

Planned Colorado Comments on Title I and III NPRM
May 22, 2015

§ 651.10 Definitions of terms used in parts 651, 652, 653, and 658

Supportive services means services such as transportation, child care, dependent care, housing, needs-related payments, and others, that are necessary to enable an individual to participate in activities authorized under WIOA or the Wagner-Peyser Act.

Comment: The regulations need to clarify whether Wagner-Peyser funds can or cannot be spent for supportive services, as defined in § 651.10. This is critical to avoiding questioned or disallowed costs.

§ 679.120 What is meant by the terms “optimum policy-making authority” and “demonstrated experience and expertise”?

(b) A representative with “demonstrated experience and expertise” means an individual with documented leadership in developing or implementing workforce development, human resources, training and development, or a core program function.

Comment: This statement does not reference education programs, which are explicitly stated in the law and in 679.110 (ii)(C) and (D). Education should be added to clarify that documented leadership in any of the areas stated in 679.100 (ii)(C) and (D) is applicable.

§ 679.210 What are the requirements for identifying a region?

(a) The Governor must assign local areas to a region prior to submission of the State Unified or Combined Plan, in order for the State to receive WIOA title I-B adult, dislocated worker, and youth allotments. **AND**

Preamble Regarding 679.510

A single local area may not be split across two planning regions. Local areas must be contiguous in order to be a planning region and effectively align economic and workforce development activities and resources. The Department anticipates providing additional guidance regarding the creation and management of interstate planning regions.

Comment: Some states have consortia of multiple counties designated as a local area, particularly across rural sections of the state. In the case of Colorado, the Rural Consortium local area consists of 52 counties that includes mountainous sub-areas focused on tourism and recreational industries, as well as flatland sub-areas focused on agriculture and manufacturing. These economies have little in common for purposes of regional planning and in some cases are non-contiguous. We propose that the requirement for not splitting a local area between two or more planning regions include the ability to opt out when local boards and local elected officials agree to the split.

Comment: The Department seeks comment on suggestions of additional data points for defining a regional economy and labor market. We recommend any additional data points should be identified in state or local policy, rather than in regulation or USDOL policy.

§ 679.510 What are the requirements for regional planning?

(a)(1)(viii) The establishment of an agreement concerning how the planning region will collectively negotiate and reach agreement with the Governor on local levels of performance for, and report on, the performance accountability measures described in WIOA sec. 116(c) for local areas or the planning region. **AND**

Preamble Regarding 679.510

While the regional plan requires coordination of local performance negotiations with the State, each CEO, as required by § 677.210(b) and (c) will negotiate performance goals with the State and will remain ultimately responsible for ensuring that the local area meets or exceeds those goals.

Comment: Many states are confused by the language of Section 679.510 and believe that planning regions are required to negotiate and meet performance standards, in addition to the performance standards that apply to the local areas. At the same time, in accordance with the law, the language in the preamble indicates that only coordination of local performance negotiations is required by the planning region. We recommend that 679.510 be clarified by stating that: CEO's of each local area in a planning region may choose to develop regional performance measures or local area measures. CEO's must establish an agreement concerning how the planning region will collectively negotiate and reach agreement with the Governor on the local or regional levels of performance, and also report on the performance accountability measures described in WIOA sec. 116(c) for the local areas or the planning region.

§ 679.430 How do entities performing multiple functions in a local area demonstrate internal controls and prevent conflict of interest?

Local organizations often function simultaneously in a variety of roles, including local fiscal agent, Local Board staff, one-stop operator, and direct provider of career services or training services. Any organization that has been selected or otherwise designated to perform more than one of these functions must develop a written agreement with the Local Board and chief local elected official to clarify how the organization will carry out its responsibilities while demonstrating compliance with the Workforce Innovation and Opportunity Act and corresponding regulations, relevant Office of Management and Budget circulars, and the State's conflict of interest policy.

Comment: In many states, local board members are volunteers, and the board is not incorporated or able to hire its own staff. In these cases the local operator or fiscal agent staff supports the board and assists with many of the required board functions, such as the drafting of plans, administrative review and approval of hundreds (if not thousands) of eligible training provider programs for inclusion on the ETPL, etc. These board functions have traditionally been delegated to staff through board authorization (votes). We recommend that in addition to establishing a written agreement that covers the general assignment of responsibilities and conflict of interest provisions, the local boards have the option to delegate individual responsibilities by vote of the members, as needed and when appropriate. This will reduce the need for modifications to the agreements and the administrative burden of this requirement.

§ 679.560 What are the contents of the local plan?

(b)(16) The local levels of performance negotiated with the Governor and chief elected official consistent with WIOA sec. 116(c), to be used to measure the performance of the local

area and to be used by the Local Board for measuring the performance of the local fiscal agent (where appropriate), eligible providers under WIOA title I subtitle B, and the one-stop delivery system in the local area; **AND**

§ 677.170 How are State adjusted levels of performance for primary indicators established?

- (a) A State must submit in the State Plan expected levels of performance on the primary indicators for each core program as required by sec. 116(b)(iv) of WIOA as explained in joint guidance issued by the Secretaries of Education and Labor.
- (1) The initial State Plan submitted under WIOA must contain expected levels of performance for the first 2 years of the State Plan period.
 - (2) States must submit expected levels of performance for the third and fourth year of the State Plan before the third program year consistent with §§ 676.135 and 676.145 of this chapter.

Comment: Section 679.560 implies that the US Departments of Labor and Education have negotiated performance levels for the WIOA Title IB programs with the states and the Governor has negotiated performance levels with Local Areas prior to the submission of local plans to the Governor. In addition, Section 679.560 does not include the Title II, III, or IV partner measures at the local level. At the same time, Section 677.160 is not crystal clear regarding whether the performance levels to be included in state plans are the proposed standards or the negotiated standards, since the term “expected” is used.

- First, performance measures included in the state plan should be the negotiated performance measures and those for all the core partners;
- Second, the State WDB should coordinate and participate in the performance negotiations for all the core partners in the state to ensure alignment;
- Third, we are recommending a regulatory requirement that the US Departments of Labor and Education complete performance negotiations for Title IB and all Core Partners with states at least 45 days prior to the statutory deadlines for submission of the four-year state plans and two-year state plan modifications. This will allow for inclusion of the negotiated standards in the state plans in time for the required public comment period prior to plan submittal, and will also allow for timely negotiation of local performance levels and their inclusion in local plans prior to the beginning of a program year.

§ 680.120 What are the eligibility criteria for career services for adults in the adult and dislocated worker programs?

Comment: There is a discrepancy between the preamble and the proposed regulation. The preamble states “Priority for individualized career services and training services funded with title I adult funds must be given to low-income adults and public assistance recipients and individuals who are basic skills deficient” but the proposed regulation does not include the priority of service as an eligibility criterion. We recommend adding the adult priority to the regulation as well.

§ 680.150 and §680.200 Career Services and Training Services

Comment: We request clarification regarding whether alternative secondary school (HSE) (formerly GED) preparation is considered a career service or a training service.

§ 680.210 Who may receive training services?

Under WIOA sec. 134(c)(3)(A) training services may be made available to employed and unemployed adults and dislocated workers who:

Comment: Will there be additional criteria for the employed worker to receive training services?

§ 680.230 What are the requirements for coordination of Workforce Innovation and Opportunity Act training funds and other grant assistance?

(c) A WIOA participant may enroll in WIOA-funded training while his/her application for a Pell Grant is pending as long as the one-stop operator has made arrangements with the training provider and the WIOA participant regarding allocation of the Pell Grant, if it is subsequently awarded. In that case, the training provider must reimburse the one-stop operator the WIOA funds used to underwrite the training for the amount the Pell Grant covers. Reimbursement is not required from the portion of Pell Grant assistance disbursed to the WIOA participant for education-related expenses. (WIOA sec. 134(c)(3)(B))

Comment: This situation will be incredibly challenging for one-stop operators to implement administratively, both in coordination with the training provider and in receiving a reimbursement from a training provider. We recommend in a situation where a Pell Grant is subsequently awarded after a one-stop operator has paid for training, that WIOA funds not be reimbursed. Allowing WIOA funds to pay the training costs also allows the customer more flexibility in how they use the Pell Grant to cover other costs.

§ 680.320 Under what circumstances may mechanisms other than Individual Training Accounts be used to provide training services?

(b) Under paragraph (a)(3) of this section, individuals with barriers to employment include those individuals in one or more of the following categories, as prescribed by WIOA sec. 3(24):

Comment: Will incumbent workers be exempt from the barrier requirement?

§ 680.340 What are the requirements for consumer choice?

(c) An individual who has been determined eligible for training services under § 680.210 may select a provider described in paragraph (b) of this section after consultation with a career planner. Unless the program has exhausted training funds for the program year, the operator must refer the individual to the selected provider, and establish an ITA for the individual to pay for training. For purposes of this paragraph, a referral may be carried out by providing a voucher or certificate to the individual to obtain the training.

Comment: The proposed regulations require that an individual must be referred to a provider and program they have selected “after consultation with a career planner” unless training funds for the year have been exhausted. The language does not make it clear if the counselor could

refuse funding for the proposed training if it is inappropriate for the participant’s educational or skill level, or similar reasons. Further clarification of the reasons that training could be refused would be helpful.

§ 680.500 How is the State list of eligible training providers disseminated?

(e) The State list and accompanying information must be made available in a manner that does not reveal personally identifiable information about an individual participant. In addition, in developing the information to accompany the State list described in § 680.490(b), disclosure of personally identifiable information from an education record must be carried out in accordance with the Family Educational Rights and Privacy Act, including the circumstances relating to prior written consent.

Comment: The proposed regulations require that the eligible training provider list be made available in such a way as to avoid revealing data about any individual. This would normally require not disclosing performance information on any program with a small number of participants. Performance data is also likely to be relatively meaningless if too few individuals are in the performance cohort. We recommend the regulations specifically recognize that this information shouldn’t be revealed for those programs with low participant numbers.

§ 680.600 What priority must be given to low-income adults and public assistance recipients and individuals who are basic skills deficient served with adult funds under title I?

- (a) WIOA states, in sec. 134(c)(3)(E), that priority for individualized career services (see § 678.430(b)) and training services funded with title I adult funds must be given to recipients of public assistance, other low-income individuals, who are basic skills deficient (as defined in WIOA sec. 3(5)(B)) in the local area.
- (b) The priority established under paragraph (b) of this section does not necessarily mean that these services may only be provided to recipients of public assistance, other low-income individuals, and individuals without basic work skills.

Comment: Sub-items (a) and (b) are stated differently and have led to the confusion on the part of states regarding whether priority of service applies to two different groups (low-income or public assistance recipients, who are also basic skills deficient,) or three different groups (low income or public assistance recipients or those who are basic skills deficient). In addition, the regulations state basic skills deficient in (a) and without basic work skills in (b). Basic work skills can include soft skills and are not necessarily part of the WIOA basic skills deficient definition, as follows:

(B) who is a youth or adult, that the individual is unable to compute or solve problems, or read, write, or speak English, at a level necessary to function on the job, in the individual’s family, or in society.

Comment: Section (a) should be corrected for consistency with the proposed regulation to add “and individuals” as follows: “(a) WIOA states, in sec. 134(c)(3)(E), that priority for individualized career services (see § 678.430(b)) and training services funded with title I adult funds must be given to recipients of public assistance, other low-income individuals, and individuals who are basic skills deficient (as defined in WIOA sec. 3(5)(B)) in the local area.”

Comment: The language of the regulation should be clarified regarding the use of the term basic work skills, and the methodology for determining basic skills deficiency should be identified in state or local policy, rather than in regulation or USDOL policy.

§ 680.630 How does a displaced homemaker qualify for services under title I?

Comment: The definition appears to now only include Veterans and spouses of Veterans as displaced homemakers. We ask for clarification on whether the original WIA definition of a displaced homemaker still applies and this Veteran piece is just an addition, or if the definition has changed.

§ 680.720 What conditions govern on-the-job training payments to employers?

(a) On-the-job training payments to employers are deemed to be compensation for the extraordinary costs associated with training participants and potentially lower productivity of the participants while in the OJT.

Comment: We concur with the Department’s decision not to define what “extraordinary costs” are through this regulation.

§ 680.780 Who is an “incumbent worker” for purposes of statewide and local employment and training activities?

The training must satisfy the requirements in WIOA sec. 134(d)(4) and § 680.790 and increase the competitiveness of the employee or employer .

Comment: Increasing the competitiveness of the employee or employer requires clarification and definition. § 680.810 also refers to “the competitiveness of a participant and the employer.” We recommend that “increased competitiveness” may be defined as training designed to retain a skilled workforce or avert the need to lay off employees.

§ 680.830 What is a transitional job?

A transitional job is one that provides a limited work experience, that is subsidized in the public, private, or non-profit sectors for those individuals with barriers to employment because of chronic unemployment or inconsistent work history; these jobs are designed to enable an individual to establish a work history, demonstrate work success, and develop the skills that lead to unsubsidized employment. (WIOA sec. 134 (d)(5))

Comment: Clarification is needed to distinguish between a paid work experience or internship and a transitional job. Can an enrolled participant do a series of transitional jobs? This is possibly a great opportunity if WIOA funds are complemented by partner services like job coaching.

Comment: “Inconsistent work history” requires definition.

§ 680.930 What are needs-related payments?

Needs-related payments provide financial assistance to participants for the purpose of enabling them to participate in training and are a supportive service authorized by WIOA sec. 134(d)(3). Unlike other supportive services, in order to qualify for needs-related payments a participant must be enrolled in training.

Comment: Funding levels are not adequate to support this service so it will either be very limited or possibly non-existent.

§ 681.220 Who is an “in-school youth”?

An in-school youth (ISY) is an individual who is: (a) Attending school (as defined by State law), including secondary and post-secondary school;

Comment: Some individuals may be taking a class or even remediation at a college and not count as out-of-school which could be an issue as 75% of youth fund must be spent on out-of-school youth. We request that a definition be added to the post-secondary school that stipulates that “in-school” means enrollment in at least nine credit hours.

§ 681.240 When do local youth programs verify dropout status, particular for youth attending alternative schools?

An individual who is out-of-school at the time of enrollment and subsequently placed in an alternative school or any school, is an out-of-school youth for the purposes of the 75 percent expenditure requirement for out-of-school youth.

Comment: This definition could incentivize the provider to encourage youth to drop out so they can be considered out of school for the purposes of funding services.

§ 681.250 Who does the low-income eligibility requirement apply to?

(c) All ISY must be low-income to meet the ISY eligibility criteria, except those that fall under the low-income exception.

Comment: Needing to document low-income status creates a challenge in working with youth and schools on Career Pathway activities as they do not like to discriminate against the student not considered low-income.

§ 681.420 How must Local Boards design Workforce Innovation and Opportunity Act youth programs?

- (a) The design framework services of local youth programs must:
 - 3. Provide case management of youth participants, including follow-up services

AND

§ 681.460 What services must local programs offer to youth participants?

- (a) Local programs must make each of the following 14 services available to youth participants (WIOA sec. 129(c)(2)):
 - 9. Follow-up services for not less than 12 months after the completion of participation, as provided in § 681.580;

Comment: Section 681.420 lists follow-up as a design framework service and Section 681.460

lists follow-up as one of the 14 program elements. Design framework services do not have to be procured and program elements must be procured unless part of a waiver. The regulations need to clarify that youth program operators have the flexibility to include follow-up in the design framework or as one of the program elements.

§ 682.100 What are the statewide employment and training activities under title I of the Workforce Innovation and Opportunity Act?

AND

§ 683.215 What Workforce Innovation and Opportunity Act title I functions and activities constitute the costs of administration subject to the administrative cost limitation?

(c)(2) Except as provided at paragraph (c)(1) of this section, all costs incurred for functions and activities of subrecipients and contractors are program costs.

Comment: Under WIA, a great deal of confusion has occurred regarding the ability to incur costs for administrative functions with statewide activities funds (Governor’s 10% and 25% set asides) when they are awarded to sub-recipients. In general USDOL has indicated that such funds cannot be spent on administrative functions. This interpretation appears to be inconsistent with **§ 683.215**. We support the inclusion of language to clarify that administrative functions can be paid for with statewide activities funds that are awarded to sub-recipients.

§ 682.220(a)(1) “explains that under WIOA ... States are required to use funds reserved by the Governor for statewide activities ... to conduct evaluations of activities of the core programs.”

Comment: While a small number of states have conducted and published evaluations of employment and training programs, there is no established broad-based record of State knowledge of research principles sufficient to effectively manage an evaluation agenda under WIOA. In order to ensure successful implementation of evaluation requirements, it is proposed that Labor suspend this requirement until such time as States can acquire the necessary evaluation skills, and that Labor institute an effort to facilitate State development of the relevant infrastructure

§ 682.330 What rapid response activities are required?

The proposed regulation begins with “Rapid response activities must include:”

Comment: There are certain services that we must make available, but if businesses refuse services, we cannot be compelled to deliver them. We recommend replacing this language with “Rapid response activities that must be made available include:”

- (i) Delivery of services to worker groups for which a petition for Trade Adjustment Assistance has been filed;

Comment: This statement suggests that Rapid Response services must be provided in parallel to TAA. These services are often decoupled and Rapid Response may happen a year prior to TAA application or certification.

§ 683.235 May Workforce Innovation and Opportunity Act title I funds be spent for construction?

WIOA title I funds must not be spent on construction, purchase of facilities or buildings, or other capital expenditures for improvements to land or buildings, except with the prior written approval of the Secretary.

AND

Preamble for § 683.235: Under the statute, WIOA title I funds can be used for construction only in limited situations, including meeting obligations to provide physical and programmatic accessibility and reasonable accommodations, certain repairs, renovations, alterations, and capital improvements of property,

Comment: The language of the preamble should be added to the regulation to clarify the allowability of expenditures for accessibility, reasonable accommodations, repairs, renovations, alterations and capital improvements of property currently occupied, or as part of a move. This is critical to avoiding questioned or disallowed costs.

§ 683.250 What other activities are prohibited under title I of the Workforce Innovation and Opportunity Act?

(a) WIOA title I funds must not be spent on:

- (1) The wages of incumbent employees during their participation in economic development activities provided through a statewide workforce investment system (WIOA secs. 181(b)(1) and 181(b)(2));

Comment: The statement “participation in economic development activities” is not clear. Does this regulation mean incumbent workers who serve as economic developers, or incumbent workers whose duties include economic development activities, or some other interpretation of the WIOA prohibition regarding economic development activities. This is critical to avoiding violations of the law and questioned or disallowed costs.

§ 683.275 What wage and labor standards apply to participants in activities under title I of the Workforce Innovation and Opportunity Act?

- (a) Individuals in on-the-job training or individuals employed in programs and activities under title I of WIOA must be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work. (WIOA sec. 181(b)(5))

Comment: Work-based learning, where wages are paid with WIOA funds, includes not only on-the-job training, but also paid work experiences, paid internships, and transitional jobs. The regulations needs to clearly define and distinguish among each of these activities, and clearly indicate whether or not this provision applies to each one. This is critical to avoiding violations of FLSA and questioned or disallowed costs.

§ 683.500 through 683.540 Subpart E - Pay for Performance Contract Strategies

Comment: Local boards may already elect to develop pay-for-performance contracts depending on local procurement and contracting rules. The additional requirements for WIOA pay-for-

performance contracts, e.g. feasibility study, confirming with LMI, additional reporting requirements, etc. are major disincentives for use of this strategy. In addition, there appear to be no benefits to participants that will result. We believe that there are more effective and less labor intensive approaches to program evaluation and performance improvement, such as an expanded Performance Incentive process that increases accountability and LEAN approaches to service delivery. At a minimum, we recommend the elimination of the feasibility study for any WIOA pay-for-performance contract requirements to reduce the administrative burden of adopting this strategy. We also recommend that the 3rd party validations be conducted through a state-level monitoring process.

§ 687.110 What are major economic dislocations or other events which may qualify for a national dislocated worker grant?

The Department seeks comment on the definition of “higher than average demand” for services in item (a)(4).

Comment: Additional technical assistance to states on accessing and utilizing predictive data analytics for National Dislocated Worker Grants and our targeted and “hard to serve” populations would allow our state to develop appropriate service delivery models/templates for each of these different populations. For example, Vocational Rehabilitation services customers will need different services to be successful in our labor market than customer who are on UI benefits. We recommend building different menus of service for the different targeted populations that we are trying to serve.