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Title 34 – Education

Subtitle B – Regulations of the Offices of the Department of Education

Chapter III – Office of Special Education and Rehabilitative Services, Department of Education

Part 397 Limitations on Use of Subminimum Wage

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PART 397—LIMITATIONS ON USE OF SUBMINIMUM WAGE

Authority: Section 511 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 794g, unless otherwise noted.

Source: 81 FR 55785, Aug. 19, 2016, unless otherwise noted.

Subpart A—General Provisions

§ 397.1 Purpose.

- (a) The purpose of this part is to set forth requirements the designated State units and State and local educational agencies must satisfy to ensure that individuals with disabilities, especially youth with disabilities, have a meaningful opportunity to prepare for, obtain, maintain, advance in, or regain competitive integrated employment, including supported or customized employment.
- (b) This part requires—
 - (1) A designated State unit to provide youth with disabilities documentation demonstrating that they have completed certain requirements, as described in this part, prior to starting subminimum wage employment with entities (as defined in § 397.5(d)) holding special wage certificates under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c));
 - (2) A designated State unit to provide, at certain prescribed intervals for the duration of such employment, career counseling and information and referral services, designed to promote opportunities for competitive integrated employment, to individuals with disabilities, regardless of age, who are known to be employed at subminimum wage; and
 - (3) A designated State unit, in consultation with the State educational agency, to develop a process or utilize an existing process, to document completion of required activities under this part by a youth with a disability known to be seeking employment at subminimum wage.
- (c) This part authorizes a designated State unit, or a representative of a designated State unit, to review individual documentation required to be maintained by these entities under this part.
- (d) The provisions in this part work in concert with requirements in 34 CFR parts 300, 361, and 363, and do not alter any requirements under those parts.

(Authority: Sections 12(c) and 511 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g)

§ 397.2 What is the Department of Education's jurisdiction under this part?

- (a) The Department of Education has jurisdiction under this part to implement guidelines for—
 - (1) Documentation requirements imposed on designated State units and local educational agencies, including the documentation process that the designated State unit must develop in consultation with the State educational agency;
 - (2) Requirements related to the services that designated State units must provide to individuals regardless of age who are employed at subminimum wage; and
 - (3) Requirements under § 397.31.
- (b) Nothing in this part will be construed to grant to the Department of Education, or its grantees, jurisdiction over requirements set forth in the Fair Labor Standards Act, including those imposed on entities holding special wage certificates under section 14(c) of that Act, which is administered by the Department of Labor.

(Authority: Sections 12(c), 511(b)(3), 511(c), and 511(d) of the Rehabilitation Act of 1973, as amended; 709(c), 794g(b)(3), 794g(c), and 794g(d))

§ 397.3 What rules of construction apply to this part?

Nothing in this part will be construed to—

- (a) Change the purpose of the Rehabilitation Act, which is to empower individuals with disabilities to maximize opportunities for achieving competitive integrated employment;
- (b) Promote subminimum wage employment as a vocational rehabilitation strategy or employment outcome, as defined in 34 CFR 361.5(c)(15); or
- (c) Be inconsistent with the provisions of the Fair Labor Standards Act, as amended before or after July 22, 2014.

(Authority: Sections 12(c) and 511(b) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(b))

§ 397.4 What regulations apply?

- (a) The regulations in 34 CFR part 300 governing the definition of transition services, and the Individualized Education Program requirements related to the development of postsecondary goals and the transition services needed to assist the eligible child in reaching those goals (§§ 300.320(b), 300.321(b), 300.324(c), and 300.43).
- (b) The regulations in 34 CFR part 361 governing the vocational rehabilitation program, especially those regarding protection and use of personal information in 34 CFR 361.38; eligibility determinations in 34 CFR 361.42; individualized plans for employment in 34 CFR 361.45 and 34 CFR 361.46; provision of vocational rehabilitation services, including pre-employment transition services, transition services, and supported employment services in 34 CFR 361.48; ineligibility determinations in 34 CFR 361.43; informed choice in 34 CFR 361.52; and case closures in 34 CFR 361.56.
- (c) The regulations in 29 CFR part 525 governing the employment of individuals with disabilities at subminimum wage rates pursuant to a certificate issued by the Secretary of Labor.
- (d) The regulations in this part 397.

(Authority: Sections 12(c), 102(a) and (b), 103(a), and 113 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 722(a) and (b), 723(a), and 733; sections 601(34) and 614(d)(1)(A)(i)(VIII) of the Individuals with Disabilities Education Act (20 U.S.C. 1401(34) and 1414(d)); and section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c))

§ 397.5 What definitions apply?

- (a) The following terms have the meanings given to them in 34 CFR 361.5(c):
 - (1) Act;
 - (2) Competitive integrated employment;
 - (3) Customized employment;
 - (4) Designated State unit;
 - (5) Extended services;
 - (6) Individual with a disability;

- (7) Individual with a most significant disability;
 - (8) Individual's representative;
 - (9) Individualized plan for employment;
 - (10) Pre-employment transition services;
 - (11) Student with a disability;
 - (12) Supported employment;
 - (13) Vocational rehabilitation services; and
 - (14) Youth with a disability.
- (b) The following terms have the meanings given to them in 34 CFR part 300:
- (1) Local educational agency (§ 300.28);
 - (2) State educational agency (§ 300.41); and
 - (3) Transition services (§ 300.43).
- (c) The following terms have the meanings given to them in 29 CFR 525.3 and section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)):
- (1) **Federal minimum wage** has the meaning given to that term in section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)); and
 - (2) **Special wage certificate** means a certificate issued to an employer under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) and 29 CFR part 525 that authorizes payment of subminimum wages, wages less than the statutory minimum wage.
- (d) **Entity** means an employer, or a contractor or subcontractor of that employer, that holds a special wage certificate described in section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)).

(Authority: Sections 7, 12(c), and 511(a) and (f) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705, 709(c), and 794g(a) and (f); sections 601 and 614(d) of the Individuals with Disabilities Education Act, 20 U.S.C. 1401 and 1414(d); section 901 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 7801; and sections 6(a)(1) and 14(c) of the Fair Labor Standards Act, 29 U.S.C. 206(a)(1) and 29 U.S.C. 214(c))

Subpart B—Coordinated Documentation Procedures Related to Youth with Disabilities

§ 397.10 What documentation process must the designated State unit develop?

- (a) The designated State unit, in consultation with the State educational agency, must develop a new process, or utilize an existing process, to document the completion of the actions described in § 397.20 and § 397.30 by a youth with a disability, as well as a process for the transmittal of that documentation from the educational agency to the designated State unit, consistent with confidentiality requirements of the Family Education Rights and Privacy Act (20 U.S.C. 1232g(b) and 34 CFR 99.30 and 99.31) and the Individuals with Disabilities Education Act (20 U.S.C. 1417(c) and 34 CFR 300.622).
- (1) Such documentation must, at a minimum, contain the—
 - (i) Youth's name;

- (ii) Determination made, including a summary of the reason for the determination, or description of the service or activity completed;
 - (iii) Name of the individual making the determination or the provider of the required service or activity;
 - (iv) Date determination made or required service or activity completed;
 - (v) Signature of the designated State unit or educational personnel making the determination or documenting completion of the required services or activity;
 - (vi) Date of signature described in paragraph (a)(1)(v) of this section;
 - (vii) Signature of designated State unit personnel transmitting documentation to the youth with a disability; and
 - (viii) Date and method (e.g., hand-delivered, faxed, mailed, emailed, etc.) by which document was transmitted to the youth.
- (2) In the event a youth with a disability or, as applicable, the youth's parent or guardian, refuses, through informed choice, to participate in the activities required by this part, such documentation must, at a minimum, contain the—
- (i) Youth's name;
 - (ii) Description of the refusal and the reason for such refusal;
 - (iii) Signature of the youth or, as applicable, the youth's parent or guardian;
 - (iv) Signature of the designated State unit or educational personnel documenting the youth's refusal;
 - (v) Date of signatures; and
 - (vi) Date and method (e.g., hand-delivered, faxed, mailed, emailed, etc.) by which documentation was transmitted to the youth.
- (3) The documentation process must include procedures for the designated State unit to retain a copy of all documentation required by this part in a manner consistent with the designated State unit's case management system and the requirements of 2 CFR 200.333.
- (b) The documentation process must ensure that—
- (1) A designated State unit provides, in the case of a student with a disability, documentation of completion of appropriate pre-employment transition services, in accordance with § 361.48(a) of this chapter and as required by § 397.20(a)(1);
 - (2) In the case of a student with a disability, for actions described in § 397.30—
 - (i) The appropriate school official, responsible for the provision of transition services, must provide the designated State unit documentation of completion of appropriate transition services under the Individuals with Disabilities Education Act, including those provided under section 614(d)(1)(A)(i)(VIII) (20 U.S.C. 1414(d)(1)(A)(i)(VIII));
 - (ii) The designated State unit must provide documentation of completion of the transition services, as documented and provided by the appropriate school official in accordance with paragraph (b)(2) of this section, to the youth with a disability.

- (c) The designated State unit must provide—
- (1) Documentation required by this part in a form and manner consistent with this part and in an accessible format for the youth; and
 - (2)
 - (i) Documentation required by paragraph (a)(1) of this section to a youth as soon as possible upon the completion of each of the required actions, but no later than—
 - (A) 45 calendar days after the determination or completion of the required activity or service; or
 - (B) 90 calendar days, if additional time is necessary due to extenuating circumstances, after the determination or completion of each of the required actions in § 397.20 and § 397.30(a). Extenuating circumstances should be interpreted narrowly to include circumstances such as the unexpected lengthy absence of the educational or designated State unit personnel necessary for the production of the documentation or the transmittal of that documentation due to illness or family emergency, or a natural disaster.
 - (ii) Documentation required by paragraph (a)(2) of this section, when a youth has refused to participate in an action required by this part, must be provided to the youth within 10 calendar days of the youth's refusal to participate.
 - (3) When transmitting documentation of the final determination or activity completed, as required by § 397.20 and § 397.30(a), the designated State unit must provide a coversheet that itemizes each of the documents that have been provided to the youth.

(Authority: Sections 12(c) and 511(d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(d))

Subpart C—Designated State Unit Responsibilities Prior to Youth With Disabilities Starting Subminimum Wage Employment

§ 397.20 What are the responsibilities of a designated State unit to youth with disabilities who are known to be seeking subminimum wage employment?

- (a) A designated State unit must provide youth with disabilities documentation upon the completion of the following actions:
- (1)
 - (i) Pre-employment transition services that are available to a student with a disability under 34 CFR 361.48; or
 - (ii) Transition services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*), such as transition services available to the individual under section 614(d) of that Act (20 U.S.C. 1414(d));
 - (2) Application for vocational rehabilitation services, in accordance with 34 CFR 361.41(b), with the result that the individual was determined—
 - (i) Ineligible for vocational rehabilitation services, in accordance with 34 CFR 361.43; or
 - (ii) Eligible for vocational rehabilitation services, in accordance with 34 CFR 361.42; and

- (A) The youth with a disability had an approved individualized plan for employment, in accordance with 34 CFR 361.46;
- (B) The youth with a disability was unable to achieve the employment outcome specified in the individualized plan for employment, as described in 34 CFR 361.5(c)(15) and 361.46, 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; and
- (C) The youth with a disability's case record, which meets all of the requirements of 34 CFR 361.47, is closed.

(3)

- (i) Regardless of the determination made under paragraph (a)(2) of this section, the youth with a disability has received career counseling, and information and referrals from the designated State unit to Federal and State programs and other resources in the individual's geographic area that offer employment-related services and supports designed to enable the individual to explore, discover, experience, and attain competitive integrated employment.
- (ii) The career counseling and information and referral services provided in accordance with paragraph (a)(3)(i) of this section must—
 - (A) Be provided by the designated State unit in a manner that facilitates informed choice and decision-making by the youth, or the youth's representative as appropriate;
 - (B) Not be for subminimum wage employment by an entity defined in § 397.5(d), and such employment-related services are not compensated at a subminimum wage and do not directly result in employment compensated at a subminimum wage provided by such an entity; and
 - (C) Be provided within 30 calendar days of a determination under paragraph (a)(2)(i) or (a)(2)(ii)(C) of this section for a youth known by the designated State unit to be seeking employment at subminimum wage.

(b) The following special requirements apply—

- (1) For purposes of this part, all documentation provided by a designated State unit must satisfy the requirements for such documentation, as applicable, under 34 CFR part 361.
- (2) The individualized plan for employment, required in paragraph (a)(2)(ii)(A) of this section, must include a specific employment goal consistent with competitive integrated employment, including supported or customized employment.

(3)

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

(Authority: Sections 7(5), 7(39), 12(c), 102(a) and (b), 103(a), 113, and 511(a) and (d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(5), 705(39), 709(c), 722(a) and (b), 723(a), 733, and 794g(a) and (d))

Subpart D—Local Educational Agency Responsibilities Prior to Youth With Disabilities Starting Subminimum Wage Employment

§ 397.30 What are the responsibilities of a local educational agency to youth with disabilities who are known to be seeking subminimum wage employment?

- (a) Of the documentation to demonstrate a youth with a disability's completion of the actions described in § 397.20(a), a local educational agency, as defined in § 397.5(b)(1), must provide the designated State unit with documentation that the youth has received transition services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*), such as transition services available to the individual under section 614(d) of that Act (20 U.S.C. 1414(d)). The documentation must be provided to the designated State unit in a manner that complies with confidentiality requirements of the Family Education Rights and Privacy Act (20 U.S.C. 1232g(b) and 34 CFR 99.30 and 99.31) and the Individuals with Disabilities Education Act (20 U.S.C. 1417(c) and 34 CFR 300.622).

- (b)

- (1) The documentation of completed services or activities required by paragraph (a) of this section must, at a minimum, contain the—
 - (i) Youth's name;
 - (ii) Description of the service or activity completed;
 - (iii) Name of the provider of the required service or activity;
 - (iv) Date required service or activity completed;
 - (v) Signature of educational personnel documenting completion of the required service or activity;
 - (vi) Date of signature described in paragraph (b)(1)(v) of this section; and
 - (vii) Signature of educational personnel transmitting documentation to the designated State unit; and
 - (viii) Date and method (e.g., hand-delivered, faxed, mailed, emailed, etc.) by which document was transmitted to the designated State unit.
- (2) In the event a youth with a disability or, as applicable, the youth's parent or guardian, refuses, through informed choice, to participate in the activities required by this part, such documentation must, at a minimum, contain the—
 - (i) Youth's name;
 - (ii) Description of the refusal and the reason for such refusal;
 - (iii) Signature of the youth or, as applicable, the youth's parent or guardian;

- (iv) Signature of the educational personnel documenting the youth's refusal;
- (v) Date of signatures required by paragraphs (b)(2)(iii) and (iv) of this section;
- (vi) Signature of educational personnel transmitting documentation of the refusal to the designated State unit; and
- (vii) Date and method (e.g., hand-delivered, faxed, mailed, emailed, etc.) by which documentation was transmitted to the designated State unit.

(c)

(1)

(i) The educational personnel must transmit the documentation required by paragraph (b)(1) of this section to the designated State unit as soon as possible upon the completion of each of the required actions, but no later than—

(A) 30 calendar days after the completion of the required activity or service; or

(B) 60 calendar days, if additional time is necessary due to extenuating circumstances, after the completion of each of the required actions in paragraph (a) of this section. Extenuating circumstances should be interpreted narrowly to include the unexpected lengthy absence due to illness or family emergency of the educational personnel necessary to produce or transmit the documentation, or a natural disaster.

(ii) Documentation required by paragraph (b)(2) of this section, when a youth has refused to participate in an action required by this part, must be provided to the DSU within 5 calendar days of the youth's refusal to participate.

(2) When the educational personnel transmits the last documentation to the designated State unit regarding the services provided to the youth under paragraph (a) of this section, the educational personnel must provide a cover sheet that itemizes the documentation that has been provided to the designated State unit regarding that youth.

(d) The educational agency must retain a copy of all documentation provided to the designated State unit under this section in a manner consistent with the requirements of 2 CFR 200.333.

(Authority: Sections 12(c), 511(a)(2)(A), and 511(d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c), 794g(a)(2)(A), and (d))

§ 397.31 What are the contracting limitations on educational agencies under this part?

Neither a local educational agency, as defined in § 397.5(b)(1), nor a State educational agency, as defined in § 397.5(b)(2), may enter into a contract or other arrangement with an entity, as defined in § 397.5(d), for the purpose of operating a program for a youth under which work is compensated at a subminimum wage.

(Authority: Section 511(b)(2) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 794g(b)(2))

Subpart E—Designated State Unit Responsibilities to Individuals With Disabilities During Subminimum Wage Employment

§ 397.40 What are the responsibilities of a designated State unit for individuals with disabilities, regardless of age, who are employed at a subminimum wage?

(a) *Counseling and information services.*

- (1) A designated State unit must provide career counseling and information and referral services, as described in § 397.20(a)(3), to individuals with disabilities, regardless of age, or the individual's representative as appropriate, who are known by the designated State unit to be employed by an entity, as defined in § 397.5(d), at a subminimum wage level.
- (2) A designated State unit may know of an individual with a disability described in this paragraph through the vocational rehabilitation process, self-referral, or by referral from the client assistance program, another agency, or an entity, as defined in § 397.5(d).
- (3) The career counseling and information and referral services must be provided in a manner that—
 - (i) Is understandable to the individual with a disability; and
 - (ii) Facilitates independent decision-making and informed choice as the individual makes decisions regarding opportunities for competitive integrated employment and career advancement, particularly with respect to supported employment, including customized employment.
- (4) The career counseling and information and referral services provided under this section may include benefits counseling, particularly with regard to the interplay between earned income and income-based financial, medical, and other benefits.

(b) *Other services.*

- (1) Upon a referral by an entity, as defined in § 397.5(d), that has fewer than 15 employees, of an individual with a disability who is employed at a subminimum wage by that entity, a designated State unit must also inform the individual within 30 calendar days of the referral by the entity, of self-advocacy, self-determination, and peer mentoring training opportunities available in the community.
- (2) The services described in paragraph (b)(1) of this section must not be provided by an *entity* as defined in § 397.5(d).

(c) *Required intervals.*

- (1) For individuals hired at subminimum wage on or after July 22, 2016, the services required by this section must be carried out once every six months for the first year of the individual's subminimum wage employment and annually thereafter for the duration of such employment.
- (2) For individuals already employed at subminimum wage prior to July 22, 2016, the services required by this section must be carried out once by July 22, 2017, and annually thereafter for the duration of such employment.
- (3)
 - (i) With regard to the intervals required by paragraphs (c)(1) and (2) of this section for purposes of the designated State unit's responsibilities to provide certain services to individuals employed at subminimum wage, the applicable intervals will be calculated based upon the date the individual becomes known to the designated State unit.

- (ii) An individual with a disability may become “known” to the designated State unit through self-identification by the individual with a disability, referral by a third-party (including an *entity* as defined in § 397.5(d)), through the individual's involvement with the vocational rehabilitation process, or any other method.

(d) **Documentation.**

(1)

- (i) The designated State unit must provide documentation to the individual as soon as possible, but no later than—
 - (A) 45 calendar days after completion of the activities required under this section; or
 - (B) 90 calendar days, if additional time is necessary due to extenuating circumstances, after the completion of the required actions in this section. Extenuating circumstances should be interpreted narrowly to include circumstances such as the unexpected lengthy absence of the designated State unit personnel, due to illness or other family emergency, who is responsible for producing or transmitting the documentation to the individual with a disability, or a natural disaster.
- (ii) Documentation required by paragraph (d)(3) of this section, when an individual has refused to participate in an activity required by this section, must be provided to the individual within 10 calendar days of the individual's refusal to participate.

(2) Such documentation must, at a minimum, contain the—

- (i) Name of the individual;
- (ii) Description of the service or activity completed;
- (iii) Name of the provider of the required service or activity;
- (iv) Date required service or activity completed;
- (v) Signature of individual documenting completion of the required service or activity;
- (vi) Date of signature described in paragraph (d)(2)(v) of this section;
- (vii) Signature of designated State unit personnel (if different from that in paragraph (d)(2)(v) of this section) transmitting documentation to the individual with a disability; and
- (viii) Date and method (e.g., hand-delivered, faxed, mailed, emailed, etc.) by which document was transmitted to the individual.

(3) In the event an individual with a disability or, as applicable, the individual's representative, refuses, through informed choice, to participate in the activities required by this section, such documentation must, at a minimum, contain the—

- (i) Name of the individual;
- (ii) Description of the refusal and the reason for such refusal;
- (iii) Signature of the individual or, as applicable, the individual's representative;
- (iv) Signature of the designated State unit personnel documenting the individual's refusal;
- (v) Date of signatures; and

(vi) Date and method (e.g., hand-delivered, faxed, mailed, emailed, etc.) by which documentation was transmitted to the individual.

(4) The designated State unit must retain a copy of all documentation required by this part in a manner consistent with the designated State unit's case management system and the requirements of 2 CFR 200.333.

(e) **Provision of services.** Nothing in this section will be construed as requiring a designated State unit to provide the services required by this section directly. A designated State unit may contract with other entities, *i.e.*, other public and private service providers, as appropriate, to fulfill the requirements of this section. The contractor providing the services on behalf of the designated State unit may not be an entity holding a special wage certificate under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) as defined in 397.5(d).

(Authority: Sections 12(c) and 511(c) and (d) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(c) and (d))

Subpart F—Review of Documentation

§ 397.50 What is the role of the designated State unit in the review of documentation under this part?

(a) 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 an *entity*, as defined in 397.5(d), under this part. The contractor referred in this section may not be an entity holding a special wage certificate under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)).

(b) If deficiencies are noted during a documentation review conducted under paragraph (a) of this section, the designated State unit should report the deficiency to the U.S. Department of Labor's Wage and Hour Division.

(Authority: Sections 12(c) and 511(e)(2)(B) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 794g(e)(2)(B))