**Workforce Innovation and Opportunity Act**

**Section 511 - Limitation on the Use of Subminimum Wages**

**Description of New Requirements Under the Act and Analysis of Proposed Regulatory Language**

**Background**

In July, 2014 Congress enacted the Workforce Innovation and Opportunity Act (WIOA). Among other changes, Congress added a new Section 511 to the Rehabilitation Act title to address the movement of transitioning students from school to segregated employment settings paying subminimum wages. Section 511, entitled Limitation on the Use of Subminimum Wages. Requires that transitioning students with disabilities receive vocational rehabilitation (VR) services before entering segregated subminimum wage employment settings.

In April, 2015, the U.S. Department of Education, Rehabilitation Services Administration (RSA) issued a Notice of Proposed Rulemaking (NPRM). The NPRM is draft regulatory language implementing the changes in WIOA, including the new Section 511. It is anticipated that final WIOA regulations will be issued in June, 2016.

The following is a description of the new Section 511 requirements and an analysis of the proposed regulatory language implementing those requirements.

**Proposed New Part 397 Regulations**

The proposed new Part 397 in the NPRM implements the provision of section 511 of the Rehabilitation Act as amended in 2014. For the most part, the proposed regulations mirror the new statutory provisions with a few clarifications and interpretations. Proposed provisions that go beyond the statute are:

1. Discussing of the jurisdiction of the Department of Education in implementing and enforcing section 511;
2. Identifying the regulations and definitions that apply to the new Part 397;
3. Proposing a 90-day time period for the provision of documentation required by section 511;
4. Proposing an individualized timeframe for “reasonable period of time” when an individual is trying out competitive, integrated employment;
5. Requesting specific comments on the Department’s role and jurisdiction in prohibiting LEAs and SEAs contracting with 14(c) entities;
6. Including language on how DSUs can identify individuals in subminimum wage employment;
7. Allowing the contracting of ongoing review activities; and,
8. Specifying the DSU’s authority to review documentation maintained by 14(c) entities.

Jurisdiction of the Department of Education

The proposed regulations in §397.2 discuss the role of the Department of Education in administering section 511 of the Act. The proposed regulations limit this jurisdiction to (1) the documentation requirements for DSUs and LEAs; and (2) the services that DSUs must provide to all persons employed under 14(c) wage certificates. In addition, this section states that nothing in this Part gives the Department of Education jurisdiction over FLSA requirements, including 14(c) wage certificates.

Regulations and Definitions that Apply to Part 397

For purposes of clarity, the proposed regulations include the various regulations and definitions that apply to this new Part. These include the regulations in Parts 361 and 363 relating to VR and Supported Employment (SE); the relevant regulations implementing IDEA and the transition provisions under those regulations, and the regulations implementing section 14(c) of the FLSA. Relevant definitions are also referenced, in particular, the definitions in proposed changes to Part 361 – including “student with a disability” and “youth with a disability.”

Timeframe for the Provision of Documentation

The statute requires that the individual receive documentation of the completion of various steps that are required prior to employment at subminimum wage within a “reasonable period of time.” The proposed regulations in §397.10(c)(2) state that such documentation should be provided to the individual as soon as possible but no later than 90 days after the completion of each required action.

Timeframe for a Try-Out in Competitive Integrated Employment

The proposed regulations in §397.20(a)(2)(ii)(B) state that in the event “the youth with a disability was unable to achieve the employment outcome specified in the individualized plan for employment, …despite working toward the employment outcome with reasonable accommodations and appropriate supports and services, including supported employment services and customized employment services, for a reasonable period of time…” This is a repeat of the language in the statute.

However, the proposed regulations in §397(b)(3) further define the “reasonable period of time” as follows:

“(i) For purposes of paragraph (a)(2)(ii)(B) of this section, a determination as to what constitutes

“reasonable period of time” must be consistent with the disability-related and vocational needs of the individual, as well as the anticipated length of time required to complete the services identified in the individualized plan for employment.

“(ii) For an individual whose specified employment goal is in supported employment, such reasonable period of time is up to 24 months, unless under special circumstances the individual and the rehabilitation counselor jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment.”

The regulations propose an individualized approach for the “reasonable period of time” for all youth with disabilities, unless the youth is in supported employment. By statute and the proposed regulations in Part 363, supported employment is limited to a period of up to 24 months – whether using title I for SE funding

Prohibition on Contracting

Both the statute and proposed regulations (§397.31) prohibit a (state education agency (SEA) or local education agency (LEA) from contracting with an entity that uses 14(c) wage certificate employment for the purpose of training youth.

Language on How a DSU Can Identify Individuals in Subminimum Wage Employment

Proposed §397.40(a)(2) lists a variety of ways in which a DSU can identify individuals in subminimum wage employment for the purposes of the on-going career counseling, and information and referral services that the DSU is required by statute to provide to any individual employed under a 14(c) wage certificate. These sources include: provision of VR services, a referral from the CAP agency or another agency, or referral by the 14(c) entity itself. While this language in the proposed regulation is beyond that in the statute, it does provide some clarification.

Contracting Out Review Activities

Section 511 allows the DSU to meet its obligation for the on-going review of individuals in subminimum wage employment through contracting with other entities. These entities must not have a financial interest in the individual’s employment outcome. The proposed regulations in §397.40(b)(2) include this requirement. In addition, proposed §397.40(e) includes a general statement that DSUs can contract out the entire process under Part 397 if the DSU so wishes.

DSU’s Authority to Review Documentation

§397.50 states, in part: “The designated State unit, or a contractor working directly for the designated State unit is authorized to engage in the review of individual documentation required

under this part that is maintained by [14(c)]entities..”