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DEPARTMENT OF EDUCATION

34 CFR Parts 369 and 371

[Docket ID ED-2013-OSERS-0083]

RIN 1820-AB66

Vocational Rehabilitation Services Projects for American Indians with Disabilities

AGENCY: Rehabilitation Services Administration (RSA), Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final rule.

SUMMARY: The Secretary amends the definition of "reservation" under the regulations governing the American Indian Vocational Rehabilitation Services (AIVRS) program to conform to the Department's current interpretation and practices. "Reservation" means Federal or State Indian reservations; public domain Indian allotments; former Indian reservations in Oklahoma; land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act; and defined areas of land recognized by a State or the Federal Government where there is a concentration of tribal members and on which the tribal

government is providing structured activities and services.

DATES: These regulations are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Thomas Finch, U.S.

Department of Education, 400 Maryland Avenue, SW., room

5147, Potomac Center Plaza (PCP), Washington, DC 20202-

2800. Telephone: (202) 245-7343, or by email:

Tom.Finch@ed.gov.

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SUPPLEMENTARY INFORMATION:

On June 23, 2014, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the Federal Register (79 FR 35502). The NPRM followed a process of consultation under E.O. 13175 that began with a request for tribal input that we published in the Federal Register on July 5, 2013 (78 FR 40458) and continued with tribal consultation listening sessions in August and September 2013 in Smith River, California, and Scottsdale, Arizona, respectively. In the NPRM, we discussed this process in detail (79 FR 35506).

In the NPRM, we sought comment on two alternative definitions of "reservation" as the term is used in section

121(d) of the Rehabilitation Act of 1973, as amended (the Rehabilitation Act) (29 U.S.C. 741(d)).<sup>1</sup> Only the governing bodies of Indian tribes and consortia of those governing bodies located on a Federal or State reservation are eligible for grants under the AIVRS program.

"Alternative A" proposed to amend §§369.4(b) and 371.4(b) to reflect the Department's current interpretation and practices. The Department currently interprets the statutory definition of "reservation," which uses the term "includes" before listing areas identified as "reservations" as non-exhaustive, and the Department's practice has been to include other land areas that it views as equivalent to those listed in the statutory definition. Under this interpretation, tribes eligible for AIVRS grants are those located on land specifically identified in the statute -- Federal or State Indian reservations; public domain Indian allotments; former Indian reservations in Oklahoma; and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act - and those located on a defined area of land recognized by a State or the Federal Government where there is a

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<sup>1</sup> Previously, we have referred to section 121(c) but subsection (c) was redesignated as subsection (d), without substantive change to the definition, by the amendments to the Rehabilitation Act made by the Workforce Innovation and Opportunity Act (WIOA), P.L. 113-128.

concentration of tribal members and on which the tribal government is providing structured activities and services. This definition includes lands identified in the U.S. Census as a State-designated tribal statistical area or a tribal-designated statistical area or are defined areas of land designated by statute, judicial decision, or administrative determination as areas where members of a particular State or federally recognized tribe reside.

Proposed "Alternative B" proposed to amend §§369.4(b) and 371.4(b) to define "reservation" more narrowly as only those land areas specifically identified in the statutory definition of "reservation": Federal or State Indian reservations; public domain Indian allotments; former Indian reservations in Oklahoma; and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act.

We adopt Alternative A. There are no differences between Alternative A in the NPRM and these final regulations.

Public Comment: In response to our invitation in the NPRM, 56 parties submitted comments on the proposed alternatives. Fifty commenters wrote in support of Alternative A, one wrote in support of Alternative B, and five suggested other

alternatives. We organize our discussion of substantive issues by the proposed alternative definitions.

Analysis of Comments and Changes: An analysis of the comments follows.

Proposed Alternative A

Comments: Nearly all of the commenters supported proposed Alternative A. They gave a number of reasons for doing so. Many commenters stated that their tribes would lose eligibility under Alternative B, that they wished to keep the services they currently have, and that the loss of services would unnecessarily harm hundreds of individuals. Without access to services, some of these commenters stated, many individuals would return to prison, relapse into addiction, or be unemployed, dependent on welfare, or homeless. Others related their personal experiences with their tribal vocational rehabilitation (VR) programs and stated how the programs helped them complete necessary education or training, find or keep jobs, start small businesses, and be productive citizens.

Some tribal entities, regardless of their eligibility under Alternative B, stated that the Department should adopt Alternative A because broader eligibility means that more disabled Indians, who are among the neediest Americans and are already underserved, could receive necessary VR

services. These commenters also noted that tribes operate their VR programs well, even often serving nearby members of other tribes in addition to their own, and that the current standard for eligibility under the AIVRS program works well. Still other commenters noted that members of tribes who would lose eligibility under Alternative B would not receive equivalent services from State VR agencies. This is so, they stated, because State VR agencies are sometimes too far away to be accessible. Even if they were closer by, State VR agencies have limited experience providing vocational rehabilitation services in a culturally relevant manner, so tribal members would be less likely to have successful outcomes or to seek services in the first place. Other commenters said that, given current funding levels, State VR agencies are not able to provide services to many more individuals than they currently serve. As a result, if some tribes could no longer provide VR services, many of their members would not receive services from the State VR agency either.

Finally, one commenter noted that Alternative A would further the purpose of the AIVRS program, namely to provide culturally appropriate VR services to as many tribal members as possible. Two other commenters noted that the broader definition of "reservation" in Alternative A is

consistent with many other Federal programs under which tribes deliver services to their members in federally defined service areas.

Discussion: We thank the commenters who shared their personal thoughts and experiences. The Department is aware of the hardships that removing VR services could cause some tribal members. We received comments to this effect not only in response to the NPRM but also during our tribal consultation process: the request for tribal input that we published on July 5, 2013 (78 FR 40458), and the tribal consultation listening sessions that we held in August and September 2013 in Smith River, California, and Scottsdale, Arizona, respectively. We are similarly aware of how tribal members have benefitted from tribal VR services and of the good work that tribal VR agencies do.

We agree that the broader interpretation of "reservation" in the Department's current practice and under the definition in Alternative A would maintain a larger pool of eligible tribes than would the definition in Alternative B. Our experience does not, however, support the assertion that Alternative A would result in tribal VR agencies actually serving more tribal members overall or placing more total tribal members overall in employment than would Alternative B. Nor do we see that Alternative B

would result in services being provided to any more or any fewer tribal members than Alternative A. As we stated in the NPRM, we expect to fund future grantees at the same level as we fund current grantees, depending on appropriations, and the number of tribal members served nationwide would remain essentially the same whether we adopt Alternative A or Alternative B (79 FR 35505). Alternative B would just result in a shift of resources from one applicant pool of tribes to another.

We agree with the comment that, if tribal VR agencies lost eligibility under Alternative B, their members would most likely go unserved because State VR agencies would not be able to provide services to any more, or many more, individuals than they already do. Again as we noted in the NPRM, our own inquiries to State VR agencies resulted in similar concerns. While the Washington State VR agency would be able to serve some of the tribal members served by the two tribal VR agencies in that State, the North Carolina and Louisiana VR agencies did not expect to be able to serve any additional consumers. We noted also that Louisiana is under an order of selection whereby it serves only individuals with the most severe or significant disabilities. Therefore, it is unlikely that the current consumers who do not have the most significant disabilities

would be able to receive VR services under an order of selection. (79 FR 35505).

We disagree with the commenter's statement that the purpose of the AIVRS program is to provide services to as many tribal members as possible. The purpose of the program is to enable the tribes themselves to provide culturally relevant VR services to their members with disabilities.

While we do agree with the commenter who noted that Alternative A is consistent with other Federal programs that allow tribes to provide services to their members in designated services areas, we note that having a service area under another Federal program does not, in and of itself, qualify that service area as a "reservation" under this definition. For example, a service area can be created for a particular program as part of a tribe's program application. This self-identification does not reflect any formal decision-making or considered recognition by a State or the Federal Government about the status of the service area for any other purposes.

By contrast, a State or Federal administrative determination not tied to funding a specific program application would qualify as "land recognized by a State or the Federal Government" under this definition. These

administrative determinations might include an executive order issued by a Governor to provide formal State recognition of a tribe or the Department of the Interior's recognition of a service area a part of the Federal acknowledgement process.

Finally, we agree with the general viewpoint of these comments, namely that we should favor the broader interpretation of "reservation" in Alternative A over the narrower interpretation of Alternative B. We need not repeat any of the legal analysis we set out in the NPRM (78 FR 35504). It is well established that the Rehabilitation Act has a remedial purpose, namely to promote and expand employment opportunities for individuals with disabilities, Consol. Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984), and that a remedial statute should be interpreted broadly to effect its purposes. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). As we stated in the NPRM, we believe that the definition of "reservation" in section 121 of the Rehabilitation Act is subject to different interpretations and that Alternative A is a reasonable interpretation (79 FR 35504).

Given all of this, we decline to change our current practice or our current interpretation of "reservation" as the term is used in section 121(d) of the Rehabilitation

Act (29 U.S.C. 741(d)). Choosing the narrow definition in Alternative B and limiting eligibility under AIVRS to only those tribes located on areas of land explicitly identified in the statute would not improve the AIVRS program. There would be no net gain in the number of VR consumers served nationwide. Instead, some consumers would lose the VR services they now receive. Though a similar number of other consumers elsewhere in the country would begin to receive VR services, the consumers who would lose services would not likely receive equivalent VR services elsewhere, and many would suffer hardship as a result.

Alternative A would likewise result in no change in the number of consumers served under AIVRS. However, this alternative has allowed grantees in the program to serve their consumers well for more than two decades and would not cause the disruption and harm to individual consumers that Alternative B would cause. Therefore, we believe that the best approach to achieve the statute's purpose is to continue to interpret a reservation as a defined area of land recognized by a State or the Federal Government where there is a concentration of tribal members and on which the tribal government is providing structured activities and services, making tribes with those areas of land eligible for a grant under the AIVRS program.

Change: None. We adopt Alternative A unchanged from the NPRM.

Proposed Alternative B

Comment: One commenter supported the adoption of Alternative B. This commenter acknowledged that Alternative B might cause some tribes that are currently funded to lose eligibility under the AIVRS program. The commenter stated, however, that the narrower interpretation was more consistent with the trust relationship between the United States and the Indian tribes, which, by definition, exists only with federally recognized tribes, many but not all of which have a reservation. According to the commenter, Alternative B would therefore better ensure that tribes with whom the United States has a trust relationship would have access to the funds available under the AIVRS program.

Discussion: By authorizing the Department to make grants to tribes "located on Federal and State reservations" the Rehabilitation Act makes both federally and State-recognized tribes eligible under AIVRS. By including State-recognized tribes as eligible applicants under the AIVRS program, Congress has already concluded that the benefits of the AIVRS program may be shared with those tribes that are not federally recognized and thus, do not

have the trust relationship with the United States as described by the commenter. Additionally, Congress has already concluded that having land associated with the tribe (i.e. a Federal or State reservation), as opposed to having the trust relationship referred to by the commenter, is a necessary condition for eligibility. It is consistent with this broad intent to include in the definition of "reservation" land that has characteristics similar in all important and practical respects to a traditional reservation, thereby providing an opportunity to a greater number of tribes to participate in the AIVRS program. Finally, we note that nothing precludes federally recognized tribes from establishing VR programs and applying to be AIVRS grantees.

Change: We adopt Alternative A unchanged from the NPRM.

#### Other Alternatives

Comments: Other commenters suggested four alternative interpretations of "reservation." One commenter suggested that "reservation" should be defined to mean any territory where indigenous people of the United States are located and observe traditional practices, religions, or culture. Another commenter suggested that we expand the reference to "incorporated Native groups ... under the provisions of the Alaska Native Claims Settlement Act" to any incorporated

group anywhere because 78 percent of Indians do not live on reservations. Two commenters stated that any federally or State-recognized tribe should be eligible, regardless of whether the tribe is landless. And one commenter suggested limiting eligibility to federally recognized tribes.

Discussion: All of these suggestions would require a change in the statutory definition of "reservation." This requires congressional action; the Department does not have the authority to make any of these changes by regulation.

Change: None.

#### Executive Orders 12866 and 13563

#### Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal

governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is a significant regulatory action subject to review by OMB under section 3(f)(4) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that

might result from technological innovation or anticipated behavioral changes.”

We are issuing these final regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

The amendment to the regulatory definition of “reservation” we adopt, Alternative A, should produce no change in costs or benefits as it conforms the definition to the Department’s current interpretation and practices.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Assessment of Education Impact

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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List of Subjects

34 CFR Part 369

Grant programs--social programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

34 CFR Part 371

Grant programs-Indians, Grant programs-social programs Indians, Vocational rehabilitation.

Dated: February 2, 2015.

Michael K. Yudin,  
Acting Assistant Secretary for  
Special Education and  
Rehabilitative Services.

For the reasons discussed in the preamble, the Secretary amends parts 369 and 371 of title 34 of the Code of Federal Regulations as follows:

PART 369—VOCATIONAL REHABILITATION SERVICE PROJECTS

1. The authority citation for part 369 is revised to read as follows:

AUTHORITY: 29 U.S.C. 709(c), 741, 773, unless otherwise noted.

2. Section 369.4(b) is amended by revising the definition of "Reservation" to read as follows:

§369.4 What definitions apply to these programs?

\* \* \* \* \*

(b) \* \* \*

Reservation means a Federal or State Indian reservation; public domain Indian allotment; former Indian reservation in Oklahoma; land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act; or a defined area of land recognized by a State or the Federal Government where there is a concentration of tribal members and on which the tribal government is providing structured activities and services.

(Authority: Sections 12(c) and 121(e) of the Act; 29

U.S.C. 709(c) and 741(e))

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PART 371—VOCATIONAL REHABILITATION SERVICES PROJECTS FOR  
AMERICAN INDIANS WITH DISABILITIES

3. The authority citation for part 371 continues to read as follows:

AUTHORITY: 29 U.S.C. 709(c) and 741, unless otherwise noted.

4. Section 371.4(b) is amended by revising the definition of "Reservation" to read as follows:

§371.4 What definitions apply to this program?

\* \* \* \* \*

(b) \* \* \*

Reservation means a Federal or State Indian reservation; public domain Indian allotment; former Indian reservation in Oklahoma; land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act; or a defined area of land recognized by a State or the Federal Government where there is a concentration of tribal members and on which the tribal government is providing structured activities and services.

(Authority: Sections 12(c) and 121(e) of the Act; 29

U.S.C. 709(c) and 741(e))

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