

Evaluation of Limitations on

# Subminimum Wage Employment Under the Workforce Innovation and Opportunity Act





Disability Rights California protects and advocates for the rights of all people with disabilities in the State of California, regardless of their ethnicity, cultural background, language, or immigration status.

**Report by:**

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# Introduction and Summary of Findings

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**T**his report summarizes Disability Rights California’s evaluation of the implementation of the Workforce Innovation and Opportunity Act (WIOA).<sup>1</sup> The WIOA is landmark legislation which reformed the public workforce system and increased access to services for people with disabilities seeking competitive integrated employment (CIE). The WIOA sets forth limitations on the use of subminimum wage employment for people with disabilities. It also provides protections for youth, age 16 to 22, to prevent young people from being transitioned from school directly to segregated, subminimum wage settings.

In this report, Disability Rights California evaluated California’s implementation of the limitations on the use of subminimum wage employment,<sup>2</sup> over three program years,<sup>3</sup> for: 1) adults currently working in subminimum wage employment and 2) youth at risk of subminimum wage employment. Disability Rights California evaluated data to inform advocacy efforts to improve access to competitive integrated employment for these target populations. Overall, we concluded that, while the California Vocational Rehabilitation Program, Department of Rehabilitation (DOR), generally complied with the federal requirements of WIOA, these efforts had little impact in addressing the needs of Californians at risk of, or currently working in, subminimum wage employment. We suspect that the challenges faced by California’s Vocational Rehabilitation Program are not unique to our state.

While career counseling and information and referral<sup>4</sup> were abundantly provided to the target populations, these services have not been effective in providing a path to vocational rehabilitation services and competitive integrated employment.

**The number of individuals who participated in these services and obtained competitive integrated employment never rose over 0.4% over the three program years.**

**W**e urge the United States Department of Education and the Department of Labor to conduct similar evaluations in other states and develop a strategic plan to strengthen and further develop the limitations on subminimum wage employment outlined in 34 CFR Part 397 et. seq. to improve outcomes for individuals at risk of or working in subminimum wage employment. Additionally, we encourage the United States Senate HELP Committee and the United States House Education and Workforce Committee to do oversight hearings to explore the impact of Section 511 and the federal limitations on the use of subminimum wage employment.

Subminimum wage employment is where a person with a disability is paid less than minimum wage based on their productivity relative to a person without a disability. This wage analysis is not applied to any other population and many have argued is exploitative and diminishes the rights and opportunities of workers with disabilities.

We urge the United States Department of Education and the Department of Labor to conduct similar evaluations in other states and develop a strategic plan to strengthen and further develop the limitations on subminimum wage employment outlined in 34 C.F.R. Part 397 et. seq. to improve outcomes for individuals at risk of or working in subminimum wage employment. Additionally, we encourage the United States Senate HELP Committee and the United States House Education and Workforce Committee to do oversight hearings to explore the impact of Section 511 and the federal limitations on the use of subminimum wage employment.

## Evaluation

Disability Rights California requested public records from the DOR on August 29, 2019 regarding policy, forms and reports describing its implementation of the limitations on use of subminimum wage employment under the WIOA.<sup>5</sup> Specifically, looking at documentation of over 16,000 youth, ages 16 to 22, with disabilities and individuals employed in subminimum wage employment describing:

- Individuals known to the department to be employed in subminimum wage employment, place of employment and referring agency(s);
- Individuals who participated in, and individuals who declined, career counselling and information and referral services;

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- Individuals who applied for vocational rehabilitation services after receiving career counselling and information and referral services;
  - Individuals who were found eligible for vocational rehabilitation services after receiving career counselling and information and referral services;
  - Individuals who participated in an Individualized Plan for Employment (IPE) after receiving career counselling and information and referral services;
  - Individuals whose case was closed with or without an employment outcome after receiving career counselling and information and referral services, including the reason for the case closure;
  - Students with disabilities who have received Pre-Employment Transition Services and their subsequent participation in vocational rehabilitation services.
  - Individuals who received Pre-Employment Transition Services and/or vocational rehabilitation services working in sub minimum-wage employment.

DRC additionally obtained policy, data and information through the following sources: Rehabilitation Services Administration,<sup>6</sup> Department of Labor<sup>7</sup> and other public sources. Analysis of these data sources has enabled us to:

- Evaluate policy related to Pre-Employment Transition Services, counseling information services to youth and persons working in subminimum wage settings for compliance with federal regulations;
- Determine the effectiveness of service provisions to limit or reduce subminimum wage employment;

## **Based on our findings, we have developed the following recommendations.**

### **Federal Recommendations**

- Redesign career counseling, and information and referral services to increase applications and employment outcomes for people working in or at risk of subminimum wage employment. This may include requiring states to make applications for vocational rehabilitation services available to individuals at the time of counseling and referral services.
- Develop or strengthen existing policy that applies the presumption of eligibility for vocational rehabilitation services to individuals who are known to be seeking subminimum wage employment.
- Develop a broader scope of services and supports to be provided under career counseling, and information and referral services. For example, providing the core services available in pre-employment transition services to individuals working in subminimum wage employment, regardless of age or application for services.
- Increase data collection, analysis and monitor progress related to individuals who are known to be working in or seeking subminimum wage employment and apply for vocational rehabilitation services, participate in an Individual Plan for Employment, and/or have a case closure with the State Vocational Rehabilitation program.

# Background

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## Workforce Innovation and Opportunity Act

On July 22, 2014, President Barack Obama signed the Workforce Innovation and Opportunity Act (WIOA). The WIOA is landmark legislation that reformed the public workforce system and increased access to services for people with disabilities seeking competitive integrated employment (CIE). The Workforce Innovation and Opportunity Act (WIOA) was signed into law on July 22, 2014. WIOA is a bipartisan effort to increase collaboration within the workforce development system and expand employment opportunities for people with disabilities. “The Workforce Innovation and Opportunity Act will provide access to the training, education, and employment services that all of America’s workers, including those with disabilities, need to prepare for and fill 21st-century jobs,” said Senator Harkin. “Giving workers the skills they need and employers the workforce they require are at the heart of this legislation.” Congress included a section on the Limitations on the Use of Subminimum-Wage Employment. This section, commonly referred to as “Section 511,” establishes certain protections for youth to address the pipeline of young people with significant disabilities from schools to segregated subminimum wage employment. Additionally, the WIOA requires that State agencies coordinate to ensure people of all ages working in subminimum wage employment have access to information about their options related to work and services that support employment in competitive integrated settings.

**In 2014, Senator Isakson noted, “Workforce training is critically important to help grow the American economy still recovering from recession and to bridge the widening skills gap separating thousands of unemployed workers from good-paying jobs.”**

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As the nation recovers from the 2020 economic recession in the wake of COVID-19, President Biden has put forth the Biden Plan for Full Participation and Equality for People with Disabilities. The Biden plan calls for, “amending our laws, policies, and culture to ensure full inclusion of the 61 million individuals with disabilities in the United States in all parts of our society.” The Biden plan “will prioritize enacting and implementing policies that break down the barriers to access for people with disabilities living and succeeding in their chosen communities, which means good jobs in competitive, integrated employment,” including phasing out 14(c) special wage certificates under the Fair Labor Standards Act that allow an employer to pay employees less than the federal minimum wage based on a discriminatory and outdated wage analysis.

Some parts of WIOA did not take effect until July 1, 2016. This report examines California’s implementation of the limitations on subminimum wage employment under WIOA over the first three program years (October 2016 – July 2019).

## **WIOA and Subminimum Wage Employment**

Subminimum wage employment is where a person with a disability is paid less than minimum wage based on their productivity relative to a person without a disability. According to the Department of Labor, approximately 10,400 people were working in subminimum wage employment in California between June 2018 and July 2019.

Under the Fair Labor Standards Act, both the employee and the employer must have a special wage certificate called a 14(c) certificate to legally earn or pay less than the minimum wage. This type of employment generally takes place in segregated settings. Very few, if any, subminimum wage jobs ever lead to work in the community or a living wage.

The WIOA mandates vocational rehabilitation programs only support employment outcomes that are in competitive integrated employment.<sup>8</sup> Under WIOA, competitive integrated employment is full or part-time work at minimum wage or higher with wages, benefits, and promotional opportunities similar to those without disabilities performing similar work. Competitive integrated employment must take place in fully integrated settings with co-workers without disabilities.<sup>9</sup>

WIOA also provides basic rights and protections for people working in, and youth at risk of, being referred to subminimum wage employment.<sup>10</sup>

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## **Protections for People Working in Subminimum Wage Employment**

WIOA limits the use of subminimum wage employment. Vocational rehabilitation programs are given the responsibility to ensure that people known to be working in subminimum wage employment have access to information about rights and options related to competitive integrated employment.<sup>11</sup> Career counseling, information, and referrals help people with disabilities make informed and independent choices about their opportunities for competitive integrated employment and may include benefits counseling.<sup>12</sup>

Under the WIOA, career counseling and information and referrals must be provided to known individuals working in subminimum wage employment and individuals being referred to subminimum wage employment at various intervals, and at least annually.<sup>13</sup>

Career counseling and information and referrals ensure information about competitive integrated employment is available to individuals who may not otherwise have access to it.

## **Protections for Youth**

Under WIOA, vocational rehabilitation programs are responsible to ensure protections for youth with disabilities, age 24 or younger, at risk of being referred to subminimum wage employment. Before being placed in subminimum wage employment, the youth must have the option to:

1. Receive “career counseling, and information and referrals from the designated State unit to Federal and State programs and other resources in the individual’s geographic area that offer employment-related services and supports designed to enable the individual to explore, discover, experience, and attain competitive integrated employment.”<sup>14</sup>
2. Participate in Pre-Employment Transition Services
3. Apply for Vocational Rehabilitation Services
4. If eligible, receive services through an Individualized Plan for Employment

Eligible youth should receive reasonable accommodations and appropriate supports and services, including supported employment services and customized employment services through an Individualized Plan for Employment (IPE). Only after a reasonable period of time, if the youth is unable to achieve the employment outcome in the IPE, may a 14(c)-employer hire and pay subminimum wages to a youth with a disability.<sup>15</sup>

# Findings

## Career Counseling and Information and Referral

We examined the effectiveness of career counseling and information and referral by analyzing the outcomes in California. However, we believe that many states may face similar challenges in creating a path to vocational rehabilitation services for people working in, or at risk of, subminimum wage employment to vocational rehabilitation services.

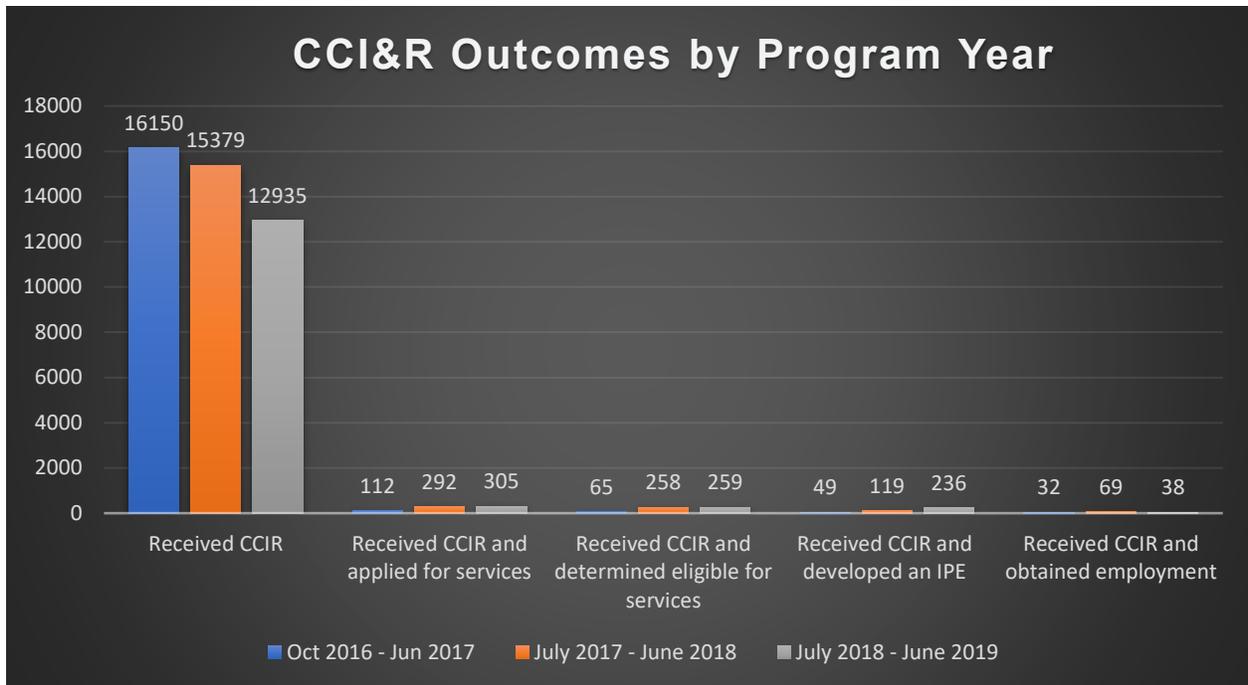
The Vocational Rehabilitation Program in California is the Department of Rehabilitation (DOR). The DOR established an Achieving Community Employment (ACE) Team to provide career counseling and information, and referral throughout the state. In California, these are referred to as Career Counseling Information and Referral (CCI&R). The ACE Team consists of counselors who provide CCI&R services within eight regions of the state.

The table below illustrates the number of individuals who received career counseling and information and referral services over each of the three program years.

<b>CCI&amp;R Outcomes by Program Year</b>			
<b>CCI&amp;R Outcome</b>	<b>Number of Individuals by Program Year</b>		
	<b>Oct 2016 - Jun 2017</b>	<b>July 2017 - June 2018</b>	<b>July 2018 - June 2019</b>
Received CCI&R	16150	15379	12935
Received CCI&R and applied for services	112	292	305
Received CCI&R and determined eligible for services	65	258	259
Received CCI&R and developed an IPE	49	119	236
Received CCI&R and obtained employment	32	69	38

The efforts by the DOR to provide career counseling and information and referral are commendable. The table on the previous page shows the outcomes of career counseling and information and referral based on the number of individuals who, after receiving career counseling and information and referral, applied for vocational rehabilitation services, those who were found eligible, those who developed an Individualized Plan for Employment and those who obtained employment.

Notice that though the number of individuals who received career counseling and information and referral services remains high over the three program years, the number of individuals for all other categories (applied for services, determined eligible, developed an IPE, and became employed in CIE), were all significantly lower in each of the three program years. The graph below further illustrates this data.



Despite the impressive number of career counseling and information and referral services provided, the number of individuals who participated in these services and obtained competitive integrated employment never rose over 0.4% over the three program years.

**Therefore, we must not evaluate career counseling and information and referral services by the number of individuals who received the services, but rather evaluate if the services are effective in helping individuals access competitive integrated employment.**

# Analysis

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## Individuals Who Received Career Counseling and Information and Referral

**B**ased on our findings, career counseling and information and referral is not effective in its current form and needs to be significantly redesigned in order to improve outcomes for people working in or at risk of subminimum wage employment. We believe robust, innovative, and proactive action is needed to enable the individuals to exercise informed choice regarding opportunities for competitive integrated employment, access local employment-related services and supports, and explore, discover, experience, and attain competitive integrated employment.

## Individuals Who Applied for Vocational Rehabilitation Services Following Career Counseling and Information and Referral

To learn more about potential barriers to competitive integrated employment for people working in or at risk of subminimum wage employment, for those individuals who applied for vocational rehabilitation services after receiving career counseling and information and referral, we analyzed the reasons cited for case closure. The table below shows a breakdown of the number of case closures by closure reason across the three program years.

CASE CLOSURES AFTER CCI&R		
Reason for Closure	Number of Case Closures	Percentage of Case Closures
Transferred to another agency <sup>16</sup>	46	15%
Refused Services or No Further Services <sup>17</sup>	95	32%
Disability too significant to benefit from VR <sup>18</sup>	20	7%
Does not require VR services <sup>19</sup>	49	16%
Extended Employment	2	1%
Extended Services not available, VR svcs provided <sup>20</sup>	7	2%
Failure to Cooperate <sup>21</sup>	11	4%
Health/medical <sup>22</sup>	3	1%
Ineligible (after a determination of eligibility) <sup>23</sup>	2	1%
Long term extended services not available, no svcs <sup>24</sup>	4	1%
Unable to locate or contact <sup>25</sup>	36	12%
Unknown	22	7%

Of those individuals who received career counseling and information and referral and applied for vocational rehabilitation services, very few were determined to have a disability too significant to benefit from vocational rehabilitation services. Across all program years, an average of only 7% of individuals were determined to be too significantly disabled to benefit from vocational rehabilitation services in terms of an employment outcome.

**Persons with disabilities should be encouraged by this information, as it indicates the majority of vocational rehabilitation program applicants, who work in or are at risk of subminimum wage employment, were found to be able to potentially benefit from vocational rehabilitation services to support their efforts toward competitive integrated employment.**

Additionally, less than a third (32%) of individuals who applied for services, declined services that would assist them in achieving competitive integrated employment. This suggests the majority of individuals who apply for vocational rehabilitation services desire to work in competitive integrated employment.

## Informed Decision Making and Access to Counseling Services

The WIOA makes a variety of options available for an individual to become known to the vocational rehabilitation program and receive career counseling and information and referrals. These include self-referral or referral through a third party other than an employer. We found several practices that may be impeding on individuals' choice to pursue services for competitive integrated employment.

- Access to career counseling and information and referral should not be contingent on an application for services or the referral of the employer holding a special wage certificate. Although the DOR recognizes this in policy, it does not appear to have developed a mechanism for an individual to request career counseling and information and referral when they want it. Rather, individuals are referred for career counseling and information and referral by a subminimum wage employer or have to apply for vocational rehabilitation services in order to self-identify. This practice appears to be in conflict with the WIOA.
- Only a small number of persons who receive career counseling and information and referral apply for services.

**We recommend that federal law require applications for vocational rehabilitation services be made available at the time of career counselling and information and referral services so that individuals may have the ability to apply for services if they choose to.**

- Further oversight of employer practices with regards to career counseling and information and referral may be necessary.

We compared the number of employees who received career counseling and information and referral in the 2019 program year with the number of individuals DOL reports are working in subminimum wage employment. We found 34 employers with a higher number of employees listed with DOL than the number that have received career counseling and information and referral. Based on our analysis, as many as 2,000 individuals working in subminimum wage employment did not receive career counseling and information and referral during the 2019 program year.

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A portion of this discrepancy may be attributed to employers listing more certificates than currently employed individuals due to varying staffing needs, including inaccurate projections of actual staff needed to perform the work, or holding certificates but discontinuing the payment of subminimum wage to their employees or a lag time in reporting. However, the distribution of employees may also indicate that not all people working in subminimum wage employment are being referred by their employers for career counseling and information and referral services.

Another concern related to employer referrals is that the form for which an individual may decline career counseling and information and referral (DOR 397B) is completed by the employer. As a result of our request for public records, the DOR provided us with 28 redacted DOR 397B forms for the three program years. The DOR notes that there is a low incidence of individuals declining to participate in career counseling and information and referral services. Of the 28 forms, 25 were not signed by a vocational rehabilitation program staff member indicating only the employer and employee were involved in the completion of the form.<sup>26</sup> In at least one employment setting, we found that for at least 12 employees, forms declining career counseling and information and referral had been completed and Xeroxed, presumably by the employer, prior to signature. These individuals had no other mechanism for accessing career counseling and information and referral if they actually wanted information about their rights and options related to competitive integrated employment.

# Conclusion

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We suspect that the challenges faced in California in creating meaningful pathways to competitive integrated employment for people with the most significant disabilities are not unique. Therefore, we urge federal leaders to conduct a similar review of other state's implementation of the limitations on sub-minimum wage employment under the WIOA.

**The Vocational Rehabilitation Program, made tremendous efforts to provide career counseling and information and referral to individuals working in subminimum wage employment and youth at-risk of subminimum wage employment, during the first three program years of the California's implementation of limitations on subminimum wage employment (2016-2017, 2017-2018 and 2018 - 2019). Unfortunately, the data indicates that these efforts alone will not result in any significant reduction of subminimum wage employment without further action.**

Across all program years, the number of individuals who received career counseling and information and referral services and then obtained employment never rose above 0.4%.

We urge federal leader's consideration of these recommendations:

- Redesign career counseling, and information and referral services to increase applications and employment outcomes for people working in or at risk of subminimum wage employment. This may include requiring states to make applications for vocational rehabilitation services available to individuals at the time of counseling and referral services.
- Develop or strengthen existing policy that applies the presumption of eligibility for vocational rehabilitation services to individuals who are known to be seeking subminimum wage employment.
- Develop a broader scope of services and supports to be provided under career counseling, and information and referral services. For example, providing the core services available in pre-employment transition services to individuals working in subminimum wage employment, regardless of age or application for services.

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- Increase data collection, analysis and monitor progress related to individuals who are known to be working in or seeking subminimum wage employment and apply for vocational rehabilitation services, participate in an Individual Plan for Employment, and/or have a case closure with the State Vocational Rehabilitation program.

We welcome collaboration in the development of a strategic plan for monitoring and improving outcomes for people with disabilities working in or at risk of subminimum wage employment. We encourage the United States Senate HELP Committee and the United States House Education and Workforce Committee to do oversight hearings to explore the impact of Section 511 and the federal limitations on the use of subminimum wage employment.

# Footnotes

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1. See 34 C.F.R. § 397 et. seq. The Workforce Innovation and Opportunity Act (WIOA) increases access to services for people with disabilities seeking competitive integrated employment (CIE). WIOA also provides basic rights and protections for people working in, and youth at risk of, being referred to subminimum wage employment. These are commonly referred to as “Section 511 Protections” and took effect on July 1, 2016.
2. See 34 C.F.R. § 397 et. seq.
3. October 2016 – July 2019.
4. See 34 C.F.R. §§ 397.20(a)(3) and 397.40(a)
5. Documentation process required by the designated State unit for youth with disabilities (34 C.F.R. § 397.10) and documentation process required by the designated State unit for youth with disabilities for individuals with disabilities, regardless of age, who are employed at a subminimum wage (34 C.F.R. § 397.40(d))
6. 2017 WIOA Annual Report; 2014, 2015, 2016 RSA 911 Case Closure Report
7. Community Rehabilitation Programs (CRPs) List, <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificateholders/county-rehabilitation-programs>
8. 34 C.F.R. § 361.1(b)
9. 34 C.F.R. § 361.5(c)(9)
10. 34 C.F.R. § 367 et. seq.
11. 34 C.F.R. §§ 397.20(a)(3) and 397.40(a); The Vocational Rehabilitation Program may contract to provide career counseling and information and referral so long as the provider is not the entity holding a special wage certificate under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) as defined in 397.5(d). (34 C.F.R. §397.40(e)).
12. 34 C.F.R. §§ 397.20(a)(3)(ii)(C) and 397.40(a)(3)
13. 34 C.F.R. §§ 397.20(a)(3) and 397.40
14. 34 C.F.R. §§ 397.20(a)(3)
15. 34 C.F.R. §397.20(b)(3)
16. 9 C.C.R. § 7179.3(a)(5)
17. 9 C.C.R. §§ 7179(a)(1) and 7179.3(a)(1)
18. 9 C.C.R. § 7179.1(c)(1)
19. 9 C.C.R. § 7179.1(c)(4)
20. 9 C.C.R. § 7179.3(a)(8)
21. 9 C.C.R. § 7179.3(a)(6)
22. 9 C.C.R. § 7179.3(a)(3)
23. 9 C.C.R. § 7179.1(a)
24. 9 C.C.R. § 7179.3(a)(8)
25. 9 C.C.R. §§ 7179(a)(2) and 7179.3(a)(2)
26. 34 C.F.R. § 397.40(d)(2)(vii) requires the vocational rehabilitation program to sign the form declining career counseling and information and referral



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