

### § 361.43

### 34 CFR Ch. III (7–1–18 Edition)

and rehabilitation needs of the individual.

(ii) Trial work experiences include supported employment, on-the-job training, and other experiences using realistic integrated work settings.

(iii) Trial work experiences must be of sufficient variety and over a sufficient period of time for the designated State unit to determine that—

(A) There is sufficient evidence to conclude that the individual can benefit from the provision of vocational rehabilitation services in terms of an employment outcome; or

(B) There is clear and convincing evidence that due to the severity of the individual's disability, the individual is incapable of benefitting from the provision of vocational rehabilitation services in terms of an employment outcome; and

(iv) The designated State unit must provide appropriate supports, including, but not limited to, assistive technology devices and services and personal assistance services, to accommodate the rehabilitation needs of the individual during the trial work experiences.

(f) *Data for determination of priority for services under an order of selection.* If the designated State unit is operating under an order of selection for services, as provided in § 361.36, the State unit must base its priority assignments on—

(1) A review of the data that was developed under paragraphs (d) and (e) of this section to make the eligibility determination; and

(2) An assessment of additional data, to the extent necessary.

(Authority: Sections 7(2), 12(c), 101(a)(12), 102(a), 103(a)(1), 103(a)(9), 103(a)(10), and 103(a)(14) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 705(2), 709(c), 721(a)(12), 722(a), 723(a)(1), 723(a)(9), 723(a)(10), and 723(a)(14))

NOTE TO § 361.42: *Clear and convincing evidence* means that the designated State unit has a high degree of certainty before it can conclude that an individual is incapable of benefitting from services in terms of an employment outcome. The clear and convincing standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case-by-case basis. The term *clear* means unequivocal. For example, the use of an intelligence test result

alone would not constitute clear and convincing evidence. Clear and convincing evidence might include a description of assessments, including situational assessments and supported employment assessments, from service providers who have concluded that they would be unable to meet the individual's needs due to the severity of the individual's disability. The demonstration of "clear and convincing evidence" must include, if appropriate, a functional assessment of skill development activities, with any necessary supports (including assistive technology), in real life settings. (S. Rep. No. 357, 102d Cong., 2d. Sess. 37–38 (1992))

#### § 361.43 Procedures for ineligibility determination.

If the State unit determines that an applicant is ineligible for vocational rehabilitation services or determines that an individual receiving services under an individualized plan for employment is no longer eligible for services, the State unit must—

(a) Make the determination only after providing an opportunity for full consultation with the individual or, as appropriate, with the individual's representative;

(b) Inform the individual in writing, supplemented as necessary by other appropriate modes of communication consistent with the informed choice of the individual, of the ineligibility determination, including the reasons for that determination, the requirements under this section, and the means by which the individual may express and seek remedy for any dissatisfaction, including the procedures for review of State unit personnel determinations in accordance with § 361.57;

(c) Provide the individual with a description of services available from a client assistance program established under 34 CFR part 370 and information on how to contact that program;

(d) Refer the individual—

(1) To other programs that are part of the one-stop service delivery system under the Workforce Innovation and Opportunity Act that can address the individual's training or employment-related needs; or

(2) To Federal, State, or local programs or service providers, including,

as appropriate, independent living programs and extended employment providers, best suited to meet their rehabilitation needs, if the ineligibility determination is based on a finding that the individual has chosen not to pursue, or is incapable of achieving, an employment outcome as defined in § 361.5(c)(15).

(e) Review within 12 months and annually thereafter if requested by the individual or, if appropriate, by the individual's representative any ineligibility determination that is based on a finding that the individual is incapable of achieving an employment outcome. This review need not be conducted in situations in which the individual has refused it, the individual is no longer present in the State, the individual's whereabouts are unknown, or the individual's medical condition is rapidly progressive or terminal.

(Authority: Sections 12(c) and 102(a)(5) and (c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c) and 722(a)(5) and (c))

**§ 361.44 Closure without eligibility determination.**

The designated State unit may not close an applicant's record of services prior to making an eligibility determination unless the applicant declines to participate in, or is unavailable to complete, an assessment for determining eligibility and priority for services, and the State unit has made a reasonable number of attempts to contact the applicant or, if appropriate, the applicant's representative to encourage the applicant's participation.

(Authority: Section 12(c) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(c))

**§ 361.45 Development of the individualized plan for employment.**

(a) *General requirements.* The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that—

(1) An individualized plan for employment meeting the requirements of this section and § 361.46 is developed and implemented in a timely manner for each individual determined to be eligible for vocational rehabilitation services or, if the designated State unit is operating under an order of selection in accordance with § 361.36, for each eligible indi-

vidual to whom the State unit is able to provide services; and

(2) Services will be provided in accordance with the provisions of the individualized plan for employment.

(b) *Purpose.* (1) The designated State unit must conduct an assessment for determining vocational rehabilitation needs, if appropriate, for each eligible individual or, if the State is operating under an order of selection, for each eligible individual to whom the State is able to provide services. The purpose of this assessment is to determine the employment outcome, and the nature and scope of vocational rehabilitation services to be included in the individualized plan for employment.

(2) The individualized plan for employment must be designed to achieve a specific employment outcome, as defined in § 361.5(c)(15), that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(c) *Required information.* The State unit must provide the following information to each eligible individual or, as appropriate, the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or the individual's representative:

(1) *Options for developing an individualized plan for employment.* Information on the available options for developing the individualized plan for employment, including the option that an eligible individual or, as appropriate, the individual's representative may develop all or part of the individualized plan for employment—

(i) Without assistance from the State unit or other entity; or

(ii) With assistance from—

(A) A qualified vocational rehabilitation counselor employed by the State unit;

(B) A qualified vocational rehabilitation counselor who is not employed by the State unit;

(C) A disability advocacy organization; or

(D) Resources other than those in paragraph (c)(1)(ii)(A) through (C) of this section.