The following is an analysis by the National Federation of the Blind (NFB) of the language found in Section 511 of Title V, the Rehabilitation Act, of S. 1356, the Workforce Investment Act (WIA) reauthorization.

The NFB recognizes that the intent of the language is to reduce the number of youth with significant disabilities being tracked directly from school to subminimum wage employment. However, our analysis finds that the language in Section 511 creates four pathways to sheltered subminimum wage employment by —

(1) incorporating the language of section 14(c) of the Fair Labor Standards Act (FLSA) into the Rehabilitation Act, linking these two conflicting statutes for the first time;

(2) opening the door for offering subminimum wage employment as a service to those age twenty-four or older;

(3) giving a prescription for an accepted use of subminimum wage employment for youth with disabilities; and

(4) authorizing subminimum wage employers as providers of employment training.

Analysis of Section 511 of Title V of the Workforce Investment Act: Limitations on employment of people with disabilities at subminimum wages.

1. **IN GENERAL.-An entity, including a contractor or subcontractor of the entity, may not employ an individual with a disability at a wage (referred to in this section as a ‘subminimum wage’) that is less than the Federal minimum wage unless the entity has complied with the requirements of section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), and any of the following additional conditions is met:**

The Rehabilitation Act, under current law, already requires vocational rehabilitation (VR) professionals to prove by clear and convincing evidence, through the use of trial work experiences, that an individual is incapable of benefiting from VR services in terms of an employment outcome. Moreover, RSA Policy Directive (PD-97-04) builds on this mandate by requiring maximization of employment outcomes. VR professionals are discouraged, if not prohibited, from using VR funds to provide training or employment in sheltered subminimum wage work environments. On the whole, Section 511 ignores these existing mandates in law and regulation, and, contrary to its stated intent, makes it more acceptable for youth with significant disabilities to be tracked into subminimum wage employment environments by incorporating section 14(c) of the FLSA into the Rehabilitation Act. The conditions are prescriptive, not prohibitive. As outlined below, the four subsections of Section 511 of the WIA reauthorization significantly weaken the existing language, and create pathways for VR professionals to use subminimum wage training and employment as a service and as an employment goal.

**(1)The individual is currently employed, as of the effective date of this section, by an entity that holds a valid certificate pursuant to section 14(c) of the Fair Labor Standards Act of 1938 (referred to in this section as a ‘certificate holder’).**

Section 511(a)(1) is a restatement of Section 14(c) of the FLSA, incorporating the latter’s language of low expectations into the Rehabilitation Act for the first time. This pathway does nothing to prohibit anyone from being tracked into subminimum wage employment. In fact, it grandfathers in every individual over twenty-four who is currently employed in a subminimum wage environment, without even a review of their work status, making it less likely that these individuals will pursue obtaining vocational rehabilitation (VR) services.

**(2)The individual is older than age 24 on the date when the individual begins employment at a subminimum wage.**

511(a)(2) is a pathway that opens the door for subminimum wage employment to be considered a service for adults with disabilities by stating that if an individual is over twenty-four, VR can refer him/her to a subminimum wage work environment with no restrictions. Currently there is a policy directive, RSA-PD-97-04, requiring maximization of employment outcomes for VR clients, and subminimum wage work environments are not listed as an option for training or placement. In this subsection, subminimum wage employment is presented as a viable option, giving VR professionals permission to use subminimum wage employment as a service for individuals over age twenty-four. This significantly undermines the purpose and intent of the Rehabilitation Act, and language meant to deter youth with disabilities from being tracked into sheltered subminimum wage work environments actually has the unintended outcome of encouraging the use of subminimum wage work outcomes for adults with severe disabilities.

**(3)The individual is age 24 or younger and, before beginning work at a subminimum wage, has completed, and produces documentation indicating completion of, each of the following 3 actions:**

**The individual has received pre-employment transition services that are available to the individual under section 114, or 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 individual has applied for vocational rehabilitation services under title I, with the result that-**

**the individual has been found ineligible for the services pursuant to that title; or**

**(ii)(I) the individual has been determined to be eligible for vocational rehabilitation services;**

**(II) the individual has an individualized plan for employment under section 102;**

**(III) the individual has been working toward an employment outcome specified in such individualized plan for employment, with appropriated supports and services, for a reasonable period of time without success; and**

 **(IV) the individual’s vocational rehabilitation case is closed after the individual’s qualified vocational rehabilitation counselor and the individual both agree that continued efforts by the individual to work toward an employment outcome, as defined in section (7), at the present time will likely not be successful.**

**The individual (with, in an appropriate case, the individual’s parent or guardian)-**

**has been provided career counseling, and information and referrals to Federal and State programs and other resources in the individuals’ geographic area that offer employment-related services and supports designed to enable the individual to explore, discover, experience, and attain competitive integrated employment;**

**understands the conditions under which a subminimum wage may be paid; and**

 **consents to work for the employer and be paid a subminimum wage.**

511(a)(3) is touted to be the pathway with “speed bumps” that will slow down the tracking of youth with disabilities into subminimum wage employment, but begins with the language “before beginning work at a subminimum wage.” This is preparatory language to a checklist of steps that should be taken to circumnavigate existing law before authorizing placement in a subminimum wage work environment.

511(a)(3)(A) references Section 114, which has language that focuses on providing better transitional services for youth with disabilities without reference to section 14(c) of the FLSA. Section 114 emphasizes the use of quality pre-vocational services, and would potentially prevent the tracking of youth with disabilities into subminimum wage employment. However, there is no requirement for VR to provide services under Section 114 if the student has documentation of pre-vocational services received under IDEA. This is an assumption that the services received under IDEA are sufficient, and VR services would not enhance the employability of the individual. Moreover, the additional language in this subsection takes away any potential gains from the Section 114 language.

511(a)(3)(B) states that the individual must apply for VR services. This simply means that in order for this provision to take effect, the individual must apply for VR services. It is important to note that an individual cannot be required to apply for VR services. Therefore, this provision cannot and does not prevent individuals from going directly into subminimum wage employment from school. The following provisions are applicable only if the individual applies for VR services:

511(a)(3)(B)(i) states that a condition for subminimum wage employment is that “the individual has been found ineligible for the services pursuant to that title.” This references the existing requirement in section 102(a)(2) of the Rehabilitation Act, stating that the agency must prove by clear and convincing evidence, through the use of trial work experiences, that an individual is incapable of benefiting from VR services in terms of an employment outcome. “Clear and convincing evidence” is the highest civil legal standard, and when enforced, youth with disabilities are not tracked into subminimum wage employment environments. This subparagraph, which restates existing law, is already much stronger than the alternative steps introduced by Section 511. In effect, individuals are guaranteed more comprehensive services when found ineligible for services under existing law than under the proposed language, which actually lowers the standard when individuals are found eligible for VR services (as described below).

511(a)(3)(B)(ii). Rather than enforcing the existing language of demonstrating through clear and convincing evidence, and using trial work experiences to maximize the employment outcome, this subsection offers an alternative that significantly weakens the existing law. Under this alternative provision, (1) an individual can be found eligible for services; (2) his/her VR case can be opened; (3) an IPE can be developed; and then, (4) after the individual has been working toward the vocational goal listed in the IPE for a “reasonable period of time without success,” the individual, along with his/her “qualified vocational rehabilitation counselor,” can determine that the individual’s efforts will “likely not be successful.” The individual can then (5) be referred to subminimum wage employment. This is a checklist for authorizing subminimum wage employment. It is also important to note that a “reasonable” attempt that “likely” will not be successful is a significantly lower bar than the existing expectation for the provision of comprehensive training and employment services. Moreover, the diminished credentials the new language sets forth in order for a person to be considered a “qualified vocational rehabilitation counselor” leaves the client potentially reliant on the advice of someone with no professional training in working effectively with people with significant disabilities.

511(a)(3)(C) is a simple information and referral process that is already expected in order for individuals to make informed choices during their VR process, but now it will include information about subminimum wage employment. This is not required under current law, but now would be required and would even include the language “consents to work for the employer and be paid a subminimum wage.”

This language, stated to be the speed bump for tracking youth into subminimum wage employment, prescribes a path that does not exists in current law to the subminimum wage employment outcome. To recap, the language simply states that before an individual can begin work at a subminimum wage, he/she must have applied for vocational rehabilitation services, and after being found eligible for VR services and having worked toward an employment goal for a “reasonable” amount of time, he/she has determined with the advice of his/her “somewhat qualified” vocational rehabilitation counselor that his/her efforts to obtain competitive integrated employment are “likely” not going to be successful. Moreover, after an information and referral process, the individual is forced to endorse this failed effort by “consenting” to work for the employer and be paid a subminimum wage.

**(4) The individual, regardless of age, is receiving work readiness or job training services provided by a certificate holder, as part of the individual’s preparation for competitive integrated employment, for-**

**a period of not more than 6 months; or**

**a longer period, if the individual wishes to continue to receive such services after an initial 6-month period and is reassessed by the agency referring the individual for such services, or an appropriate entity, not less often than every 6 months, to determine the individual’s ability to transition to competitive integrated employment.**

511(a)(4). This pathway is the most detrimental and potentially most frequently used. It clearly states that rather than providing the services listed as a “speed bump” to subminimum wage placement, disabled persons of any age can be immediately referred to a subminimum wage employer under the guise of training for competitive integrated employment. Vocational rehabilitation professionals are currently discouraged from using subminimum wage environments for training or employment, but this language endorses the practice. Not only can a youth with a disability be sent directly to a subminimum wage work environment, but the sheltered workshop holding the 14(c) certificate is being endorsed as a viable employment training provider for youth with disabilities. This ignores the research that demonstrates job training services provided by an employer holding a special wage certificate are more costly, produce poorer outcomes, and teach outdated skills and poor work habits that individuals with disabilities must unlearn in order to obtain gainful employment. In addition, data show that less than 5 percent of individuals in a sheltered subminimum wage work environment ever transition into competitive integrated work environments. Rather than reducing the number of youth tracked into subminimum wage work environments, this provision sentences the next generation of subminimum wage workers to a lifetime of low expectations. This is especially true for those individuals with the most significant disabilities, who are seen as presenting a considerable challenge for vocational rehabilitation agencies to place in competitive integrated employment.

**(b) CONSTRUCTION. –**

 **(1) SERVICES -- Nothing in subsection (a)(3)(B) shall be construed to prohibit a designated State unit from allowing an individual to receive work readiness or job training services provided by a certificate holder, for a period of not more than 6 months.**

 **(2) RULE – Nothing in this section shall be construed as** **changing the purpose of this Act described in section 2(b)(1), to empower individuals with disabilities to maximize opportunities for competitive integrated employment.**

511(b)(1): This subsection reaffirms the intent of the new language to endorse sheltered subminimum wage work environments as work readiness and job training service providers. Again, this is contrary to the research that demonstrates that training services provided by an employer holding a special wage certificate are more costly, produce poorer outcomes, and teach outdated skills and poor work habits that individuals with disabilities must unlearn in order to obtain gainful employment.

511(b)(2): The requirement for consideration of sheltered subminimum wage training and employment as services under the Act drastically changes the purpose of this Act away from empowering individuals with disabilities to maximize opportunities for competitive integrated employment.

**(c) DURING EMPLOYMENT.—**

 **(1) IN GENERAL -- The entity described in subsection (a) may not continue to employ an individual at a subminimum wage unless, after the individual begins work at that wage, at the intervals described in paragraph (2), the individual (with, in an appropriate case, the individual’s parent or guardian)--**

**(A) is provided career counseling, and information and referrals described in subsection (a)(3)(C)(i), delivered in a manner that facilitates independent decisionmaking and informed choice, as the individual makes decisions regarding employment and career advancement; and**

**(B) is informed by the employer of self-advocacy, self-determination, and peer mentoring training opportunities available in the individual’s geographic area, provided by an entity that does not have a financial interest in the individual’s employment outcome, under applicable Federal and State programs or other sources.**

**(2) TIMING – The actions required under subparagraphs (A) and (B) of paragraph (1) shall be carried out once every 6 months for the first year of the individual’s employment at a subminimum wage, and annually thereafter for the duration of such employment.**

**(3) SMALL BUSINESS EXCEPTION -- In the event that the entity described in subsection (a) is a business with fewer than 15 employees, such entity can satisfy the requirements of subparagraphs (A) and (B) of paragraph (1) by referring the individual, at the intervals described in paragraph (2), to the designated State unit for the counseling, information, and referrals described in subparagraph (A) and the information described in subparagraph (B).**

511(c): Restates the Informed Choice language that already exists in current law, and requires the first review of an individual’s progress to take place after six months rather than after twelve months. The subsequent language restores the review requirement to the existing annual review. For businesses with less than fifteen employees, the review is reduced to a referral requirement.

**(d) DOCUMENTATION.-**

**IN GENERAL.-The designated State unit, in consultation with the State educational agency, shall develop a new process or utilize an existing process, consistent with guidelines developed by the Secretary, to document the completion of the actions described in subparagraphs (A), (B), and (C) of subsection (a)(3) by a youth with a disability who is an individual with a disability.**

**DOCUMENTATION PROCESS- Such process shall require that-.**

**in the case of a student with a disability, for documentation of actions described in subsection (a)(3)(A)-**

**if such a student with a disability receives and completes each category described in clauses (i) through (v) of section 7(30)(B) of available pre-employment transition services, such completion of services shall be documented by the designated State unit in a manner consistent with this section;**

**if such a student with a disability receives and completes any transition services available for students with disabilities 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)),such completion of services shall be documented by the appropriate school official responsible for the provisions of such transition services for students with disabilities in the school or school district, in a manner consistent with this section; and**

**a Local Pre-Employment Transition Coordinator shall provide the final documentation, in a form and manner consistent with this section, of the completion of pre-employment transition services as described in clause (i), or transition services under the Individuals with Disabilities Education Act as described in clause (ii), to the student with a disability within a reasonable period of time following the completion; and**

**when an individual has completed the actions described in subsection (a)(3)(C), following the completion of the actions described in subparagraphs (A) and (B) of subsection (a)(3), the designated State unit shall provide the individual a document indicating such completion, in a manner consistent with this section, within a reasonable time period following the completion of the actions described in this subparagraph.**

511(d): The requirement to develop and implement the complicated documentation and review process outlined in this subsection does not take into consideration the fact that state vocational rehabilitation programs do not have the resources to ensure effective compliance with the prescribed documentation and review requirements, including the six-month review period in the proposed language. As a result, the documentation and review requirements will inevitably be reduced to a paperwork checklist that is routinely filled out by overworked rehabilitation counselors to justify lightening their caseloads by placing workers in subminimum wage employment.

**(e) VERIFICATION.-**

**BEFORE EMPLOYMENT.-Before an individual covered by subsection (a)(3) begins work for an employer at a subminimum wage, the employer shall review the documentation received by the individual under subsection (d), and provided by the individual to the employer, that indicates that the individual has completed the actions described in subparagraphs (A), (B), and (C) of subsection (a)(3) and the employer shall maintain copies of the documentation.**

**DURING EMPLOYMENT.-In order to continue to employ an individual at a subminimum wage, the employer shall verify completion of the requirements of subsection (c), including reviewing any relevant documents provided by the individual, and shall maintain copies of the documentation.**

511(e): The requirements placed on the employer cannot be enforced without redirecting resources that could be better used to fulfill the true purpose of the Act. Just as the Wage and Hour Division of the Department of Labor has been ineffective in preventing abuse of the exemption contained in section 14(c) of the FLSA, state vocational rehabilitation agencies will find enforcing the documentation and review requirements difficult if not impossible. The time and resources spent to attempt to implement and enforce this additional bureaucratic process would be better spent creating additional opportunities, positive incentives, and creative strategies for the competitive integrated employment of people with disabilities.

Again, we recognize the intent, but the proposed language of Section 511 introduces four pathways to sheltered subminimum wage work that do not currently exist in the Rehabilitation Act. Our policy recommendation is to amend WIA to strike Section 511 in its entirety, or use the following language we have offered as an alternative:

SEC. 511 REQUIREMENT OF TRAINING AND EMPLOYMENT OF INDIVIDUALS WITH SIGNIFICANT DISABILITIES IN COMPETITIVE INTEGRATED EMPLOYMENT.

(1) IN GENERAL.-An entity, including a contractor or subcontractor of the entity, may only train or employ an individual with a significant disability in Competitive Integrated Employment.