability of community supports that may facilitate transition to integrated employment.

On the other hand, at least one State unit stated that annual reviews of individuals in extended employment have been effective and that it is unlikely that persons would remain in extended employment if they sought and were capable of competitive employment.

Finally, one commenter asked that we clarify this section of the proposed regulations, in particular the circumstances under which individuals are to receive annual reviews.

Discussion: We understand that there is uncertainty in the disability field concerning the extent to which reviews of VR program participants in extended employment have resulted in individuals transitioning to jobs in integrated settings. VR agencies must be vigorous in determining which individuals can, and wish to, transition to integrated employment (particularly competitive employment); in providing necessary supports to facilitate that transition; and in ensuring that annual reviews are more than cursory exercises (see e.g., Senate Report No. 105–166, p. 13, for more information on that point).

The statutory requirements concerning annual reviews of those in extended employment are key factors underlying these regulations. Those requirements, specifically section 101(a)(14) of the Act, establish an expectation that extended employment is not intended to serve as a final outcome under the VR program, but rather as an interim step through which eligible individuals can prepare for competitive employment. Given the importance of the reviews in enabling individuals with significant disabilities to transition to work in an integrated setting when desired by the individual, those reviews should be thorough evaluations of readiness for integrated work so that the State unit can effectively determine the interests, priorities, and needs of the individual with respect to employment in integrated settings.

To enhance the effectiveness of the annual reviews, § 361.55 of the regulations requires that the review and reevaluation of an individual's readiness for competitive employment provide for input from the individual or the individual's representative. We believe this requirement, which is based on corresponding requirements in the Act, will help ensure that State units make maximum efforts to assist individuals in transitioning from extended employment to integrated employment consistent with their desires.

While we do not believe it is necessary to revise § 361.55(a), we wish to clarify the instances in which reviews under this section of the regulations must be conducted. Specifically, annual reviews (for two years, and thereafter at the individual's request) are required if a VR program participant has—(1) achieved an employment outcome in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act (i.e., the individual is working in an integrated setting, but is compensated at less than the minimum wage); (2) had his or her record of services closed while in extended employment on the basis that the individual is unable to achieve an employment outcome; or (3) had his or her record of services closed while in extended employment because the individual has made an informed choice to remain in extended employment.

If an individual with a disability, in conjunction with the State unit, chooses to receive VR services initially in an extended employment setting in order to prepare for competitive employment, it is incumbent on the State unit to monitor closely the individual's progress. However, it is important to note that the annual review requirements of this section do not apply in that situation since the individual's program of VR services is ongoing and the individual's record of services remains open.

Changes: None.

§ 361.56 Requirements for Closing the Record of Services of an Individual Who Has Achieved an Employment Outcome

Comments: None.

Discussion: Section 361.56, which specifies the criteria for closing the record of services for an individual who has achieved an employment outcome under the VR program, like §§ 361.45 and 361.46 discussed previously, has been slightly revised in these final regulations to reflect the revised definition of the term ''employment outcome'' under the VR program.

Changes: We have amended § 361.56 to conform to the revised definition of ''employment outcome'' in § 361.5(b)(16).

Effective Date

Comments: A number of commenters suggested that the final regulations should provide VR agencies with the flexibility to implement the new regulations before the effective date proposed in the NPRM (October 1, 2001).

Discussion: As explained in the NPRM, we proposed requiring States to implement the regulatory changes in FY 2002 to minimize any potentially adverse impact on VR agencies or eligible individuals. At the same time, however, we are aware that some agencies already have established policies under which all VR program participants pursue integrated employment. We believe those policies are entirely consistent with the Act and the purpose of these regulations. Therefore, we are requiring that States implement these regulatory changes on or before October 1, 2001. After that date, an ''employment outcome'' under the VR program means employment in an integrated setting.

Changes: We have amended the regulations to allow VR agencies to implement the requirements in these regulations prior to FY 2002 at their discretion. The final regulations require that the requirements be implemented no later than October 1, 2001.

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