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## **Policy & Practice Brief #1**

# **State and Federal Vocational Rehabilitation Programs**

Services and Supports to assist individuals with disabilities in preparing for, attaching to, and advancing in employment.

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This is one of a series of articles written for benefits specialists employed by Benefits Planning, Assistance and Outreach projects and attorneys and advocates employed by Protection and Advocacy for Beneficiaries of Social Security programs. Materials contained within this policy brief have been reviewed for accuracy by the Social Security Administration (SSA), Office of Employment Support Programs. However, the thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the SSA. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency with implementation and/or administrative responsibilities.

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## I. Introduction

The services available through each state's vocational rehabilitation (VR) system can play a critical role in assisting people with disabilities to enter the work force. Since virtually every recipient of Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) is eligible for VR services, it is very important for Benefits Specialists and others working with people with disabilities to be aware of how the VR system operates.

In addition, the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA) gives an SSDI or SSI recipient the option of obtaining a "ticket" for VR services directly from service providers, known as "employment networks." Understanding this law will ensure that individuals planning to return to work are fully aware of the assistance available to them.

This article will review the services available from the state VR system and the appeal options available to challenge a denial of VR services. A separate policy and practice brief highlights the ticket provisions of TWWIIA.<sup>1</sup>

### A. VR Services

Pursuant to Title I of the Rehabilitation Act, states are given money to provide VR services to persons with disabilities.<sup>2</sup> The Rehabilitation Services Administration (RSA), within the U.S. Department of Education, is the federal agency holding the responsibility for administration and oversight of the state VR programs. Every state has a state VR agency to serve individuals with disabilities. Some states will have a second state VR agency that serves only individuals who are legally blind.

VR agencies can fund a wide range of goods and services that are connected to a person's vocational goal. Congress has stated that VR services are designed to empower individuals to maximize employability, economic self-sufficiency, independence and integration into the work place and the community through "comprehensive and coordinated state-of-the-art programs."<sup>3</sup>

### B. Workforce Investment Act

The Workforce Investment Act of 1998 (WIA),<sup>4</sup> included the Rehabilitation Act Amendments of 1998 (Rehab'98), reauthorizing the Rehabilitation Act through 2003. To implement Rehab'98, proposed regulations were published on February 28, 2000.<sup>5</sup> Final regulations were published on January 17, 2001.<sup>6</sup> (This article will make reference to comments from both the proposed and final regulations.<sup>7</sup>)

The WIA is a major federal effort to incorporate a myriad of federal job training programs into a coordinated, comprehensive system. The WIA has been implemented through the creation of state "One-Stop" service delivery systems. The intent is to eliminate the old system where individuals or employers had to seek information and services from a variety of sources which was "often costly, discouraging and confusing." States and communities must coordinate programs and resources at the "street level" through "user-friendly" One-Stops.<sup>8</sup>

<sup>1</sup> The Ticket to Work and Self Sufficiency Program, [www.ilr.cornell.edu/edi/publications/PPBriefs/PP\\_6.pdf](http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_6.pdf) and [www.ilr.cornell.edu/edi/publications/PPBriefs/PP\\_6.txt](http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_6.txt).

<sup>2</sup> 29 U.S.C. §§ 701 *et seq.*; 34 C.F.R. Part 361.

<sup>3</sup> 29 U.S.C. § 701(b)(1) (emphasis added).

<sup>4</sup> P.L. 105-220, 112 Stat. 936.

<sup>5</sup> 65 Fed. Reg. 10620.

<sup>6</sup> 66 Fed. Reg. 4380. Additional final regulations were published on January 22, 2001 concerning appropriate employment outcomes for VR consumers. 66 Fed. Reg. 7250.

<sup>7</sup> Although only the final regulations are officially binding, the comments in the proposed regulations are helpful to understand how the agency interprets the law, particularly where there has been no change between the proposed and final regulations.

<sup>8</sup> 65 Fed. Reg. 10620.

States are required to develop both state-wide and local plans and to include the VR system in that planning process. The vocational training opportunities of the state workforce investment system are clearly intended to be available to individuals with disabilities.<sup>9</sup> Moreover, the state VR agency must enter into cooperative agreements with other One-Stop partners and “work toward increasing the capacity of those partners, and the One-Stop system as a whole, to better address the needs of individuals with disabilities.”<sup>10</sup>

## II. Eligibility for Vocational Rehabilitation Services

To receive services, an individual must be disabled and require VR services “to prepare for, secure, retain or regain employment.”<sup>11</sup> Therefore, any service an individual is to receive from the VR system must be connected to an ultimate employment goal. Employment outcomes include full- or part-time competitive employment to the greatest extent practicable, supported employment or other employment consistent with the individual’s strengths, abilities, interests and informed choice, as well as self-employment, telecommuting and business ownership.<sup>12</sup>

Persons must show a mental, physical or learning disability that interferes with the ability to work. The disability need not be so severe as to qualify the person for SSDI or SSI benefits. The disability must only be a substantial impediment to employment.<sup>13</sup> Recipients of SSDI or SSI are presumed to be eligible for VR services, as individuals with a significant disability, provided they intend to achieve an employment outcome.<sup>14</sup> The regulations allow VR agencies to make interim eligibility decisions and provide interim services pending a final decision for individuals they reasonably believe will be eligible.<sup>15</sup> The comments to the proposed regulations note that these interim services may be used for SSI or SSDI recipients while the VR system is waiting for documentation from the Social Security Administration (SSA).<sup>16</sup>

Although VR services may be denied if a person cannot benefit from them, a person is presumed capable of employment, despite the severity of a disability, unless the VR agency shows by “clear and convincing” evidence that he or she cannot benefit.<sup>17</sup> The clear and convincing standard means that a state VR program must have a “high degree of certainty before it can conclude that an individual is incapable of benefiting.”<sup>18</sup> Prior to determining whether a person is incapable of benefiting from VR services because of the severity of the disability, the VR agency must explore the individual’s work potential through a variety of trial work experiences, with appropriate supports. These trial work experiences must “be of sufficient variety and over a sufficient period of time to determine” whether the individual is eligible.<sup>19</sup>

If a state does not have the resources to provide VR services to all eligible individuals who apply, it must specify in its VR Plan the order to be followed in selecting those individuals who will receive services. This is called the “Order of Selection.”<sup>20</sup> It must also provide justification for the Order of Selection it establishes. However, the State must ensure that individuals with the most significant disabilities are selected first to receive VR services.<sup>21</sup>

<sup>9</sup> See 29 U.S.C.

§ 701(b)(1)(A).

<sup>10</sup> 65 Fed. Reg. 10624.

<sup>11</sup> 29 U.S.C. § 722(a)(1).

<sup>12</sup> 34 C.F.R. § 361.5(b)(16).

<sup>13</sup> 29 U.S.C. § 705(20)(A).

<sup>14</sup> *Id.* § 722(a)(3).

<sup>15</sup> 34 C.F.R. § 361.42(b).

<sup>16</sup> 65 Fed. Reg. 10626.

<sup>17</sup> 29 U.S.C. § 722(a)(2); 34

C.F.R. § 361.42(a)(2).

<sup>18</sup> 34 C.F.R. § 361.42(a)(2),

Note.

<sup>19</sup> 29 U.S.C. § 722(a)(2)(B).

<sup>20</sup> There is a policy and practice brief devoted to the topic of Orders of Selection. *Orders of Selection for Vocational Rehabilitation Services*, [www.ilr.cornell.edu/edi/publications/PPBriefs/PP\\_23.pdf](http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_23.pdf) and [www.ilr.cornell.edu/edi/publications/PPBriefs/PP\\_23.txt](http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_23.txt).

<sup>21</sup> *Id.* § 721(a)(5).

The following factors may not be used in establishing an Order of Selection: (1) any duration of residency requirement; (2) type of disability; (3) age, gender, race, color, or national origin; (4) source of referral; (5) type of expected employment outcome; (6) need for specific services or anticipated cost of services; (7) individual or family income.<sup>22</sup> If a state goes to an Order of Selection, it must continue to provide all necessary services to anyone who started receiving services prior to the effective date, regardless of the severity of the individual’s disability.<sup>23</sup> Those who are not served are entitled to an appropriate referral to other state and federal programs, including other providers within the state workforce investment system.<sup>24</sup>

With limited exceptions, the VR agency must determine eligibility within a reasonable period of time, not to exceed 60 days, after the individual submits an application.<sup>25</sup> Information used to determine eligibility includes: (1) existing data, such as medical reports, SSA records and education records; and (2) to the extent existing data is insufficient to determine eligibility, an assessment done by, or obtained by, the VR agency.<sup>26</sup>

### III. The Individualized Plan for Employment

After eligibility is established, the next step is to develop a written Individualized Plan for Employment (IPE), listing the employment goal and the specific services to be provided to assist the individual to reach that goal. The plan is to be set forth on a form provided by the VR agency.<sup>27</sup>

Prior to developing the IPE there must be a comprehensive assessment, to the extent necessary to determine the employment outcome, objectives, and nature and scope of VR services. The assessment evaluates the unique strengths, resources, priorities, abilities and interests of the individual and can cover educational, psychological, psychiatric, vocational, personal, social and medical factors which affect the needs of the individual.<sup>28</sup> It may also include a referral for the provision of rehabilitation technology services, “to assess and develop the capacities of the individual to perform in a work environment.”<sup>29</sup>

#### A. Informed Choice

The VR system must ensure that all activities are implemented consistent with the principles of “respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities.”<sup>30</sup> VR agencies must assist individuals in their exercise of informed choice throughout the VR process, including the assessment, selection of an employment outcome, the specific VR services to be provided, the entity which will provide the services, the method for procuring services and the setting in which the services will be provided.<sup>31</sup> The VR agency must approve the IPE, but the individual decides the level of involvement, if any, of the VR counselor in developing the IPE.<sup>32</sup> In fact, consumers can develop the IPE by themselves or with the assistance of others outside of the state VR program.<sup>33</sup> The reason for such an expanded role for the consumer was Congress’ belief “that a consumer-driven program is most effective in getting people jobs.”<sup>34</sup>

<sup>22</sup> 34 C.F.R. § 361.36(d)(2).

<sup>23</sup> *Id.* § 361.36(e)(3).

<sup>24</sup> 29 U.S.C. §§ 721(a)(5)(D) and 721(a)(20).

<sup>25</sup> *Id.* § 722(a)(6).

<sup>26</sup> *Id.* § 722(a)(4)(C).

<sup>27</sup> *Id.* § 722(b)(2)(A).

<sup>28</sup> *Id.* § 705(2)(B).

<sup>29</sup> *Id.* § 705(2)(C).

<sup>30</sup> *Id.* § 701(c)(1)(emphasis added).

<sup>31</sup> *Id.* §§ 720(a)(3)(C) and 722(d)(1)-(5).

<sup>32</sup> *Id.* §§ 722(b)(1)(A) and 722(b)(2)(C).

<sup>33</sup> 34 C.F.R. § 361.45(c)(1)(ii)(B) & (C).

<sup>34</sup> 144 Cong. Rec. H6604-01 (July 29, 1998).

## B. Developing the Individualized Plan for Employment

All services to meet the employment goal must be specified on the IPE. The IEP must include:

1. The specific employment outcome, chosen by the individual, consistent with the individual's unique strengths, concerns, abilities and interests;
2. The specific VR services to be provided, in the most integrated setting appropriate to achieve the employment outcome, including assistive technology (AT) and personal assistance services, as appropriate;
3. The timeline for starting services and achieving the employment outcome;
4. The specific entity, chosen by the individual, to provide the VR services and the method chosen to procure those services;
5. The criteria for evaluating progress;
6. The responsibilities of the VR agency, the individual (to obtain comparable benefits) and any other agencies (to provide comparable benefits);
7. In states that have a financial needs test (see below), any costs for which the individual will be responsible;
8. For individuals with the most significant disabilities who are expected to need supported employment, the extended services to be provided; and
9. The projected need for post-employment services, if necessary.<sup>35</sup>

The IPE must be reviewed at least annually and, if necessary, amended if there are changes in the employment outcome, the VR services to be provided or the service providers. Any changes will not take effect until agreed to by the individual and the VR counselor.<sup>36</sup>

## C. Closing the Record of Services

The regulations also specify the conditions which must be met before the VR agency can close a case for an individual who has achieved an employment outcome.<sup>37</sup> To close a record of services, the individual must achieve the employment objective listed in the IPE and maintain the outcome for no less than 90 days. Also, the individual and VR counselor must agree that the employment outcome is satisfactory and that the individual is "performing well." The VR agency must also notify the individual that post-employment services may be available even after the record is closed.

<sup>35</sup> 29 U.S.C. § 722(b)(3).

<sup>36</sup> *Id.* § 722(b)(2)(E).

<sup>37</sup> 34 C.F.R. § 361.56.

## IV. Available Services

### A. Required Services

VR services are any services, described in an IPE, necessary to assist an individual with a disability in “preparing for, securing, retaining, or regaining an employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual.”<sup>38</sup> The VR agency is to ensure that all necessary services to equip the individual for employment are provided. It cannot choose to provide only some services to eligible individuals to save costs. In fact, the comments to the 2001 regulations state explicitly that the “severity of an individual’s disability or the cost of services can have no bearing on the scope of services the individual receives.”<sup>39</sup> As noted above, if there are insufficient resources to fully meet the needs of all individuals in the state, it must go to an Order of Selection. Even if a state goes to an Order of Selection, the state must serve each individual who is in a category that is eligible to be served and it must provide all needed services to each individual it serves.

The services available from the VR system are incredibly broad and varied. Services must include, but are not limited to, the following:

1. The assessment to determine eligibility and needs, including, if appropriate, by someone skilled in rehabilitation technology (i.e., AT).
2. Counseling, guidance and job placement services and, if appropriate, referrals to the services of WIA providers.
3. Vocational and other training, including higher education and the purchase of tools, materials and books.
4. Diagnosis and treatment of physical or mental impairments to reduce or eliminate impediments to employment, to the extent financial support is not available from other sources, including health insurance or other comparable benefits. This may include:
  - a) corrective surgery;
  - b) therapeutic treatment;
  - c) necessary hospitalization;
  - d) prosthetic and orthotic devices;
  - e) eyeglasses and visual services;
  - f) services for individuals with end-stage renal disease, including dialysis, transplants, artificial kidneys; and
  - g) diagnosis and treatment for mental or emotional disorders.
5. Maintenance for additional costs incurred during rehabilitation.

<sup>38</sup> 29 U.S.C. § 723(a).

<sup>39</sup> 66 Fed. Reg. 4426.

6. “Transportation, including adequate training in the use of public transportation vehicles and systems, that is provided in connection with the provision of any other service described in this section and needed by the individual to achieve an employment outcome (emphasis added).” Transportation may include vehicle purchase. Under the regulations, transportation is defined as “travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a [VR] service.”<sup>40</sup> A note, following the regulation, specifically states that “[t]he purchase and repair of vehicles, including vans” is an example of an expense that would meet the definition of transportation.<sup>41</sup>
7. Personal assistance services while receiving VR services.
8. Interpreter services for individuals who are deaf, readers, rehabilitation teaching and orientation and mobility services for individuals who are blind.
9. Occupational licenses, tools, equipment, initial stocks and supplies.
10. Technical assistance for those who are pursuing telecommuting, self-employment or small business operation.
11. Rehabilitation technology (i.e., AT), including vehicular modification, telecommunications, sensory, and other technological aids and devices.
12. Transition services for students with disabilities to facilitate the achievement of the employment outcome identified in the IPE.
13. Supported employment.
14. Services to the family to assist an individual with a disability to achieve an employment outcome.
15. Other goods and services determined necessary to enable the individual with a disability to achieve an employment outcome.
16. Post-employment services necessary to assist an individual to retain, regain or advance in employment.<sup>42</sup>

<sup>40</sup> 34 C.F.R. § 361.5(b)(57).

<sup>41</sup> *Id.* § 361.5(b)(57)(i), Ex.2.

<sup>42</sup> 29 U.S.C. § 723(a)(emphasis added); 34 C.F.R. § 361.48.

<sup>43</sup> 34 C.F.R. § 361.50(a).

<sup>44</sup> *Id.* § 361.50(d).

<sup>45</sup> *Id.* § 361.50(c).

<sup>46</sup> *Id.* § 361.50(e).

States must develop policies concerning the provision of VR services. These policies must ensure that services are provided based on individual needs. They may not place “any arbitrary limits on the nature and scope of” VR services to be provided to achieve an employment outcome.<sup>43</sup> The state may establish reasonable time periods for the provision of services, but it must not be so short as to effectively deny a service and it must “permit exceptions so that individual needs can be addressed.”<sup>44</sup> Similarly, the state’s policies on the rates of payment for services must not be so low as to effectively deny an individual a necessary service and may not be absolute.<sup>45</sup> Finally, the policies must include provisions for the timely authorization of services, “including any conditions under which verbal authorization can be given.”<sup>46</sup>

## B. Post-Employment Services

Provided after the person has achieved an employment outcome, post-employment services are necessary for the individual “to maintain, regain or advance in employment.”<sup>47</sup> A note to the regulation indicates some possible circumstances in which post-employment services may be appropriate:

Post-employment services are available to assist an individual to maintain employment, e.g., the individual’s employment is jeopardized because of conflicts with supervisors or co-workers, and the individual needs mental health services and counseling to maintain the employment; to regain employment, e.g., the individual’s job is eliminated through reorganization and new placement services are needed; and to advance in employment, e.g., the employment is no longer consistent with the individual’s strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.<sup>48</sup>

Each IPE must indicate the expected need for post-employment services.<sup>49</sup> Prior to closing a case, the individual must be informed of the availability of post-employment services.<sup>50</sup> Post-employment services are not intended to be complex or comprehensive and should be limited in scope and duration. If more comprehensive services are required, a new rehabilitation effort should be considered.<sup>51</sup>

## C. Out-of-State Services

A state cannot establish policies which “effectively prohibit the provision of out-of-state services.”<sup>52</sup> However, a state “may establish a preference for in-state services,” as long as there are exceptions to ensure that an individual is not denied a necessary service.<sup>53</sup> Therefore, if there is no program within the state that will enable the individual to meet the employment goal, the state must have a process to fully fund the out-of-state program (subject to any financial need criteria the state may have established).

On the other hand, if the out-of-state program costs more than an in-state service, and either service would meet the individual’s rehabilitation needs, the VR system is not responsible for costs in excess of the cost of the in-state service. The individual must still be able to choose an out-of-state service, and the VR system would be responsible for the costs of the out-of-state program, up to the cost of the in-state program.<sup>54</sup>

<sup>47</sup> *Id.* § 361.5(b)(42) (emphasis added).  
<sup>48</sup> *Id.*, Note (emphasis added).  
<sup>49</sup> *Id.* § 361.46(c).  
<sup>50</sup> *Id.* § 361.56(d).  
<sup>51</sup> *Id.* § 361.5(b)(42), Note.  
<sup>52</sup> *Id.* § 361.50(b)(2).  
<sup>53</sup> *Id.* § 361.50(b)(1).  
<sup>54</sup> *Id.*  
<sup>55</sup> *Id.* § 361.54(a).  
<sup>56</sup> *Id.* § 361.54(b)(2)(i).

## V. Financial Need Criteria

There is no requirement for a state to consider financial need when providing VR services.<sup>55</sup> However, if a state VR agency chooses to establish a financial needs test, it must establish written policies which govern the determination of financial need and which identify the specific VR services that will be subject to the financial needs test.<sup>56</sup>

Any financial needs test must take into account the individual's disability-related expenses.<sup>57</sup> The level of the individual's participation must not be so high as to "effectively deny the individual a necessary service."<sup>58</sup> The following services must be provided without regard to financial need: (1) diagnostic services; (2) counseling, guidance and referral services; (3) job placement; and (4) personal assistance services.<sup>59</sup> The regulations add "any auxiliary aid or service," such as interpreter or reader services, that the individual needs to participate in the VR program and which would be mandated under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act, to the list of services that are exempt from the financial needs test.<sup>60</sup> Also, SSI and SSDI recipients are totally exempt from any financial needs test.<sup>61</sup>

## VI. Maximization of Employment

### A. Statutory Requirements

The requirement that VR services are to maximize the employment of VR consumers was first added by 1986 amendments. The legislative history emphasized Congressional intent:

[T]he overall purpose of the Act is to develop and implement comprehensive and coordinated programs of rehabilitation for handicapped individuals which will maximize their employability, independence and integration into the work place and the community. The Committee views [the Act] as a comprehensive set of programs designed to meet the broad range of needs of individuals with handicaps in becoming integrated into the community and in reaching their highest level of achievement.<sup>62</sup>

As currently stated, the purpose of the Rehabilitation Act is to:

[E]mpower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through... comprehensive and coordinated state-of-the-art programs of [VR].<sup>63</sup>

This language was added in 1992. Arguably, it strengthens the standard first set out in 1986, as it requires the VR agency to maximize an individual's economic self-sufficiency. Presumably, this means that if an individual has the requisite ability, and has the option of either obtaining a bachelor's degree and becoming a paralegal or going to law school to become an attorney, the VR system should approve the goal of becoming an attorney, because the attorney position would more likely "maximize economic self-sufficiency."

### B. Rehabilitation Services Administration Policy Directive

Consistent with the increased statutory obligations placed on VR agencies, on August 19, 1997, the RSA issued a Policy Directive, RSA-PD-97-04.<sup>64</sup> It requires VR agencies to approve vocational goals and services to enable persons with disabilities to maximize their employment potential. It represents a dramatic shift in RSA policy. RSA's change is best expressed in the following quote from the Policy Directive:

<sup>57</sup> *Id.* § 361.54(b)(2)(iv)(B).

<sup>58</sup> *Id.* § 362.54(b)(2)(iv)(C).

<sup>59</sup> *Id.* § 361.54(b)(3)(i).

<sup>60</sup> *Id.* § 361.54(b)(3)(i)(G).

<sup>61</sup> *Id.* § 361.54(b)(3)(ii).

<sup>62</sup> S. Rep. No. 388, 99th Cong., 2d Sess. 5 (1986) (emphasis added), as quoted in *Palkabla v. Commission for the Blind*, 183 A.D.2d 575, 576, 583 N.Y.S.2d 464, 465 (N.Y. App. Div. 1st Dept. 1992).

<sup>63</sup> 29 U.S.C. § 701(b)(1)(A) (emphasis added).

<sup>64</sup> [www.ed.gov/offices/OSERS/RSA/guidance/PD-97-04.pdf](http://www.ed.gov/offices/OSERS/RSA/guidance/PD-97-04.pdf) and [www.ed.gov/offices/OSERS/RSA/guidance/PD-97-04.doc](http://www.ed.gov/offices/OSERS/RSA/guidance/PD-97-04.doc).

The guidance provided through this Policy Directive is intended to correct the misperception that achievement of an employment goal under Title I of the Act can be equated with becoming employed at any job. As indicated above, the State VR Services program is not intended solely to place individuals with disabilities in entry-level jobs, but rather to assist eligible individuals to obtain employment that is appropriate given their unique strengths, resources, priorities, concerns, abilities, and capabilities. The extent to which State units should assist eligible individuals to advance in their careers through the provision of VR services depends upon whether the individual has achieved employment that is consistent with this standard (emphasis added).

This directive clarifies that the cost or extent of VR services an individual may require to achieve a particular employment goal should not be considered in identifying the goal in the IPE. The directive also clarifies that a person who is currently employed will, in appropriate cases, be eligible for VR services to allow for “career advancement” or “upward mobility.”

It emphasizes that the VR agency must still determine whether the individual’s career choice is consistent with his or her vocational aptitude. In an effort to meet the maximization of employment requirements, however, VR agencies are encouraged to make these determinations through a comprehensive assessment (such as a trial placement in a real work setting) or by establishing short-term objectives in the IPE (such as a trial semester in college).

The comments to the regulations reaffirm this policy directive. They note that states must “look beyond options in entry-level employment for VR program participants who are capable of more challenging work.” Additionally, “individuals with disabilities who are currently employed should be able to receive services to advance in their careers.”<sup>65</sup>

<sup>65</sup> 66 Fed. Reg. 4419.  
<sup>66</sup> 29 U.S.C. § 721(a)(8).

## VII. Comparable Services Requirements

### A. Basic Requirements

VR agencies are considered the payer of last resort for many services. This means they will not pay for a service if a similar or comparable benefit is available through another provider.<sup>66</sup> For example, if an applicant qualifies for personal assistance services through Medicaid, the VR agency will not provide them. But, the VR agency cannot deny payment for college tuition because an individual could obtain student loans. Loans, which must be repaid, are not similar benefits.<sup>67</sup> Comparable benefits do not include awards and scholarships based on merit.<sup>68</sup> The comments to the regulations also make it clear that a Plan for Achieving Self-Support (PASS) is not a comparable benefit.<sup>69</sup> This is particularly noteworthy because there had been a question in some states about whether or not a PASS would be considered a comparable benefit. On the other hand, the comments note that services an individual receives from a “ticket” under TWWIIA would be a comparable benefit.<sup>70</sup>

<sup>67</sup> RSA-PD-92-02 (11/21/91), [www.ed.gov/policy/speced/guid/rsa/pd-02.pdf](http://www.ed.gov/policy/speced/guid/rsa/pd-02.pdf); [www.ed.gov/offices/OSERS/RSA/guidance/PD-92-02.doc](http://www.ed.gov/offices/OSERS/RSA/guidance/PD-92-02.doc).

<sup>68</sup> 29 U.S.C. § 721(a)(8)(A)(ii).

<sup>69</sup> 66 Fed. Reg. 4419. The PASS is an SSI work incentive in which the SSI recipient may, in exchange for a higher SSI check, use their own income or resources to support their vocational goal.

A person does not have to exhaust similar benefits in the following circumstances:

1. If consideration of the similar benefit would interrupt or delay:
  - a) Progress toward achieving the employment outcome;
  - b) An immediate job placement; or
  - c) Services to an individual at extreme medical risk; or
2. If diagnostic services, VR counseling, referral to other services, job placement or rehabilitation technology (i.e., AT) is involved.<sup>71</sup>

What if a potential funding source, such as Medicaid, is refusing to pay for an augmentative communication device (ACD), which is needed for the person to meet the employment objective and the person cannot proceed while waiting for the device? States must develop a comprehensive plan involving all of the public agencies providing what could be considered VR services, including the states' Medicaid agency, public colleges and the workforce investment system, to identify who will be responsible for providing what services.<sup>72</sup> The plan must ensure the coordination and timely delivery of services. All public agencies in the state remain responsible for providing services mandated by other state laws or policy, or federal laws.

The IPE must list all services to be provided to meet the employment goal, whether or not they are the responsibility of the VR agency. It must identify the services the VR agency is responsible for providing, any comparable benefits the individual is responsible for applying for or securing, and the responsibilities of any agencies to provide comparable benefits.<sup>73</sup> If another agency refuses to fulfill its obligations, the VR agency must provide the services, but may seek reimbursement from that agency.<sup>74</sup> Therefore, if another agency is refusing to provide a service that is within its area of responsibility, the individual does not have to wait until that dispute is resolved before obtaining the service.<sup>75</sup>

## B. Defaulted Student Loans<sup>76</sup>

Many individuals with disabilities may have attempted college either before or after they became disabled. If previous college attempts were unsuccessful, the student may have defaulted on student loans. When the loans are secured by the federal government, the individual will not be eligible for further financial assistance, such as grants, for college until the prior loans are no longer in default. What if the individual now seeks to return to college, with VR agency support, and does not have the financial ability to get the loan out of default? Must the VR agency consider, as a comparable benefit, the value of any grants for which the individual would have been eligible, and reduce its support to the individual by that amount?

### I. Effect of Defaulted Student Loans on VR Funding for College

VR agencies may fund higher education, if it is needed to meet an employment goal. However, the VR agency cannot use Title I funds “unless maximum efforts have been made. . . to secure grant assistance in whole or in part from other sources to pay for that” higher

<sup>70</sup> 66 Fed. Reg. 4418.

<sup>71</sup> 29 U.S.C.

§ 721(a)(8)(A)(i); 34 C.F.R. § 361.53(a) and (b).

<sup>72</sup> 29 U.S.C.

§ 721(a)(8)(B).

<sup>73</sup> *Id.* § 722(b)(3)(E).

<sup>74</sup> *Id.* § 721(a)(8)(C)(ii).

<sup>75</sup> See 34 C.F.R.

§ 361.53(c).

<sup>76</sup> There is a policy and practice brief devoted to this topic: *Effect of Defaulted Student Loans on Return to Work Efforts*, [www.ilr.cornell.edu/edi/publications/PPBriefs/PP\\_7.pdf](http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_7.pdf) and [www.ilr.cornell.edu/edi/publications/PPBriefs/PP\\_7.txt](http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_7.txt).

education.<sup>77</sup> The RSA has issued a Policy Directive to reconcile the requirement to use “maximum efforts” to secure outside grant assistance and the problem for individuals with defaulted student loans, where that assistance is unavailable.<sup>78</sup>

RSA’s policy provides that if an individual with the financial means to do so fails to repay a loan, the VR agency may determine that the financial assistance for which the student is ineligible is, in any event, “available.” Accordingly, the VR agency would deduct from the amount of assistance it will provide the value of the grants for which the student would have been eligible. But, when a student with limited financial means cannot make repayment arrangements with the lender, the VR agency may conclude that “maximum efforts” have been made and full VR assistance would be appropriate. When confronted with this question, VR counselors must make individualized determinations, based on all of the circumstances.<sup>79</sup>

## 2. Repayment of Defaulted Student Loans

The law also makes it relatively easy to develop a repayment plan which will take the loan out of default. Each guaranty agency under the federal student loan program must allow a borrower with defaulted loans to renew eligibility for all federal financial assistance. The borrower must make six consecutive monthly payments for the loan to be taken out of default. The guaranty agency cannot demand from a borrower a monthly payment amount that is “more than is reasonable and affordable based upon the borrower’s total financial circumstances.” A borrower may only use this provision once.<sup>80</sup>

The payments must be voluntary and on-time. “On-time” means payments are made within 15 days of the scheduled due date. “Voluntary payments” do not include payments obtained by income tax offset, garnishment, or income or asset execution.”<sup>81</sup>

## VIII. Hearing and Appeal Rights

Anyone who is dissatisfied with a decision by the VR agency has a right to appeal. Each state must establish procedures governing appeals, which must include the right to mediation and an administrative hearing before an impartial hearing officer.<sup>82</sup> The VR agency must notify individuals, in writing, of their right to mediation, an impartial hearing and the availability of the Client Assistance Program (CAP) at the following times: at the application; when the IPE is developed; and upon the reduction, suspension or cessation of VR services.<sup>83</sup>

There is a CAP office in every state.<sup>84</sup> CAP provides information to individuals concerning their rights in the VR process and provides advocacy services in resolving disputes, including representation at impartial hearings. Individuals who do not understand the proposed IPE, have questions about their VR rights, or who receive an adverse decision from the VR agency, should consider contacting the appropriate CAP office for assistance.

<sup>77</sup> 29 U.S.C. § 723(a)(3); 34 C.F.R. § 361.48(f).  
<sup>78</sup> RSA-PD-92-02 (11/21/91). [www.ed.gov/policy/speced/guid/rsa/pd-92-02.pdf](http://www.ed.gov/policy/speced/guid/rsa/pd-92-02.pdf); [www.ed.gov/offices/OSERS/RSA/guidance/PD-92-02.doc](http://www.ed.gov/offices/OSERS/RSA/guidance/PD-92-02.doc).  
<sup>79</sup> *Id.*  
<sup>80</sup> 20 U.S.C. § 1078-6(b)(emphasis added).  
<sup>71</sup> 34 C.F.R. § 685.102(b).  
<sup>82</sup> 29 U.S.C. § 722(c)(1).  
<sup>83</sup> *Id.* § 722(c)(2)(A).  
<sup>84</sup> See *Id.* § 732(a).

Mediation is available to resolve disputes between consumers and the VR agency. It must be offered to resolve disputes, at a minimum, whenever an impartial hearing is requested. However, in each case, participation must be voluntary for both the individual and the state. In addition, involvement in mediation cannot be used to deny or delay the right to an impartial hearing. The state bears the costs of mediation. All discussions that occur during mediation are confidential and cannot be used at any subsequent hearing.<sup>85</sup>

At an impartial hearing, the individual has the right to be represented by an attorney or other advocate. The individual can present evidence and cross examine witnesses.<sup>86</sup> The hearing decision is final and must be implemented, unless appealed.<sup>87</sup>

A state may establish a procedure for a second level of administrative review. The review officer must be the chief official of the designated VR agency or an official from the Governor's office. If the state establishes a second level of review, either party may appeal within 20 days of the hearing decision. The review officer cannot overturn a hearing decision unless, based on clear and convincing evidence, the decision is "clearly erroneous" based on an approved VR Plan, federal law, or state law or policy that is consistent with federal law.<sup>88</sup>

Either party may appeal a final administrative decision to state or federal court.<sup>89</sup> However, pending review in court, the final administrative decision shall be implemented.<sup>90</sup>

## IX. Conclusion

The VR system can be a crucial resource for people with disabilities who are planning to enter the workforce. The VR system provides a very comprehensive set of services to prepare people for work. Over the years, Congress and the federal RSA have strengthened the mandate of VR agencies to provide a range of services to maximize employability and economic self-sufficiency.

<sup>85</sup> *Id.* § 722(c)(4); 34 C.F.R. § 361.57(d)(3).

<sup>86</sup> 34 C.F.R. § 361.57(b)(3) & (e)(2).

<sup>87</sup> *Id.* § 361.57(e)(4) & (h).

<sup>88</sup> 29 U.S.C. § 722(c)(5)(D)-(F).

<sup>89</sup> *Id.* § 722(c)(5)(J).

<sup>90</sup> *Id.* § 722(c)(5)(I).

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