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**Senior Community Service Employment
Program; Final Rule**

DEPARTMENT OF LABOR**Employment and Training Administration****20 CFR Part 641**

RIN 1205-AB48 and RIN 1205-AB47

Senior Community Service Employment Program; Final Rule

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department) issues this final rule to implement changes in the Senior Community Service Employment Program (SCSEP) resulting from the 2006 Amendments to title V of the Older Americans Act, and to clarify various policies. These regulations provide administrative and programmatic guidance and requirements for the implementation of the SCSEP.

The Department issued an interim final rule (IFR) implementing changes in the SCSEP performance accountability regulations. We issued a notice of proposed rulemaking (NPRM) proposing changes to the remainder of the SCSEP regulations on August 14, 2008. This final rule takes into consideration comments received on the IFR and the NPRM.

DATES: *Effective date:* This final rule is effective October 1, 2010.

FOR FURTHER INFORMATION CONTACT: Judith Gilbert, Team Leader, Division of Adult Services, Office of Workforce Investment, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-4209, Washington, DC 20210; telephone (202) 693-3046 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

The preamble to this final rule is organized as follows:

- I. Background—provides a brief description of the development of the rule.
- II. Summary of the Comments—provides an overview of the comments received.
- III. Section-by-Section Review—discusses comments on the SCSEP regulations.
- IV. Administrative Information—sets forth the applicable regulatory requirements.

I. Background

The Older Americans Act (OAA) Amendments of 2006, Public Law 109-365 (2006 OAA) were signed into law

on October 17, 2006. This law amended the statute authorizing the SCSEP and necessitates changes to the SCSEP regulations. The 2006 OAA required regulations that address performance measures by July 1, 2007. To meet this deadline, the Department promulgated an Interim Final Rule on June 29, 2007. 72 FR 35832. We issued an NPRM on August 14, 2008, to propose changes to the remainder of the SCSEP regulations in light of the 2006 OAA. 73 FR 47770. We invited comments on both the IFR and the NPRM, and thoroughly evaluated those comments in the process of developing this final rule.

The SCSEP, authorized by title V of the OAA, is the only federally-sponsored employment and training program targeted specifically to low-income older individuals who want to enter or re-enter the workforce. Participants must be unemployed, 55 years of age or older, and have incomes no more than 125 percent of the Federal poverty level. The program offers participants community service assignments and training in public and non-profit agencies. The dual goals of the program are to promote useful opportunities in community service activities and to also move SCSEP participants into unsubsidized employment, where appropriate, so that they can achieve economic self-sufficiency. In the 2006 OAA, Congress expressed its sense of the benefits of the SCSEP, stating, “placing older individuals in community service positions strengthens the ability of the individuals to become self-sufficient, provides much-needed support to organizations that benefit from increased civic engagement, and strengthens the communities that are served by such organizations.” OAA § 516(2).

Although some of these regulations remain unchanged from the 2004 SCSEP final rule, this final rule does include certain significant changes to the program. Perhaps most notably, the new 48-month limitation on participation (OAA § 518(a)(3)(B); § 641.570 of this part), and the increase in available funds for training and supportive services (OAA § 502(c)(6)(C); § 641.874 of this part).

The 2006 OAA also increases the accountability of national grantees by clearly requiring a competitive process for grant awards. This final rule implements the statute’s requirement that the national SCSEP grantees be re-competed regularly, generally every four years. OAA § 514(a); § 641.490(a) of this part. This final rule also implements the statute’s requirement that a State compete its SCSEP grant if the current

State grantee fails to meet its core performance goals for three consecutive years. OAA § 513(d)(3)(B)(iii); § 641.490 of this part.

In addition, the 2006 OAA establishes new funding opportunities for pilot, demonstration, and evaluation projects (OAA § 502(e); § 641.600–640 of this part), expands the priority-for-service categories (OAA § 518(b); § 641.520 of this part), and modifies how the program determines income eligibility (OAA § 518(a)(3)(A); § 641.510 of this part).

Coordination between the SCSEP and the programs under the Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 *et seq.*, continues to be an important objective of the 2006 OAA. With the enactment of WIA in 1998, the SCSEP became a required partner in the workforce investment system. 29 U.S.C. 2841(b)(1)(B)(vi). In 2000, Congress amended the SCSEP to require coordination with the WIA One-Stop delivery system (Pub. L. 106-501, § 505(c)(1)), including reciprocal use of assessment mechanisms and Individual Employment Plans (Pub. L. 106-501, § 502(b)(4)). In 2006, Congress continued both the requirement to coordinate at OAA § 505(c)(1) and the reciprocal use of assessments at OAA § 502(b)(3)(B). The underlying notion of the One-Stop delivery system is the coordination of programs, services, and governance structures, so that the customer has access to a seamless system of workforce investment services.

Consistent with current SCSEP practice, both WIA and the 2006 OAA require any grantee operating a SCSEP project in a local area to negotiate a Memorandum of Understanding (MOU) with the Local Workforce Investment Board. WIA § 121; OAA § 511(b); see also OAA § 502(b)(1)(O). The MOU must detail the SCSEP project’s involvement in the One-Stop delivery system. In particular, SCSEP grantees and sub-recipients must make arrangements to provide their participants, eligible individuals the grantees are unable to serve, as well as SCSEP-ineligible individuals, with access to services available in the One-Stop centers. OAA §§ 510, 511; §§ 641.210, 641.220, and 641.230 of this part.

II. Summary of the Comments

We have carefully reviewed all of the comments received in response to both the IFR and to the NPRM. We received 1,505 comments during the comment periods, of which 364 were unique, 959 were duplicates or “form” letters, and one was a petition with 182 signatures. The commenters fell into a variety of

categories that reflect the broad range of constituencies for the SCSEP program, including State and national grantees, program non-profit host agencies, area agencies on aging, WIA providers, and program participants.

A number of commenters requested additional time to review and submit comments on the changes proposed in the NPRM. Many of these commenters requested an additional 60 days to determine the impact on SCSEP stakeholders and participants. Several commenters mentioned that many who will be impacted by the proposed changes are not yet even aware of them. Others mentioned that they have had insufficient time to contact host agencies and obtain their input. One commenter pointed out that the SCSEP system is a diverse and complex network of agencies, and said that insufficient time had been allowed to seek input from this network. One commenter said additional time was required to evaluate the impact of the recent economic downturn on SCSEP participants. A few others suggested that the Department put the proposed regulations aside and work collaboratively with the grantee community and with the Administration on Aging to draft new regulations.

We reviewed these requests and concluded that they presented no novel or difficult issues justifying an extension of the comment period or a withdrawal of the proposed rule. In this case, the Department provided 60 days for notice and comment. We believe the time allotted was more than sufficient to review this regulation given that most of the rule simply reflects changes required by the 2006 OAA, or is a continuation of policies that were published in the 2004 Final Rule. Accordingly, the Department did not extend the comment period.

The more substantive comments touched on almost every section of the proposed regulation. These comments are discussed in Section III below. In addition, the Department has made technical changes to the regulatory text for clarity and consistency. Provisions that were not the subject of a comment or that were not revised for technical reasons have been adopted as proposed and are not discussed in Section III.

III. Section-by-Section Review

In this section, we discuss the comments, our responses to them and any changes to the regulations that we made as a result of comments. In the course of reviewing the NPRM, we have made some technical or grammatical changes to the regulatory text, which are

not intended to change the meaning or intent of the regulatory provisions. Generally, we do not discuss these types of changes in this section.

Subpart A—Purpose and Definitions

What is the SCSEP? (§ 641.110)

This section of the final rule describes the SCSEP as it is defined by the 2006 OAA. We received several comments on this provision. Those commenters expressed concern about using the term “employment” in the phrase “community service employment assignment” as referenced in §§ 641.110 and 641.120 of the rule. A few commenters found that adding the term “places undue confusion on both grantees and participants.” As a result, these commenters recommended that the regulation only refer to “employment” in the context of unsubsidized employment. Other commenters stated that changing the name would reverse grantee efforts to promote SCSEP as a training program rather than an employment program.

The Department accepts this comment. The regulation has been revised to use the term “community service assignment” throughout. The term “community service employment” in the rule is consistent with the term as it is defined in the 2006 OAA at § 518(a)(2). To remedy any potential confusion, the Department notes that the terms “community service assignment” and “community service employment assignment” are the same in that they both represent part-time, temporary job training through a work experience that is paid with grant funds. Therefore, the Department recommends that grantees continue to clarify the nature of the community service assignment with participants, which should alleviate any potential confusion.

One final comment came from a program participant who stated that the program should allow for more than part-time hours so that participants are able to further develop and improve their skills. We are unable to accommodate the participant’s request, because the OAA at § 518(a)(2) defines “community service employment” as “part-time, temporary employment.” We are pleased to receive comments from our program participants, including this commenter, and note that developing and improving skills does not have to end with SCSEP. There are other no-cost training resources available to seniors (including, in some cases, through the One-Stop delivery system) that we hope program participants utilize.

What are the purposes of the SCSEP? (§ 641.120)

This section describes the purpose of the SCSEP program. A major purpose of the SCSEP program is minimizing the economic disadvantages of the higher priority placement goal of the community service employment program does not come because they are as elevating unsubsidized expense of community service employment. Congress when those comments 516 of the 2006 OAA.

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(1) The old service employment in this title with intent of placing community providing job

(2) placing community strengthens to become so much-needed that benefit engagement communities organization

Those comments placement of service” before the case that community priority than of these comments sufficient” in emotional and sufficiency, sufficiency, the comments of placing a community means of improvement of financial social well-being useful and community commenters ignore the value both to the community stressed the non-profit on the program do not have for their organization commended stressing the

program's goal to foster economic self-sufficiency.

In addition, some commenters focused on other language in the 2006 OAA. In addition to § 516, these commenters referenced § 502(a), "Establishment of Program" and § 518(a), which defines "community service employment." These commenters stated that these provisions "reinforce[] the primary purpose of community service employment, along with its dual purpose of placing workers into unsubsidized employment." One of the commenters noted that the Department misinterpreted the 2006 OAA when it attempted to "meld together" four disparate provisions "to support an exclusive focus on job placement" in the proposed rule.

The Department appreciates the commenters' concern about the perceived changes in the program. However, the Department finds that the dual purposes of the program—community service and appropriate employment objectives for participants—with its related performance goals, are not inconsistent. We fully embrace these dual purposes of the SCSEP as envisioned by the Congress. We recognize the importance of the community service aspect of the SCSEP. But we do not think that the regulation should overemphasize either aspect of the program. We have, therefore, written this regulation to strike an appropriate balance between community service and unsubsidized employment. Therefore, we have not changed this section.

What definitions apply to this part? (§ 641.140)

This section provides specific or contextual definitions for the terms used in this part. We received numerous comments on this section with suggestions on how to better clarify, amend, or define the following ten (10) definitions: "co-enrollment," "employment," "equitable distribution report," "host agency," "individual employment plan," "other participant costs," "state plan," "sub-recipient," "supportive services," and "unemployed." In addition, commenters asked the Department to add definitions for "community service employment" and "job ready."

As indicated in the preamble to the proposed rule, the definition of "co-enrollment" was eliminated because it related to private sector 502(e) projects which are no longer authorized. This definition was specific to the 502(e) projects and had no bearing on SCSEP participants co-enrolling into other federally funded programs. Upon

further reflection, however, the Department realized that although this definition is no longer applicable to the 502(e) projects from the 2004 regulation, it is still applicable to define the status of participants who are enrolled in WIA or other employment and training programs since SCSEP is a mandatory partner in the One-Stop system. Therefore, we have reinstated this definition with some changes to reflect that the participants must be enrolled in those other programs to be considered co-enrolled.

Commenters suggested two substantial changes to the definition of "equitable distribution report." First, the commenters suggest the Department allow grantees to use other reputable and reliable population data in order to determine the optimum number of participant positions for equitable distribution purposes. The Department understands the limits of census data when determining equitable distribution of positions, given that Census data is updated only every 10 years. The Department also agrees that more timely information would help the grantees make better decisions for program efficiencies (i.e., equitable distribution of SCSEP positions), which would allow more eligible individuals to participate in the program. Furthermore, by relaxing the limitations on grantees on the data they may use for equitable distribution of positions, grantees will be able to respond to major changes in their programs, such as in the case of a natural disaster or other unforeseen demographic shifts. Therefore, the Department agrees to allow the use of other data for equitable distribution purposes, as long as that information is from a reliable source, comparable in quality to the Census data, and grantees document the source of the information.

Other commenters took issue with the change of words in the definition from "counties" to "jurisdiction." We made this change to make the definition more inclusive of potentially underserved incorporated cities. One commenter specifically suggested that the Department reverse the change of wording, and edit the definition to include the term "incorporated cities." The Department accepts these commenters' suggestions and has expanded the definition of "equitable distribution report" to include these suggestions.

One commenter expressed concern with the addition of the word "training" within the definition of "host agency." The commenter felt that this term added to the confusion participants experience when they accept a community service assignment. Although the Department

appreciates the sentiments of this commenter, we disagree. We believe that the added term "training" helps to underscore the fact that the community service assignment provides an opportunity to train SCSEP participants for unsubsidized employment. Congress indicates in § 502(a)(1) of the 2006 OAA, that the SCSEP is designed to "[i]ncrease the number of persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors." Further in § 516 of the 2006 OAA, Congress indicates that the SCSEP program "was established with the intent of placing older individuals in community service positions and providing job training." Thus, the Department has decided to retain the term "training" in the definition of "host agency."

We received several comments on the definition of "individual employment plan or IEP." One commenter requested that the Department include the term "mandatory" in place of the term "appropriate" to describe the employment goal included in the IEP. The Department agrees that one of the end goals of an IEP should be unsubsidized employment for many participants; however, making this a mandatory function of the IEP runs counter to the statutory language in § 502(b)(1)(N)(ii) of the 2006 OAA, which provides that the grantee "will provide training and employment counseling to eligible individuals based on strategies that identify appropriate employment objectives * * * developed as a result of [an] assessment and service strategy." Thus, the use of the word "appropriate" further underscores the need to identify a strategy in the IEP that is tailored to the needs of each participant.

Additionally, commenters stated that the Department did not include community service in the definition of IEP. These commenters suggested the Department change the term IEP to "individual service employment program" or ISEP. Other suggestions included "ISS" for Individual Service Strategy and "ITP" for Individual Training Plan. There is no doubt that the community service assignment is an important aspect of the IEP, since it provides a work environment in which to obtain needed job skills. The goal of the IEP is to plot the participant's training plan that will lead to an appropriate employment objective, which includes more than just community service. Read together, paragraphs (i) and (ii) of § 502(b)(1)(N) focus on a strategy aimed at employment, and thus the IEP is appropriate. However, there is nothing

in the definition of IEP or elsewhere that prevents grantees from including a variety of other services and strategies not directly related to the employment goal as part of the IEP. For the reasons provided, the Department therefore finds this change unnecessary and did not alter this definition. However, in response to these comments we did add language to the definition to make it clear that, while the first IEP must contain an employment goal, later IEPs need not, if employment is not a feasible outcome for a participant.

Two commenters found that the term “other participant costs” contained much the same list of activities defined under “supportive services.” These commenters are correct. The Department has elected to keep both definitions because the definition of “other participant costs” contains a variety of activities in addition to those listed in the definition of “supportive services.” In addition, we have clarified the definition of “severely limited employment prospects” by substituting the words “substantial likelihood” for the words “substantially higher likelihood.”

One commenter noted that the definition of “sub-recipient,” caused general confusion by changing from the previously defined term, “subgrantee.” However, the Department was clear about why it changed the various definitions and the definition of “sub-recipient” in particular in the preamble to the proposed rule. The Department explained that the previous term, “subgrantee,” failed to take other recipients into account that may have grant management responsibilities. The term “sub-recipient,” therefore, is inclusive of subgrants as well as other types of funding awards. For this reason, the Department did not make any changes to this definition.

One commenter noted that the cost of incidentals was not included in the proposed definition of “supportive services,” even though incidentals are the most widely used supportive service. Although the Department used the definition in the OAA at § 518(a)(7), we have now modified the definition to more fully reflect the language on supportive services found in section 502(c)(6)(A)(iv).

We received a few comments on the definition of “unemployed.” One commenter disagreed with the Department’s interpretation and found that the definition unnecessarily complicates a grantee’s ability to make eligibility decisions. This commenter further stated that use of the words the “occasional employment” works against older individuals and particularly those

who reside in rural areas who take part-time jobs. This definition tracks the statutory language, and it is sufficiently clear. Therefore, we have not changed the definition.

We also received recommendations from commenters to add two definitions to this section, and we have adopted both. An overwhelming number of commenters suggested that the Department add the term “community service employment” to this regulation. The term “community service employment” is included in § 518(a)(2) of the 2006 OAA and reads as follows:

The term “community service employment” means part-time, temporary employment paid with grant funds in projects described in section 502(b)(1)(D), through which eligible individuals are engaged in community service and receive work experience and job skills that can lead to unsubsidized employment.

The other definition we adopted in this final rule is “job ready” which pertains to the rule that prohibits the enrollment of job ready participants in §§ 641.512 and 641.535(c). The term “job ready” has been discussed in training and in conversations with grantees when the Department has provided technical assistance. The Department has generally meant the term to apply to an individual who requires no more than just job club or job search assistance to be employed. The Department discussed its policy in the 2004 regulations at 69 FR 19014 at 19031, 19032, and 19038, Apr. 9, 2004. To reiterate the Department’s policy as announced in 2004, the purpose of the program is to “assure that grantees concentrate their efforts and limited funds on providing community service work assignments to those older [individuals] who are most in need” as opposed to those who are job ready. 69 FR 19014 at 19031. Therefore, a simple definition of “job ready” is now provided. It refers to “individuals who do not require further education or training to perform work that is available in his or her labor market.” Thus, it may include an individual who is already employed, even if only part-time, or was recently unemployed but has a skill set to fill the jobs available in his or her area; or who has received sufficient training from SCSEP or some other employment and training program to be able to perform work that is available in the labor market.

Subpart B—Coordination With the Workforce Investment Act

What is the relationship between the SCSEP and the Workforce Investment Act? (§ 641.200)

This section provides that SCSEP grantees are required to follow all applicable rules under WIA and its regulations. The WIA operational requirements generally do not apply to SCSEP operations. As required partners under WIA, grantees are obligated to be familiar with the WIA requirements when they are acting as a WIA/One Stop delivery system partner. The only proposed changes made in this section are to clarify that sub-recipients (and not just grantees) are included in the requirement to follow all applicable WIA rules and regulations, and to make certain technical corrections to the citations.

A number of commenters objected to the requirement that SCSEP follow all applicable rules under WIA and its regulations. The commenters cited various problems and experiences they perceive WIA has in serving older workers, and argued that SCSEP is a different type of program than WIA and should therefore not be required to comply with its rules, which they believe are burdensome on SCSEP grantees. Several commenters said that it is unclear which WIA rules and regulations are applicable to SCSEP and which are not. Several commenters asked that the requirement to follow applicable WIA rules be removed. Since both the OAA and WIA require SCSEP to be a One-Stop partner, we cannot make the suggested change.

These commenters also mentioned that WIA performance measures create a disincentive to serving older workers, and cited as evidence findings of an April 2008 Government Accountability Office report entitled “Most One-Stop Career Centers Are Taking Multiple Actions to Link Employers and Older Workers.” One commenter said the onus seems to be on SCSEP to initiate collaborative relationships with WIA. Another commenter suggested releasing a Training and Employment Guidance Letter (TEGL) to highlight the importance of coordination between WIA and SCSEP.

We appreciate the commenters’ concerns about ways to improve SCSEP–WIA coordination but none of the comments received addressed the specific changes to this section proposed by the NPRM. The comments appear to reflect a concern that the coordination requirements of the 2006 OAA and WIA will have the effect of diluting or undercutting the focus and

mission of the SCSEP. As we stated in response to similar comments in the preamble to the 2004 Final Rule, we do not intend the regulations to convey this message. 69 FR 19017–19019. WIA envisions a coordinated workforce development system in which a variety of programs work more closely together to make access to workforce development services easier and more efficient. WIA includes a number of programs that serve special populations to be required partners and is very careful to assure that program boundaries are respected. None of the WIA requirements on SCSEP grantees have changed from those that applied in 2004, so we have not changed the SCSEP regulations that govern SCSEP–WIA coordination. The Department intends that the regulations will enable grantees and sub-recipients to concentrate better on the core missions of the SCSEP, providing community service assignments to hard-to-serve older individuals. The Department intends that the One-Stop delivery system be used to provide services both to older individuals who are not eligible for the SCSEP and to those who are eligible but need the intensive services that the SCSEP is unable to provide. The kinds of partnerships that the regulations envision will enable SCSEP grantees and sub-recipients to focus more of their efforts on the core population that the SCSEP is intended to serve. We did, however, add language to make it clear that the requirements of the section apply to SCSEP grantees and sub-recipients when they are acting in their capacities of required One-Stop partners.

What services, in addition to the applicable core services, must SCSEP grantees and sub-recipients provide through the One-Stop delivery system? (§ 641.210)

This section requires SCSEP grantees and sub-recipients to make arrangements to provide their participants, eligible individuals the grantees and sub-recipients are unable to serve, as well as SCSEP ineligible individuals, with access to other services available at One-Stop centers. We received comments on the second clarification made to this provision that SCSEP grantees and sub-recipients must also make arrangements through the One-Stop delivery system to provide eligible and ineligible individuals with referrals to WIA intensive and training services.

Several commenters objected to this requirement and asked that it be removed, while others noted problems with the requirement. One commenter

said that it is not always feasible to make referrals to WIA intensive or training services because many participants live long distances from One-Stop centers and do not have transportation to access services. Another commenter noted the absence of One-Stop centers in rural areas. Another commenter said that even if referrals of older individuals for WIA services are made, the WIA program tends not to serve them. Still another commenter said that the One-Stop delivery system provides limited or no bi-lingual programs that target older workers and in many instances are not located in proximity to Hispanic and minority neighborhoods. Finally, a commenter said that the 2006 OAA does not require SCSEP to provide core services through the WIA One-Stop delivery system, but requires potential participants to be registered with One-Stop centers.

The Department acknowledges that access and referral to WIA services in rural areas may present particular challenges, as do addressing the special needs of older workers who are limited-English proficient. To address these challenges, the Department encourages coordination with other organizations, in addition to One-Stop centers, that may be more appropriate. This provision reminds grantees and sub-recipients that they are required to be part of the One-Stop delivery system and to participate when appropriate in providing access and referral to the other services that the One-Stop partners offer. Grantees may also decide to provide core services outside the One-Stop Career Centers.

Does title I of WIA require the SCSEP to use OAA funds for individuals who are not eligible for SCSEP services or for services that are not authorized under the OAA? (§ 641.220)

This section states that even in the One-Stop center environment, SCSEP projects are limited to serving SCSEP-eligible individuals with title V grant funds. The local Workforce Investment Board and the One-Stop partners, including SCSEP, should negotiate in the Memorandum of Understanding (MOU) arrangements for referral of individuals to WIA who are not eligible for SCSEP.

A single comment on this section suggested including language that if a Local Workforce Investment Board is a SCSEP sub-grantee, then no MOU is necessary because the contract between the grantee and sub-grantee already stipulates arrangements for administration of the SCSEP.

The Department disagrees that an MOU is not necessary when the local board is a SCSEP sub-grantee, although we acknowledge that this situation adds a degree of complexity to the relationship. As required of all partner relationships with the One-Stop delivery system, the requirement to have an MOU is statutory and therefore, still necessary. The relationship the local board would have as a sub-recipient only mandates services to participants under the grant agreement but does not ensure that there is a written policy for how services would be coordinated with the One-Stop center. Therefore, we did not make any change to this section.

Must the individual assessment conducted by the SCSEP grantee and the assessment performed by the One-Stop delivery system be accepted for use by either entity to determine the individual's need for services in the SCSEP and adult programs under title I–B of WIA? (§ 641.230)

The only proposed changes the Department made to this section were of a technical nature. We received two comments recommending the Department modify the section to include Aging Disability Resource Centers or other organizations that perform assessments in addition to WIA, to assist with the data validation requirements.

This section merely reflects the language of the 2006 OAA on the acceptance of each others' assessments by the SCSEP and One-Stop delivery system. The Department believes the SCSEP program will be better served if the regulations do not specify what other organizations perform assessments. The Department emphasizes that grantees are responsible for determining whether assessments performed by other organizations are sufficient for the grantee's and the participant's needs.

Subpart C—The State Plan

We received a large number of comments on this subpart, although a few were outside the scope of this rulemaking because they related to subpart G, which had a separate comment period from the proposed rule. Most of the comments were related to the 4-year strategy in the State Plan, although others discussed participation in developing the State Plan, community service needs, modifications to the State Plan, and equitable distribution. We received a few comments related to the cost and resources needed to complete the State Plan, which are addressed in the

Administrative Section of this final rule under Section D, Unfunded Mandates. We also received several comments that generally discussed the State Plan requirements or discussed the need for greater coordination with aging programs, which the Department has decided to address in this subpart on the State Plan requirements.

What is the State Plan? (§ 641.300)

This section describes the purpose and function of the State Plan. We made a number of changes to this section to reflect the new provision in the 2006 OAA, which requires State grantees to submit a four-year strategy to the Department.

A few commenters asked the Department to consider allowing the State grantees to combine the State SCSEP strategic plan with the State Unit on Aging strategic plan to further the goals and efforts of its SCSEP program. Some of those commenters specifically justified this request by stating that the Department allows the State grantees to submit the State Plan as a part of the WIA Unified Plan, but since SCSEP is an OAA program, submitting the State Plan with the other OAA programs should also be acceptable.

Although we appreciate the logic of these comments, it is not possible for the State Plans to be submitted with the other OAA strategic plans. According to 20 U.S.C. 9271, "a State may develop and submit to the appropriate Secretaries a State unified plan for 2 or more of the activities or programs" provided in a specific list, and the only part of OAA listed is Title V. Therefore, 20 U.S.C. 9271 does not authorize States to include a unified plan that includes OAA activities or programs that are authorized by a section of OAA other than Title V. Such programs are governed by their own planning requirements. Furthermore, SCSEP is unique in that it is the only program under the OAA that is administered by the Department of Labor. Section 503 of the 2006 OAA specifically requires each State to submit a State Plan to the Secretary of Labor to be eligible for grant funding under this program. The Department shares the State Plans with the Administration on Aging in an effort to coordinate with them on older American policies. However, if they so desire, we do not prevent State grantees from also submitting their SCSEP strategic plan with their OAA strategic plan.

Many commenters suggested that the Department develop regulations that require SCSEP grantees to coordinate with other programs under the 2006 OAA, such as State units and area

agencies on aging, and with other Federal programs such as Foster Grandparents, Senior Companions, Vocational Rehabilitation and several others. A few even requested that the Administration on Aging and other SCSEP providers be involved in writing the regulations. These commenters did not submit their comments on any particular section of the regulation and, in fact, some commenters were "disappointed" because they found the regulations "silent" on this issue.

The regulations are not "silent" on the coordination requirement with other Federal agencies, and especially the other aging programs. There are several provisions in this regulation that require coordination with aging and other resources. The first is in § 641.315, which requires the State grantees to seek the advice and recommendation of representatives from State and area agencies on aging, social service organizations, and community-based organizations in § 641.315(a), and permits the State grantee to obtain the advice and recommendation of other interested organizations and individuals in § 641.315(b). In addition, § 641.302(i) requires the States to plan actions that coordinate activities of SCSEP grantees with other public and private entities and programs that provide services to older Americans. That the Department did not mention a specific social service or other program by name does not exclude it from being a worthy organization for collaboration. Given the large number of comments that addressed this particular concern, the Department hopes that grantees will now understand the importance of the State planning requirements that grantees will make a genuine effort to include those organizations during State planning meetings. The Department expects grantees to work with any and as many organizations as will help achieve the purpose of the program. The Department emphasizes that the grantees do not need explicit permission in the regulations to work with these organizations. Finally, at the Federal level, the Department will continue to coordinate with the Administration on Aging on State planning and other major policy concerns under the MOU that exists between the two Federal agencies.

What is the four-year strategy? (§ 641.302)

This section outlines the requirements for the four-year strategy. We received many comments on this section, largely in opposition to the various requirements. Two comments were of a more general nature.

One commenter was not in favor of the four-year strategy because he felt that "[p]lanning beyond funding periods exceed[ed] the parameters of the grantee" particularly in light of the requirements to resubmit the plans for modification. As discussed below, the State grantee is responsible for the higher-level oversight of activities in the State required by § 503 of the 2006 OAA. As a practical matter, however, a strategy is the pre-planning for what the program will accomplish over a period of time based on a forecast of events and not a mere short-term snapshot of activities or actual workload action items. The reality is that the State program operators provide continuity for the program, while other organizations may be transient. Therefore, the State grantee is in the best position to develop a thoughtful long-term plan for how activities will be provided statewide.

The other general commenter stated that, unlike their WIA program, they do not have an economist or the funds to hire an economist to provide the information that is required for a four-year strategy. Therefore, this commenter argues that the "[i]nformation submitted by the State SCSEP [grantees] are assumptions and not factual."

The Department appreciates the desire to be as precise as possible, but it does not believe that an economist is needed to develop the four-year strategy for this program. It is true that it is important to have certain data, such as information on the growth of the eligible population; however, much of this information can already be found online from the Bureau of Labor Statistics or other resources, such as from the State workforce agency, which manages SCSEP in a growing number of States. One of the requirements of the four-year strategy is to describe the planned actions to coordinate with other programs, including WIA. The Department suggests that State grantees that are not workforce agencies coordinate with their workforce agencies first to find out what information is already available. Other information requirements are grantee-dependent, such as equitable distribution, which requires the type of collaboration with the national grantees discussed in §§ 641.300 and 641.365.

Several commenters suggested that the State Plan requirements go beyond what Congress intended in § 503 of the 2006 OAA, and found many of the requirements duplicative of other Department requirements and policies. As an example, these commenters cited § 641.302(f) because a "performance system and sanctions system is already

in place.” These commenters also noted that the regulations at § 641.302(a)(3), (c), and (d) overlapped with certain grant application requirements.

At the outset, the Department would like to point out that the State Plan is “statewide.” That is to say, it is designed to cover all program activities that will occur in the State, both those operated by the State and those operated by national grantees. It is for that reason that the State grantees, which have this oversight responsibility, are required to seek the advice and consultation of other organizations in the State, including the national grantees. To that extent, there are no other vehicles in the program that would provide this higher level of thoughtful planning for the betterment of program services in the State. As previously noted, a strategy is the pre-planning for what the program will accomplish over a period of time based on a forecast of events. The main reason for a State Plan is the recognition that the State grantees are in the best position to forge relationships that cross programs, communities, and organization silos. The best way for any State to provide services to its citizens is by working with all of the relevant partners to lead the State in a direction that will produce positive outcomes overall. Such coordination requires strategic planning. Therefore, a State’s individual grant application, even if duplicative to some extent, represents the more immediate actions the State plans to take, which is only one small part of the overall strategy for providing services in the State.

We received a few comments on § 641.302(a) on equitable distribution and the requirement to address priority individuals, comments on § 641.302(f) on continuous increase in performance, and one comment on § 641.302(g) on coordination with WIA. With regard to § 641.302(a)(1), one commenter argued that, given the limited ability of the State to alter positions between the national grantees and the State, creating “a long range strategy beyond the scope of the Older Americans Act * * * reauthorization increases paper work without measurable benefits to program participants.” Another commenter mentioned that this paragraph “exclude[d] any mention of national grantees and the key role they play in the distribution process.” This commenter requested that the Department rewrite the section to say: “Moves positions from over-served to under-served locations within the State by working collaboratively with national grantees through a participatory process.”

In response to the first commenter, we disagree that a long range strategy increases paperwork without measurable benefit to program participants because of the limited ability of the State to alter positions. The four-year State Plan guides the annual adjustments that occur with the annual Equitable Distribution report, which itself insures positions are moved from over-served to under-served locations. This process helps ensure that positions are distributed in the most appropriate and least disruptive manner to participants and also to grantees. The 4-year plan outlines the principles for determining the need for moving positions and when “swaps” will occur. As to the point about the State’s limited ability to alter positions, the language in § 641.365(f) gives the State the ability to influence the movement of positions. (“All grantees are required to coordinate any proposed changes in position distribution with the other grantees in the State, including the State project director, before submitting the proposed changes to the Department for approval. The request for the Department’s approval must include the comments of the State project director, which the Department will consider in making its decision.”) The Department intends to give significant weight to the State project director’s comments in deciding whether to approve any proposed changes in position distribution.

As to the second commenter, their concern about the exclusion of any mention of national grantees is addressed in §§ 641.360 and 641.365 on equitable distribution. As provided in those sections, the State grantees are responsible for submitting an equitable distribution report at the beginning of each fiscal year and that the report is the result of consultations with all the grantees (including the national grantees) in the State to discuss the location of their authorized positions. In addition to showing where the positions are currently located, the equitable distribution report reflects an agreement among the grantees for how positions will gradually shift over time to either align with changes in the population either through movement of the positions to underserved areas by the grantees, or through “swaps.” Those consultations by their nature already require grantees to do some forecasting about where positions should be located. Therefore, the four-year strategy is consistent with the goals and current practices for equitable distribution. When these provisions are read together, it is clear that the Department expects the national grantees to have a

significant role in the equitable distribution process. Therefore, particularly since § 641.302(a)(1) specifically refers to § 641.365, the Department does not believe the regulation provision needs to be revised as suggested.

We received comments about § 641.302(f) of the proposed rule. One commenter stated that because the Department sets the minimum levels of performance each year, the States have minimal input in determining the performance levels and are not consulted when they are established. Another commenter found that the regulation provision, as written, implied that State grantees were responsible for performance of the national grantees. This commenter suggested that the Department amend the provision to read: “The State strategy, including input from national grantees regarding their own performance strategies, for continuous increase in the level of performance for entry into unsubsidized employment, and to achieve at a minimum, the levels * * *.”

In the Department’s opinion, these commenters misunderstood the purpose of that provision and the role of the State grantee in shepherding the State Plan process. As noted in the preamble to the proposed rule, the four-year strategy is a long-term strategy for increasing the level of performance in the State. We further stated in the NPRM preamble that “[a]ll grantees should strive to continuously improve their performance levels to assist enrollees in becoming self-sufficient, make available opportunities for other individuals to enroll in SCSEP, and better fulfill the objectives of the program.” Therefore, the regulation does not make the State grantees responsible for ensuring that every national grantee that operates in the State meet its performance goal; rather, the State grantees are responsible for planning a strategy in collaboration with the national grantees to provide better services to participants overall, which will lead to higher performance for the State as a whole. We believe the rule, which requires in this section and § 641.315 that the State Plan must be developed in consultation with, among others, the national grantees in the State, is clear on these purposes and does not need to be amended.

Some commenters took issue with § 641.302(g) of the proposed rule. A few commenters stated that the programs under WIA “seem to focus on the younger generation” and full-time employment opportunities, which makes it difficult to set employment expectations for the older workers in

collaboration with WIA projects. Other commenters did not have an issue with the language but echoed these sentiments. These commenters wanted to know what the Department was doing to encourage similar collaborative efforts with the WIA programs, however, rather than leaving the onus on SCSEP to initiate partnering efforts.

We believe these commenters are reading the provision too narrowly. The point of the coordination requirement is no different from the expectations and requirements established in subpart B of this final rule. The type and degree of coordination will vary depending on the geographic location. This provision requires the State grantees to develop a long-term strategic plan for how those activities will be coordinated over a period of time for the benefit of the program. The Department further notes that WIA grantees have a responsibility to coordinate with the SCSEP program as well, but these regulations are not intended to apply to WIA-funded recipients. For example, State Workforce Investment Boards are required to develop linkages among One-Stop Partner programs such as SCSEP in order to assure coordination and avoid duplication of activities. 20 CFR 661.205(b)(1). For a more in depth discussion on the coordination requirements, see the discussion of subpart B of this final rule.

Finally, one commenter argued that § 641.302(k) is "overly prescriptive" in requiring the State to provide a long-term strategy because it "presumes the necessity for every state to make long-term program design changes in order to improve services to participants and communities." The commenter argued that instead, the State "should have the latitude to plan strategically, within the framework of the OAA, for what works best * * *." There is nothing in § 641.302(k) that prevents a State from planning strategically for what works best. Indeed, that is precisely what this provision assumes that the States will do. This provision does not require change for change's sake, rather, it requires that a State take a hard look at the SCSEP in the State, determine whether changes in the program will improve it and develop a plan to move toward those changes. Therefore, we disagree that § 641.302(k) is overly prescriptive, because as explained above, we believe that long-term, 4-year planning will improve services overall in the State.

May the Governor, or the highest government official, delegate responsibility for developing and submitting the State Plan? (§ 641.310)

Although we did not receive any comments on this section, we made technical amendments to this section by breaking it into paragraphs to make it easier to read.

Who participates in developing the State Plan? (§ 641.315)

This section describes the required participants to the State planning process. We received a few comments on this section.

One commenter stated that the requirement to seek the advice and recommendation of representatives of the various organizations involved too many people, and that it "would take an entire year just to coordinate those efforts." This commenter requested that the Department limit the number of organizations required to provide input to the development of the State Plan.

This part of the proposed rule did not change from the 2004 regulations. In addition, the list of organizations and individuals is consistent with the § 503(a)(2) of the 2006 OAA. The Department commented on this issue in the 2004 regulations. At that time the Department stated: "[Although] obtaining information on coordination may be a bit more complicated whe[n] there are several national grantees in a State, we believe that if the Governor has set up a good consultation process, obtaining the information should not be difficult." 69 FR 19014, 19022, Apr. 9, 2004.

Other commenters found this section to be inadequate as written because it does not address coordination requirements with aging programs. Specifically, one commenter noted that the SCSEP regulation should "enforce and reflect section 503(b) of the 2006 OAA, requiring coordination of SCSEP with other programs under the Older Americans Act, such as state units and area agencies on aging, and with other Federal programs such as Foster Grandparents, Senior Companions, and Vocational Rehabilitation." We did not make any changes to these sections because the regulation lists aging organizations in paragraphs (1), (4), (5) and (7) and thus clearly requires coordination with aging organizations.

Must all national grantees operating within a State participate in a State planning process? (§ 641.320)

This provision explains that all national grantees are required to participate in the State planning process

with the exception of grantees serving older American Indians or Pacific Island and Asian Americans. One commenter disagreed with this provision and stated that these entities should not be exempt from participation. As noted in the regulation text at paragraph (b), however, that exclusion is mandated by Congress at § 503(a)(8) of the 2006 OAA. That being said, the Department agrees that it would be helpful for these organizations to participate in the development of the State Plan, which is designed to improve services, and we believe they have done so in the past. Therefore, as noted in the regulation provision, the Department will continue to encourage these national grantees to participate in the State Plan process.

How should the State Plan reflect community service needs? (§ 641.330)

We received one comment on this section; however, because the substance of the comment was related to a lack of resources, it will be addressed in the Administrative section of the preamble under Section D, Unfunded Mandates.

How should the Governor, or the highest government official, address the coordination of SCSEP services with activities funded under title I of WIA? (§ 641.335)

We received several comments on this section. These commenters found this section inadequate as drafted to address coordination requirements with aging programs but failed to provide any specific regulatory suggestions other than to draft more regulations. The Department did not make any changes to these sections because, as mentioned in the discussion of § 641.315, the requirements to coordinate with aging groups are clear.

How often must the Governor, or the highest government official, update the State Plan? (§ 641.340)

This section discusses the situations when the State is required or encouraged to update the State Plan. We received one comment on this section. This commenter stated that requiring updates more frequently than every two years as specified by the 2006 OAA, would convert a long range strategy into an annual plan, which is the current requirement. Although updates are not required more frequently than every two years, they are encouraged and should be done when circumstances warrant, as noted in § 641.345. The State Plan process is not an exercise that should be done as an item on a "to do" list. Rather, it is a thoughtful instrument that is designed to lead the State forward to achieve positive outcomes. In order for

any plan to be effective, it must align with current circumstances. Over the course of two or four years, it is reasonable to think that there could be some major shifts in policy, local or national economy, employers, performance, or community social service organizations that may alter the State's direction described in the State Plan. Therefore, without monitoring and adjusting the State Plan, it would be easy for the State Plan to become obsolete. Therefore, the Department did not make any changes based on this comment. However, as a technical amendment, we did divide the section into two paragraphs to make it easier to read.

What are the requirements for modifying the State Plan? (§ 641.345)

We received several comments on this section. One commenter stated that modifying the State Plan according to § 641.345(b)(3) would require grantees to modify the State Plan every year, which is contrary to the four-year strategic planning document. This commenter stated that almost every State and national grantee failed to meet at least one goal, and because the Department requires grantees to submit a performance improvement plan each year when one or more goal is not met, that effectively results in annual modifications.

We appreciate this comment and upon further reflection have decided to delete this provision from the final rule. Although the assertions that most grantees fail to meet at least one goal each year and that they are required to submit a performance improvement plan each year is inaccurate, the Department does agree that the requirement is unnecessary for continuous improvement. As a consequence, proposed § 641.345(b)(3) has been deleted and § 641.345(b)(4) will be renumbered as § 641.345(b)(3).

Two other commenters reported contradictions: One found that paragraphs (c) and (d) contradicted each other and the other found that paragraph (d) contradicted OAA § 503(a)(3). We do not find a contradiction in either case.

Paragraph (c) requires the modified State Plan to be published for public comment, while paragraph (d) allows the grantees to make modifications to the plan without seeking the advice and recommendation of those entities and individuals listed in § 641.315. Paragraph (d) addresses the development of the modification while paragraph (c) addresses the post-development, pre-submission phase of the planning process. However, it

appears that some State grantees have used the public comment period as the main mechanism for seeking the advice and recommendation of those organizations and individuals, which is not the intent of the statute. Section 503(a)(2) of the 2006 OAA requires State grantees to seek the advice and recommendations of those organizations and individuals while developing the plan. The public comment period occurs after the State Plan is developed. Although it is a time consuming process, as we have stated elsewhere in this preamble, the State Plan process is not an item on a "to do" list. The State Plan process requires the grantee to identify and assess the resources available in the State, to engage the key members of organizations providing those resources in the planning process, and to provide a roadmap for how the State will reach overall projected outcomes. Therefore, it is a critical document for helping the State provide continuously improving services to as many eligible individuals possible in that State. Thus, if the plan development or modification processes are being run correctly, there is no contradiction in the provisions on consultation and public comment.

The second commenter further stated that paragraph (d) negates the role of the national grantees in the modification process. This commenter recommended that the Department strike this provision and replace it with a provision that reads: "the Governor, or the highest [S]tate official, must seek advice and recommendations from each grantee operating a SCSEP within the State."

The Department agrees with this comment and has modified the language to require the Governor or the highest State official to consult with the national grantees. In addition, given the commenter's rationale, the Department also considered whether this provision should be revised to require the full consultation of those entities listed at § 641.315 as well. The purpose of the State Plan is to draft a plan that will improve services across the State and this provision relates to major changes that will impact services to participants statewide, which suggests the importance of full consultation even when modifying the plan. On the other hand, we recognize that the State may need some flexibility about which organizations it seeks advice from during the modification planning process because the need for advice from particular organizations may vary, depending on the event that gave rise to the need for a modification. Therefore, while the Department strongly encourages State grantees to seek the

advice and recommendation of each entity listed in § 641.315 when or if modifying the State Plan becomes necessary, we have decided not to require it except for the national grantees in the state.

How does the State Plan relate to the equitable distribution report? (§ 641.360)

This section describes the connection between the State Plan and the equitable distribution report. The Department made one substantive change to this section. The Department changed "Census data" to "Census or other reliable data" to be consistent with the changes made to the definition of "Equitable Distribution Report" in § 641.140.

A commenter stated that the State Plan should address competition and the authorized positions that could change. That commenter further argued that the Department should require a plan to involve State grantees in the finalization of the authorized positions to avoid disruptions, or the ability to make recommendations to better serve areas proportionately.

We agree with these concerns and it is for that reason that the 4-year strategy and the meetings on equitable distribution are so vitally important to the program, as discussed in other sections of this final rule. Further, § 641.480 addresses the commenter's other concern that States should have a role in determining where positions are located during a competitive process. Since the commenter's concerns are addressed in that provision, we did make any changes to this section.

How must the equitable distribution provisions be reconciled with the provision that disruptions to current participants should be avoided? (§ 641.365)

This section describes the Department's policy on the movement of positions for equitable distribution in the context of minimizing disruptions to participants. One commenter supported the proposed regulation because it included language that emphasized the coordination of all grantees within the State. Another commenter requested that the Department require national grantees to report to the State when they move positions within the State, and wanted us to allow the States to authorize these changes. This commenter felt that this change would ensure that "the maximum number of eligible individuals will have an opportunity to participate in the program and will allow States to demonstrate that they are making good

faith efforts to correct slot inequities and are on track to meet their state plan goals.”

We appreciate the comment in support of this proposed section as well as the sentiments of the commenter, who would like to see more State authority over any position movement within the State. Section 641.365(d) requires that national grantees notify the State of any position transfers before the transfers may be made. Not only are national grantees required to participate in the equitable distribution and State Plan processes, but they are also required to notify the State before any positions are transferred within the State. § 641.365(f). However, to ensure that national grantees coordinate with the State grantee before submitting a request to the Department to move positions, we are revising this section to require that the national grantee’s request to DOL include a recommendation from the State grantee in which the affected positions are located and to indicate that the Department will consider those comments in reviewing the application. As a matter of practice, since the 2004 regulations, the Department has looked for the State’s comments on any position relocation request from a national grantee and will continue to do so. This revision conforms the regulation to our established practice and ensures that the State’s comment on the proposed transfer will be considered by the Department in the decision making process. Approval authority, however, will continue to remain with the Department consistent with the 2006 OAA.

The Department recognizes that it may have been difficult to follow this provision and, therefore, has divided the section into subparagraphs to make it easier to read. The requirements discussed above are now reflected in new §§ 641.365(a)–(f). The Department also made a few technical changes, which included changing “Federal Project Officer” to “the Department” to be more consistent with the statutory language; and editing “Census data” to read “Census or other reliable data” to be consistent with the changes to the definition of “Equitable Distribution Report” in § 641.140.

Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants

We received several comments on this subpart. Those comments were related to State competition, the use of past performance for selecting grantees, State involvement in the national

competition, and the timing of a national competition.

What entities are eligible to apply to the Department for funds to administer SCSEP projects? (§ 641.400)

This section describes the entities that are eligible to apply for SCSEP grants. We received one comment on this proposed section on the funding to the State for conducting a competition. The commenter stated that the regulations do not address the funding provided to the State to conduct a competition. This commenter also stated that the Department “appear[ed] to define the State in two distinctly different definitions.”

The Department does not provide additional funding for the States to compete their grant program. States that compete their programs will have plenty of advance notice that they will have to compete because it takes a failure to meet performance standards for three consecutive years to trigger the competition requirement. States therefore will have time to plan for the possibility of competition and to set money aside to fund it. The Department suggests that grantees work with their Federal Project Officer to determine a sufficient amount for administrative management of a competitive process for State grantees that are required or desire to compete their programs.

In addition, we have amended § 641.420(d) to cross reference § 641.460, which provides that relevant past participation will be used as scoring criteria, as well as a factor for determining an applicant’s eligibility.

How will the Department examine the responsibility of eligible entities? (§ 641.450)

We have amended this section to state that in reviewing records, the Department may consider “all relevant” information including the organization’s history in “managing” other grants. These changes merely reflect the Department’s standard practice in reviewing competitive grants.

What factors will the Department consider in selecting national grantees? (§ 641.460)

This section describes the factors the Department will consider when it competes the national grant funds. We received several comments on this proposed section. One commenter stated that § 641.460 appeared to be at odds with § 514(c)(4) of the 2006 OAA because the statutory language was intended “to prevent selection bias where past performance was meritorious.” The commenter compared

the OAA to the NPRM language, in which the Department “propose[d] to drop the reference to past performance among the rating criteria [it] will consider.” That same commenter went on to request that the Department propose more comprehensive regulations to address the interrelated issues of past performance and the manner and timing of the competition for SCSEP grants. The commenter based this argument on his organization’s experience with prior competitions and the 2006 Solicitation for Grant Applications. See 71 FR 10798, Mar. 2, 2006. This commenter stated that his organization believed the statute only provided the Department the authority to re-allocate positions from grantees that failed to meet national performance goals. Another commenter stated that written comments should be sought on this provision from the Governor or designee of the State.

We do not agree that the statute only provides the Department the authority to reallocate positions from grantees that failed to meet national performance goals. While OAA § 513(d)(2)(B)(iii) bars grantees which have failed to meet their performance goals for four consecutive years from participating in the next competition, we interpret OAA § 514(a)(1) to require an open competition; a competition in which all funds and slots available to national grantees are competed. As discussed in the preamble to the proposed rule, at 73 FR 47770, 47780, Aug. 14, 2008, the proposed change merely took past performance out of the rating criteria in the Solicitation for Grant Applications requirements because it is included already as an eligibility criterion under § 514(c)(4), as the commenters point out. However, upon further consideration, we believe that using past performance merely as an eligibility criterion is inadequate to give effect to the Congressional requirement. Grantees that fail to meet their aggregate level of performance for four consecutive years are precluded by statute from participating in the competition. This would still allow a grantee with totally unacceptable performance in the last three years to compete. Therefore, we have concluded that consideration of all relevant past performance should be part of the scoring mechanism and of the awarding criteria. Considering all relevant experience, and not just SCSEP experience, will protect against selection bias. What constitutes relevant experience and the specific weight given to past performance will be addressed in the Solicitation for Grant Applications published in the **Federal**

Register or other appropriate instrument.

Finally, written comments from the Governor or highest elected official are provided for under § 641.480, which outlines the process by which the Governor or highest elected official may participate in the national competition process.

When will the Department compete SCSEP grant awards? (§ 641.490)

This section outlines the circumstances that govern the Department's decision to compete the national grant funds. We received one comment on this section.

The commenter expressed concern that having an additional grant year for some grantees but not for all would create a complicated competitive grant cycle. The commenter also thought that such a process would remove the opportunity for new and incumbent organizations to compete with all the national organizations and "would only serve to exacerbate the difficulties of SCSEP participant transition [from] one provider to another." The commenter recommended that the Department make a decision to hold a national SCSEP competition "using the national baseline for all organizations."

The Department takes this comment to mean that a competition should be for all available national grant positions and that the extension of the grants for an additional year as permitted by § 514(a)(2) of the 2006 OAA, should be determined by how well all grantees are performing at the end of the four-year period referenced in § 514(a)(1).

Although we appreciate the commenter's concerns, we decline to address this issue in a regulation, but will take it under advisement. The 2006 OAA requires us to compete the program every four years but permits us to grant a one-year extension to any national grantee that has met its performance goals for each year of the four-year grant period. Although we cannot extend the grants of grantees that have failed to meet their expected levels of performance, the extension is otherwise discretionary. It is discretionary in the sense that we could decide to compete all of the grants after the fourth year, extend all of the grants if all the national grantees have met their expected levels of performance, or compete the funds of only those grantees that have failed to meet their expected levels of performance. We will decide how to structure the future competition after reviewing program performance toward the end of the four-year period, and will make the decision based on the best interests of the

participants and our policy of avoiding disruptions to the extent possible.

Subpart E—Services to Participants

Who is eligible to participate in the SCSEP? (§ 641.500)

This section describes the eligible population for participation in the program. We received one comment on this section. That commenter recommended the Department lower the age limit of participants to 50 with continued priority to those who meet the most-in-need characteristics. We did not make this change because the requirement to serve individuals age who are at least 55 years of age is statutory. OAA § 502(a)(1). For clarity, the Department has added the phrase "at the option of the applicant" to the sentence about treating a person with a disability as a family of one at the end of this section. This change is consistent with the intent of the statutory provision, and conforms to the Department's long-standing interpretation of the provision.

How is applicant income computed? (§ 641.507)

This section describes the procedures grantees must follow when making income determinations for enrolling participants. Most of these requirements were previously in administrative guidance and were adopted with the 2006 OAA.

We received one comment on this section related to using either a 12-month period of income or a 6-month period of annualized income to determine participant eligibility. This commenter stated that the regulation appeared to require the grantee to use one or the other and requested that the Department allow grantees the flexibility to use whichever method was most favorable to the participant on a case-by-case basis.

The Department previously stated that grantees should use which method of calculating income is most favorable to the participant and for that reason, the preamble to the proposed rule acknowledged that we were adopting the procedures that were published in TEGL No. 12-06 (Dec. 28, 2006), which went into effect on January 1, 2007. See 73 FR 47770, 47781, Aug. 14, 2008. That section of the preamble specifically allowed grantees to calculate income based on either 12 months or 6 months annualized. Further, in that section, the Department encouraged grantees to "choose the computation method that is most favorable to each participant, on a case-by-case basis, for the broadest possible inclusion of the eligible

applicants." 73 FR at 47781. To reinforce this interpretation, the Department is changing the language of the regulation to remove the word "encourages" and to track the language of TEGL 12-06, which requires the grantee to use whichever period is more favorable to the participant.

What types of income are included and excluded for participant eligibility determinations? (§ 641.510)

This section generally describes what does and does not constitute income for purposes of determining participant eligibility. We received a few comments on this section expressing agreement with the provision. One of the commenters further stated that the regulation should specifically reference other income exclusions, such as income from training programs, SSI, Veterans benefits, and any other publicly subsidized program where the goal is self-sufficiency.

The Department declines to make the suggested change to this provision for the reasons stated in the preamble to the proposed rule at 73 FR 47781-47782, Aug. 14, 2008. The Department encourages grantees to read TEGL No. 12-06 (Dec. 28, 2007) for the most recent information on excludable income. The Department also notes that that TEGL includes the exclusions referenced by this commenter and is located on the SCSEP Web site at <http://www.doleta.gov/seniors> under Grantee Information, Technical Assistance. The income exclusions included in the regulation were only those exclusions required in the 2006 OAA. The issue of includable and excludable income is one that requires some measure of flexibility for good program management. It is for that reason that the details of the income requirements have always been in an administrative guidance, as authorized by § 641.510(c).

May grantees and sub-recipients enroll otherwise eligible job ready individuals and place them directly into unsubsidized employment? (§ 641.512)

This section prohibits grantees from enrolling job ready individuals, who can be directly placed into unsubsidized employment, as SCSEP participants. One commenter suggested the Department add a definition or criteria for "job ready," which would help the providers determine the type of individual that is not eligible for SCSEP services. The Department agrees and has included a definition of "job ready" in § 641.140. As noted in that section of the preamble, in general terms, it is an individual who requires no more than

just job club or job search assistance to be employed. Therefore, the definition of "job ready," as now defined at § 641.140, refers to an individual who does not require further education or training to perform work that is available in his or her labor market. For further clarity, we have added the word "job-ready" to the text of § 641.512 to describe those individuals "who can be directly placed into unsubsidized employment" and thus cannot be enrolled in SCSEP but should be directly referred to the One-Stop system.

How must grantees and sub-recipients recruit and select eligible individuals for participation in the SCSEP? (§ 641.515)

This section describes the criteria grantees must use when determining the eligibility of an individual to receive program services. We received a few comments on this section specifically related to proposed paragraph (b), on using the One-Stop delivery system for recruiting participants.

One commenter acknowledged the essential relationship that must exist between the One-Stop delivery system and the SCSEP. However, that commenter further stated that transferring the responsibility of recruitment and selection of all eligible participants to the One-Stop appears duplicative and eliminates the role of SCSEP in participant selection. Several other commenters stated that the provision is inconsistent with § 502(b)(1)(H). Those commenters reasoned that the statutory language did not require grantees to use the One-Stop delivery system to recruit or select eligible individuals because of the use of "will" rather than "must." They wanted the regulation to reflect that there are other means to recruit and select participants.

We believe these commenters misinterpreted that section of the statute and the proposed rule. In the context of OAA § 502(b), the Department interprets the use of the word "will," to be synonymous with the words "shall," or "must." Section 502(b)(1) requires the Secretary not to fund programs unless she determines that the programs "will" do all of the things listed in paragraphs (A)–(R). In that context, "will" means that the 18 activities listed in § 502(b)(1) must be done for a program to be funded. That being said, however, we do not believe the statute or the regulation implies a requirement for an exclusive use of the One-Stop delivery system as the means to recruit eligible participants, as required by § 641.515(b). Rather, it is one method that grantees must use to recruit eligible participants.

Moreover, this requirement in the regulation is not new to SCSEP; it appeared in the 2004 regulations at 20 CFR 641.515(b). Therefore, the Department's interpretation is consistent with the 2006 OAA and the 2004 regulations and accompanying preamble discussion at 69 FR 19014, at 19029.

What services must grantees and sub-recipients provide to participants? (§ 641.535)

This section describes the types of services that are required, permitted, and prohibited in the program. We received a few comments on this section. One commenter requested language in proposed paragraph (a)(1)(ii), to ensure grantees have the flexibility to determine when a participant needed to be reassessed. The Department does not agree that additional language is necessary. The regulation text, as written, as well as the preamble discussion in the proposed rule, already allows for such flexibility so long as participants are assessed upon entry, and for a total of at least two times in a 12-month period.

In addition, two commenters stated that proposed § 641.535(a)(9), as well as §§ 641.540(f) and 641.565(a), appeared to require projects to pay participants for time spent in such training and orientation. In particular, one commenter stated that orientation activities can occur as part of the initial assessment process which may be before a community service assignment. The commenter notes that under the proposed rule, such a participant would not be required to receive wages, which appeared inconsistent with the proposed § 641.540(h), and therefore, disagreed with the proposed change.

We do not read this provision as narrowly as this commenter. Paragraph (a) of § 641.535 specifically states: "When individuals are selected for participation in the SCSEP" the grantee is responsible for the activities listed at paragraphs (1) through (11) of that section. Included on that list is paragraph (9) "Providing participants with wages and benefits for time spent in the community service employment assignment, orientation, and training." The Department believes that the operative words in this paragraph are "selected for participation." The point of the regulation is that when a person is formally enrolled in the program the enrollee must receive paid services. Therefore, it is possible, as the commenter described, that an individual may attend a general overview of the program or participate in a general assessment for eligibility

before the individual is enrolled in the program. In that case, the individual, who is not yet a SCSEP participant, is not required to be paid SCSEP wages for attending that overview or assessment. However, once a participant is enrolled in the program, which means the individual has been found eligible, has been given a community service assignment, and is receiving a service, paragraph (a)(9) requires that the grantee must pay wages for time spent in orientation, training, assessment, or in receiving any other service. This requirement applies even if the participant has yet to start his or her assigned community service assignment at the host agency.

Further, as one commenter noted, participants may continue to receive self-development training outside of their participation in the SCSEP as provided in § 641.540(h). However, the regulation does not require grantees to pay wages when the participants are participating in training that they have selected and that is not identified in their IEP.

Another commenter stated that proposed paragraph (b) allows the Department to increase programmatic costs without funding and that, "utilizing the administrative guidelines appears to circumvent the rule making process." The Department disagrees with this commenter for a number of reasons. Proposed paragraph (b) states that "[t]he Department may issue administrative guidance that clarifies the requirements of paragraph (a)." The Department is fully compliant with the notice and comment procedures for rulemaking under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). The administrative guidance discussed in paragraph (b) will merely clarify the requirements of paragraph (a) and is not intended to create new rules or regulations. Such guidance would provide further explanation, as necessary, of the meaning and parameters of the various activities required by the regulation and functions as a type of technical assistance to grantees that sometime struggle to understand how they are expected to satisfy a regulation. The portion of the comment that is related to increasing programmatic costs without funding is addressed in the Administrative section of this preamble under Section D, Unfunded Mandates. However we also note that rather than increase programmatic costs, we anticipate that such guidance will actually decrease programmatic costs.

We have also changed the language in paragraph (a)(3) by adding a new subparagraph (iii) to clarify that the

requirement that an appropriate unsubsidized employment goal be part of the IEP for all participants applies only for the first IEP. Thereafter, if it becomes apparent that unsubsidized employment is not feasible for the participant, the IEP should be adjusted to reflect other appropriate goals for increased self-sufficiency, including the transition to other services, as required by § 641.570(a)(2). Since it is possible that some SCSEP participants will not achieve unsubsidized employment during or immediately following their enrollment in SCSEP, grantees must have the flexibility to design an IEP that will lead to maximum self-sufficiency for the participant and an enhanced quality of life after participation in SCSEP has ended.

Finally, we have removed the citation in paragraph (a)(1) to the 2006 OAA, since OAA § 502 does not specifically require a grantee or sub-recipient to provide orientation to the SCSEP. However, it is the Department's position that requiring the provision of orientation is consistent with the purpose of title V. Orientation adds great value to the participants' experience. Orientation is the ideal forum in which to provide participants with important information on the program; to address expectations and desired outcomes; and explain participant's rights and obligations, grievance procedures, safety issues, and any other information deemed necessary to ensure a positive experience.

What types of training may grantees and sub-recipients provide to SCSEP participants in addition to the training received at the community service assignment? (§ 641.540)

The purpose of this section is to describe the types and the timing of training services grantees may provide to participants. We received several comments on this section about on-line training and the Department's interpretation of training.

One commenter requested that the Department revise paragraph (b) to be more consistent with the 2006 OAA. That commenter interpreted § 502(c)(6)(A)(ii) of the 2006 OAA to allow training before or after an unsubsidized placement.

We understand how a reader could interpret the provision to allow training after a participant is placed in unsubsidized employment because that provision may not be clear; however, we do not agree with that interpretation. The relevant provision states: "participant training * * * which may be provided prior to or subsequent to placement and which may be provided

on the job, in a classroom setting, or pursuant to other appropriate arrangements." We interpret the term "placement" here to mean a placement in a community service assignment. We base our interpretation on the latter part of that provision, which indicates that the training may be provided on the job, in a classroom, or through other appropriate arrangements. In the Department's opinion, the examples listed go hand-in-hand with the types of training a grantee would provide while a participant is in a community service assignment, given that the community service assignment is an on-the-job type of training. The commenter's reading is not only inconsistent with the SCSEP's policy on services to exited participants, but is also inconsistent with the intent of the program to help most-in-need, older individuals find employment.

Given the program's limited resources, it is important that grantees use grant funds to help current participants achieve self-sufficiency. Grantees have a responsibility to provide training for the participants that will make them job ready. In appropriate cases, the grantees have an obligation to provide or assist participants to obtain supportive services to make sure the participant keeps that job, as the commenter notes. We do not, however, define supportive services to include training for a participant once he or she has exited the program. Although there is government support for incumbent worker training in WIA and TAA, SCSEP's funds cannot be used to provide training after unsubsidized employment has been attained. SCSEP's goal is to help participants become job-ready through community service and approved training; therefore, training may occur during enrollment but not after completion of the program. We have revised this provision to clarify that training may be provided "before or during" a community service assignment.

Other comments were about on-line training. One commenter expressed support for the approval to use on-line instruction for training as discussed in the preamble to the proposed rule at 73 FR 47770, 47784, Aug. 14, 2008. Another commenter questioned how the Department expected grantees to calculate the participant's time toward on-line training for wage purposes and who would validate the time spent in this activity.

The Department does not expect on-line training to be handled any differently than any other training. On-line training is not new to SCSEP; it is not required, but is one of several

options for how training may be provided. It has long been recognized as an approved training activity, although not expressly mentioned in the regulations. Grantees that have questions about how to implement on-line training should contact their Federal Project Officer for technical assistance.

Another commenter requested that the Department add the language "and any other costs deemed necessary" to the end of § 641.540(e). We decline to make this suggested change. The language follows the statutory language at 502(c)(6)(A)(ii) of the 2006 OAA and is sufficiently inclusive of all costs the Department considers part of training. Any allowable cost associated with training that is not included in § 641.540(e) will fall within the wages and other benefits listed in § 502(c)(6)(A)(i) of the 2006 OAA and participant supportive services costs which are addressed in § 641.540(g). Making the suggested change would likely lead to unnecessary confusion over whether the "other costs" associated with training fall within § 641.540(e) or § 641.540(g). Such confusion would be especially problematic because the statute excludes the cost of activities listed in § 641.540(e) from its general rule that 75% of costs go to wages, while the statute *includes* costs listed in § 641.540(g) within the "75% of grant funds go to wages" rule. OAA § 502(c)(6)(B)(i).

We make one technical change in paragraph (a) to clarify that the grantee "may" pay for appropriate skill training, in addition to that provided through the community service assignment, "that is realistic and consistent with the participant's IEP, that makes the most effective use of the participant's skills and talents, and that prepares them for unsubsidized employment." The prior mandatory language, "must," was meant to apply to the criteria that have to be met before the grantee may pay for such skill training. It was not meant to require the grantee to pay for such training for all participants. Grantees are encouraged to arrange or provide for such training when appropriate, but given the limited funds available for this purpose, they are not required to provide or pay for training when it is not appropriate.

What supportive services may grantees and sub-recipients provide to participants? (§ 641.545)

This section describes the types of supportive services grantees may provide to participants. We received a few comments on this section about the

proposed rule language that limits supportive services to those services that support an employment goal. Those commenters asserted that there are times when a participant may need services in order to be able to participate in the SCSEP, and therefore, providing those services should not be tied specifically to an employment goal. One other commenter requested that the Department add "temporary shelter" to the list of supportive services.

The regulation as drafted is consistent with the historical practice of providing supportive services in the program and specifically refers to supportive services "that are necessary to enable an individual to successfully participate in a SCSEP project." The regulation's language is consistent with the comments about using supportive services to assist participants during their enrollment in the program. In the preamble discussion of 20 CFR 641.545 of the 2003 Notice of Proposed Rulemaking, the Department stated: "Grantees/subgrantees should seek to ensure that participants receive those supportive services necessary for them to participate in the program and to realize the goals set forth in their SCSEP IEPs." 68 FR 22520, 22529, Apr. 28, 2003. The Department's position was later restated in the 2004 Final Rule preamble for 20 CFR 641.545:

To meet the needs of the seniors the SCSEP serves, grantees must make every effort to provide them the supportive services they need to be able to participate in their community service assignments. The Department recognizes that SCSEP grantees will not be able to provide all needed or desirable supportive services with grant funds * * *. But the Department expects grantees and subgrantees to make every reasonable effort to provide participants with the supportive services provided for in their IEPs. 69 FR 19014, 19032, Apr. 9, 2004.

We believe the commenters' concerns arise from the requirement in § 641.535(a)(6) for the supportive services to be consistent with the participant's IEP. Commenters seem to interpret that requirement to mean that grantees may not provide supportive services during a participant's community service assignment. The fact that the IEP, and particularly the initial IEP, is tied to an employment goal does not mean that the IEP is limited to only those services that advance the employment goal. The IEP may and should assess and consider all of the services the participant needs to successfully participate in SCSEP, and should address supportive services that may be required before assignment to community service, during assignment,

and during the first 12 months of unsubsidized employment.

For all these reasons, we find no inconsistency between the rule and the way the commenters want to provide supportive services and thus have not changed the final rule.

On the issue of temporary shelter, we agree with the commenter. Accordingly, we are revising the regulatory text to be more inclusive by saying "housing, including temporary shelter."

We have also changed the language of paragraph (a) to reinforce the idea that grantees must assess participants' need for supportive services and must assist participants in meeting those needs and grantees may directly pay for or arrange for supportive services as necessary. This change reconciles § 641.545(a) with § 641.535(a)(2) and (a)(6), and clarifies that, while paying for supportive services directly is optional, grantees must assess participants' supportive services needs and must make every effort to help participants to meet the needs so identified.

What responsibilities do grantees and sub-recipients have to place participants in unsubsidized employment? (§ 641.550)

This provision identifies the steps that grantees must take to assist participants to obtain unsubsidized employment. We received two comments about the emphasis on unsubsidized placements. The first commenter found the proposed rule's increased emphasis on placement in unsubsidized employment in conflict with self-directed job searches which, when appropriate, should "be an acceptable alternative for promoting placement in unsubsidized employment."

The Department does not construe this change in emphasis to restrict the grantees from providing this type of assistance when it is appropriate. The grantees are still required to assess participants and to ensure they are following their IEP. If a grantee or sub-recipient determines that self-directed job searches are a reasonable method for seeking unsubsidized employment for certain participants, the grantee or sub-recipient may encourage or assist in such efforts in place of more intensive placement assistance, but they must still document it in the IEP and follow-up with the participant. In some cases, grantees may need to use a combination of methods to help participants locate and apply for unsubsidized employment. The regulation was not meant to prescribe how grantees may help participants find employment but rather to make it clear that they are

expected to work with participants to help them find unsubsidized employment.

Another commenter disliked the changes from "reasonable" effort to "every reasonable effort" as it relates to a grantee's responsibility to place participants in unsubsidized employment. The commenter argued that a participant could claim that every effort was not provided to help him or her achieve unsubsidized placement. Thus, the commenter, argued, the participant could wait for the perfect unsubsidized placement and refuse the other opportunities. Therefore, the commenter concluded that "[r]easonable should be the standard."

We agree that the language of § 641.550 could be read as imposing an obligation on grantees to provide unsubsidized employment for all participants, even those for whom unsubsidized employment is not a goal in their IEP, and could be interpreted as overstating the extent of reasonable effort required. Moreover, helping participants find unsubsidized employment is not required or possible until participants become job-ready. Therefore, consistent with the change in the language to § 641.535(a)(3), we agree with the recommendation. We have eliminated the requirement to "make every reasonable effort" and section 641.550 now provides that the obligation to help participants achieve unsubsidized employment only applies to those participants who have unsubsidized employment as a goal.

What policies govern the provision of wages and benefits to participants? (§ 641.565)

This section provides the requirements for wages and benefits that participants may receive. This section was updated from the 2004 regulations to reflect new statutory provisions. The Department received several comments on this section, largely related to compensation for Federal holidays. One commenter, however, noted that the acronym "WIA" was missing before the word intensive services in proposed paragraph (a)(1)(ii). The Department appreciates this comment and made the change to the regulation so it is now consistent with the rule as we described it in the preamble to the proposed rule.

One commenter noted that the limitation in proposed paragraph (b)(ii)(A) that the results of a physical examination be provided only to the participant hindered the grantee's ability to meet the Department's data validation requirements for determining disability if they were unable to require the physical examination results. The

commenter misunderstands the data validation requirement. Grantees merely need to document that a physical was offered. That can easily be accomplished without having the results of the physical. (If the offer is declined, grantees must obtain a written waiver from the participant.)

Furthermore, grantees should not use the physical examination results to document disability for the most-in-need performance requirement. The certification of the attending physician or official documentation of a disability is sufficient. To the extent that a participant declines to provide that information, the grantee will not be able to take credit for it. However, participants have an incentive to provide that information because documentation is required if a participant claims family of one status for eligibility purposes. To avoid any confusion about the use of the results of the physical and to clarify that the physical itself is a fringe benefit meant solely for the benefit of the participant, we have deleted the last sentence of subparagraph (b)(1)(ii)(A), which stated that the participant could provide the grantee a copy of the physical examination results. There are circumstances under which a grantee may request documentation of a disability or may even require all participants assigned to a particular community service position to take a physical examination. For example, documentation is required for family of one status, as well as where a participant claims an accommodation. A physical also can be required of all participants who are assigned to community service positions that require certain physical capability. However, those circumstances are entirely unrelated to the physical examination that must be offered to the participant as a fringe benefit under the statute.

The remainder of the comments related to the requirement that grantees provide compensation for participants when the scheduled workday in the program falls on a Federal holiday for the host agency. Almost all of these commenters requested that the Department allow flexibility in the regulation text to allow participants to make up the time. One commenter specifically requested that the language in the regulation more closely track the language of the 2006 OAA, which provides for "employer" closure for Federal holidays. Another commenter stated that having the flexibility to allow participants to make up the hours posed concerns when program policies could vary from grantee to grantee. This

commenter was concerned that in one instance, a program may pay the participant for the Federal holiday and in another, the program may require the participant to make up the hours. This commenter also raised a concern about adjusting the timesheets and the difficulties it would cause for validating community service hours. The commenter did not address how the adjustment of timesheets would be a problem. Other commenters approved of the flexibility described in the preamble of the NPRM that allows the participants to make up the time rather than pay them for a day off. They believe it helps to distinguish the participants from being considered employees of the host agency.

The Department appreciates these commenters' concerns, which reflect a desire to maintain the participants' status as "trainees" rather than "employees" at the host agency. Upon further reflection, we find that the NPRM's regulation text provision of only two categories of participant benefits (required and prohibited) failed to reflect the flexibility the Department intended to provide for Federal holiday leave and sick leave. For both of these benefits, as indicated in the preamble to the NPRM, "(t)he Department broadly interprets the word 'compensation' * * * to allow for a variety of practices * * * The intent of the Department here is to allow flexibility in administering the SCSEP * * * " Unlike the other benefits listed in the NPRM regulation text as "required," the NPRM preamble noted that Federal holiday and sick leave benefits need not be paid in cash but must be provided in some fashion. Accordingly we have amended the regulation to clearly indicate that Federal holiday leave and sick leave "may be paid or in the form of rescheduled work time."

These modifications and clarifications address the concern of perceived inequity mentioned by one commenter. It is not uncommon for programs to offer different services and benefits. We have written these regulations to permit each grantee to have the maximum available flexibility in the design of its benefit programs, as long as each grantee consistently applies the rules to all of its program participants as required in § 641.565(b)(1). We also do not see any issues with validating timesheets for program accuracy or data validation purposes. The timesheets are always based on the actual hours the participant spends in a community service assignment at the host agency. To the extent a participant makes up hours at the host agency, it will be reflected in the total number of hours

the participant worked at the host agency in his or her assignment.

Finally, we interpret the word "employer" as meaning a "host agency" since that is the only context in which this provision would apply. Therefore, the Department has not made the change the commenter requested.

Is there a time limit for participation in the program? (§ 641.570)

The Department received a large number of comments about this section. The NPRM implemented the 48-month limitation on individual participation in the program as required by § 518(a)(3)(B) of the 2006 OAA. Paragraph (c) of this section addressed the average participation cap created by § 502(b)(1)(C) of the 2006 OAA. Paragraphs (d), (e), and (f) further implemented these limits on program participation.

The majority of comments on this section pertain to paragraph (b). The statute provides for increased periods of participation for individuals who meet one of the criteria listed in the statute. As explained in the NPRM, the Department proposed to implement the extension as a one-time, one-year extension to ensure that SCSEP participation is not indefinitely extended, thus preventing other eligible individuals from benefiting from the SCSEP, and to be generally consistent with the possible extension of the average participation cap which extends up to a maximum of only nine additional months.

Most commenters asserted that the limit on the extension of the individual participation limit to one-time and one-year "is both contrary to Congressional intent and counterproductive to assisting the most vulnerable older adults." The commenters noted that Congress did not place an absolute time limit on individual participation. The commenters also argued that limiting the potential extension in this way is unnecessary to reduce the number of long-term SCSEP participants because there are several other program features, such as the performance measurement system, that effectively achieve that goal. The commenters also contended that restricting the extension to one-year, one-time would result in involuntary terminations from the program for older adults who are benefiting from the SCSEP and may be unable to find any other meaningful employment and training assistance from other programs. One commenter requested that the Department delay the implementation of this provision in order to consult with other Federal and State agencies on alternative programs

and resources for terminated participants. A few comments, including those from participants, noted that the time limit could be more costly to the government in the long-run and would create a financial hardship on participants who are on the verge of obtaining employment. A few commenters agreed generally with time limits in the program but disagreed with applying it to all participants.

After considering these comments, the Department has decided not to impose the proposed one-time, one-year restriction on the increased period of individual participation. We agree that Congress could have included an absolute limit on SCSEP participation in the 2006 OAA, but did not do so. We also are sympathetic to the assertion that grantees are in the best position to manage their programs to satisfy the various aspects of the 2006 OAA and this final rule, some of which impose other limitations on participation. Therefore, we agree that grantees require the flexibility to determine the needs of individuals, which necessarily means that some individuals may be in the program longer provided they meet one of the waiver factors listed in § 641.570(b), and will continue to receive services consistent with their IEP. As noted in paragraph (e), the Department will issue administrative guidance that describes the process for grantees to request increased periods of individual participation. We expect that grantees will make their determinations for requesting extensions for individual participants who meet the eligibility factors in a fair and equitable manner and in accordance with applicable civil rights laws. This process developed in the administrative guidance will reflect this expectation.

Given that the average participation in the program is approximately two years and that there are other requirements designed to limit participation in the program, we agree that it is not necessary to retain this requirement. However, as some commenters pointed out, grantees are cautioned that they are nevertheless responsible for satisfying the average participation cap described in paragraph (c) of this section as well as the expected levels of performance for the core performance measures.

In addition, we received a number of comments on the 27 month cap in paragraph (c). One commenter requested that the Department edit this regulation provision to more accurately reflect the law as written. Thus, this commenter requested that we revise the rule to read: "each grantee must comply with an average participation cap for eligible individuals (in the aggregate) of 27

months." Other commenters requested that the grantees be consulted on the method used to determine the 27 month average participation cap. One commenter asked for clarification on whether the 27 month cap, like the 48 month time limit, was intended to be consecutive or not.

The Department does not agree that the language in the proposed rule paragraph (c) requires additional clarification. The Department opted to draft the language in this way to make it more reader-friendly. We do not believe there are any inconsistencies between the regulatory provision and the 2006 OAA, and therefore, did not make any changes to this section. Finally, the Department will work with grantees to implement the participation limits.

May a grantee or sub-recipient establish a limit on the amount of time its participants may spend at each host agency? (§ 641.575)

This section authorizes grantees to adopt a policy under which participants are rotated among community service assignments. We received several comments on this section. One commenter stated that moving participants around from host agency to host agency every 12 months has a negative impact on the program and considered it to be an arbitrary rule. This commenter further claimed that this provision did not consider the needs of the workers (participants). Other commenters echoed this concern in one way or another, mostly opposing the provision because they find it disruptive to the host agency when a participant leaves and then they are understaffed.

The Department appreciates these commenters' concerns; however, the rule does not require a grantee to adopt a rotation policy. Rather, it allows grantees to implement a rotation policy when the grantee believes it will make the program more effective and help program participants achieve economic self-sufficiency consistent with their IEP. This provision has been helpful to an increasing number of grantee organizations over the years, who find it difficult to persuade host agencies that they should not expect the SCSEP to augment their workforce. More importantly, grantee rotation policies have allowed participants to acquire more job skills, which increase their opportunities to find unsubsidized employment. However, we do agree that rotation of participants among host agencies may be disruptive and counter-productive if the participant is still effectively acquiring needed skills at his

or her assignment. Therefore, we are revising the regulation to provide that no rotation policy will be approved that does not require an individualized determination that rotation is in the best interest of the participant and will further the acquisition of skills listed in the IEP.

Is there a limit on community service assignment hours? (§ 641.577)

We received a significant number of comments on this section. In the NPRM, the Department proposed a limit of 1,300 hours per year on participants' community service hours. The proposed limit is similar to a previous 1,300 hours per year limit on all participant paid hours.

Several commenters criticized the proposed 1,300 hour limit as "another example of an unnecessary restriction on a SCSEP grantee's capacity to meet the needs of individual participants and to respond to local conditions." Although commenters acknowledged that participation in SCSEP is part-time, they asserted that the proposed 1,300 hour limit "sets an arbitrary cap on participation" and "disregards the * * * particular needs of a community (such as responding to a natural disaster)." The commenters further asserted that although the 1,300 hours is still a good benchmark, the restriction limits their ability to address the backgrounds, life challenges and other circumstances that make providing services to each participant a unique experience. Still other commenters found that a majority of participants work less than 1,100 hours because their higher State minimum wage prevents them from overspending their budget. One commenter stated that if participant staff are not allowed to exceed the 20–25 hours per week, the grantees' performance measures will suffer.

The Department has considered these comments and has decided to eliminate the 1,300 hour limit, as suggested by the commenters. We agree that the grantees need the flexibility to respond to downturns in the economy or natural disasters, for example. Therefore, we have changed this provision to read that the 1,300-hour requirement is not required but is still a benchmark and good practice that the Department strongly encourages grantees to follow. This language is consistent with the Department's position on this issue published in the preamble to the 2004 Final Rule, at 69 FR 19014, 19036, Apr. 9, 2004. The statute defines "community service employment" as "part-time" work and grantees must ensure that community service assignments are part-time positions. In addition, the

Department cautions grantees about allowing participant staff to exceed the part-time requirements, which is not permitted.

Under what circumstances may a grantee or sub-recipient terminate a participant? (§ 641.580)

This section describes a variety of circumstances in which a participant may or must be terminated from the program and the procedures by which terminations must be accomplished. We received several comments on this section. One commenter asked for an explanation of what “knowingly” means in paragraph (a). The common legal definition of “knowingly” is “[w]ith knowledge; consciously; intelligently; willfully; intelligently.” Black’s Law Dictionary 4th Ed. (1957) West Publishing. The Department recommends a common-sense application of this definition. For example, if a participant provided false information in order to meet the eligibility requirements for the program and either knew or should have known that the information was false, then such provision was done “knowingly.”

We received two comments on paragraph (e) of this proposed section which deals with terminations when a participant has refused a reasonable number of job offers or referrals. One commenter requested that the Department add language to paragraph (e) allowing the grantee to terminate the participant for refusal to accept a reasonable number of job searches or job offers. The other commenter reminded the Department that in some cases, local, State, or Federal law and/or agency policy requires immediate termination for cause as described in the proposed rule at paragraph (e).

As to the first comment, the Department does not believe the commenter’s proposed language is necessary. Paragraph (e) already states that if a participant refuses to accept a reasonable number of job offers or referrals to unsubsidized employment, the grantee may terminate the participant. The only word that appears to be different between the comment and the regulation is the word “searches.” It is the Department’s opinion that “job searches” are included as part of the “job referral” process. Therefore, the Department did not make this change in the regulation.

The commenter that disagreed with “for cause terminations 30 days after written notice” may have confused this provision with another paragraph in this section. Paragraphs (a) and (d) did not contain the 30-day termination requirement that is found in paragraphs

(b), (c), and (e) of this final rule. However, upon reconsideration, we believe that paragraphs (a) and (d) should also require 30 days notice before a termination for cause may be effective. Notice allows a participant time to contest the grantee’s determination and to offer factors in mitigation. Notice is inherent in fundamental notions of fairness and is arguably more necessary in cases of alleged misconduct than in cases where a participant was mistakenly determined eligible. We already require notice in the case of terminations under paragraph (e), which is a type of termination for cause. We see no reason not to expand the notice to all cause terminations.

We note that the requirement for 30 days notice before termination does not require the grantee to permit a participant to remain assigned to the host agency where the offense is alleged to have occurred. In those cases where a statute or regulation requires the immediate removal of a participant for certain specified offenses, the grantee may remove the participant from the host agency and may assign the participant to another host agency (including the local project office) or to no host agency, depending on the circumstance, during the notice period.

We have made an additional change in the notice language in paragraphs (a), (d) and (e) to provide that the termination after notice is not required if additional facts or evidence shows that the basis for the termination is incorrect. The original intent of this provision was that termination could not be effected until 30 days had elapsed, not that termination was always required once 30 days had elapsed. Indeed, the notice requirement would be rendered largely meaningless if the grantee were required to terminate the participant at the end of the notice period regardless of what information the participant might have produced in the interval. We thus have added language to paragraphs (a)–(e) to make it clear that a grantee is not required to terminate a participant if the evidence shows that the grounds for termination were incorrect. We remind grantees, however, that if a participant has finally been determined to be ineligible (after being given 30 days to provide evidence of eligibility), the grantee must terminate the participant.

Another commenter questioned how the organization would know when a participant receives a written notice of termination as suggested by paragraphs (b), (c), and (e). This commenter requested that the language in the proposed rule only require grantees to

provide written notice explaining the reasons for termination when the termination is the result of an adverse action.

Again, we believe the commenter is misreading the intention of these regulatory provisions. Each of these situations represents circumstances where a termination is necessary. However, the Department has made a change to the regulation to clarify the notice requirement. The purpose of the notice requirement is that the participant would be terminated in 30 days after either the day notice was provided to the participant in person, or the day the grantee mailed the termination notice. Given the propensity for confusion with the current language, the Department has revised paragraphs (b), (c), and (e) to read “and may terminate the participant 30 days after it has provided the participant with written notice.”

Another commenter criticized the termination process as “indicative of micromanagement.” This commenter further expressed disagreement with the single national approach to termination because it limited the discretion of grantees and sub-recipients.

In response, the Department notes that there are certain requirements to which grantees must adhere to in order to receive Federal funds. Uniform policies are necessary in some cases for a program of national scope to ensure all participants are treated in a fair and consistent manner. The issue of termination is one of those necessary policies. Grantees may not continue to spend grant funds on ineligible participants. The rule does allow for some flexibility, such as determining what constitutes cause for termination, which we recognize may vary among grantee organizations. Grantees also have flexibility to determine whether they want to terminate participants for failure to accept a reasonable number of job offers or referrals and, if they do, what constitutes a reasonable number.

One final commenter raised the issue of termination in the context of the performance measures and how terminations impact a grantee’s ability to meet the performance measures. This comment is outside the scope of this rulemaking as it does not relate to the proposed rule.

What is the employment status of SCSEP participants? (§ 641.585)

This section discusses the employment status of program participants given that they receive work experience training. The Department received one comment on this section. This commenter requested

a ruling on the responsibility of the grantees and sub-recipients to conduct background checks on SCSEP applicants as part of the application process if they are not employees of the grantee or sub-recipient.

Although this comment is outside the scope of this rulemaking, the Department will reiterate its policy here. Grantees may take the responsibility of providing background checks before placing participants in community service assignments, provided that the background check is conducted because of the requirements of a specific community service assignment, rather than based on a particular participant, and is consistently applied to all applicants considered for that position. We stress that background checks are relevant to the assignment of participants to particular host agency positions only and cannot be used as a basis for denying eligibility. In addition, grantees should be careful to comply with EEOC and any state or local rules regarding the use of background checks.

Subpart F—Pilot, Demonstration, and Evaluation Projects

What is the purpose of the pilot, demonstration, and evaluation projects authorized under § 502(e) of the OAA? (§ 641.600)

This section describes the purpose of the new provisions implementing § 502(e) of the 2006 OAA. The Department received one comment that asked the Department to clarify whether On-the-Job Experience (OJE) projects would continue under the new section and whether the Department plans to introduce new pilot projects or expand and improve existing projects.

The Department is pleased that grantees have found the OJE program useful and will take that under advisement as we explore how best to exercise this new flexible authority, as we noted in the preamble to the NPRM. See 73 FR 47770, 47789, Aug. 14, 2008.

Should pilot, demonstration, and evaluation project entities coordinate with SCSEP grantees and sub-recipients, including area agencies on aging? (§ 641.640)

This section provides that the Department will collaborate with appropriate aging organizations when developing projects under this section and grantees of these projects must also consult with appropriate organizations. We received several comments related to this section. The comments mostly suggested that § 641.640, in concert with §§ 641.315 and 641.335, were inadequate to address the type of

coordination that should occur between SCSEP and other aging programs. One commenter stated that the regulation should be written to “requir[e] coordination of SCSEP with other programs under the Older Americans Act, such as state units and area agencies on aging, and with other Federal programs.” Another commenter “suggest[ed] that the regulations reflect additional coordination requirements with disability networks, in order to better incorporate person-centered planning, Americans with Disability Act compliance, and independent living philosophy concepts into the provision of services.” Yet another commenter expressed a concern about where the funding for these projects would come from given that the revised funding allocations appear to decrease services to participants. That commenter cited recent Department actions to reserve \$5,000,000 for program support activities under the Secretary’s discretionary authority.

Section 641.640 has been written to follow the statutory language, with the addition of a clarification that SCSEP grantees and sub-grantees are among the entities that must be consulted with. To be more prescriptive in this section would limit the Department’s and the grantees’ ability to use the flexibility granted by the statute. Finally, comments about the possible effect of funding for the pilot, demonstration and evaluation projects on the funding of the “regular” program are outside the scope of this rulemaking.

Subpart G—Performance Accountability

On June 29, 2007, the Department published an IFR that implemented changes in the SCSEP performance measurement system in light of the OAA. This section discusses comments on the performance measurement system.

The OAA requires the SCSEP to track six¹ core indicators of performance² (also called “core performance indicators,” or just “core indicators”): (1) Hours (in the aggregate) of community service employment; (2) entry into unsubsidized employment; (3) retention in unsubsidized employment for six months; (4) earnings; (5) the number of eligible

individuals served; and (6) most-in-need (the number of barriers per participant as listed in subsection (a)(3)(B)(ii) or (b)(2) of § 518 of the OAA. Core indicators are subject to goal-setting and corrective action. The statute also requires two additional indicators of performance (also called “additional performance indicators,” or just “additional indicators”): Retention in unsubsidized employment for one year; and satisfaction of participants, employers, and host agencies with their experiences and the services provided. Additional indicators are not subject to goal-setting and corrective action. The OAA gives the Department the authority to add other additional indicators that it determines to be appropriate to evaluate services and performance, but we are not adding any other additional indicators at this time.

Under authority of the IFR, grantees have been using the common measures definitions for the three core indicators addressing unsubsidized employment. We received a number of comments raising concerns about whether the common measures are an appropriate way to measure participation in SCSEP. Changes in the core indicator definitions at this point will muddle the data we have collected for three program years using the existing definitions. The Department wants to have a consistent body of data over a multiyear period through which to be able to evaluate both the overall performance of the SCSEP, and the utility of the performance indicators. In addition, any changes would not be fully implemented until PY 2011.

As a result, the Department has concluded that to change the definitions of the core indicators at this time would create a significant administrative burden for grantees, which would outweigh any benefit of changing those definitions. With reauthorization of the SCSEP also on the horizon for 2011, it would be difficult to conduct evaluations of the program and collect data for doing so if the definitions were changed at this late stage. Moreover, a change in the measures at this late date would deprive the grantees of valuable baseline data that they are using for program management and improvement. The Department intends to maintain the existing definitions for the three core indicators on unsubsidized employment, under which grantees have been working for three years already.

Overview of Comments Received on Subpart G

The Department received eleven comments in response to the

¹ Section 513(b)(1) of the 2006 OAA lists, “[t]he number of eligible individuals served, including the number of participating individuals described in subsection (a)(3)(B)(ii) or (b)(2) of section 518,” on performance, as a single core indicator. However, as discussed in the IFR, 72 FR 35836, June 29, 2007, the Department chose to divide it into two separate indicators—number of eligible individuals served, and number of most-in-need participants.

² We use the terms “indicator” and “measure” interchangeably throughout this rule.

performance accountability IFR. Some commenters urged changes to particular performance measures and/or asked specific questions about one or more of the measures. Such comments commonly expressed the view that the SCSEP is unique among workforce programs primarily because of its community service element, and therefore use of the common measures is neither appropriate nor desirable.

A second theme common to several of the comments is that an emphasis on performance accountability may lead to unintended consequences. In this view, SCSEP grantees and sub-recipients may feel pressure to serve individuals who are relatively easy to place in unsubsidized employment to meet performance goals. Such a focus, it was argued, would thwart a consistent tenet of the SCSEP, reflected in the 2006 OAA, that the program should prioritize individuals with multiple barriers to employment. Further, several commenters expressed concern that this pressure to attain good performance outcomes could result in fewer minorities being served by the SCSEP.

Because the definition of the most-in-need indicator changed significantly from the 2004 SCSEP final rule, the Department treated the 2007 Program Year as a baseline year for that indicator and did not set sanctionable goals for the most-in-need measure. Some commenters thought that the 2007 Program Year should be treated as a baseline year for all indicators; that is, they thought no goals should be set for any of the core indicators for the Program Year 2007.

Other commenters expressed concern with one or more of the indicators. One commenter requested that the Department decrease the number of core indicators and increase the number of additional indicators. A few commenters urged the Department to develop the remainder of the regulations before finalizing the performance accountability requirements. Finally, some commenters supported the creation of an interagency group to provide input on the SCSEP regulations.

We will discuss all of the comments below, beginning with the comments that broadly address the performance measurement system overall.

Broad Comments on the Performance Measurement System Overall

A few commenters urged the Department to develop the remainder of the regulations before finalizing the performance accountability requirements. Some commenters requested that we convene meetings on the performance measurement

regulations before finalizing them. Several commenters supported the creation of an interagency group to provide input on the SCSEP regulations.

We agree with the commenters who urged the Department to develop the remainder of the regulations before finalizing the performance accountability requirements. To that end, we published an NPRM on August 14, 2008, that addressed all aspects of the SCSEP regulations other than performance measures. We were able to carefully consider the comments from both the IFR and the NPRM before proceeding with this final rule.

We also received some comments requesting that we convene meetings with grantees and other interested parties as we developed final regulations on the performance measurement system. We considered this suggestion but chose not to adopt it. All interested persons were invited to participate in the regulatory process by submitting comments on the IFR and the NPRM, and we considered those comments very seriously as we developed this rule.

In the IFR, we stated that we had “implemented an interagency group to oversee the strategy for implement[ing]” the performance measurement system required by the 2006 OAA. 72 FR 35845, June 29, 2007. Some commenters interpreted this to mean that the Department had convened a group that included the Administration on Aging, and those commenters applauded such efforts. In fact, the group to which we were referring was comprised of representatives from different agencies within the Department. Nevertheless, we acknowledge that several commenters urged greater coordination between the Department and the Administration on Aging. The 2006 OAA already requires the SCSEP to coordinate with area agencies on aging at the local level, and the Department endeavors to mirror that coordination at the national level. However, it is clear from these comments that some in the SCSEP network think that we have not done enough coordinating at the Federal level. We appreciate that even closer coordination may aid the SCSEP overall and its participants in particular. To that end, we will pursue strengthening our relationship with the Administration on Aging as we move forward.

We now respond to the comments on the IFR that pertain to particular regulatory sections within subpart G.

What performance measures/indicators apply to SCSEP grantees? (§ 641.700)

Several commenters criticized the performance measurement system implemented in the IFR generally, and the common measures in particular. Some of the commenters asserted that the SCSEP is unique among workforce programs primarily because of its community service element, and that use of the common measures is therefore neither appropriate nor desirable for the SCSEP. Other commenters maintained that an emphasis on performance accountability may lead to unintended, adverse consequences. These commenters argued that, in an effort to achieve the expected levels of performance for the core indicators, SCSEP grantees and sub-recipients may feel pressure to serve individuals who are relatively easy to place in unsubsidized employment. This incentive to “cream” from applicants contravenes a consistent and central theme of the SCSEP, reflected in the 2006 OAA, that the program serves individuals with barriers to employment. Of particular concern to some commenters was that a focus on performance outcomes would result in a reduction of services to disadvantaged and minority older adults.

In the IFR, as well as the NPRM, the Department specifically requested that the public submit comments addressing concerns that the performance measurement system implemented by the IFR compromises the ability of grantees to serve minority individuals. We particularly appreciate the comments we received on that topic.

The Department does not, however, view the performance measurement system required by the 2006 OAA and implemented in the IFR as inappropriate or undesirable for the SCSEP, or as adverse to the SCSEP’s traditional focus on serving persons with barriers to employment or minority individuals. We hold a different view from the commenters who argued that this performance measurement system will lead to a reduction in services to persons with barriers to employment, including minority individuals. We will address these points in turn.

The Department fully acknowledges that community service is integral to the SCSEP. Congress gave voice to the importance of this aspect of the SCSEP in its “[s]ense of the Congress” provision in the 2006 OAA: “placing older individuals in community service positions strengthens the ability of the individuals to become self-sufficient, provides much-needed support to organizations that benefit from

increased civic engagement, and strengthens the communities that are served by such organizations.” OAA § 516(2). We also acknowledge that the 2006 OAA’s requirement that grantees spend a minimum of 65–75 percent of their funds on participant wages and benefits is a unique program feature, and one that clearly assists persons with otherwise low incomes. Providing an opportunity for low-income older adults in need of job training to work at community service organizations that need operational support is a “win-win” situation.

Some commenters asserted that the SCSEP should not align with other workforce programs in its use of common measures because the SCSEP retains this unique community service element, and that the common measures are limited in providing full evidence of the SCSEP’s performance. We also received comments noting that initially there were plans for common performance measures to be applied across a wide array of Federal agencies and programs. These commenters suggest that the scope of the common measures has been reduced to “[F]ederal job training and employment programs that share similar goals” (emphasis omitted), and that the SCSEP does not share sufficiently similar goals with other Federal job training and employment programs to make the common measures appropriate.

Other commenters claimed that Congress “overwhelmingly rejected” a focus by the SCSEP on unsubsidized employment outcomes. These commenters argued that the Department is contravening Congressional intent by requiring performance measures that focus on unsubsidized employment outcomes.

Congress made both community service and its potential to lead to unsubsidized employment important goals. Congress required the use of specified core indicators in the 2006 OAA, including the entry into employment, retention in employment for six months, and earnings indicators. Along with providing valuable community service, then, the SCSEP is a training program for low-income persons who have not been able to obtain employment on their own. Congress was well aware of the unique nature of the SCSEP, and could have chosen separate outcome measures unique to the SCSEP as it did in the 2000 Amendments to the OAA. Instead, it specifically mandated that the program report on certain core indicators, three of which measure employment outcomes; therefore, the Department must implement those

indicators as stated in the 2006 OAA to achieve the dual purpose of ensuring community service opportunities, but also making unsubsidized employment possible where appropriate for exiting SCSEP participants. Furthermore, the language Congress used in the 2006 OAA to mandate the implementation of the three core indicators on employment outcomes mirrored the common measures. It therefore seemed sensible to define these three core indicators using common measures definitions.

The 2006 OAA requires the Department to implement the three core indicators on employment outcomes. This requires us to gather consistent data on program performance to inform reauthorization. Without a body of consistent performance data over a reasonable number of years, we will not be able to determine whether those indicators as defined are or are not effective performance measures. In addition, grantees would be deprived of meaningful baseline data for making improvements in services, which is the primary purpose behind measurement. As discussed above, therefore, the administrative burden of changing these definitions would outweigh the policy value of changing them before a good body of consistent data has been gathered to inform the program reauthorization anticipated in 2011. This is particularly so since the Department anticipates proposing another SCSEP additional indicator for volunteer work performed after exit from the program, which would further reinforce the Department’s support for community service and volunteer work.

In addition, several commenters asserted that the common measures are limited in providing full evidence of the SCSEP’s performance, and we agree. The common measures do not accurately portray the entirety of the SCSEP program or its successes. These three core measures, which currently use common measures definitions (entry, six-month retention, and earnings), relate most closely to the SCSEP’s goal of unsubsidized employment. However, Congress also required three other core measures (number of persons served, most-in-need, and community service), and they relate most closely to the community service goal of the SCSEP. Accordingly, we acknowledge that the common measures do not “tell the whole SCSEP story.” However, we remain convinced that in light of the need to gather data for reauthorization and our consideration of another additional indicator, for now these definitions are most sensibly kept as a method to capture important data on the success of

participants in meeting the goals deemed appropriate for their personal circumstances, as laid out in their IEPs.

We turn now to the commenters’ argument that implementing the performance measurement system described in the IFR will lead to a reduction in services to persons with barriers to employment, including minority individuals. Some of these commenters asserted that the introduction of common measures in other workforce programs has led to a decrease in the number of low-income participants and participants with barriers to employment in those programs. These commenters claim that such programs have selected participants based on the participants’ potential to achieve positive indicator outcomes. They contend that, faced with the same common measures, SCSEP program operators will “cream” by selecting those participants who are easiest to serve. In this view, persons with barriers to employment, including minority individuals, will be disfavored by SCSEP program operators. Some commenters asserted that “creaming” is contrary to Congressional intent, because in the 2006 OAA Congress intended the SCSEP to serve low-income persons and persons with other barriers to employment. Several commenters cited a study of WIA indicating that, following the introduction of common measures in WIA, there was a decline in the number of WIA participants with low incomes or who had barriers to employment, and suggested that implementing the common measures in the SCSEP would lead to similar results.

For reasons discussed already, the Department will continue to implement the core indicators of performance. We take the commenters’ argument to be effectively limited to the core indicators, as additional indicators of performance are not subject to sanctionable goal-setting. The Department is required to implement the indicators mandated in the 2006 OAA; we disagree that such indicators will lead to “creaming,” or a reduction in SCSEP services to low-income individuals or individuals with barriers to employment. We agree with the commenters’ assertion that Congress clearly intended for the SCSEP to serve low-income individuals and to prioritize persons most-in-need. Moreover, Congress designed the SCSEP to have two goals—community service and an appropriate employment objective for participants whose experience in the SCSEP may lead to unsubsidized employment. But it is not possible for SCSEP program operators to reduce the numbers of low-income

participants in the SCSEP because, unlike WIA, only low-income persons are eligible for the SCSEP. Regardless of the population characteristics of other workforce programs, the SCSEP is specifically designed to serve lower income older persons with barriers to employment. The 2006 OAA requires program operators to prioritize persons who have barriers to employment such as those who have a disability, low employment prospects, or limited English proficiency. Moreover, SCSEP has a counter-balance to any creaming that the employment indicators might engender because another of the core indicators measures, the average number of most-in-need characteristics per participant. The Department's view is that the SCSEP performance measurement system will not disfavor people with barriers to employment when one of the measures is designed to give effect to the statute's requirement that program operators prioritize those most in need of SCSEP services. In fact, studies for PY 2006 and PY 2007 show that minorities are served by SCSEP in greater proportions than their incidence in the population and have employment outcomes no different from those of non-minority participants.

Finally, one commenter requested that the Department switch several of the core indicators to become additional indicators. We are bound by the 2006 OAA to implement the core and additional indicators of performance required in the statute; we do not have the discretion to reclassify core indicators as additional indicators.

How are the performance indicators defined? (§ 641.710)

In this section the Department defines each of the indicators. A few commenters suggested that the Department use data available from unemployment insurance wage records to capture data for such indicators as entry, retention, and earnings. Some commenters stated that it can be difficult to obtain this data from employers and exited participants.

The Department agrees that unemployment insurance wage records are a potentially advantageous method of collecting performance data, and we are actively pursuing the use of such records by the SCSEP. For the reasons already stated, however, we have decided to retain the performance indicator definitions in their current form.

Entry Into Unsubsidized Employment

One commenter disagreed with the existing definition of entry into unsubsidized employment as each

participant who is employed during the first quarter after the exit quarter. The traditional SCSEP entry indicator treated as entered employment any participant who worked 30 days within the 90 days following their program exit. This commenter argued that the current definition will make it harder to count an exited participant as having entered employment because of the later qualifying period (the first 90 days after exit versus the quarter following the exit quarter).

It is clear that using this definition over the past six years has not resulted in fewer exited participants being counted as having entered unsubsidized employment. While the qualifying period under the current definition occurs later in time than the qualifying period under the traditional SCSEP entry measure, the former SCSEP entry indicator required 30 days of employment, but this definition does not specify an employment period. A participant could be employed for significantly fewer than 30 days during the relevant quarter, and that person would be counted as having entered unsubsidized employment under the existing definition of entry. In this way, the existing definition actually makes it more likely that an exited participant will be counted as a positive entry outcome. Indeed, during each of the three years when outcomes for both the SCSEP placement measure and the existing entry indicator were reported, the average entry outcome under the existing definition was higher than the average SCSEP placement outcome.

Retention in Unsubsidized Employment for Six Months

We received one comment proposing that we revert to the former, SCSEP-specific retention indicator, which measured retention for six months at 180 days after program exit. The current definition measures retention for six months based on employment in the second and third quarters after the exit quarter. This commenter asserted that the longer qualifying period for this indicator increases the difficulty of obtaining the information.

We do not question the commenter's assertion that it can sometimes be difficult to obtain this retention information. Nevertheless, grantees and sub-recipients have been submitting data using the current definition since the first quarter of Program Year 2005, although as an additional rather than a core indicator in the early years. We are confident that grantees and sub-recipients will be able to continue obtaining those data in the future. Also, as noted previously, we are actively

pursuing the use of unemployment insurance wage records; these records would provide significant retention data.

Earnings

We received one comment on the definition of the earnings indicator. This commenter urged the use of a simpler indicator that captured wages at the time of program exit rather than the current indicator definition which averages the earnings received during the second and third quarters after the exit quarter. However, this always has been a core indicator and the current definition is that used by all of ETA. The commenter also asked a few questions about the description of the earnings indicator in TEGL 17-05. This commenter asked whether the term "exited participants" refers to all exited participants, or only those who achieved unsubsidized employment. If the term "exited participants" refers to all exited participants, the commenter wondered whether that would dilute the average earnings figure.

The term, "exited participants," refers to the pool of individuals who satisfy the six months retention indicator, not the entire pool of persons who left the SCSEP for a variety of reasons during the relevant quarter. As implemented, the three core indicators may be viewed as building upon each other. To arrive at the entry outcome, one considers how many persons, of the total number who exited the SCSEP during the relevant exit quarter, were employed during the first quarter after the exit quarter. To arrive at the retention in six months outcome, one considers how many persons, of those who satisfied the entry indicator, were employed during the second and third quarters after the exit quarter. To arrive at the earnings outcome, one considers what was earned by those persons who were included the six months retention indicator.

The previous earnings measures counted the earnings of exiters who achieved entered employment, whether or not they were employed in the reporting period, and that did have the effect of distorting the outcomes of the measure. By including those who were not employed in the earnings measure, it was difficult to determine how much those who were employed were actually earning. Under this final rule, however, only the wages of exiters who entered employment *and* who were employed during both quarters of the reporting period are included in the earnings measure.

Most-in-Need

We received several comments about the definition of most-in-need. The "most-in-need" population is based on the fifth core indicator in 2006 OAA § 513(b): "the number of eligible individuals served, including the number of participating individuals described in subsection (a)(3)(B)(ii) or (b)(2) of section 518." One commenter advocated reducing and simplifying the list of most-in-need characteristics. The regulatory definition cannot be reduced or simplified any more than it already is, because it is taken directly from the statute.

Several commenters were distressed that the revised definition of most-in-need "no longer includes any reference to racial minority status." Another commenter took issue with the characteristic, "has failed to find employment after utilizing services provided under title I of [WIA]." This commenter asserted that most SCSEP participants are not even considered for services under title I of WIA, and proposed that instead the characteristic should be, "[w]here not considered for services under [t]itle I of WIA and/or failed to find employment after utilizing services under [t]itle I of WIA."

The 2006 OAA omitted the characteristic of "greatest social need" from the list of characteristics that comprise the "most-in-need" indicator. OAA §§ 513(b)(1)(E), 518(a)(3)(B)(ii), and 518(b)(2). Whatever the relative merits of considering other groups to be most in need, Congress defined most in need with great specificity, and we have no authority to change the statutory definition.

The 2006 OAA does require the Department to annually report to Congress on the levels of participation and performance outcomes of minority individuals by grantees, by service area and in the aggregate. OAA § 515. The analyses conducted for both PY 2006 and PY 2007 indicate that minorities are served in greater numbers than their incidence in the population and that minorities achieve employment outcomes equal to those of non-minorities. Therefore, we have not changed the definition of the most-in-need indicator.

Retention for One Year

We received one comment on the definition of retention for one year. In the IFR, we defined this indicator to align with the WIA one-year retention indicator, which measures retention at the end of the fourth quarter after the exit quarter. This commenter recommended that we instead capture

retention data at 360 days following program exit.

The Department has considered this comment but has decided to retain the definition of retention for one-year as published in the IFR for the reasons already stated.

Satisfaction of the Participants, Employers, and Host Agencies With Their Experiences and the Services Provided

We received one comment on this indicator. The commenter asserted that sub-recipients should not have to be involved in gathering data for this indicator, including mailing cover letters to encourage survey participation.

The Department already provides very substantial assistance in obtaining the data for this indicator. We request that program operators—whether a grantee or a sub-recipient—deliver the employer survey, which we supply, and which ideally is done in person. For the participant and host agency surveys, we create the survey instrument as well as a cover letter explaining the survey and requesting its completion; draw the samples of those who will be asked to complete the survey; and mail it to those persons. We ask program operators to mail pre-survey letters to those participants selected to complete the survey to request cooperation with the survey, and we provide the pre-survey letter text and the mailing list. We have considered the commenter's request and have decided not to make any changes to the customer satisfaction survey process at this time. Given the substantial amount of the burden that we already shoulder, we ask very little of grantees, sub-recipients and host agencies. The work we ask them to perform is work that we cannot do and that we need grantees, sub-recipients, and host agencies to manage.

How will the Department and grantees initially determine and then adjust expected levels of performance for the core performance measures? (§ 641.720)

We received several comments about the expected levels of performance that were set for Program Year 2007. In general, such concerns must be raised during the process of setting the expected levels of performance and are not appropriate for the regulatory comment process as they relate to the specifics of each grantee's situation. We will, however, respond to those aspects of these comments that have general applicability.

One commenter asserted that the statutorily-mandated minimum expected level of performance for the

entry indicator would be difficult for sub-grantees to achieve using the current definition of entry. The Department does not have the discretion to set the expected levels of performance below those required by statute. Further, we hold grantees accountable for achieving the expected levels of performance, but we do not set goals at the sub-recipient level. Having said that, we do conduct training sessions that are open to all program operators and offer technical assistance to both grantees and sub-recipients that are experiencing difficulty in any aspect of program administration. Finally, we note that the nationally-averaged outcome for the entry indicator at the end of Program Year 2007 was 52.4 percent, greatly in excess of the statutorily-mandated goal. Only three individual grantees with adequate data to permit accurate measurement failed to meet at least 80% of their negotiated goal, and 62 grantees exceeded 100% of their negotiated goal.

Other commenters suggested that the expected levels of performance for the entry and earnings indicators for Program Year 2007 were too high. These commenters noted that the median expected level of performance for the entry indicator was higher than the statutory minimum. They also asserted that the earnings and entry indicator levels were set so high that program operators would be encouraged to "cream," which would lead to fewer minority participants.

Although the § 513(a)(2)(E)(ii) of the statute sets a minimum percentage for the entry indicator, it is in fact merely a minimum, and the Department has the authority to set expected levels of performance above that minimum. The Department bases a grantee's expected levels of performance in part on the prior performance of the grantee. The statute requires that the expected levels of performance for the core indicators be designed to promote continuous improvement in performance. OAA § 513(a)(2)(B). And, as we explained in the IFR, the Department has consistently established a performance level higher than the minimum required by statute for many grantees, and expects to continue to do so.

In response to the assertion that the expected levels of performance are set so high that the Department is encouraging "creaming," we disagree. As noted, a grantee's expected levels of performance for a new program year are based in part on the prior performance of the grantee, so sudden large increases in performance goals generally do not occur. The expected levels of performance are designed to promote

continuous improvement; however, the Department also takes into account such factors as unemployment rates, relative poverty levels, and whether the grantee is serving a disproportionate share of most-in-need individuals. Negotiating expected levels of performance is a data-driven process; when a grantee presents the Department with relevant data, we take that into consideration when setting the performance goals. Also, expected levels of performance may be adjusted during the Program Year if circumstances warrant. See § 641.720(b).

The Department is making three technical corrections to this section of the regulations none of which are intended to change the meaning of the section. First, we are removing the word "baseline" from the first sentence of paragraph (a)(1). The word was mistakenly included in this paragraph in the IFR; the expected level of performance initially proposed by the Department is more commonly called a goal or target, not a baseline. Second, we are adding the word "a" at the beginning of the third sentence in paragraph (a)(3); it was inadvertently omitted from the IFR. Finally, we updated the citation format in paragraph (a)(2).

How will the Department assist grantees in the transition to the new core performance indicators? (§ 641.730)

In paragraph (a) of this section, the Department explained that we would be providing technical assistance to help certain grantees meet the expected levels of performance for the core indicators in Program Year 2007. Technical assistance was provided to those grantees whose performance outcomes during Program Year 2006 did not achieve the levels expected during Program Year 2007. In paragraph (b) of this section we created an exception from sanctionable goal-setting for Program Year 2007 for the most-in-need measure because the 2006 OAA so changed the list of most-in-need characteristics that we determined that a year was needed to gather baseline data before meaningful goals could be established. Some commenters thought that Program Year 2007 should have been treated as a baseline year for all of the indicators; they suggested that no sanctionable goals should have been set for Program Year 2007.

Five of the indicators now classified as "core" are indicators that the SCSEP was already using before the IFR (*i.e.*, hours of community service, number of individuals served, entry into employment, six-month retention in employment, and earnings), although some of these had been classified as additional measures previously. The

most-in-need indicator was the only indicator that changed so significantly that we determined that we did not have sufficient data to set meaningful goals. Therefore, goals were set for the other core indicators for Program Year 2007.

Subpart H—Administrative Requirements

We received several comments on this section about non-Federal share, participant wages and fringe benefits, and performance reporting requirements.

How must SCSEP program income be used? (§ 641.806)

We have inserted clarifying language in paragraph (b) of this section to provide for a distinction in the expenditure of program income for grantees with continuing relationships with the Department of Labor and allow program income to be expended for 1 additional program year.

What non-Federal share (matching) requirements apply to the use of SCSEP funds? (§ 641.809)

This section describes the requirements grantees have to contribute a 10 percent match to the program. We received one comment on this section of the proposed rule that disagreed with the provision that prohibits grantees from requiring sub-recipients to contribute financially to the program to meet their match requirement. This commenter stated that he believed that a financial investment from a sub-recipient encourages ownership and responsibility for the program. This commenter suggested that a State's inability to require a sub-recipient to provide a 10 percent match shifts all the responsibility to the State grantee and reduces the commitment of the sub-recipient to meet performance goals.

Although the Department appreciates this concern, this requirement was added in the 2004 regulations to prevent abuses in the program where some grantees permitted only those organizations with cash contributions to be sub-recipients. The fact remains that the grantees are the organizations responsible for program operations and services as evidenced by the grant agreement with the Department. Further, the Department does not believe this limitation is onerous to meet. As provided in § 641.809(d), the match may be cash, in-kind, or a combination of the two. Program data indicates that with this flexibility, most grantees tend to exceed the match requirement for the program. Also, paragraph (e) of this section allows sub-

recipients to voluntarily provide a contribution to the program.

What minimum expenditure levels are required for participant wages and benefits? (§ 641.873)

This section outlines the financial requirements for wages and fringe benefits and expressly adds the new statutory provisions that permit grantees to reduce the 75 percent requirement to 65 percent for the wages and fringe benefits cost category. We received one comment on this section. This commenter expressed concern with the change that in the past required 75 percent of grant funds to be spent on participant wages and fringe benefits (PWFB) based on final expenditures to now being 75 percent of the grant funds. This commenter noted that there was no change from the 2000 OAA to the 2006 OAA and the Department did not provide a rationale in the proposed rule to justify this change. The commenter noted that "[t]rying to reach the goal based on the award amount changes the emphasis from using resources to effectively benefit the program to just incurring PWFB cost to meet the goal."

The commenter is correct that the OAA did not change the language at § 502(c)(6)(B)(i) from the 2000 Amendments to the 2006 Amendments. The Department made the change in the proposed rule to more closely follow the statutory language, which requires "75 percent of the grant funds [be used] to pay for wages, benefits, and other costs." However, the Department has reconsidered its position and has decided not to depart from its established practice of measuring compliance with this requirement for the grantee as a whole, at the conclusion of the grant, based upon the total amount expended. Accordingly, we are withdrawing the proposed revision to the regulation, and are retaining the existing text of § 641.873(b).

How will compliance with cost limitations and minimum expenditure levels be determined? (§ 641.876)

For clarity, we changed the first word in the title for this section. It originally asked "When will compliance with cost limitations and minimum expenditure levels be determined?" Because the content of the section does not actually discuss a time period but instead the method of determining compliance, we replaced "When" with "How."

What are the financial and performance reporting requirements for recipients? (§ 641.879)

This section describes the financial and reporting requirements that grantees

must submit to the Department. We received one comment on this section that argued that the financial and performance reporting requirements conflict with § 514(f) of the 2006 OAA. This commenter cited this section of the statute, which states the Secretary of Labor may not promulgate rules or regulations that would significantly compromise the ability of the grantees to serve their target population of minority older individuals. The commenter suggested the Department add the following language in a new § 641.879(i): "Collection and validation of data should in no way compromise the ability of grantees to serve the targeted population of most-in-need individuals, and significant attention should be paid to the unintended consequences that documentation may cause for minority older individuals, particularly those with specific language and culture limitations."

The Department agrees that the collection and validation of data should not compromise the ability of grantees to serve the target population. Although it may take more time to obtain the required information due to language barriers, the statute requires that we collect a variety of information on program performance, including information on the populations and subpopulations served. This is information that grantees must collect and have on file for program management and auditing purposes anyway. Although collecting information may be a burden, it is a required part of program management and is necessary to show that the program meets its statutory goals effectively.

Furthermore, the Department monitors services to minorities closely, as required by the 2006 OAA. According to PY 2006 and PY 2007 data, minorities are served by SCSEP in substantially greater numbers than their incidence in the population and show no differences in employment outcomes from non-minority participants. Therefore, there is no evidence that minorities are underserved in the program. Given that this commenter did not provide more specific information on how she believed minorities would be affected, we are not persuaded that any such injury would occur from these regulations to diminish services to this population.

We are, however, making technical changes in paragraphs (b), (d) and (e) to clarify that SPARQ is the vehicle by which all grantees must report information on participants, host agencies, and employers, including demographic and performance

information. All grantees are required to report the required information in a format specified by the Department. We have also clarified that grantees may be required to report additional demographic and performance information through means other than SPARQ if required by the Department.

Subpart I—Grievance Procedures and Appeals Process

What grievance procedures must grantees make available to applicants, employees, and participants? (§ 641.910)

This section describes the grievance procedures that must be in place for grantees and that those grantees must have in place for program participants. We received one comment on this section. That commenter stated that he found the Department's requirement to submit a copy of the grantee's appeal process with the grant application micromanaging.

As a recipient of Federal funds, however, there are certain requirements that grantees must adhere to in order to receive those funds. See §§ 641.420 and 430. Prior program experience has indicated that the grantees do not always have the most up-to-date policies, and sometimes, do not have policies on file at all. This requirement ensures that grantees are meeting their obligation without the Department having to go to each program office to check for these documents.

IV. Administrative Information

A. Regulatory Flexibility Analysis, Executive Order 13272, Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605(b) of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Section 601 of the RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions.

There are approximately 970 SCSEP grantees and sub-recipients. Of these, more than 50 are States, State agencies, or territories and are not small entities as defined by the RFA. The vast majority of the rest are non-profit organizations, many of which may be categorized as small entities for RFA purposes. The Department does not

have a precise number of small entities that may be impacted by this rulemaking, but it requested comments on the possible impact of the rule in the NPRM. The Department did not receive any comments on this section.

Although there may be a substantial number of small entities impacted by this rulemaking, the Department has determined that the economic impact of this final rule is not significant because these regulations will not result in any additional costs to grantees and sub-recipients. The SCSEP is designed so that SCSEP funds cover the vast majority of the costs of implementing this program. Subpart H of this final rule provides detailed information to grantees on what costs are proper program expenditures, how to properly categorize those costs, etc. The SCSEP statute does require a 10 percent non-Federal match (see § 641.809); however, the 10 percent match requirement has been in effect in previous SCSEP regulations and, therefore, does not constitute a new economic burden on grantees. Furthermore, the Department's allowance of in-kind contributions in lieu of monetary payments significantly moderates the economic impact of the match requirement. Accordingly, the Department certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

The Department has also determined that this rule is not a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA), Public Law 104-121 (1996) (codified in scattered sections at 5 U.S.C.). SBREFA requires agencies to take certain actions when a "major rule" is promulgated. 5 U.S.C. 801. SBREFA defines a "major rule" as one that will have an annual effect on the economy of \$100,000,000 or more; that will result in a major increase in costs or prices for, among other things, State or local government agencies; or that will significantly and adversely affect the business climate, including competition, employment, investment, and innovation. 5 U.S.C. 804(2).

This final rule will not significantly or adversely affect the business climate. First, the rule will not create a significant impact on the business climate at all because, as discussed above, SCSEP grantees are governmental jurisdictions and not-for-profit enterprises. Moreover, any secondary impact of the program on the business community would not be adverse. To the contrary, the SCSEP functions to assist the business community by training older Americans to participate in the workforce.

This final rule will also not result in a major increase in costs or prices for States or local government agencies. The SCSEP has no impact on prices, and as discussed above, the only costs that could potentially be borne by governmental jurisdictions are limited to the 10 percent matching share. Finally, this final rule will not have an annual effect on the economy of \$100,000,000 or more.

Therefore, because none of the definitions of "major rule" apply in this instance, we determine that this final rule is not a "major rule" for SBREFA purposes.

B. Executive Order 12866

Executive Order 12866 requires that for each "significant regulatory action" taken by the Department, the Department conduct an assessment of the regulatory action and provide OMB with the regulation and the requisite assessment prior to publishing the regulation. A significant regulatory action is defined to include an action that will have an annual effect on the economy of \$100 million or more, as well as an action that raises a novel legal or policy issue.

As discussed in the SBREFA analysis above, this final rule will not have an annual effect on the economy of \$100,000,000 or more. However, the rule does raise novel policy issues concerning implementing the 2006 OAA in the SCSEP. The key policy changes being implemented include the introduction of a 48-month limit on participation, institution of a regular competition for national grants, and an increase in the proportion of grant funds that can be used for participant training and supportive services. Therefore, the Department has submitted this final rule to the OMB.

C. Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise the collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. 44 U.S.C. 3507.

Because the 2006 OAA necessitated changes in many of the SCSEP forms used by grantees before the effective date of the Act, in July 2007 the Department submitted to OMB for review and approval in accordance with § 3507(d) of the PRA a modification to the SCSEP information collection requirements. The four-year strategy

newly required by the 2006 OAA (see § 641.302) was accounted for in that PRA submission. The SCSEP PRA submission was assigned OMB control number 1205-0040 and was approved by OMB in October 2007. The approval expires October 31, 2010. This final rule neither introduces new nor revises any existing information collection requirements.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104-4, 2 U.S.C. 1501 *et seq.*) requires an agency to "prepare a written statement" providing specific information before "promulgating any final rule for which a general notice of proposed rulemaking was published." The Department has done this and, as required by 2 U.S.C. 1523(b), it includes a summary of the statement. For purposes of the UMRA, this final rule does not include any Federal mandate that may result in increased expenditure by State, local, and tribal governments in the aggregate of more than \$100 million, or increased expenditures by the private sector of more than \$100 million. We did, however, receive some comments on the costs of the rule, to which we respond here.

We received several comments on this section from State agencies related to the responsibilities in the State Plan requirements at subpart C of this rule, State competition requirements, and administrative guidance related to required services to participants. The programmatic aspects of these comments are discussed in the related sections of the preamble. This section is limited to a discussion that addresses the impact of this rule as an unfunded mandate.

One commenter generally noted that its jurisdiction was neither financially nor functionally prepared to take on this added workload. Several States specifically stated that the Department was imposing additional requirements on State grantees without providing additional funding. A few commenters stated that they did not have funds to hire an economist to provide the data required for the State four-year strategy as provided in the State WIA program; and one commenter said that it did not have the funds to obtain the data to meet the requirement that State grantees identify the types of community services that are needed and their location statewide. Some commenters requested that the Department provide additional resources to help States develop a comprehensive four-year State Plan. Another commenter protested that the Department did not

provide funding for States to conduct a competition if, under § 641.400, the State fails to meet its expected levels of performance for the core indicators for three consecutive years. That same commenter also stated that the requirement in § 641.535(b) (additional guidance) has the potential to increase program costs without providing funding to cover such requirements.

The Department disagrees that any of these requirements impose an unfunded mandate. The requirements in this final rule are funded by SCSEP grant funds and fall under the category of either administrative costs or programmatic costs. Section 502(c)(3) allows grantees to request an increase in administrative costs from 13.5 percent to 15 percent, if the grantee demonstrates that such increase is necessary to carry out the program. There are several States that take advantage of this provision by submitting applications meeting the criteria listed in § 641.870. We have no evidence that the additional administrative funds they receive are insufficient to oversee sub-recipient operations and perform the requirements of subpart B for State Planning. Further, to the extent that the Department has always expected grantees to take the State planning process seriously and formulate a projection for how services would be provided, the requirements in this final rule are not new. They are merely more descriptive and now in regulations where before the requirements were listed in a Training and Employment Guidance Letter (TEGL No. 16-07): <http://www.doleta.gov/Seniors/pdf/TEGL16-07.pdf>.

Finally, the catch-all provision in § 641.535 that informs grantees that they may be expected to provide services to participants according to administrative guidelines does not impose more responsibilities that require additional grant funds. The administrative guidance discussed in that section relates to further explanation or clarification for how the services listed in that section or in the 2006 OAA can be carried out. For example, past guidance has provided the Federal poverty levels which are adjusted each year. This guidance is important because it provides the framework for determining participant eligibility in the program. Other past guidance has allowed grantees the option of providing On-the-Job Experience or OJE training and established the parameters for using that training option.

Department-issued guidance is designed to inform the grantees about ways to serve participants within program parameters and do not rise to

the level of creating an unfunded mandate for the program. To avoid ambiguity, we changed the regulatory text in § 641.535(b) to reflect that further guidance may be issued to clarify existing requirements. The Department may also from time-to-time request that grantees provide certain information to program participants, such as information about Earned Income Tax Credit program services. We have found that as a general matter, grantees are eager to provide information to the participants when it is in the participants' best interest, and do so willingly. Furthermore, although carrying out the obligations of the statute and regulations may require careful management, the duties imposed by the regulations flow from the specific requirements of the statute as well as the Congressional purposes expressed in the statute. Although the regulations may provide more specifics on how those duties and purposes are to be carried out, the regulations do not do anything more than flesh out the requirements on how to properly implement and manage the SCSEP. Therefore, for the reasons described above, the Department believes that the requirements of this final rule do not impose any unfunded mandates.

E. Executive Order 13132

The Department has reviewed this final rule in accordance with Executive Order 13132 on federalism and has determined that the Final Rule does not have "policies that have federalism implications." As explained at § 1(a) of the Order, "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have 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." This rule does not "have 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" because the requirements in this final rule flow directly from the 2006 OAA. Whatever federalism implications these regulations have on the States is merely indirect. Moreover, these grants are, by definition, voluntary. States are not required to take the grant funds if they do not approve of the conditions attached to the funds. Therefore, the rule does not have a "substantial direct effect" on the States, nor will it alter the

relationship, power, or responsibilities between the Federal and State governments. The relationship, power, or responsibilities were already established in the authorizing legislation.

Finally, the Department received no comments on this provision. Accordingly, we conclude that this rule does not have federalism implications for the purposes of Executive Order 13132.

F. Executive Order 13045

Executive Order 13045 concerns the protection of children from environmental health risks and safety risks. This final rule addresses the SCSEP, a program for older Americans, and has no impact on safety or health risks to children.

G. Executive Order 13175

Executive Order 13175 addresses the unique relationship between the Federal Government and Indian tribal governments. The order requires Federal agencies to take certain actions when regulations have "tribal implications." Required actions include consulting with tribal governments prior to promulgating a regulation with tribal implications and preparing a tribal impact statement. The Order defines regulations as having "tribal implications" when they have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Department has reviewed this final rule and concludes that it does not have tribal implications. Although tribes are sub-recipients of national SCSEP grant funds, this final rule will not have a substantial direct effect on those tribes, because, as outlined in the Regulatory Flexibility section of the preamble, there are no new costs associated with implementing this final rule. This regulation does not affect the relationship between the Federal Government and the tribes, nor does it affect the distribution of power and responsibilities between the Federal Government and tribal governments. These grants are, by definition, voluntary and tribes are not required to take the grant funds if they do not approve of the conditions attached to the funds.

Finally, the Department received no comments on this issue. Accordingly, we conclude that this rule does not have tribal implications for the purposes of Executive Order 13175.

H. Environmental Impact Assessment

The Department has reviewed this final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department's NEPA procedures (29 CFR part 11). The rule will not have a significant impact on the quality of the human environment, and, thus, the Department has not prepared an environmental assessment or an environmental impact statement.

I. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681), requires the Department to assess the impact of this rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this final rule and determines that it will not have a negative effect on families. Indeed, we believe the SCSEP strengthens families by providing job training and support services to low-income older Americans.

J. Executive Order 12630

Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, is not relevant to this Final Rule because the rule does not involve implementation of a policy with takings implications.

K. Executive Order 12988

This final rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has written the regulation so as to minimize litigation and provide a clear legal standard for affected conduct, and has carefully reviewed it to eliminate drafting errors and ambiguities.

L. Executive Order 13211

This final rule is not subject to Executive Order 13211 because the rule will not have a significant adverse effect on the supply, distribution, or use of energy.

M. Plain Language

The Department drafted this rule in plain language.

List of Subjects in 20 CFR Part 641

Aged, Employment, Government contracts, Grant programs—Labor, Reporting and recordkeeping requirements.

■ For the reasons discussed in the preamble, the Department of Labor amends 20 CFR part 641 as follows:

PART 641—PROVISIONS GOVERNING THE SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM

Subpart A—Purpose and Definitions

Sec.

- 641.100 What does this part cover?
- 641.110 What is the SCSEP?
- 641.120 What are the purposes of the SCSEP?
- 641.130 What is the scope of this part?
- 641.140 What definitions apply to this part?

Subpart B—Coordination With the Workforce Investment Act

- 641.200 What is the relationship between the SCSEP and the Workforce Investment Act?
- 641.210 What services, in addition to the applicable core services, must SCSEP grantees and sub-recipients provide through the One-Stop delivery system?
- 641.220 Does title I of WIA require the SCSEP to use OAA funds for individuals who are not eligible for SCSEP services or for services that are not authorized under the OAA?
- 641.230 Must the individual assessment conducted by the SCSEP grantee or sub-recipient and the assessment performed by the One-Stop delivery system be accepted for use by either entity to determine the individual's need for services in the SCSEP and adult programs under title I-B of WIA?
- 641.240 Are SCSEP participants eligible for intensive and training services under title I of WIA?

Subpart C—The State Plan

- 641.300 What is the State Plan?
- 641.302 What is a four-year strategy?
- 641.305 Who is responsible for developing and submitting the State Plan?
- 641.310 May the Governor, or the highest government official, delegate responsibility for developing and submitting the State Plan?
- 641.315 Who participates in developing the State Plan?
- 641.320 Must all national grantees operating within a State participate in the State planning process?
- 641.325 What information must be provided in the State Plan?
- 641.330 How should the State Plan reflect community service needs?
- 641.335 How should the Governor, or the highest government official, address the coordination of SCSEP services with activities funded under title I of WIA?
- 641.340 How often must the Governor, or the highest government official, update the State Plan?

- 641.345 What are the requirements for modifying the State Plan?
- 641.350 How should public comments be solicited and collected?
- 641.355 Who may comment on the State Plan?
- 641.360 How does the State Plan relate to the equitable distribution report?
- 641.365 How must the equitable distribution provisions be reconciled with the provision that disruptions to current participants should be avoided?

Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants

- 641.400 What entities are eligible to apply to the Department for funds to administer SCSEP projects?
- 641.410 How does an eligible entity apply?
- 641.420 What are the eligibility criteria that each applicant must meet?
- 641.430 What are the responsibility conditions that an applicant must meet?
- 641.440 Are there responsibility conditions that alone will disqualify an applicant?
- 641.450 How will the Department examine the responsibility of eligible entities?
- 641.460 What factors will the Department consider in selecting national grantees?
- 641.465 Under what circumstances may the Department reject an application?
- 641.470 What happens if an applicant's application is rejected?
- 641.480 May the Governor, or the highest government official, make recommendations to the Department on national grant applications?
- 641.490 When will the Department compete SCSEP grant awards?
- 641.495 When must a State compete its SCSEP award?

Subpart E—Services to Participants

- 641.500 Who is eligible to participate in the SCSEP?
- 641.505 When is eligibility determined?
- 641.507 How is applicant income computed?
- 641.510 What types of income are included and excluded for participant eligibility determinations?
- 641.512 May grantees and sub-recipients enroll otherwise eligible job ready individuals and place them directly into unsubsidized employment?
- 641.515 How must grantees and sub-recipients recruit and select eligible individuals for participation in the SCSEP?
- 641.520 Are there any priorities that grantees and sub-recipients must use in selecting eligible individuals for participation in the SCSEP?
- 641.535 What services must grantees and sub-recipients provide to participants?
- 641.540 What types of training may grantees and sub-recipients provide to SCSEP participants in addition to the training received at the community service assignment?
- 641.545 What supportive services may grantees and sub-recipients provide to participants?
- 641.550 What responsibility do grantees and sub-recipients have to place

participants in unsubsidized employment?

- 641.565 What policies govern the provision of wages and benefits to participants?
- 641.570 Is there a time limit for participation in the program?
- 641.575 May a grantee or sub-recipient establish a limit on the amount of time its participants may spend at a host agency?
- 641.577 Is there a limit on community service assignment hours?
- 641.580 Under what circumstances may a grantee or sub-recipient terminate a participant?
- 641.585 What is the employment status of SCSEP participants?

Subpart F—Pilot, Demonstration, and Evaluation Projects

- 641.600 What is the purpose of the pilot, demonstration, and evaluation projects authorized under § 502(e) of the OAA?
- 641.610 How are pilot, demonstration, and evaluation projects administered?
- 641.620 How may an organization apply for pilot, demonstration, and evaluation project funding?
- 641.630 What pilot, demonstration, and evaluation project activities are allowable under § 502(e)?
- 641.640 Should pilot, demonstration, and evaluation project entities coordinate with SCSEP grantees and sub-recipients, including area agencies on aging?

Subpart G—Performance Accountability

- 641.700 What performance measures/indicators apply to SCSEP grantees?
- 641.710 How are the performance indicators defined?
- 641.720 How will the Department and grantees initially determine and then adjust expected levels of performance for the core performance measures?
- 641.730 How will the Department assist grantees in the transition to the new core performance indicators?
- 641.740 How will the Department determine whether a grantee fails, meets, or exceeds the expected levels of performance for the core indicators and what will be the consequences of failing to meet expected levels of performance?
- 641.750 Will there be performance-related incentives?

Subpart H—Administrative Requirements

- 641.800 What uniform administrative requirements apply to the use of SCSEP funds?
- 641.803 What is program income?
- 641.806 How must SCSEP program income be used?
- 641.809 What non-Federal share (matching) requirements apply to the use of SCSEP funds?
- 641.812 What is the period of availability of SCSEP funds?
- 641.815 May the period of availability be extended?
- 641.821 What audit requirements apply to the use of SCSEP funds?
- 641.824 What lobbying requirements apply to the use of SCSEP funds?

- 641.827 What general nondiscrimination requirements apply to the use of SCSEP funds?
- 641.833 What policies govern political patronage?
- 641.836 What policies govern political activities?
- 641.839 What policies govern union organizing activities?
- 641.841 What policies govern nepotism?
- 641.844 What maintenance of effort requirements apply to the use of SCSEP funds?
- 641.847 What uniform allowable cost requirements apply to the use of SCSEP funds?
- 641.850 Are there other specific allowable and unallowable cost requirements for the SCSEP?
- 641.853 How are costs classified?
- 641.856 What functions and activities constitute administrative costs?
- 641.859 What other special rules govern the classification of costs as administrative costs or programmatic activity costs?
- 641.861 Must SCSEP recipients provide funding for the administrative costs of sub-recipients?
- 641.864 What functions and activities constitute programmatic activity costs?
- 641.867 What are the limitations on the amount of SCSEP administrative costs?
- 641.870 Under what circumstances may the administrative cost limitation be increased?
- 641.873 What minimum expenditure levels are required for participant wages and benefits?
- 641.874 What conditions apply to a SCSEP grantee request to use additional funds for training and supportive service costs?
- 641.876 When will compliance with cost limitations and minimum expenditure levels be determined?
- 641.879 What are the financial and performance reporting requirements for recipients?
- 641.881 What are the SCSEP recipient's responsibilities relating to awards to sub-recipients?
- 641.884 What are the grant closeout procedures?

Subpart I—Grievance Procedures and Appeals Process

- 641.900 What appeal process is available to an applicant that does not receive a grant?
- 641.910 What grievance procedures must grantees make available to applicants, employees, and participants?
- 641.920 What actions of the Department may a grantee appeal and what procedures apply to those appeals?
- 641.930 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?

Authority: 42 U.S.C. 3056 *et seq.*; Pub. L. 109–365.

Subpart A—Purpose and Definitions

§ 641.100 What does this part cover?

Part 641 contains the Department of Labor's regulations for the Senior

Community Service Employment Program (SCSEP), authorized under title V of the Older Americans Act (OAA), 42 U.S.C. 3056 *et seq.*, as amended by the Older Americans Act Amendments of 2006, Public Law 109–365. This part and other pertinent regulations set forth the regulations applicable to the SCSEP.

(a) Subpart A of this part contains introductory provisions and definitions that apply to this part.

(b) Subpart B of this part describes the required relationship between the OAA and the Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 *et seq.* These provisions discuss the coordinated efforts to provide services through the integration of the SCSEP within the One-Stop delivery system.

(c) Subpart C of this part sets forth the requirements for the State Plan, such as the four-year strategy, required coordination efforts, public comments, and equitable distribution.

(d) Subpart D of this part establishes grant planning and application requirements, including grantee eligibility and responsibility review provisions that apply to the Department's award of SCSEP funds for State and national grants.

(e) Subpart E of this part details SCSEP participant services.

(f) Subpart F of this part provides the rules for pilot, demonstration, and evaluation projects.

(g) Subpart G of this part outlines the performance accountability requirements. This subpart establishes requirements for performance measures, defines such measures, and establishes corrective actions for failure to meet core performance measures.

(h) Subpart H of this part sets forth the administrative requirements for SCSEP funds.

(i) Subpart I of this part describes the grievance and appeals processes and requirements.

§ 641.110 What is the SCSEP?

The Senior Community Service Employment Program (SCSEP) is a program administered by the Department of Labor that serves unemployed low-income persons who are 55 years of age and older and who have poor employment prospects by training them in part-time community service assignments and by assisting them in developing skills and experience to facilitate their transition to unsubsidized employment.

§ 641.120 What are the purposes of the SCSEP?

The purposes of the SCSEP are to foster individual economic self-sufficiency and promote useful part-

time opportunities in community service assignments for unemployed low-income persons who are 55 years of age or older, particularly persons who have poor employment prospects, and to increase the number of older persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors. (OAA § 502(a)(1)).

§ 641.130 What is the scope of this part?

The regulations in this part address the requirements that apply to the SCSEP. More detailed policies and procedures are contained in administrative guidelines issued by the Department. Throughout this part, phrases such as, "according to instructions (procedures) issued by the Department" or "additional guidance will be provided through administrative issuance" refer to the documents issued under the Secretary's authority to administer the SCSEP, such as Training and Employment Guidance Letters (TEGLs), Training and Employment Notices (TENs), previously issued SCSEP Older Worker Bulletins that are still in effect, technical assistance guides, and other SCSEP guidance.

§ 641.140 What definitions apply to this part?

The following definitions apply to this part:

Additional indicators mean retention in unsubsidized employment for one year; satisfaction of participants, employers and their host agencies with their experiences and the services provided; and any other indicators of performance that the Secretary determines to be appropriate to evaluate services and performance. (OAA § 513(b)(2)).

At risk for homelessness means an individual is likely to become homeless and the individual lacks the resources and support networks needed to obtain housing.

Authorized position level means the number of SCSEP enrollment opportunities that can be supported for a 12-month period based on the average national unit cost. The authorized position level is derived by dividing the total amount of funds appropriated for a Program Year by the national average unit cost per participant for that Program Year as determined by the Department. The national average unit cost includes all costs of administration, other participant costs, and participant wage and benefit costs as defined in § 506(g) of the OAA.

Co-enrollment applies to any individual who meets the qualifications for SCSEP participation and is also

enrolled as a participant in WIA or another employment and training program, as provided in the Individual Employment Plan.

Community service means:

- (1) Social, health, welfare, and educational services (including literacy tutoring), legal and other counseling services and assistance, including tax counseling and assistance and financial counseling, and library, recreational, and other similar services;
- (2) Conservation, maintenance, or restoration of natural resources;
- (3) Community betterment or beautification;
- (4) Antipollution and environmental quality efforts;
- (5) Weatherization activities;
- (6) Economic development; and
- (7) Other such services essential and necessary to the community as the Secretary determines by rule to be appropriate. (OAA § 518(a)(1)).

Community service assignment means part-time, temporary employment paid with grant funds in projects at host agencies through which eligible individuals are engaged in community service and receive work experience and job skills that can lead to unsubsidized employment. (OAA § 518(a)(2)).

Core indicators means hours (in the aggregate) of community service employment; entry into unsubsidized employment; retention in unsubsidized employment for six months; earnings; the number of eligible individuals served; and most-in-need (the number of individuals described in § 518 (a)(3)(B)(ii) or (b)(2) of the OAA). (OAA § 513(b)(1)).

Core Services means those services described in § 134(d)(2) of WIA.

Department or DOL means the United States Department of Labor, including its agencies and organizational units.

Disability means a disability attributable to a mental or physical impairment, or a combination of mental and physical impairments, that results in substantial functional limitations in one or more of the following areas of major life activity:

- (1) Self-care;
 - (2) Receptive and expressive language;
 - (3) Learning;
 - (4) Mobility;
 - (5) Self-direction;
 - (6) Capacity for independent living;
 - (7) Economic self-sufficiency;
 - (8) Cognitive functioning; and
 - (9) Emotional adjustment.
- (42 U.S.C. 3002(13)).

Equitable distribution report means a report based on the latest available Census or other reliable data, which lists the optimum number of participant

positions in each designated area in the State, and the number of authorized participant positions each grantee serves in that area, taking into account the needs of underserved counties and incorporated cities as necessary. This report provides a basis for improving the distribution of SCSEP positions.

Frail means an individual 55 years of age or older who is determined to be functionally impaired because the individual—

- (1)(i) Is unable to perform at least two activities of daily living without substantial human assistance, including verbal reminding, physical cueing, or supervision; or
- (ii) At the option of the State, is unable to perform at least three such activities without such assistance; or

(2) Due to a cognitive or other mental impairment, requires substantial supervision because the individual behaves in a manner that poses a serious health or safety hazard to the individual or to another individual. (42 U.S.C. 3002(22)).

Grant period means the time period between the effective date of the grant award and the ending date of the award, which includes any modifications extending the period of performance, whether by the Department's exercise of options contained in the grant agreement or otherwise. This is also referred to as "project period" or "award period."

Grantee means an entity receiving financial assistance directly from the Department to carry out SCSEP activities. The grantee is the legal entity that receives the award and is legally responsible for carrying out the SCSEP, even if only a particular component of the entity is designated in the grant award document. Grantees include public and nonprofit private agencies and organizations, agencies of a State, tribal organizations, and Territories, that receive SCSEP grants from the Department. (OAA §§ 502(b)(1), 506(a)(2)). As used here, "grantee" includes "grantee" as defined in 29 CFR 97.3 and "recipient" as defined in 29 CFR 95.2(gg).

Greatest economic need means the need resulting from an income level at or below the poverty guidelines established by the Department of Health and Human Services and approved by the Office of Management and Budget (OMB). (42 U.S.C. 3002(23)).

Greatest social need means the need caused by non-economic factors, which include: Physical and mental disabilities; language barriers; and cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, which restricts

the ability of an individual to perform normal daily tasks or threatens the capacity of the individual to live independently. (42 U.S.C. 3002(24)).

Homeless includes:

(1) An individual who lacks a fixed, regular, and adequate nighttime residence; and

(2) An individual who has a primary nighttime residence that is:

(i) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(ii) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(iii) A public or private place not designed for, or ordinarily used as, regular sleeping accommodations for human beings. (42 U.S.C. 11302(a)).

Host agency means a public agency or a private nonprofit organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code of 1986 which provides a training work site and supervision for one or more participants. Political parties cannot be host agencies. A host agency may be a religious organization as long as the projects in which participants are being trained do not involve the construction, operation, or maintenance of any facility used or to be used as a place for sectarian religious instruction or worship. (OAA § 502(b)(1)(D)).

Indian means a person who is a member of an Indian tribe. (42 U.S.C. 3002(26)).

Indian tribe means any tribe, band, nation, or other organized group or community of Indians (including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*) which: (1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or (2) is located on, or in proximity to, a Federal or State reservation or Rancheria. (42 U.S.C. 3002(27)).

Individual employment plan (IEP) means a plan for a participant that is based on an assessment of that participant conducted by the grantee or sub-recipient, or a recent assessment or plan developed by another employment and training program, and a related service strategy. The IEP must include an appropriate employment goal (except that after the first IEP, subsequent IEPs need not contain an employment goal if such a goal is not feasible), objectives that lead to the goal, a timeline for the achievement of the objectives; and be

jointly agreed upon with the participant. (OAA § 502(b)(1)(N)).

Intensive services means those services authorized by § 134(d)(3) of the Workforce Investment Act.

Jobs for Veterans Act means Public Law 107-288 (2002). Section 2(a) of the Jobs for Veterans Act, codified at 38 U.S.C. 4215(a), provides a priority of service for Department of Labor employment and training programs for veterans, and certain spouses of veterans, who otherwise meet the eligibility requirements for participation. Priority is extended to veterans. Priority is also extended to the spouse of a veteran who died of a service-connected disability; the spouse of a member of the Armed Forces on active duty who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power; the spouse of any veteran who has a total disability resulting from a service-connected disability; and the spouse of any veteran who died while a disability so evaluated was in existence. (See § 641.520(b)).

Job ready refers to individuals who do not require further education or training to perform work that is available in their labor market.

Limited English proficiency means individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English.

Local Workforce Investment Area or local area means an area designated by the Governor of a State under § 116 of the Workforce Investment Act.

Local Board means a Local Workforce Investment Board established under § 117 of the Workforce Investment Act.

Low employment prospects means the likelihood that an individual will not obtain employment without the assistance of the SCSEP or another workforce development program. Persons with low employment prospects have a significant barrier to employment. Significant barriers to employment may include but are not limited to: Lacking a substantial employment history, basic skills, and/or English-language proficiency; lacking a high school diploma or the equivalent; having a disability; being homeless; or residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

Low literacy skills means the individual computes or solves problems, reads, writes, or speaks at or below the 8th grade level or is unable to compute or solve problems, read, write, or speak at a level necessary to

function on the job, in the individual's family, or in society.

Most-in-need means participants with one or more of the following characteristics: Have a severe disability; are frail; are age 75 or older; are age-eligible but not receiving benefits under title II of the Social Security Act; reside in an area with persistent unemployment and have severely limited employment prospects; have limited English proficiency; have low literacy skills; have a disability; reside in a rural area; are veterans; have low employment prospects; have failed to find employment after using services provided under title I of the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*); or are homeless or at risk for homelessness. (OAA § 513(b)(1)(E)).

National grantee means a public or non-profit private agency or organization, or Tribal organization, that receives a grant under title V of the OAA (42 U.S.C. 3056 *et seq.*) to administer a SCSEP project. (See OAA § 506(g)(5)).

OAA means the Older Americans Act, 42 U.S.C. 3001 *et seq.*, as amended.

One-Stop Center means the One-Stop Center system in a WIA local area which must include a comprehensive One-Stop Center through which One-Stop partners provide applicable core services and which provides access to other programs and services carried out by the One-Stop partners. (See WIA § 134(c)(2)).

One-Stop delivery system means a system under which employment and training programs, services, and activities are available through a network of eligible One-Stop partners, which assures that information about and access to core services is available regardless of where the individuals initially enter the workforce investment system. (See WIA § 134(c)(2)).

One-Stop partner means an entity described in § 121(b)(1) of the Workforce Investment Act, *i.e.*, required partners, or an entity described in § 121(b)(2) of the Workforce Investment Act, *i.e.*, additional partners.

Other participant (enrollee) costs means the costs of participant training, including the payment of reasonable costs to instructors, classroom rental, training supplies, materials, equipment, and tuition, and which may be provided before or during a community service assignment, in a classroom setting, or under other appropriate arrangements; job placement assistance, including job development and job search assistance; participant supportive services to enable a participant to successfully participate in a project, including the payment of reasonable costs of transportation,

health care and medical services, special job-related or personal counseling, incidentals (such as work shoes, badges, uniforms, eyeglasses, and tools), child and adult care, temporary shelter, and follow-up services; and outreach, recruitment and selection, intake orientation, and assessments. (OAA § 502(c)(6)(A)(ii)-(v)).

Pacific Island and Asian Americans means Americans having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. (OAA § 518(a)(5)).

Participant means an individual who is determined to be eligible for the SCSEP, is given a community service assignment, and is receiving any service funded by the program as described in subpart E.

Persistent unemployment means that the annual average unemployment rate for a county or city is more than 20 percent higher than the national average for two out of the last three years.

Poor employment prospects means the significant likelihood that an individual will not obtain employment without the assistance of the SCSEP or another workforce development program. Persons with poor employment prospects have a significant barrier to employment; significant barriers to employment include but are not limited to: lacking a substantial employment history, basic skills, and/or English-language proficiency; lacking a high school diploma or the equivalent; having a disability; being homeless; or residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

Program operator means a grantee or sub-recipient that receives SCSEP funds from a SCSEP grantee or a higher-tier SCSEP sub-recipient and performs the following activities for all its participants: Eligibility determination, participant assessment, and development of and placement into community service assignments.

Program Year means the one-year period beginning on July 1 and ending on June 30.

Project means an undertaking by a grantee or sub-recipient in accordance with a grant or contract agreement that provides service to communities and training and employment opportunities to eligible individuals.

Recipient means grantee. As used here, "recipient" includes "recipient" as defined in 29 CFR 95.2(gg) and "grantee" as defined in 29 CFR 97.3.

Residence means an individual's declared dwelling place or address as

demonstrated by appropriate documentation.

Rural means an area not designated as a metropolitan statistical area by the Census Bureau; segments within metropolitan counties identified by codes 4 through 10 in the Rural Urban Commuting Area (RUCA) system; and RUCA codes 2 and 3 for census tracts that are larger than 400 square miles and have population density of less than 30 people per square mile.

SCSEP means the Senior Community Service Employment Program authorized under title V of the OAA.

Secretary means the Secretary of the U.S. Department of Labor.

Service area means the geographic area served by a local SCSEP project in accordance with a grant agreement.

Severe disability means a severe, chronic disability attributable to mental or physical impairment, or a combination of mental and physical impairments, that—

(1) Is likely to continue indefinitely; and

(2) Results in substantial functional limitation in 3 or more of the following areas of major life activity:

- (i) Self-care;
 - (ii) Receptive and expressive language;
 - (iii) Learning;
 - (iv) Mobility;
 - (v) Self-direction;
 - (vi) Capacity for independent living;
 - (vii) Economic self-sufficiency.
- (42 U.S.C. 3002(48)).

Severely limited employment prospects means the substantial likelihood that an individual will not obtain employment without the assistance of the SCSEP or another workforce development program. Persons with severely limited employment prospects have more than one significant barrier to employment; significant barriers to employment may include but are not limited to: Lacking a substantial employment history, basic skills, and/or English-language proficiency; lacking a high school diploma or the equivalent; having a disability; being homeless; or residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

State Board means a State Workforce Investment Board established under WIA § 111.

State grantee means the entity designated by the Governor, or the highest government official, to enter into a grant with the Department to administer a State or Territory SCSEP project under the OAA. Except as applied to funding distributions under § 506 of the OAA, this definition applies

to the 50 States, Puerto Rico, the District of Columbia and the following Territories: Guam, American Samoa, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

State Plan means a plan that the Governor, or the highest government official, of a State must submit to the Secretary that outlines a four-year strategy, and describes the planning and implementation process, for the statewide provision of community service employment and other authorized activities for eligible individuals under SCSEP. (See § 641.300).

Sub-recipient means the legal entity to which a sub-award of financial assistance is made by the grantee (or by a higher-tier sub-recipient), and that is accountable to the grantee for the use of the funds provided. As used here, “sub-recipient” includes “sub-grantee” as defined in 29 CFR 97.3 and “sub-recipient” as defined in 29 CFR 95.2(kk).

Supportive services means services, such as transportation, health and medical services, special job-related or personal counseling, incidentals (such as work shoes, badges, uniforms, eyeglasses, and tools), child and adult care, housing, including temporary shelter, follow up services, and needs-related payments, which are necessary to enable an individual to participate in activities authorized under the SCSEP. (OAA § 502(c)(6)(A)(iv) and 518(a)(7)).

Title V of the OAA means 42 U.S.C. 3056 *et seq.*, as amended.

Training services means those services authorized by WIA § 134(d)(4).

Tribal organization means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body. (42 U.S.C. 3002(54)).

Unemployed means an individual who is without a job and who wants and is available for work, including an individual who may have occasional employment that does not result in a constant source of income. (OAA 518(a)(8)).

Veteran means an individual who is a “covered person” for purposes of the Jobs for Veterans Act, 38 U.S.C. 4215(a)(1).

Workforce Investment Act (WIA) means the Workforce Investment Act of 1998 (Pub. L. 105–220 (Aug. 7, 1998)), 29 U.S.C. 2801 *et seq.*, as amended.

Workforce Investment Act (WIA) regulations means regulations at 20 CFR part 652, subpart D and parts 660–671.

Subpart B—Coordination With the Workforce Investment Act

§ 641.200 What is the relationship between the SCSEP and the Workforce Investment Act?

The SCSEP is a required partner under the Workforce Investment Act. As such, it is a part of the One-Stop delivery system. When acting in their capacity as WIA partners, SCSEP grantees and sub-recipients are required to follow all applicable rules under WIA and its regulations. (29 U.S.C. 2841(b)(1)(B)(vi) and 20 CFR 662.200 through 662.280).

§ 641.210 What services, in addition to the applicable core services, must SCSEP grantees and sub-recipients provide through the One-Stop delivery system?

In addition to providing core services, as defined at 20 CFR 662.240 of the WIA regulations, SCSEP grantees and sub-recipients must make arrangements through the One-Stop delivery system to provide eligible and ineligible individuals with referrals to WIA intensive and training services and access to other activities and programs carried out by other One-Stop partners.

§ 641.220 Does title I of WIA require the SCSEP to use OAA funds for individuals who are not eligible for SCSEP services or for services that are not authorized under the OAA?

No, SCSEP requirements continue to apply. Title V resources may not be used to serve individuals who are not SCSEP-eligible. The Workforce Investment Act creates a seamless service delivery system for individuals seeking workforce development services by linking the One-Stop partners in the One-Stop delivery system. Although the overall effect is to provide universal access to core services, SCSEP resources may only be used to provide services that are authorized and provided under the SCSEP to eligible individuals. Note, however, that one allowable SCSEP cost is a SCSEP project's proportionate share of One-Stop costs. See § 641.850(d). Title V funds can be used to pay wages to SCSEP participants receiving intensive and training services under title I of WIA provided that the SCSEP participants have each received a community service assignment. All other individuals who are in need of the services provided under the SCSEP, but who do not meet the eligibility criteria to enroll in the SCSEP, should be referred to or enrolled in WIA or other appropriate partner programs. WIA § 121(b)(1). These arrangements should be negotiated in the Memorandum of Understanding (MOU), which is an agreement developed and executed

between the Local Workforce Investment Board, with the agreement of the chief local elected official, and the One-Stop partners relating to the operation of the One-Stop delivery system in the local area. The MOU is further described in the WIA regulations at 20 CFR §§ 662.300 and 662.310.

§ 641.230 Must the individual assessment conducted by the SCSEP grantee or sub-recipient and the assessment performed by the One-Stop delivery system be accepted for use by either entity to determine the individual's need for services in the SCSEP and adult programs under title I-B of WIA?

Yes, § 502(b)(3) of the OAA provides that an assessment or IEP completed by the SCSEP satisfies any condition for an assessment, service strategy, or IEP completed at the One-Stop and vice-versa. (OAA § 502(b)(3)). These reciprocal arrangements and the contents of the SCSEP IEP and WIA IEP should be negotiated in the MOU.

§ 641.240 Are SCSEP participants eligible for intensive and training services under title I of WIA?

(a) Although SCSEP participants are not automatically eligible for intensive and training services under title I of WIA, local boards may deem SCSEP participants, either individually or as a group, as satisfying the requirements for receiving adult intensive and training services under title I of WIA.

(b) SCSEP participants who have been assessed and for whom an IEP has been developed have received an intensive service under 20 CFR 663.240(a) of the WIA regulations. In order to enhance skill development related to the IEP, it may be necessary to provide training beyond the community service assignment to enable participants to meet their unsubsidized employment objectives. The SCSEP grantee or sub-recipient, the host agency, the WIA program, or another One-Stop partner may provide training as appropriate and as negotiated in the MOU. (See § 641.540 for a further discussion of training for SCSEP participants.)

Subpart C—The State Plan

§ 641.300 What is the State Plan?

The State Plan is a plan, submitted by the Governor, or the highest government official, in each State, as an independent document or as part of the WIA Unified Plan, that outlines a four-year strategy for the statewide provision of community service employment and other authorized activities for eligible individuals under the SCSEP as described in § 641.302. The State Plan also describes the planning and implementation process for SCSEP

services in the State, taking into account the relative distribution of eligible individuals and employment opportunities within the State. The State Plan is intended to foster coordination among the various SCSEP grantees and sub-recipients operating within the State and to facilitate the efforts of stakeholders, including State and local boards under WIA, to work collaboratively through a participatory process to accomplish the SCSEP's goals. (OAA § 503(a)(1)). The State Plan provisions are listed in § 641.325.

§ 641.302 What is a four-year strategy?

The State Plan must outline a four-year strategy for the statewide provision of community service employment and other authorized activities for eligible individuals under the SCSEP program. (OAA § 503(a)(1)). The four-year strategy must specifically address the following:

(a) The State's long-term strategy for achieving an equitable distribution of SCSEP positions within the State that:

(1) Moves positions from over-served to underserved locations within the State, under § 641.365;

(2) Equitably serves rural and urban areas; and

(3) Serves individuals afforded priority for service, pursuant to § 641.520;

(b) The State's long-term strategy for avoiding disruptions to the program when new Census or other reliable data become available, or when there is over-enrollment for any other reason;

(c) The State's long-term strategy for serving minority older individuals under SCSEP;

(d) Long-term projections for job growth in industries and occupations in the State that may provide employment opportunities for older workers, and how those relate to the types of unsubsidized jobs for which SCSEP participants will be trained, and the types of skill training to be provided;

(e) The State's long-term strategy for engaging employers to develop and promote opportunities for the placement of SCSEP participants in unsubsidized employment;

(f) The State's strategy for continuous improvement in the level of performance for entry into unsubsidized employment, and to achieve, at a minimum, the levels specified in § 513(a)(2)(E)(ii) of the OAA;

(g) Planned actions to coordinate activities of SCSEP grantees with the activities being carried out in the State under title I of WIA, including plans for using the WIA One-Stop delivery system and its partners to serve individuals aged 55 and older;

(h) Planned actions to coordinate activities of SCSEP grantees with the activities being carried out in the State under other titles of the OAA;

(i) Planned actions to coordinate the SCSEP with other public and private entities and programs that provide services to older Americans, such as community and faith-based organizations, transportation programs, and programs for those with special needs or disabilities;

(j) Planned actions to coordinate the SCSEP with other labor market and job training initiatives; and

(k) The State's long-term strategy to improve SCSEP services, including planned longer-term changes to the design of the program within the State, and planned changes in the use of SCSEP grantees and program operators to better achieve the goals of the program; this may include recommendations to the Department, as appropriate.

§ 641.305 Who is responsible for developing and submitting the State Plan?

The Governor, or the highest governmental official, of each State is responsible for developing and submitting the State Plan to the Department.

§ 641.310 May the Governor, or the highest government official, delegate responsibility for developing and submitting the State Plan?

(a) Yes, the Governor, or the highest governmental official of each State, may delegate responsibility for developing and submitting the State Plan, provided that any such delegation is consistent with State law and regulations.

(b) To delegate responsibility, the Governor, or the highest government official, must submit to the Department a signed statement indicating the individual and/or organization that will be submitting the State Plan on his or her behalf.

§ 641.315 Who participates in developing the State Plan?

(a) In developing the State Plan the Governor, or the highest government official, must seek the advice and recommendations of representatives from:

(1) The State and area agencies on aging;

(2) State and local boards under the Workforce Investment Act (WIA);

(3) Public and private nonprofit agencies and organizations providing employment services, including each grantee operating a SCSEP project within the State, except as provided in § 641.320(b);

(4) Social service organizations providing services to older individuals;
 (5) Grantees under title III of the OAA;
 (6) Affected communities;
 (7) Unemployed older individuals;
 (8) Community-based organizations serving older individuals;
 (9) Business organizations; and
 (10) Labor organizations.
 (b) The Governor, or the highest government official, may also obtain the advice and recommendations of other interested organizations and individuals, including SCSEP program participants, in developing the State Plan. (OAA § 503(a)(2)).

§ 641.320 Must all national grantees operating within a State participate in the State planning process?

(a) The eligibility provision at OAA § 514(c)(6) requires national grantees to coordinate activities with other organizations at the State and local levels. Therefore, except as provided in paragraph (b) of this section, any national grantee that does not participate in the State planning process may be deemed ineligible to receive SCSEP funds in the following Program Year.

(b) National grantees serving older American Indians, or Pacific Island and Asian Americans, with funds reserved under OAA § 506(a)(3), are exempted from the requirement to participate in the State planning processes under § 503(a)(8) of the OAA. Although these national grantees may choose not to participate in the State planning process, the Department encourages their participation. Only those grantees using reserved funds are exempt; if a grantee is awarded one grant with reserved funds and another grant with non-reserved funds, the grantee is required under paragraph (a) of this section to participate in the State planning process for purposes of the non-reserved funds grant.

§ 641.325 What information must be provided in the State Plan?

The Department issues instructions detailing the information that must be provided in the State Plan. At a minimum, the State Plan must include the State's four-year strategy, as described in § 641.302, and information on the following:

- (a) The ratio of eligible individuals in each service area to the total eligible population in the State;
- (b) The relative distribution of:
 - (1) Eligible individuals residing in urban and rural areas within the State;
 - (2) Eligible individuals who have the greatest economic need;
 - (3) Eligible individuals who are minorities;

- (4) Eligible individuals who are limited English proficient; and
- (5) Eligible individuals who have the greatest social need;

(c) The current and projected employment opportunities in the State (such as by providing information available under § 15 of the Wagner-Peyser Act (29 U.S.C. 491–2) by occupation), and the types of skills possessed by eligible individuals;

(d) The localities and populations for which projects of the type authorized by title V are most needed;

(e) Actions taken and/or planned to coordinate activities of SCSEP grantees in the State with activities carried out in the State under title I of WIA;

(f) A description of the process used to obtain advice and recommendations on the State Plan from representatives of organizations and individuals listed in § 641.315, and advice and recommendations on steps to coordinate SCSEP services with activities funded under title I of WIA from representatives of organizations listed in § 641.335;

(g) A description of the State's procedures and time line for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment as required by § 641.350;

(h) Public comments received, and a summary of the comments;

(i) A description of the steps taken to avoid disruptions to the greatest extent possible as provided in § 641.365; and

(j) Such other information as the Department may require in the State Plan instructions. (OAA § 503(a)).

§ 641.330 How should the State Plan reflect community service needs?

The Governor, or the highest government official, must ensure that the State Plan identifies the types of community services that are needed and the places where these services are most needed. The State Plan should specifically identify the needs and locations of those individuals most in need of community services and the groups working to meet their needs. (OAA § 503(a)(4)(E)).

§ 641.335 How should the Governor, or the highest government official, address the coordination of SCSEP services with activities funded under title I of WIA?

The Governor, or the highest government official, must seek the advice and recommendations from representatives of the State and area agencies on aging in the State and the State and local boards established under title I of WIA. (OAA § 503(a)(2)). The State Plan must describe the steps that are being taken to coordinate SCSEP

activities within the State with activities being carried out under title I of WIA. (OAA § 503(a)(4)(F)). The State Plan must describe the steps being taken to ensure that the SCSEP is an active partner in each One-Stop delivery system and the steps that will be taken to encourage and improve coordination with the One-Stop delivery system.

§ 641.340 How often must the Governor, or the highest government official, update the State Plan?

(a) Under instructions issued by the Department, the Governor, or the highest government official, must review the State Plan and submit an update to the State Plan to the Secretary for consideration and approval not less often than every two years. OAA § 503(a)(1). States are encouraged to review their State Plan more frequently than every two years, however, and make modifications as circumstances warrant, under § 641.345.

(b) Before development of the update to the State Plan, the Governor, or the highest government official, must seek the advice and recommendations of the individuals and organizations identified in § 641.315 about what, if any, changes are needed, and must publish the State Plan, showing the changes, for public comment. OAA § section 503(a)(2), 503(a)(3).

§ 641.345 What are the requirements for modifying the State Plan?

(a) Modifications may be submitted anytime circumstances warrant.

(b) Modifications to the State Plan are required when:

(1) There are changes in Federal or State law or policy that substantially change the assumptions upon which the State Plan is based;

(2) There are significant changes in the State's vision, four-year strategy, policies, performance indicators, or organizational responsibilities; or

(3) There is a change in a grantee or grantees.

(c) Modifications to the State Plan are subject to the same public comment requirements that apply to the development of the State Plan under § 641.350.

(d) States are not required to seek the advice and recommendations of the individuals and organizations identified in § 641.315 when modifying the State Plan, except that States must seek the advice and recommendations of any national grantees operating in the State. While not required, states are strongly encouraged to seek the advice and recommendation of the relevant entities listed in § 641.315 when or if modifying the State Plan becomes necessary.

(e) The Department will issue additional instructions for the procedures that must be followed when requesting modifications to the State Plan.

§ 641.350 How should public comments be solicited and collected?

The Governor, or the highest government official, should follow established State procedures to solicit and collect public comments. The State Plan must include a description of the State's procedures and schedule for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment.

§ 641.355 Who may comment on the State Plan?

Any individual or organization may comment on the Plan.

§ 641.360 How does the State Plan relate to the equitable distribution report?

The two documents address some of the same areas, but are prepared at different points in time. The equitable distribution report is prepared by State grantees at the beginning of each fiscal year and provides a "snapshot" of the actual distribution of all of the authorized positions within the State, grantee-by-grantee, and the optimum number of participant positions in each designated area based on the latest available Census or other reliable data. The State Plan is prepared by the Governor, or the highest government official, and covers many areas in addition to equitable distribution, as discussed in § 641.325, and sets forth a proposed plan for distribution of authorized positions in the State. Any distribution or redistribution of positions made as a result of a State Plan proposal will be reflected in the next equitable distribution report, which then forms the basis for the proposed distribution in the next State Plan update. This process is iterative in that it moves the authorized positions from overserved areas to underserved areas over a period of time.

§ 641.365 How must the equitable distribution provisions be reconciled with the provision that disruptions to current participants should be avoided?

(a) Governors, or highest government officials, must describe in the State Plan the steps that are being taken to comply with the statutory requirement to avoid disruptions in the provision of services for participants. (OAA § 503(a)(6)).

(b) When there is new Census or other reliable data indicating that there has been a shift in the location of the eligible population or when there is

over-enrollment for any other reason, the Department recommends a gradual shift in positions as they become vacant to areas where there has been an increase in the eligible population.

(c) The Department does not define disruptions to mean that participants are entitled to remain in a subsidized community service assignment indefinitely. As discussed in § 641.570, there is a time limit on SCSEP participation, thus permitting positions to be transferred over time.

(d) Grantees and sub-recipients must not transfer positions from one geographic area to another without first notifying the State agency responsible for preparing the State Plan and equitable distribution report.

(e) Grantees must submit, in writing, any proposed changes in distribution that occur after submission of the equitable distribution report to the Department for approval.

(f) All grantees are required to coordinate any proposed changes in position distribution with the other grantees in the State, including the State project director, before submitting the proposed changes to the Department for approval. The request for the Department's approval must include the comments of the State project director, which the Department will consider in making its decision.

Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants

§ 641.400 What entities are eligible to apply to the Department for funds to administer SCSEP projects?

(a) *National Grants.* Entities eligible to apply for national grants include nonprofit organizations, Federal public agencies, and tribal organizations. These entities must provide information to establish that they are capable of administering a multi-State program, as required by the Secretary. State and local agencies may not apply for these funds.

(b) *State Grants.*

(1) Section 506(e) of the OAA requires the Department to award each State a grant to provide SCSEP services. Governors, or highest government officials, designate an individual State agency as the organization to administer SCSEP funds.

(2) If the State fails to meet its expected levels of performance for the core indicators for three consecutive years, it is not eligible to designate an agency to administer SCSEP funds in the following year. Instead, the State must conduct a competition to select an organization as the grantee of the funds

allotted to the State under § 506(e). Public and nonprofit private agencies and organizations, State agencies other than the previously designated, failed agency, and tribal organizations, are eligible to be selected as a grantee for the funds. Other States may not be selected as a grantee for this funding.

§ 641.410 How does an eligible entity apply?

(a) *General.* An eligible entity must follow the application guidelines issued by the Department. The Department will issue application guidelines announcing the availability of national funds and State funds, whether they are awarded on a competitive or noncompetitive basis. The guidelines will contain application due dates, application instructions, evaluation criteria, and other necessary information.

(b) *National Grant Applicants.* All applicants for SCSEP national grant funds, except for applications for grants proposing to serve older Indians and Pacific Island and Asian Americans with funds reserved under OAA § 506(a)(3), must submit their applications to the Governor, or the highest government official, of each State in which projects are proposed so that he or she has a reasonable opportunity to make the recommendations described in § 641.480, before submitting the application to the Department. (OAA § 503(a)(5)).

(c) *State Applicants.* A State that submits a Unified Plan under § 501 of WIA may include the State's SCSEP grant application in its Unified Plan. Any State that submits a SCSEP grant application as part of its WIA Unified Plan must address all of the application requirements as published in the Department's instructions. Sections 641.300 through 641.365 address State Plans and modifications.

§ 641.420 What are the eligibility criteria that each applicant must meet?

To be eligible to receive SCSEP funds, each applicant must demonstrate:

(a) An ability to administer a program that serves the greatest number of eligible participants, giving particular consideration to individuals with greatest economic need, individuals with greatest social need, and individuals described in § 641.570(b) or § 641.520(a)(2) through (a)(8).

(b) An ability to administer a program that provides employment in community service assignments for eligible individuals in communities in which they reside, or in nearby communities, that will contribute to the general welfare of the community;

(c) An ability to administer a program that moves eligible participants into unsubsidized employment;

(d) Where the applicant has previously received a SCSEP grant, the applicant's prior performance in meeting SCSEP core measures of performance and addressing SCSEP additional measures of performance; and where the applicant has not received a SCSEP grant, the applicant's prior performance under other Federal or State programs; relevant past performance will also be used for scoring criterion and will be set forth more fully in the Solicitation for Grant Applications (see § 641.460);

(e) An ability to move participants with multiple barriers to employment, including individuals described in § 641.570(b) or § 641.520(a)(2) through (a)(8), into unsubsidized employment;

(f) An ability to coordinate activities with other organizations at the State and local levels, including the One-Stop delivery system;

(g) An ability to properly manage the program, as reflected in its plan for fiscal management of the SCSEP;

(h) An ability to administer a project that provides community service;

(i) An ability to minimize program disruption for current participants and in community services provided if there is a change in project sponsor and/or location, and its plan for minimizing disruptions;

(j) Any additional criteria that the Department deems appropriate to minimize disruptions for current participants. (OAA § 514(c)).

§ 641.430 What are the responsibility conditions that an applicant must meet?

Subject to § 641.440, each applicant must meet the listed responsibility "tests" by not having committed the following acts:

(a) The Department has been unable to recover a debt from the applicant, whether incurred by the applicant or by one of its sub-recipients, or the applicant has failed to comply with a debt repayment plan to which it agreed. In this context, a debt is established by final agency action, followed by three demand letters to the applicant, without payment in full by the applicant.

(b) Established fraud or criminal activity of a significant nature within the applicant's organization.

(c) Serious administrative deficiencies identified by the Department, such as failure to maintain a financial management system as required by Federal regulations.

(d) Willful obstruction of the auditing or monitoring process.

(e) Failure to provide services to applicants as agreed to in a current or

recent grant or to meet applicable core performance measures or address other applicable indicators of performance.

(f) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, or other activities.

(g) Failure to return a grant closeout package or outstanding advances within 90 days after the grant expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted.

(h) Failure to submit required reports.

(i) Failure to properly report and dispose of Government property as instructed by the Department.

(j) Failure to have maintained effective cash management or cost controls resulting in excess cash on hand.

(k) Failure to ensure that a sub-recipient complies with applicable audit requirements, including OMB Circular A-133 and the audit requirements specified at § 641.821.

(l) Failure to audit a sub-recipient within the period required under § 641.821.

(m) Final disallowed costs in excess of five percent of the grant or contract award if, in the judgment of the Grant Officer, the disallowances are egregious findings.

(n) Failure to establish a mechanism to resolve a sub-recipient's audit in a timely fashion. (OAA § 514(d)(4)).

§ 641.440 Are there responsibility conditions that alone will disqualify an applicant?

(a) Yes, an applicant may be disqualified if

(1) Either of the first two responsibility tests, a or b, listed in § 641.430 is not met, or

(2) The applicant substantially, or persistently for two or more consecutive years, fails one of the other responsibility tests listed in § 641.430.

(b) The second responsibility test addresses "fraud or criminal activity of a significant nature." The Department will determine the existence of significant fraud or criminal activity which typically will include willful or grossly negligent disregard for the use or handling of, or other fiduciary duties concerning, Federal funding, where the grantee has no effective systems, checks, or safeguards to detect or prevent fraud or criminal activity. Additionally, significant fraud or criminal activity will typically include coordinated patterns or behaviors that pervade a grantee's administration or are committed by the higher levels of a grantee's management or authority. The

Department will determine whether "fraud or criminal activity of a significant nature" has occurred on a case-by-case basis, regardless of what party identifies the alleged fraud or criminal activity.

§ 641.450 How will the Department examine the responsibility of eligible entities?

The Department will review available records to assess each applicant's overall fiscal and administrative ability to manage Federal funds. The Department's responsibility review may consider all relevant information, including the organization's history of managing other grants awarded by the Department or by other Federal agencies. (OAA § 514(d)(1) and (d)(2)).

§ 641.460 What factors will the Department consider in selecting national grantees?

The Department will select national grantees from among applicants that are able to meet the eligibility and responsibility review criteria at § 514 of the OAA. (Section 641.420 contains the eligibility criteria and §§ 641.430 and 641.440 contain the responsibility criteria.) The Department also will take the rating criteria described in the Solicitation for Grant Applications or other instrument into consideration. These rating criteria will include relevant past performance.

§ 641.465 Under what circumstances may the Department reject an application?

(a) The Department may question any proposed project component of an application if it believes that the component will not serve the purposes of the SCSEP. The Department may reject the application if the applicant does not submit or negotiate an acceptable alternative.

(b) The Department may reject any application that the Grant Officer determines unacceptable based on the content of the application, rating score, past performance, fiscal management, or any other factor the Grant Officer believes serves the best interest of the program, including the application's comparative rating in a competition.

§ 641.470 What happens if an applicant's application is rejected?

(a) Any entity whose application is rejected in whole or in part will be informed that it has not been selected. The non-selected entity may request an explanation of the Department's basis for its rejection. If requested, the Department will provide the entity with feedback on its proposal. The non-selected entity may follow the procedures in § 641.900.

(b) Incumbent grantees will not have an opportunity to obtain technical assistance provided by the Department under OAA § 513(d)(2)(B)(i) to cure, in an open competition, any deficiency in a proposal because that will create inequity in favor of incumbents. Nor, during an open competition, will the Department provide assistance to any applicant to improve its application.

(c) If the Administrative Law Judge (ALJ) rules, under § 641.900, that the organization should have been selected, in whole or in part, the matter must be remanded to the Grant Officer. The Grant Officer must, within 10 working days, determine whether the organization continues to meet the requirements of this part, and whether the positions which are the subject of the ALJ's decision will be awarded, in whole or in part, to the organization and the timing of the award. In making this determination, the Grant Officer must take into account disruption to participants, disruption to grantees, and the operational needs of the SCSEP.

(d) In the event that the Grant Officer determines that it is not feasible to award any positions to the appealing applicant, the applicant will be awarded its bid preparation costs, or a pro rata share of those costs if the Grant Officer's finding applies to only a portion of the funds that would be awarded. If positions are awarded to the appealing applicant, that applicant is not entitled to the full grant amount but will only receive the funds remaining in the grant that have not been expended by the current grantee through its operation of the grant and its subsequent closeout. The available remedy in a SCSEP non-selection appeal is neither retroactive nor immediately effective selection; rather it is the potential to be selected as a SCSEP grantee as quickly as administratively feasible in the future, for the remainder of the grant cycle.

(e) In the event that any party notifies the Grant Officer that it is not satisfied with the Grant Officer's decision, the Grant Officer must return the decision to the ALJ for review.

(f) Any organization selected and/or funded as a SCSEP grantee is subject to having its positions reduced or to being removed as a SCSEP grantee if an ALJ decision so orders. The Grant Officer provides instructions on transition and closeout to both the newly designated grantee and to the grantee whose positions are affected or which is being removed. All parties must agree to the provisions of this paragraph as a condition of being a SCSEP grantee.

§ 641.480 May the Governor, or the highest government official, make recommendations to the Department on national grant applications?

(a) Yes, in accordance with § 641.410(b), each Governor, or highest government official, will have a reasonable opportunity to make comments on any application to operate a SCSEP project located in the Governor's, or the highest government official's, State before the Department makes a final decision on a grant award. The Governor's, or the highest government official's, comments should be directed to the Department and may include the anticipated effect of the proposal on the overall distribution of program positions within the State; recommendations for redistribution of positions to underserved areas as vacancies occur in previously encumbered positions in other areas; and recommendations for distributing any new positions that may become available as a result of an increase in funding for the State. The Governor's, or the highest government official's, recommendations should be consistent with the State Plan. (OAA § 503(a)(5)).

(b) The Governor, or the highest government official, has the option of making the authorized recommendations on all applications or only on those applications proposed for award following the rating process. It is incumbent on each Governor, or the highest government official, to inform the Department of his or her intent to review the applications before or after the rating process.

§ 641.490 When will the Department compete SCSEP grant awards?

(a)(1) The Department will hold a full and open competition for national grants every four years. (OAA § 514(a)(1)).

(2) If a national grantee meets the expected level of performance for each of the core indicators for each of the four years, the Department may provide an additional one-year grant to the national grantee. (OAA § 514(a)(2)).

§ 641.495 When must a State compete its SCSEP award?

If a State grantee fails to meet its expected levels of performance for three consecutive Program Years, the State must hold a full and open competition, under such conditions as the Secretary may provide, for the State SCSEP funds for the full Program Year following the determination of consecutive failure. (OAA § 513(d)(3)(B)(iii)). The incumbent (failed) grantee is not eligible to compete. Other states are also not eligible to compete for these funds. § 641.400(b)(2).

Subpart E—Services to Participants

§ 641.500 Who is eligible to participate in the SCSEP?

Anyone who is at least 55 years old, unemployed (as defined in § 641.140), and who is a member of a family with an income that is not more than 125 percent of the family income levels prepared by the Department of Health and Human Services and approved by OMB (Federal poverty guidelines) is eligible to participate in the SCSEP. (OAA § 518(a)(3), (8)). A person with a disability may be treated as a "family of one" for income eligibility determination purposes at the option of the applicant.

§ 641.505 When is eligibility determined?

Initial eligibility is determined at the time individuals apply to participate in the SCSEP. Once individuals become SCSEP participants, the grantee or sub-recipient is responsible for verifying their continued eligibility at least once every 12 months. Grantees and sub-recipients may also verify an individual's eligibility as circumstances require, including instances when enrollment is delayed.

§ 641.507 How is applicant income computed?

An applicant's income is computed by calculating the includable income received by the applicant during the 12-month period ending on the date an individual submits an application to participate in the SCSEP, or the annualized income for the 6-month period ending on the application date. The Department requires grantees to use whichever method is more favorable to the individual. (OAA § 518(a)(4)).

§ 641.510 What types of income are included and excluded for participant eligibility determinations?

(a) With certain exceptions, the Department will use the definition of income from the U.S. Census Bureau's Current Population Survey (CPS) as the standard for determining SCSEP applicant income eligibility.

(b) Any income that is unemployment compensation, a benefit received under title XVI of the Social Security Act (42 U.S.C. 1381 *et seq.*), a payment made to or on behalf of veterans or former members of the Armed Forces under the laws administered by the Secretary of Veterans Affairs, or 25 percent of a benefit received under title II of the Social Security Act (42 U.S.C. 401 *et seq.*), must be excluded from SCSEP income eligibility determinations. (OAA § 518(a)(3)(A)).

(c) The Department has issued administrative guidance on income

inclusions and exclusions and procedures for determining SCSEP income eligibility. This guidance may be updated periodically.

§ 641.512 May grantees and sub-recipients enroll otherwise eligible job ready individuals and place them directly into unsubsidized employment?

No, grantees and sub-recipients may not enroll as SCSEP participants job-ready individuals who can be directly placed into unsubsidized employment. Such individuals should be referred to an employment provider, such as the One-Stop Center for job placement assistance under WIA or another employment program.

§ 641.515 How must grantees and sub-recipients recruit and select eligible individuals for participation in the SCSEP?

(a) Grantees and sub-recipients must develop methods of recruitment and selection that assure that the maximum number of eligible individuals have an opportunity to participate in the program. To the extent feasible, grantees and sub-recipients should seek to enroll minority and Indian eligible individuals, eligible individuals with limited English proficiency, and eligible individuals with greatest economic need, at least in proportion to their numbers in the area, taking into consideration their rates of poverty and unemployment. (OAA § 502(b)(1)(M)).

(b) Grantees and sub-recipients must use the One-Stop delivery system as one method in the recruitment and selection of eligible individuals to ensure that the maximum number of eligible individuals have an opportunity to participate in the project. (OAA § 502(b)(1)(H)).

(c) States may enter into agreements among themselves to permit cross-border enrollment of eligible participants. Such agreements should cover both State and national grantee positions and must be submitted to the Department for approval in the grant application or a modification of the grant.

§ 641.520 Are there any priorities that grantees and sub-recipients must use in selecting eligible individuals for participation in the SCSEP?

(a) Yes, in selecting eligible individuals for participation in the SCSEP, priority must be given to individuals who have one or more of the following characteristics:

- (1) Are 65 years of age or older;
- (2) Have a disability;
- (3) Have limited English proficiency or low literacy skills;
- (4) Reside in a rural area;
- (5) Are veterans (or, in some cases, spouses of veterans) for purposes of

§ 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a) as set forth in paragraph (b) of this section;

- (6) Have low employment prospects;
- (7) Have failed to find employment after using services provided through the One-Stop delivery system; or
- (8) Are homeless or are at risk for homelessness.

(OAA § 518(b)).

(b) Section 2(a) of the Jobs for Veterans Act creates a priority for service for veterans (and, in some cases, spouses of veterans) who otherwise meet the program eligibility criteria for the SCSEP. 38 U.S.C. 4215(a). Priority is extended to veterans. Priority is also extended to the spouse of a veteran who died of a service-connected disability; the spouse of a member of the Armed Forces on active duty who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power; the spouse of any veteran who has a total disability resulting from a service-connected disability; and the spouse of any veteran who died while a disability so evaluated was in existence.

(c) Grantees and sub-recipients must apply these priorities in the following order:

- (1) Persons who qualify as a veteran or qualified spouse under § 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a), and who possess at least one of the other priority characteristics;
- (2) Persons who qualify as a veteran or qualified spouse under § 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a), who do not possess any other of the priority characteristics;
- (3) Persons who do not qualify as a veteran or qualified spouse under § 2(a) of the Jobs for Veterans Act (non-veterans), and who possess at least one of the other priority characteristics.

§ 641.535 What services must grantees and sub-recipients provide to participants?

(a) When individuals are selected for participation in the SCSEP, the grantee or sub-recipient is responsible for:

- (1) Providing orientation to the SCSEP, including information on project goals and objectives, community service assignments, training opportunities, available supportive services, the availability of a free physical examination, participant rights and responsibilities, and permitted and prohibited political activities;
- (2) (i) Assessing participants' work history, skills and interests, talents, physical capabilities, aptitudes, needs for supportive services, occupational preferences, training needs, potential for

performing community service assignments, and potential for transition to unsubsidized employment;

(ii) Performing an initial assessment upon program entry, unless an assessment has already been performed under title I of WIA as provided in § 641.230. Subsequent assessments may be made as necessary, but must be made no less frequently than two times during a twelve month period (including the initial assessment);

(3)(i) Using the information gathered during the initial assessment to develop an IEP that includes an appropriate employment goal for each participant, except that if an assessment has already been performed and an IEP developed under title I of WIA, the WIA assessment and IEP will satisfy the requirement for a SCSEP assessment and IEP as provided in § 641.230;

(ii) Updating the IEP as necessary to reflect information gathered during the subsequent participant assessments (OAA § 502(b)(1)(N));

(iii) The initial IEP should include an appropriate employment goal for each participant. Thereafter, if the grantee determines that the participant is not likely to obtain unsubsidized employment, the IEP must reflect other approaches to help the participant achieve self-sufficiency, including the transition to other services or programs.

(4) Placing participants in appropriate community service assignments in the community in which they reside, or in a nearby community (OAA § 502(b)(1)(B));

(5) Providing or arranging for training identified in participants' IEPs and consistent with the SCSEP's goal of unsubsidized employment (OAA § 502(a)(1), 502(b)(1)(B), 502(b)(1)(I), 502(b)(1)(N)(ii));

(6) Assisting participants in obtaining needed supportive services identified in their IEPs (OAA § 502(b)(1)(N));

(7) Providing appropriate services for participants, or referring participants to appropriate services, through the One-Stop delivery system established under WIA (OAA § 502(b)(1)(O));

(8) Providing counseling on participants' progress in meeting the goals and objectives identified in their IEPs, and in meeting their supportive service needs (OAA § 502(b)(1)(N)(iii));

(9) Providing participants with wages and benefits for time spent in the community service assignment, orientation, and training (OAA § 502(b)(1)(I), 502(b)(1)(J), 502(c)(6)(A)(i)) (see also §§ 641.565 and 641.540(f), addressing wages and benefits);

(10) Ensuring that participants have safe and healthy working conditions at

their community service employment worksites (OAA § 502(b)(1)(I));

(11) Assisting participants in obtaining unsubsidized employment, including providing or arranging for employment counseling in support of their IEPs;

(b) The Department may issue administrative guidance that clarifies the requirements of paragraph (a).

(c) Grantees may not use SCSEP funds for job ready individuals who only need job search assistance or job referral services. Grantees may provide job search assistance and job club activities to participants who are enrolled in the SCSEP and are assigned to community service assignments. (See also § 641.512).

§ 641.540 What types of training may grantees and sub-recipients provide to SCSEP participants in addition to the training received at a community service assignment?

(a) In addition to the training provided in a community service assignment, grantees and sub-recipients may arrange skill training provided that it:

(1) Is realistic and consistent with the participants' IEP;

(2) Makes the most effective use of the participant's skills and talents; and

(3) Prepares the participant for unsubsidized employment.

(b) Training may be provided before or during a community service assignment.

(c) Training may be in the form of lectures, seminars, classroom instruction, individual instruction, online instruction, on-the-job experiences. Training may be provided by the grantee or through other arrangements, including but not limited to, arrangements with other workforce development programs such as WIA. (OAA § 502(c)(6)(A)(ii)).

(d) Grantees and sub-recipients are encouraged to obtain training through locally available resources, including host agencies, at no cost or reduced cost to the SCSEP.

(e) Grantees and sub-recipients may pay for participant training, including the payment of reasonable costs of instructors, classroom rental, training supplies, materials, equipment, and tuition. (OAA § 502(c)(6)(A)(ii)).

(f) Participants must be paid wages while in training, as described in § 641.565(a). (OAA § 502(b)(1)(I)).

(g) As provided in § 641.545, grantees and sub-recipients may pay for costs associated with supportive services, such as transportation, necessary to participate in training. (OAA § 502(b)(1)(L)).

(h) Nothing in this section prevents or limits participants from engaging in self-development training available through other sources, at their own expense, during hours when not performing their community service assignments.

§ 641.545 What supportive services may grantees and sub-recipients provide to participants?

(a) Grantees and sub-recipients are required to assess all participants' need for supportive services and to make every effort to assist participants in obtaining needed supportive services. Grantees and sub-recipients may provide directly or arrange for supportive services that are necessary to enable an individual to successfully participate in a SCSEP project, including but not limited to payment of reasonable costs of transportation; health and medical services; special job-related or personal counseling; incidentals such as work shoes, badges, uniforms, eyeglasses, and tools; dependent care; housing, including temporary shelter; needs-related payments; and follow-up services. (OAA § 502(c)(6)(A)(iv), 518(a)(7)).

(b) To the extent practicable, the grantee or sub-recipient should arrange for the payment of these expenses from other resources.

(c) Grantees and sub-recipients are encouraged to contact placed participants throughout the first 12 months following placement to determine if they have the necessary supportive services to remain in the job and to provide or arrange to provide such services if feasible.

§ 641.550 What responsibility do grantees and sub-recipients have to place participants in unsubsidized employment?

For those participants whose IEPs include a goal of unsubsidized employment, grantees and sub-recipients are responsible for working with participants to ensure that the participants are receiving services and taking actions designed to help them achieve this goal. Grantees and sub-recipients must contact private and public employers directly or through the One-Stop delivery system to develop or identify suitable unsubsidized employment opportunities. They must also encourage host agencies to assist participants in their transition to unsubsidized employment, including unsubsidized employment with the host agency.

§ 641.565 What policies govern the provision of wages and benefits to participants?

(a) *Wages.*

(1)(i) Grantees and sub-recipients must pay participants the highest applicable required wage for time spent in orientation, training, and community service assignments.

(ii) SCSEP participants may be paid the highest applicable required wage while receiving WIA intensive services.

(2) The highest applicable required wage is either the minimum wage applicable under the Fair Labor Standards Act of 1938; the State or local minimum wage for the most nearly comparable covered employment; or the prevailing rate of pay for persons employed in similar public occupations by the same employer.

(3) Grantees and sub-recipients must make any adjustments to minimum wage rates payable to participants as may be required by Federal, State, or local statute during the grant term.

(b) *Benefits.*

(1) *Required benefits.* Except as provided in paragraph (b)(2) of this section, grantees and sub-recipients must ensure that participants receive such benefits as are required by law.

(i) Grantees and sub-recipients must provide benefits uniformly to all participants within a project or subproject, unless the Department agrees to waive this provision due to a determination that such a waiver is in the best interests of applicants, participants, and project administration.

(ii) Grantees and sub-recipients must offer participants the opportunity to receive physical examinations annually.

(A) Physical examinations are a benefit, and not an eligibility criterion. The examining physician must provide, to the participant only, a written report of the results of the examination.

(B) Participants may choose not to accept the physical examination. In that case, the grantee or sub-recipient must document this refusal, through a signed statement, within 60 workdays after commencement of the community service assignment. Each year thereafter, grantees and sub-recipients must offer the physical examination and document the offer and any participant's refusal.

(C) Grantees and sub-recipients may use SCSEP funds to pay the costs of physical examinations.

(iii) When participants are not covered by the State workers' compensation law, the grantee or sub-recipient must provide participants with workers' compensation benefits equal to those provided by law for covered employment. OAA § 504(b).

(iv) If required by State law, grantees/sub-recipients must provide unemployment compensation coverage for participants.

(v) Grantees and sub-recipients must provide compensation for scheduled work hours during which a host agency's business is closed for a Federal holiday, which may be paid or in the form of rescheduled work time.

(vi) Grantees and sub-recipients must provide necessary sick leave that is not part of an accumulated sick leave program, which may be paid or in the form of rescheduled work time.

(2) *Prohibited wage and benefits costs.*

(i) Participants may not carry over allowable benefits from one Program Year to the next;

(ii) Grantees and sub-recipients may not provide payment or otherwise compensate participants for unused benefits such as sick leave or holidays;

(iii) Grantees and sub-recipients may not use SCSEP funds to cover costs associated with the following participant benefits:

(A) Retirement. Grantees and sub-recipients may not use SCSEP funds to provide contributions into a retirement system or plan, or to pay the cost of pension benefits for program participants.

(B) Annual leave.

(C) Accumulated sick leave.

(D) Bonuses.

(OAA § 502(c)(6)(A)(i)).

§ 641.570 Is there a time limit for participation in the program?

(a) *Individual time limit.* (1) Eligible individuals may participate in the program for a maximum duration of 48 months in the aggregate (whether or not consecutive), from the later of July 1, 2007, or the date of the individual's enrollment in the program.

(2) At the time of enrollment, the grantee or sub-recipient must inform the participant of this time limit and the possible extension available under paragraph (b) of this section, and the grantee or sub-recipient must provide for a system to transition participants to unsubsidized employment or other assistance before the maximum enrollment duration has expired. Provisions for transition must be reflected in the participant's IEP.

(3) If requested by a grantee or sub-recipient, the Department will authorize an extension for individuals who meet the criteria in paragraph (b) of this section. Notwithstanding any individual extensions granted, grantees and sub-recipients must ensure that projects do not exceed the overall average participation cap for all participants, as described in paragraph (c) of this section.

(b) *Increased periods of individual participation.* If requested by a grantee, the Department will authorize increased

periods of participation for individuals who:

(1) Have a severe disability;

(2) Are frail or are age 75 or older;

(3) Meet the eligibility requirements related to age for, but do not receive, benefits under title II of the Social Security Act (42 U.S.C. 401 *et seq.*);

(4) Live in an area with persistent unemployment and are individuals with severely limited employment prospects; or

(5) Have limited English proficiency or low literacy skills.

(c) *Average grantee participation cap.*

(1) Notwithstanding any individual extension authorized under paragraph (b) of this section, each grantee must manage its SCSEP project in such a way that the grantee does not exceed an average participation cap for all participants of 27 months (in the aggregate).

(2) A grantee may request, and the Department may authorize, an extended average participation period of up to 36 months (in the aggregate) for a particular project area in a given Program Year if the Department determines that extenuating circumstances exist to justify an extension, due to one more of the following factors:

(i) High rates of unemployment or of poverty or of participation in the program of block grants to States for temporary assistance for needy families established under part A of title IV of the Social Security Act, in the areas served by a grantee, relative to other areas of the State involved or the Nation;

(ii) Significant downturns in the economy of an area served by the grantee or in the national economy;

(iii) Significant numbers or proportions of participants with one or more barriers to employment, including "most-in-need" individuals described in § 641.710(a)(6), served by a grantee relative to such numbers or proportions for grantees serving other areas of the State or Nation;

(iv) Changes in Federal, State, or local minimum wage requirements; or

(v) Limited economies of scale for the provision of community service employment and other authorized activities in the areas served by the grantee.

(3) For purposes of the average participation cap, each grantee will be considered to be one project.

(d) *Authorized break in participation.* On occasion a participant takes an authorized break in participation from the program, such as a formal leave of absence necessitated by personal circumstances or a break caused because a suitable community service

assignment is not available. Such an authorized break, if taken under a formal grantee policy allowing such breaks and formally entered into the SCSEP Performance and Results Quarterly Performance Reporting (SPARQ) system, will not count toward the individual time limit described in paragraph (a) or the average participation cap described in paragraph (c) of this section.

(e) *Administrative guidance.* The Department will issue administrative guidance detailing the process by which a grantee may request increased periods of individual participation, and the process by which a grantee may request an extension of the average participation cap. The process will require that the determination of individual participant extension requests is made in a fair and equitable manner.

(f) *Grantee authority.* Grantees may limit the time of participation for individuals to less than the 48 months described in paragraph (a) of this section, if the grantee uniformly applies the lower participation limit, and if the grantee submits a description of the lower participation limit policy in its grant application or modification of the grant and the Department approves the policy. (OAA §§ 502(b)(1)(C), 518(a)(3)(B)).

§ 641.575 May a grantee or sub-recipient establish a limit on the amount of time its participants may spend at a host agency?

Yes, grantees and sub-recipients may establish limits on the amount of time that participants spend at a particular host agency, and are encouraged to rotate participants among different host agencies, or to different assignments within the same host agency, as such rotations may increase participants' skills development and employment opportunities. Such limits must be established in the grant agreement or modification of the grant, and approved by the Department. The Department will not approve any limit that does not require an individualized determination that rotation is in the best interest of the participant and will further the acquisition of skills listed in the IEP. Host agency rotations have no effect on either the individual participation limit or the average participation cap.

§ 641.577 Is there a limit on community service assignment hours?

While there is no specific limit on the number of hours that may be worked in a community service assignment, a community service assignment must be a part-time position. However, the Department strongly encourages grantees to use 1,300 hours as a

benchmark and good practice for monitoring community service hours.

§ 641.580 Under what circumstances may a grantee or sub-recipient terminate a participant?

(a) If, at any time, a grantee or sub-recipient determines that a participant was incorrectly declared eligible as a result of false information knowingly given by that individual, the grantee or sub-recipient must give the participant immediate written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(b) If, during eligibility verification under § 641.505, a grantee or sub-recipient finds a participant to be no longer eligible for enrollment, the grantee or sub-recipient must give the participant written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(c) If, at any time, the grantee or sub-recipient determines that it incorrectly determined a participant to be eligible for the program through no fault of the participant, the grantee or sub-recipient must give the participant immediate written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(d) A grantee or sub-recipient may terminate a participant for cause. Grantees must include their policies concerning for-cause terminations in the grant application and obtain the Department's approval. The grantee or sub-recipient must give the participant written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(e) A grantee or sub-recipient may terminate a participant if the participant refuses to accept a reasonable number of job offers or referrals to unsubsidized employment consistent with the IEP and there are no extenuating circumstances that would hinder the participant from moving to unsubsidized employment. The grantee or sub-recipient must give the participant written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(f) When a grantee or sub-recipient makes an unfavorable determination of enrollment eligibility under paragraph (b) or (c) of this section, it should refer the individual to other potential sources of assistance, such as the One-Stop delivery system. When a grantee or sub-

recipient terminates a participant under paragraph (d) or (e) of this section, it may refer the individual to other potential sources of assistance, such as the One-Stop delivery system.

(g) Grantees and sub-recipients must provide each participant at the time of enrollment with a written copy of its policies for terminating a participant for cause or otherwise, and must verbally review those policies with each participant.

(h) Any termination, as described in paragraphs (a) through (e) of this section, must be consistent with administrative guidelines issued by the Department and the termination notice must inform the participant of the grantee's grievance procedure, and the termination must be subject to the applicable grievance procedures described in § 641.910.

(i) Participants may not be terminated from the program solely on the basis of their age. Grantees and sub-recipients may not impose an upper age limit for participation in the SCSEP.

§ 641.585 What is the employment status of SCSEP participants?

(a) Participants are not considered Federal employees solely as a result of their participation in the SCSEP. (OAA § 504(a)).

(b) Grantees must determine whether or not a participant qualifies as an employee of the grantee, sub-recipient, local project, or host agency, under applicable law. Responsibility for this determination rests with the grantee even when a Federal agency is a grantee or host agency.

Subpart F—Pilot, Demonstration, and Evaluation Projects

§ 641.600 What is the purpose of the pilot, demonstration, and evaluation projects authorized under § 502(e) of the OAA?

The purpose of the pilot, demonstration, and evaluation projects authorized under § 502(e) of the OAA is to develop and implement techniques and approaches, and to demonstrate the effectiveness of these techniques and approaches, in addressing the employment and training needs of individuals eligible for SCSEP.

§ 641.610 How are pilot, demonstration, and evaluation projects administered?

The Department may enter into agreements with States, public agencies, nonprofit private organizations, or private business concerns, as may be necessary, to conduct pilot, demonstration, and evaluation projects.

§ 641.620 How may an organization apply for pilot, demonstration, and evaluation project funding?

Organizations applying for pilot, demonstration, and evaluation project funding must follow the instructions issued by the Department. Instructions for these unique funding opportunities are published in TEGs available at <http://www.doleta.gov/Seniors>.

§ 641.630 What pilot, demonstration, and evaluation project activities are allowable under § 502(e)?

Allowable pilot, demonstration and evaluation projects include:

(a) Activities linking businesses and eligible individuals, including activities providing assistance to participants transitioning from subsidized activities to private sector employment;

(b) Demonstration projects and pilot projects designed to:

(1) Attract more eligible individuals into the labor force;

(2) Improve the provision of services to eligible individuals under One-Stop delivery systems established under title I of WIA;

(3) Enhance the technological skills of eligible individuals; and

(4) Provide incentives to SCSEP grantees for exemplary performance and incentives to businesses to promote their participation in the SCSEP;

(c) Demonstration projects and pilot projects, as described in paragraph (b) of this section, for workers who are older individuals (but targeted to eligible individuals) only if such demonstration projects and pilot projects are designed to assist in developing and implementing techniques and approaches in addressing the employment and training needs of eligible individuals;

(d) Provision of training and technical assistance to support a SCSEP project;

(e) Dissemination of best practices relating to employment of eligible individuals; and

(f) Evaluation of SCSEP activities.

§ 641.640 Should pilot, demonstration, and evaluation project entities coordinate with SCSEP grantees and sub-recipients, including area agencies on aging?

(a) To the extent practicable, the Department will provide an opportunity, before the development of a demonstration or pilot project, for the appropriate area agency on aging and SCSEP grantees and sub-grantees to submit comments on the project in order to ensure coordination of SCSEP activities with activities carried out under this subpart.

(b) To the extent practicable, entities carrying out pilot, demonstration, and evaluation projects must consult with

appropriate area agencies on aging, SCSEP grantees and sub-grantees, and other appropriate agencies and entities to promote coordination of SCSEP and pilot, demonstration, and evaluation activities. (OAA § 502(e)).

Subpart G—Performance Accountability

§ 641.700 What performance measures/indicators apply to SCSEP grantees?

(a) *Indicators of performance.* There are currently eight performance measures, of which six are core indicators and two are additional indicators. Core indicators (defined in § 641.710) are subject to goal-setting and corrective action (described in § 641.720); that is, performance level goals for each core indicator must be agreed upon between the Department and each grantee before the start of each program year, and if a grantee fails to meet the performance level goals for the core indicators, that grantee is subject to corrective action. Additional indicators (defined in § 641.710) are not subject to goal-setting and are, therefore, also not subject to corrective action.

(b) *Core Indicators.* Section 513(b)(1) of the 2006 OAA establishes the following core indicators of performance:

- (1) Hours (in the aggregate) of community service employment;
- (2) Entry into unsubsidized employment;
- (3) Retention in unsubsidized employment for six months;
- (4) Earnings;
- (5) The number of eligible individuals served; and
- (6) The number of most-in-need individuals served (the number of participating individuals described in § 518(a)(3)(B)(ii) or (b)(2) of the OAA).

(c) *Additional indicators.* Section 513(b)(2) of the 2006 OAA establishes the following additional indicators of performance:

- (1) Retention in unsubsidized employment for one year; and
- (2) Satisfaction of the participants, employers, and their host agencies with their experiences and the services provided.
- (3) Any other indicators of performance that the Secretary determines to be appropriate to evaluate services and performance.

(d) *Affected entities.* The core indicators of performance and additional indicators of performance are applicable to each grantee without regard to whether the grantee operates the program directly or through sub-contracts, sub-grants, or agreements with other entities. Grantees must

assure that their sub-grantees and lower-tier sub-grantees are collecting and reporting program data.

(e) *Required evaluation and reporting.* An agreement to be evaluated on the core indicators of performance and to report information on the additional indicators of performance is a requirement for application for, and is a condition of, all SCSEP grants.

§ 641.710 How are the performance indicators defined?

(a) The core indicators are defined as follows:

(1) "Hours of community service employment" is defined as the total number of hours of community service provided by SCSEP participants divided by the number of hours of community service funded by the grantee's grant, after adjusting for differences in minimum wage among the States and areas. Paid training hours are excluded from this measure.

(2) "Entry into unsubsidized employment" is defined by the formula: Of those who are not employed at the date of participation: The number of participants who are employed in the first quarter after the exit quarter divided by the number of adult participants who exit during the quarter.

(3) "Retention in unsubsidized employment for six months" is defined by the formula: Of those who are employed in the first quarter after the exit quarter: The number of adult participants who are employed in both the second and third quarters after the exit quarter divided by the number of adult participants who exit during the quarter.

(4) "Earnings" is defined by the formula: Of those participants who are employed in the first, second and third quarters after the exit quarter: Total earnings in the second quarter plus total earnings in the third quarter after the exit quarter divided by the number of participants who exit during the quarter.

(5) "The number of eligible individuals served" is defined as the total number of participants served divided by a grantee's authorized number of positions, after adjusting for differences in minimum wage among the States and areas.

(6) "Most-in-need" or the number of participating individuals described in § 518(a)(3)(B)(ii) or (b)(2) is defined by counting the total number of the following characteristics for all participants and dividing by the number of participants served. Participants are characterized as most-in-need if they:

- (i) Have a severe disability;
- (ii) Are frail;
- (iii) Are age 75 or older;

(iv) Meet the eligibility requirements related to age for, but do not receive, benefits under title II of the Social Security Act (42 U.S.C. 401 *et seq.*);

(v) Live in an area with persistent unemployment and are individuals with severely limited employment prospects;

(vi) Have limited English proficiency;

(vii) Have low literacy skills;

(viii) Have a disability;

(ix) Reside in a rural area;

(x) Are veterans;

(xi) Have low employment prospects;

(xii) Have failed to find employment

after utilizing services provided under title I of the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*); or

(xiii) Are homeless or at risk for homelessness.

(b) The additional indicators are defined as follows:

(1) "Retention in unsubsidized employment for 1 year" is defined by the formula: Of those who are employed in the first quarter after the exit quarter: The number of participants who are employed in the fourth quarter after the exit quarter divided by the number of participants who exit during the quarter.

(2) "Satisfaction of the participants, employers, and their host agencies with their experiences and the services provided" is defined as the results of customer satisfaction surveys administered to each of these three customer groups. The Department will prescribe the content of the surveys.

§ 641.720 How will the Department and grantees initially determine and then adjust expected levels of performance for the core performance measures?

(a) *Initial agreement.* Before the beginning of each Program Year, the Department and each grantee will undertake to agree upon expected levels of performance for each core indicator, except as provided in paragraph (b) of § 641.730.

(1) As a first step in this process, the Department proposes a performance level for each core indicator, taking into account any statutory performance requirements, the need to promote continuous improvement in the program overall and in each grantee, the grantee's past performance, and the statutory adjustment factors articulated in paragraph (b) of this section.

(2) A grantee may request a revision to the Department's initial performance level goal determination. The request must be based on data that supports the revision request. The data supplied by the grantee at this stage may concern the statutory adjustment factors articulated in paragraph (b) of this section, but is not limited to those factors; it is permissible for a grantee to supply data

on "other appropriate factors as determined by the Secretary." (OAA § 513(a)(2)(C)).

(3) The Department may revise the performance level goal in response to the data provided. The Department then sets the expected levels of performance for the core indicators. At this point, agreement is reached by the parties and funds may be awarded. If a grantee does not agree with the offered expected level of performance, agreement is not reached and no funds may be awarded. A grantee may submit comments to the Department about the grantee's satisfaction with the expected levels of performance.

(4) Funds may not be awarded under the grant until such agreement is reached.

(5) At the conclusion of performance level negotiations with all grantees, the Department will make available for public review the final negotiated expected levels of performance for each grantee, including any comments submitted by the grantee about the grantee's satisfaction with the negotiated levels.

(6) The minimum percentage for the expected level of performance for the entry into unsubsidized employment core indicator is:

- (i) 21 percent for Program Year 2007;
- (ii) 22 percent for Program Year 2008;
- (iii) 23 percent for Program Year 2009;
- (iv) 24 percent for Program Year 2010;

and

- (v) 25 percent for Program Year 2011.

(b) *Adjustment during the Program Year.* After the Department and grantees reach agreement on the core indicator levels, those levels may only be revised in response to a request from a grantee based on data supporting one or more of the following statutory adjustment factors:

(1) High rates of unemployment or of poverty or of participation in the program of block grants to States for temporary assistance for needy families established under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), in the areas served by a grantee, relative to other areas of the State involved or Nation.

(2) Significant downturns in the economy of the areas served by the grantee or in the national economy.

(3) Significant numbers or proportions of participants with one or more barriers to employment, including individuals described in § 518(a)(3)(B)(ii) or (b)(2) of the 2006 OAA (most-in-need), served by a grantee relative to such numbers or proportions for grantees serving other areas of the State or Nation.

(4) Changes in Federal, State, or local minimum wage requirements.

(5) Limited economies of scale for the provision of community service employment and other authorized activities in the areas served by the grantee.

§ 641.730 How will the Department assist grantees in the transition to the new core performance indicators?

(a) *General transition provision.* As soon as practicable after July 1, 2007, the Department will determine if a SCSEP grantee has, for Program Year 2006, met the expected levels of performance for the Program Year 2007. If the Department determines that the grantee failed to meet Program Year 2007 goals in Program Year 2006, the Department will provide technical assistance to help the grantee meet those expected levels of performance in Program Year 2007.

(b) *Exception for most-in-need for Program Year 2007.* Because the 2006 OAA Amendments expanded the list of most-in-need characteristics, neither the Department nor the grantees have sufficient data to set a goal for measuring performance. Accordingly, Program Year 2007 will be treated as a baseline year for the most-in-need indicator so that the grantees and the Department may collect sufficient data to set a meaningful goal for this measure for Program Year 2008.

§ 641.740 How will the Department determine whether a grantee fails, meets, or exceeds the expected levels of performance for the core indicators and what will be the consequences of failing to meet expected levels of performance?

(a) *Aggregate calculation of performance.* Not later than 120 days after the end of each Program Year, the Department will determine if a national grantee has met the expected levels of performance (including any adjustments to such levels) by aggregating the grantee's core indicators. The aggregate is calculated by combining the percentage of goal achieved on each of the individual core indicators to obtain an average score. A grantee will fail to meet its performance measures when it does not meet 80 percent of the agreed-upon level of performance for the aggregate of all the core indicators. Performance in the range of 80 to 100 percent constitutes meeting the level for the core performance measures. Performance in excess of 100 percent constitutes exceeding the level for the core performance measures.

(b) *Consequences—*

(1) *National grantees.* (i) If the Department determines that a national grantee fails to meet the expected levels of performance in a Program Year, the Department, after each year of such

failure, will provide technical assistance and will require such grantee to submit a corrective action plan not later than 160 days after the end of the Program Year.

(ii) The corrective action plan must detail the steps the grantee will take to meet the expected levels of performance in the next Program Year.

(iii) Any national grantee that has failed to meet the expected levels of performance for 4 consecutive years (beginning with Program Year 2007) will not be allowed to compete in the subsequent grant competition, but may compete in the next grant competition after that subsequent competition.

(2) *State Grantees.* (i) If the Department determines that a State fails to meet the expected levels of performance, the Department, after each year of such failure, will provide technical assistance and will require the State to submit a corrective action plan not later than 160 days after the end of the Program Year.

(ii) The corrective action plan must detail the steps the State will take to meet the expected levels of performance in the next Program Year.

(iii) If the Department determines that the State fails to meet the expected levels of performance for 3 consecutive Program Years (beginning with Program Year 2007), the Department will require the State to conduct a competition to award the funds allotted to the State under § 506(e) of the OAA for the first full Program Year following the Department's determination. The new grantee will be responsible for administering the SCSEP in the State and will be subject to the same requirements and responsibilities as had been the State grantee.

(c) *Evaluation.* The Department will annually evaluate, publish and make available for public review, information on the actual performance of each grantee with respect to the levels achieved for each of the core indicators of performance, compared to the expected levels of performance, and the actual performance of each grantee with respect to the levels achieved for each of the additional indicators of performance. The results of the Department's annual evaluation will be reported to Congress.

§ 641.750 Will there be performance-related incentives?

The Department is authorized by §§ 502(e)(2)(B)(iv) and 517(c)(1) of the 2006 OAA to use recaptured SCSEP funds to provide incentive awards. The Department will exercise this authority at its discretion.

Subpart H—Administrative Requirements**§ 641.800 What uniform administrative requirements apply to the use of SCSEP funds?**

(a) SCSEP recipients and sub-recipients must follow the uniform administrative requirements and allowable cost requirements that apply to their type of organization. (OAA § 503(f)(2)).

(b) Governments, State, local, and Indian tribal organizations that receive SCSEP funds under grants or cooperative agreements must follow the common rule implementing OMB Circular A–102, “Grants and Cooperative Agreements with State and Local Governments” (10/07/1994) (further amended 08/29/1997), codified at 29 CFR part 97.

(c) Nonprofit and commercial organizations, institutions of higher education, hospitals, other nonprofit organizations, and commercial organizations that receive SCSEP funds under grants or cooperative agreements must follow the common rule implementing OMB Circular A–110, codified at 29 CFR part 95.

§ 641.803 What is program income?

Program income, as described in 29 CFR 97.25 (State and local governments) and 29 CFR 95.2(bb) (non-profit and commercial organizations), is income earned by the recipient or sub-recipient during the grant period that is directly generated by an allowable activity supported by grant funds or earned as a result of the award of grant funds. Program income includes income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. (See 29 CFR 95.24(e) (non-profit and commercial organizations) and 29 CFR 97.25(e) (State and local governments)). Costs of generating SCSEP program income may be deducted from gross income received by SCSEP recipients and sub-recipients to determine SCSEP program income earned or generated provided these costs have not been charged to the SCSEP.

§ 641.806 How must SCSEP program income be used?

(a) SCSEP recipients that earn or generate program income during the grant period must add the program income to the Federal and non-Federal funds committed to the SCSEP and must use it to further the purposes of the program and in accordance with the terms and conditions of the grant award. Program income may only be spent

during the grant period in which it was earned (except as provided for in paragraph (b)), as provided in 29 CFR 95.24(a) (non-profit and commercial organizations) or 29 CFR 97.25(g) (2) (State and local governments), as applicable.

(b)(1) Except as provided for in paragraph (b)(2), recipients that continue to receive a SCSEP grant from the Department must spend program income earned from SCSEP-funded activities in the Program Year in which the earned income was received.

(b)(2) Any program income remaining at the end of the Program Year in which it was earned will remain available for expenditure in the subsequent Program Year only. Any program income remaining after the second Program Year must be remitted to the Department.

(c) Recipients that do not continue to receive a SCSEP grant from the Department must remit unexpended program income earned during the grant period from SCSEP funded activities to the Department at the end of the grant period. These recipients have no obligation to the Department for program income earned after the end of the grant period.

§ 641.809 What non-Federal share (matching) requirements apply to the use of SCSEP funds?

(a) The Department will pay no more than 90 percent of the total cost of activities carried out under a SCSEP grant. (OAA sec. 502(c)(1)).

(b) All SCSEP recipients, including Federal agencies if there is no statutory exemption, must provide or ensure that at least 10 percent of the total cost of activities carried out under a SCSEP grant (non-Federal share of costs) consists of allowable costs paid for with non-Federal funds, except as provided in paragraphs (e) and (f) of this section.

(c) Recipients must determine the non-Federal share of costs in accordance with 29 CFR 97.24 for governmental units, or 29 CFR 95.23 for nonprofit and commercial organizations.

(d) The non-Federal share of costs may be provided in cash, or in-kind, or a combination of the two. (OAA § 502(c)(2)).

(e) A recipient may not require a sub-recipient or host agency to provide non-Federal resources for the use of the SCSEP project as a condition of entering into a sub-recipient or host agency relationship. This does not preclude a sub-recipient or host agency from voluntarily contributing non-Federal resources for the use of the SCSEP project.

(f) The Department may pay all of the costs of activities in an emergency or disaster project or a project in an economically distressed area. (OAA § 502(c)(1)(B)).

§ 641.812 What is the period of availability of SCSEP funds?

(a) Except as provided in § 641.815, recipients must expend SCSEP funds during the Program Year for which they are awarded (July 1–June 30). (OAA § 517(b)).

(b) SCSEP recipients must ensure that no sub-agreement provides for the expenditure of any SCSEP funds before the start of the grant year, or after the end of the grant period, except as provided in § 641.815.

§ 641.815 May the period of availability be extended?

SCSEP recipients may request in writing, and the Department may grant, an extension of the period during which SCSEP funds may be obligated or expended. SCSEP recipients requesting an extension must justify that an extension is necessary. (OAA § 517(b)). The Department will notify recipients in writing of the approval or disapproval of any such requests.

§ 641.821 What audit requirements apply to the use of SCSEP funds?

(a) Recipients and sub-recipients receiving Federal awards of SCSEP funds must follow the audit requirements in paragraphs (b) and (c) of this section that apply to their type of organization. As used here, Federal awards of SCSEP funds include Federal financial assistance and Federal cost-reimbursement contracts received directly from the Department or indirectly under awards by SCSEP recipients or higher-tier sub-recipients. (OAA § 503(f)(2)).

(b) All governmental and nonprofit organizations that are recipients or sub-recipients must follow the audit requirements of OMB Circular A–133. These requirements are codified at 29 CFR parts 96 and 99 and referenced in 29 CFR 97.26 for governmental organizations and in 29 CFR 95.26 for institutions of higher education, hospitals, and other nonprofit organizations.

(c) (1) The Department is responsible for audits of SCSEP recipients that are commercial organizations.

(2) Commercial organizations that are sub-recipients under the SCSEP and that expend more than the minimum level specified in OMB Circular A–133 (\$500,000, for fiscal years ending after December 31, 2003) must have either an organization-wide audit or a program-specific financial and compliance audit

conducted in accordance with OMB Circular A-133.

§ 641.824 What lobbying requirements apply to the use of SCSEP funds?

SCSEP recipients and sub-recipients must comply with the restrictions on lobbying codified in the Department's regulations at 29 CFR part 93. (Also refer to § 641.850(c), "Lobbying costs.")

§ 641.827 What general nondiscrimination requirements apply to the use of SCSEP funds?

(a) SCSEP recipients, sub-recipients, and host agencies are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR parts 31 and 32 and the provisions on the equal treatment of religious organizations at 29 CFR part 2 subpart D.

(b) Recipients and sub-recipients of SCSEP funds are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR part 37 if:

(1) The recipient:

(i) Is a One-Stop partner listed in § 121(b) of WIA, and
(ii) Operates programs and activities that are part of the One-Stop delivery system established under WIA; or

(2) The recipient otherwise satisfies the definition of "recipient" in 29 CFR 37.4.

(c) Recipients must ensure that participants are provided informational materials relating to age discrimination and/or their rights under the Age Discrimination in Employment Act of 1975 that are distributed to recipients by the Department as required by § 503(b)(3) of the OAA.

(d) Questions about or complaints alleging a violation of the nondiscrimination requirements cited in this section may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N-4123, 200 Constitution Avenue, NW., Washington, DC, 20210, for processing. (See § 641.910(d)).

(e) The specification of any right or protection against discrimination in paragraphs (a) through (d) of this section must not be interpreted to exclude or diminish any other right or protection against discrimination in connection with a SCSEP project that may be available to any participant, applicant for participation, or other individual under any applicable Federal, State, or local laws prohibiting discrimination, or their implementing regulations.

§ 641.833 What policies govern political patronage?

(a) A recipient or sub-recipient must not select, reject, promote, or terminate

an individual based on political services provided by the individual or on the individual's political affiliations or beliefs. In addition, as provided in § 641.827(b), certain recipients and sub-recipients of SCSEP funds are required to comply with WIA nondiscrimination regulations in 29 CFR part 37. These regulations prohibit discrimination on the basis of political affiliation or belief.

(b) A recipient or sub-recipient must not provide, or refuse to provide, funds to any sub-recipient, host agency, or other entity based on political affiliation.

(c) SCSEP recipients must ensure that every entity that receives SCSEP funds through the recipient is applying the policies stated in paragraphs (a) and (b) of this section.

§ 641.836 What policies govern political activities?

(a) No project under title V of the OAA may involve political activities. SCSEP recipients must ensure compliance with the requirements and prohibitions involving political activities described in paragraphs (b) and (c) of this section.

(b) State and local employees involved in the administration of SCSEP activities may not engage in political activities prohibited under the Hatch Act (5 U.S.C. chapter 15), including:

(1) Seeking partisan elective office;
(2) Using official authority or influence for the purpose of affecting elections, nominations for office, or fund-raising for political purposes. (5 U.S.C. 1502).

(c) SCSEP recipients must provide all persons associated with SCSEP activities with a written explanation of allowable and unallowable political activities under the Hatch Act. A notice explaining these allowable and unallowable political activities must be posted in every workplace in which SCSEP activities are conducted. The Department will provide the form and content of the notice and explanatory material by administrative issuance. (OAA § 502(b)(1)(P)).

(d) SCSEP recipients must ensure that:

(1) No SCSEP participants or staff persons engage in partisan or nonpartisan political activities during hours for which they are being paid with SCSEP funds.

(2) No participants or staff persons engage in partisan political activities in which such participants or staff persons represent themselves as spokespersons for the SCSEP.

(3) No participants are employed or out-stationed in the offices of a Member of Congress, a State or local legislator,

or on the staff of any legislative committee.

(4) No participants are employed or out-stationed in the immediate offices of any elected chief executive officer of a State or unit of general government, except that:

(i) Units of local government may serve as host agencies for participants, provided that their assignments are non-political; and

(ii) While assignments may place participants in such offices, such assignments actually must be concerned with program and service activities and not in any way involved in political functions.

(5) No participants are assigned to perform political activities in the offices of other elected officials. Placement of participants in such offices in non-political assignments is permissible, however, provided that:

(i) SCSEP recipients develop safeguards to ensure that participants placed in these assignments are not involved in political activities; and

(ii) These safeguards are described in the grant agreement and are approved by the Department and are subject to review and monitoring by the SCSEP recipient and by the Department.

§ 641.839 What policies govern union organizing activities?

Recipients must ensure that SCSEP funds are not used in any way to assist, promote, or deter union organizing.

§ 641.841 What policies govern nepotism?

(a) SCSEP recipients must ensure that no recipient or sub-recipient hires, and no host agency serves as a worksite for, a person who works in a SCSEP community service assignment if a member of that person's immediate family is engaged in a decision-making capacity (whether compensated or not) for that project, subproject, recipient, sub-recipient, or host agency. The Department may exempt worksites on Native American reservations and in rural areas from this requirement provided that adequate justification can be documented, such as that no other persons are eligible and available for participation in the program.

(b) To the extent that an applicable State or local legal nepotism requirement is more restrictive than this provision, SCSEP recipients must ensure that the more restrictive requirement is followed.

(c) For purposes of this section, "immediate family" means wife, husband, son, daughter, mother, father, brother, sister, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, aunt,

uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild.

§ 641.844 What maintenance of effort requirements apply to the use of SCSEP funds?

(a) A community service assignment for a participant under title V of the OAA is permissible only when specific maintenance of effort requirements are met.

(b) Each project funded under title V:

(1) Must not reduce the number of employment opportunities or vacancies that would otherwise be available to individuals not participating in the program;

(2) Must not displace currently employed workers (including partial displacement, such as a reduction in the hours of non-overtime work, wages, or employment benefits);

(3) Must not impair existing contracts or result in the substitution of Federal funds for other funds in connection with work that would otherwise be performed; and

(4) Must not employ or continue to employ any eligible individual to perform the same work or substantially the same work as that performed by any other individual who is on layoff. (OAA § 502(b)(1)(G)).

§ 641.847 What uniform allowable cost requirements apply to the use of SCSEP funds?

(a) *General.* Unless specified otherwise in this part or the grant agreement, recipients and sub-recipients must follow the uniform allowable cost requirements that apply to their type of organization. For example, a local government sub-recipient receiving SCSEP funds from a nonprofit organization must use the allowable cost requirements for governmental organizations in OMB Circular A-87. The Department's regulations at 29 CFR 95.27 (non-profit and commercial organizations) and 29 CFR 97.22 (State and local governments) identify the Federal principles for determining allowable costs that each kind of organization must follow. The applicable Federal principles for each kind of organization are described in paragraphs (b)(1) through (b)(5) of this section. (OAA § 503(f)(2)).

(b) *Allowable costs/cost principles.*

(1) Allowable costs for State, local, and Indian tribal government organizations must be determined under OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments."

(2) Allowable costs for nonprofit organizations must be determined under OMB Circular A-122, "Cost Principles for Non-Profit Organizations."

(3) Allowable costs for institutions of higher education must be determined under OMB Circular A-21, "Cost Principles for Educational Institutions."

(4) Allowable costs for hospitals must be determined in accordance with appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals."

(5) Allowable costs for commercial organizations and those nonprofit organizations listed in Attachment C to OMB Circular A-122 must be determined under the provisions of the Federal Acquisition Regulation (FAR), at 48 CFR part 31.

§ 641.850 Are there other specific allowable and unallowable cost requirements for the SCSEP?

(a) Yes, in addition to the generally applicable cost principles in § 641.847(b), the cost principles in paragraphs (b) through (g) of this section apply to SCSEP grants.

(b) *Claims against the Government.* For all types of entities, legal expenses for the prosecution of claims against the Federal Government, including appeals to an Administrative Law Judge, are unallowable.

(c) *Lobbying costs.* In addition to the prohibition contained in 29 CFR part 93, SCSEP funds must not be used to pay any salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States or any State legislature. (See § 641.824).

(d) *One-Stop Costs.* Costs of participating as a required partner in the One-Stop delivery system established in accordance with § 134(c) of the WIA are allowable, provided that SCSEP services and funding are provided in accordance with the MOU required by the WIA and OAA § 502(b)(1)(O), and costs are determined in accordance with the applicable cost principles. The costs of services provided by the SCSEP, including those provided by participants/enrollees, may comprise a portion or the total of a SCSEP project's proportionate share of One-Stop costs.

(e) *Building repairs and acquisition costs.* Except as provided in this paragraph and as an exception to the allowable cost principles in § 641.847(b), no SCSEP funds may be used for the purchase, construction, or renovation of any building except for the labor involved in:

(1) Minor remodeling of a public building necessary to make it suitable for use for project purposes;

(2) Minor repair and rehabilitation of publicly used facilities for the general benefit of the community; and

(3) Repair and rehabilitation by participants of housing occupied by persons with low incomes who are declared eligible for such services by authorized local agencies.

(f) *Accessibility and reasonable accommodation.* Recipients and sub-recipients may use SCSEP funds to meet their obligations under § 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended, and any other applicable Federal disability nondiscrimination laws, to provide physical and programmatic accessibility and reasonable accommodation/modifications for, and effective communications with, individuals with disabilities. (29 U.S.C. 794).

(g) *Participants' benefit costs.*

Recipients and sub-recipients may use SCSEP funds for participant benefit costs only under the conditions set forth in § 641.565.

§ 641.853 How are costs classified?

(a) All costs must be classified as "administrative costs" or "programmatic activity costs." (OAA § 502(c)(6)).

(b) Recipients and sub-recipients must assign participants' wage and benefit costs and other participant (enrollee) costs such as supportive services to the programmatic activity cost category. (See § 641.864). When a participant's community service assignment involves functions whose costs are normally classified as administrative costs, compensation provided to the participants must be charged as programmatic activity costs instead of administrative costs, since participant wage and benefit costs are always charged to the programmatic activity cost category.

§ 641.856 What functions and activities constitute administrative costs?

(a) Administrative costs are that allocable portion of necessary and reasonable allowable costs of recipients and program operators that are associated with those specific functions identified in paragraph (b) of this section and that are not related to the direct provision of programmatic activities specified in § 641.864. These costs may be both personnel and non-personnel and both direct and indirect costs.

(b) Administrative costs are the costs associated with:

(1) Performing general administrative and coordination functions, including:

(i) Accounting, budgeting, financial, and cash management functions;

(ii) Procurement and purchasing functions;
 (iii) Property management functions;
 (iv) Personnel management functions;
 (v) Payroll functions;
 (vi) Coordinating the resolution of findings arising from audits, reviews, investigations, and incident reports;
 (vii) Audit functions;
 (viii) General legal services functions;
 (ix) Developing systems and procedures, including information systems, required for these administrative functions;
 (x) Preparing administrative reports; and

(xi) Other activities necessary for general administration of government funds and associated programs.

(2) Oversight and monitoring responsibilities related to administrative functions;

(3) Costs of goods and services used for administrative functions of the program, including goods and services such as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(4) Travel costs incurred for official business in carrying out administrative activities or the overall management of the program;

(5) Costs of information systems related to administrative functions (for example, personnel, procurement, purchasing, property management, accounting, and payroll systems) including the purchase, systems development, and operating costs of such systems and;

(6) Costs of technical assistance, professional organization membership dues, and evaluating results obtained by the project involved against stated objectives.

(OAA § 502(c)(4)).

§ 641.859 What other special rules govern the classification of costs as administrative costs or programmatic activity costs?

(a) Recipients and sub-recipients must comply with the special rules for classifying costs as administrative costs or programmatic activity costs set forth in paragraphs (b) through (e) of this section.

(b)(1) Costs of awards by recipients and program operators that are solely for the performance of their own administrative functions are classified as administrative costs.

(2) Costs incurred by recipients and program operators for administrative functions listed in § 641.856(b) are classified as administrative costs.

(3) Costs incurred by vendors and sub-recipients performing the administrative functions of recipients and program operators are classified as

administrative costs. (See 29 CFR 99.210 for a discussion of factors differentiating sub-recipients from vendors.)

(4) Except as provided in paragraph (b)(3) of this section, all costs incurred by all vendors, and only those sub-recipients below program operators, are classified as programmatic activity costs. (See 29 CFR 99.210 for a discussion of factors differentiating sub-recipients from vendors.)

(c) Personnel and related non-personnel costs of staff who perform both administrative functions specified in § 641.856(b) and programmatic services or activities must be allocated as administrative or programmatic activity costs to the benefiting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.

(d) The allocable share of indirect or overhead costs charged to the SCSEP grant are to be allocated to the administrative and programmatic activity cost categories in the same proportion as the costs in the overhead or indirect cost pool are classified as programmatic activity or administrative costs.

(e) Costs of the following information systems including the purchase, systems development and operating (e.g., data entry) costs are charged to the programmatic activity cost category:

(1) Tracking or monitoring of participant and performance information;

(2) Employment statistics information, including job listing information, job skills information, and demand occupation information; and

(3) Local area performance information.

§ 641.861 Must SCSEP recipients provide funding for the administrative costs of sub-recipients?

(a) Recipients and sub-recipients must obtain funding for administrative costs to the extent practicable from non-Federal sources. (OAA § 502(c)(5)).

(b) SCSEP recipients must ensure that sufficient funding is provided for the administrative activities of sub-recipients that receive SCSEP funding through the recipient. Each SCSEP recipient must describe in its grant application the methodology used to ensure that sub-recipients receive sufficient funding for their administrative activities. (OAA § 502(b)(1)(R)).

§ 641.864 What functions and activities constitute programmatic activity costs?

Programmatic activity costs include, but are not limited to, the costs of the following functions:

(a) Participant wages, such benefits as are required by law (such as workers' compensation or unemployment compensation), the costs of physical examinations, compensation for scheduled work hours during which a host agency is closed for a Federal holiday, and necessary sick leave that is not part of an accumulated sick leave program, except that no amounts provided under the grant may be used to pay the cost of pension benefits, annual leave, accumulated sick leave, or bonuses, as described in § 641.565;

(b) Outreach, recruitment and selection, intake, orientation, assessment, and preparation and updating of IEPs;

(c) Participant training, as described in § 641.540, which may be provided before commencing or during a community service assignment, and which may be provided at a host agency, in a classroom setting, or using other appropriate arrangements, which may include reasonable costs of instructors' salaries, classroom space, training supplies, materials, equipment, and tuition;

(d) Subject to the restrictions in § 641.535(c), job placement assistance, including job development and job search assistance, job fairs, job clubs, and job referrals; and

(e) Participant supportive services, to enable an individual to successfully participate in a SCSEP project, as described in § 641.545.

(OAA § 502(c)(6)(A)).

§ 641.867 What are the limitations on the amount of SCSEP administrative costs?

(a) Except as provided in paragraph (b), no more than 13.5 percent of the SCSEP funds received for a Program Year may be used for administrative costs.

(b) The Department may increase the amount available for administrative costs to not more than 15 percent, in accordance with § 641.870.

(OAA § 502(c)(3)).

§ 641.870 Under what circumstances may the administrative cost limitation be increased?

(a) SCSEP recipients may request that the Department increase the amount available for administrative costs. The Department may honor the request if:

(1) The Department determines that it is necessary to carry out the project; and
 (2) The recipient demonstrates that:

(i) Major administrative cost increases are being incurred in necessary program components, such as liability insurance, payments for workers' compensation for staff, costs associated with achieving unsubsidized placement goals, and

other operation requirements imposed by the Department;

(ii) The number of community service assignment positions in the project or the number of minority eligible individuals participating in the project will decline if the amount available for paying the cost of administration is not increased; or

(iii) The size of the project is so small that the amount of administrative costs incurred to carry out the project necessarily exceeds 13.5 percent of the grant amount.

(OAA § 502(c)(3)).

(b) A request by a recipient or prospective recipient for an increase in the amount available for administrative costs may be submitted as part of the grant application or as a separate submission at any time after the grant award.

§ 641.873 What minimum expenditure levels are required for participant wages and benefits?

(a) Except as provided in § 641.874 or in paragraph (c) of this section, not less than 75 percent of the SCSEP funds provided under a grant from the Department must be used to pay for wages and benefits of participants as described in § 641.864(a). (OAA § 502(c)(6)(B)).

(b) A SCSEP recipient is in compliance with this provision if at least 75 percent of the total expenditure of SCSEP funds provided to the recipient was for wages and benefits, even if one or more sub-recipients did not expend at least 75 percent of their SCSEP sub-recipient award for wages and benefits.

(c) A SCSEP grantee may submit to the Department a request for approval to use not less than 65 percent of the grant funds to pay wages and benefits under § 641.874.

§ 641.874 What conditions apply to a SCSEP grantee request to use additional funds for training and supportive service costs?

(a) A grantee may submit to the Department a request for approval—

(1) To use not less than 65 percent of the grant funds to pay the wages and benefits described in § 641.864(a);

(2) To use the percentage of grant funds specified in § 641.867 to pay for administrative costs as described in § 641.856;

(3) To use the 10 percent of grant funds that would otherwise be devoted to wages and benefits under § 641.873 to provide participant training (as described in § 641.540(e)) and participant supportive services to enable participants to successfully participate in a SCSEP project (as described in

§ 641.545), in which case the grantee must provide (from the funds described in this paragraph) the wages for those individual participants who are receiving training from the funds described in this paragraph, but may not use the funds described in this paragraph to pay for any administrative costs; and

(4) To use the remaining grant funds to provide participant training, job placement assistance, participant supportive services, and outreach, recruitment and selection, intake, orientation and assessment.

(b) In submitting the request the grantee must include in the request—

(1) A description of the activities for which the grantee will spend the grant funds described in paragraphs (a)(3) and (a)(4) of this section;

(2) An explanation documenting how the provision of such activities will improve the effectiveness of the project, including an explanation of whether any displacement of eligible individuals or elimination of positions for such individuals will occur, information on the number of such individuals to be displaced and of such positions to be eliminated, and an explanation of how the activities will improve employment outcomes for the individuals served, based on the assessment conducted under § 641.535(a)(2); and

(3) A proposed budget and work plan for the activities, including a detailed description of how the funds will be spent on the activities described in paragraphs (a)(3) and (a)(4) of this section.

(c)(1) If a grantee wishes to amend an existing grant agreement to use additional funds for training and supportive service costs, the grantee must submit such a request not later than 90 days before the proposed date of implementation contained in the request. Not later than 30 days before the proposed date of implementation, the Department will approve, approve as modified, or reject the request, on the basis of the information included in the request.

(2) If a grantee submits a request to use additional funds for training and supportive service costs in the grant application, the request will be accepted and processed as a part of the grant review process.

(d) Grantees may apply this provision to individual sub-recipients but need not provide this opportunity to all their sub-recipients.

§ 641.876 How will compliance with cost limitations and minimum expenditure levels be determined?

The Department will determine compliance by examining expenditures of SCSEP funds. The cost limitations and minimum expenditure level requirements must be met at the time all such funds have been expended or the period of availability of such funds has expired, whichever comes first.

§ 641.879 What are the financial and performance reporting requirements for recipients?

(a) In accordance with 29 CFR 97.41 (State and local governments) or 29 CFR 95.52 (non-profit and commercial organizations), each SCSEP recipient must submit a SCSEP Financial Status Report (FSR, ETA Form 9130) in electronic format to the Department via the Internet within 45 days after the ending of each quarter of the Program Year. Each SCSEP recipient must also submit a final closeout FSR to the Department via the Internet within 90 days after the end of the grant period. The Department will provide instructions for the preparation of this report. (OAA § 503(f)(3)).

(1) Financial data must be reported on an accrual basis, and cumulatively by funding year of appropriation. Financial data may also be required on specific program activities as required by the Department.

(2) If the SCSEP recipient's accounting records are not normally kept on the accrual basis of accounting, the SCSEP recipient must develop accrual information through an analysis of the documentation on hand.

(b) In accordance with 29 CFR 97.40 (State and local governments) or 29 CFR 95.51 (non-profit and commercial organizations), each SCSEP recipient must submit updated data on participants (including data on demographic characteristics and data regarding the performance measures), host agencies, and employers in an electronic format specified by the Department via the Internet within 30 days after the end of each of the first three quarters of the Program Year, on the last day of the fourth quarter of the Program Year, and within 90 days after the last day of the Program Year. Recipients wishing to correct data errors or omissions for their final Program Year report must do so within 90 days after the end of the Program Year. The Department will generate SCSEP Quarterly Progress Reports (QPRs), as well as the final QPR, as soon as possible after receipt of the data. (OAA § 503(f)(3)).

(c) Each State agency receiving title V funds must annually submit an equitable distribution report of SCSEP positions by all recipients in the State. The Department will provide instructions for the preparation of this report. (OAA § 508).

(d) In addition to the data required to be submitted under paragraph (b) of this section, each SCSEP recipient may be required to collect data and submit reports on the performance measures. See subpart G. The Department will provide instructions detailing these measures and how recipients must prepare this report.

(e) In addition to the data required to be submitted under paragraph (b) of this section, each SCSEP recipient may be required to collect data and submit reports about the demographic characteristics of program participants. The Department will provide instructions detailing these measures and how recipients must prepare these reports.

(f) Federal agencies that receive and use SCSEP funds under interagency agreements must submit project financial and progress reports in accordance with this section. Federal recipients must maintain the necessary records that support required reports according to instructions provided by the Department. (OAA § 503(f)(3)).

(g) Recipients may be required to maintain records that contain any other information that the Department determines to be appropriate in support of any other reports that the Department may require. (OAA § 503(f)(3)).

(h) Grantees submitting reports that cannot be validated or verified as accurately counting and reporting activities in accordance with the reporting instructions may be treated as failing to submit reports, which may result in failing one of the responsibility tests outlined in § 641.430 and OAA § 514(d).

§ 641.881 What are the SCSEP recipient's responsibilities relating to awards to sub-recipients?

(a) Recipients are responsible for ensuring that all awards to sub-recipients are conducted in a manner to provide, to the maximum extent practicable, full and open competition in accordance with the procurement procedures in 29 CFR 95.43 (non-profit and commercial organizations) and 29 CFR 97.36 (State and local governments).

(b) The SCSEP recipient is responsible for all grant activities, including the performance of SCSEP activities by sub-recipients, and ensuring that sub-recipients comply with the OAA and

this part. (See also OAA § 514(d) and § 641.430 of this part on responsibility tests).

(c) Recipients must follow their own procedures for allocating funds to other entities. The Department will not grant funds to another entity on the recipient's behalf.

(d)(1) National grantees that receive grants to provide services in an area where a substantial population of individuals with barriers to employment exists must, in selecting sub-recipients, give special consideration to organizations (including former national grant recipients) with demonstrated expertise in serving such individuals. (OAA § 514(e)(2)).

(2) For purposes of this section, the term "individuals with barriers to employment" means minority individuals, Indian individuals, individuals with greatest economic need, and most-in-need individuals. (OAA § 514(e)(1)).

§ 641.884 What are the grant closeout procedures?

SCSEP recipients must follow the grant closeout procedures at 29 CFR 97.50 (State and local governments) or 29 CFR 95.71 (non-profit and government organizations), as appropriate. The Department will issue supplementary closeout instructions to OAA title V recipients as necessary.

Subpart I—Grievance Procedures and Appeals Process

§ 641.900 What appeal process is available to an applicant that does not receive a multi-year grant?

(a) An applicant for financial assistance under title V of the OAA that is dissatisfied because it was not awarded financial assistance in whole or in part may request that the Grant Officer provide an explanation for not awarding financial assistance to that applicant. The request must be filed within 10 days of the date of notification indicating that financial assistance would not be awarded. The Grant Officer must provide the protesting applicant with feedback concerning its proposal within 21 days of the protest. Applicants may appeal to the U.S. Department of Labor, Office of Administrative Law Judges (OALJ), within 21 days of the date of the Grant Officer's feedback on the proposal, or within 21 days of the Grant Officer's notification that financial assistance would not be awarded if the applicant does not request feedback on its proposal. The appeal may be for a part or the whole of the denied funding. This appeal will not in any way interfere with the Department's decisions to fund

other organizations to provide services during the appeal period.

(b) Failure to file an appeal within the 21 days provided in paragraph (a) of this section constitutes a waiver of the right to a hearing.

(c) A request for a hearing under this section must state specifically those issues in the Grant Officer's notification upon which review is requested. Those provisions of the Grant Officer's notification not specified for review are considered resolved and not subject to further review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400 North, 800 K Street, NW., Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2-96, published at 61 FR 19978, May 3, 1996), specifically identifying the procedure, fact, law, or policy to which exception is taken. The mailing address for the ARB is 200 Constitution Ave., NW., Room N5404, Washington, DC 20210. The Department will deem any exception not specifically urged to have been waived. A copy of the petition for review must be sent to the grant officer at that time. If, within 30 days of the filing of the petition for review, the ARB does not notify the parties that the case has been accepted for review, then the decision of the ALJ constitutes final agency action. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

(f) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(1) The appeal is not considered a complaint; and

(2) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the ALJ conducting the hearing considers them reasonably necessary. The certified copy

of the administrative file transmitted to the ALJ by the official issuing the notification not to award financial assistance must be part of the evidentiary record of the case and need not be moved into evidence.

(g) The ALJ should render a written decision no later than 90 days after the closing of the record.

(h) The remedies available are provided in § 641.470.

§ 641.910 What grievance procedures must grantees make available to applicants, employees, and participants?

(a) Each grantee must establish, and describe in the grant agreement, grievance procedures for resolving complaints, other than those described by paragraph (d) of this section, arising between the grantee, employees of the grantee, sub-recipients, and applicants or participants.

(b) The Department will not review final determinations made under paragraph (a) of this section, except to determine whether the grantee's grievance procedures were followed, and according to paragraph (c) of this section.

(c) Allegations of violations of Federal law, other than those described in paragraph (d) of this section, which are not resolved within 60 days under the grantee's procedures, may be filed with the Chief, Division of Adult Services, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Allegations determined to be substantial and credible will be investigated and addressed.

(d) Questions about, or complaints alleging a violation of, the nondiscrimination requirements of title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act of 1973, § 188 of the Workforce Investment Act of 1998 (WIA), or their implementing regulations, may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N-4123, 200 Constitution Avenue, NW., Washington, DC 20210. In the alternative, complaints alleging violations of WIA § 188 may be filed initially at the grantee level. See 29 CFR 37.71, 37.76. In such cases, the grantee must use complaint processing procedures meeting the requirements of 29 CFR 37.70 through 37.80 to resolve the complaint.

§ 641.920 What actions of the Department may a grantee appeal and what procedures apply to those appeals?

(a) Appeals from a final disallowance of costs as a result of an audit must be made under 29 CFR 96.63.

(b) Appeals of suspension or termination actions taken on the grounds of discrimination are processed under 29 CFR 31 or 29 CFR 37, as appropriate.

(c) Protests and appeals of decisions not to award a grant, in whole or in part, will be handled under § 641.900.

(d) Upon a grantee's receipt of the Department's final determination relating to costs (except final disallowance of costs as a result of an audit, as described in paragraph (a) of this section), payment, suspension or termination, or the imposition of sanctions, the grantee may appeal the final determination to the Department's Office of Administrative Law Judges, as follows:

(1) Within 21 days of receipt of the Department's final determination, the grantee may transmit by certified mail, return receipt requested, a request for a hearing to the Chief Administrative Law Judge, United States Department of Labor, Suite 400 North, 800 K Street, NW., Washington, DC 20001 with a copy to the Department official who signed the final determination.

(2) The request for hearing must be accompanied by a copy of the final determination, and must state specifically those issues of the determination upon which review is requested. Those provisions of the determination not specified for review, or the entire determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review.

(3) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(i) The appeal is not considered as a complaint; and

(ii) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the Administrative Law Judge conducting the hearing considers them reasonably necessary. The certified copy of the administrative file transmitted to the Administrative Law Judge by the official issuing the final determination must be part of the evidentiary record of the case and need not be moved into evidence.

(4) The Administrative Law Judge should render a written decision no later than 90 days after the closing of the record. In ordering relief, the ALJ may

exercise the full authority of the Secretary under the OAA.

(5) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the ARB (established under Secretary's Order No. 2-96), specifically identifying the procedure, fact, law, or policy to which exception is taken. The mailing address for the ARB is 200 Constitution Ave., NW., Room N5404, Washington, DC 20210. The Department will deem any exception not specifically argued to have been waived. A copy of the petition for review must be sent to the grant officer at that time. If, within 30 days of the filing of the petition for review, the ARB does not notify the parties that the case has been accepted for review, then the decision of the ALJ constitutes final agency action. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

§ 641.930 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?

(a) Parties to a complaint that has been filed according to the requirements of § 641.920 (a), (c), and (d) may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) Unless the parties agree in writing to extend the period, the waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as the final agency decision.

Signed at Washington, DC, this 19th day of August 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

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