

**FUNDING OF ASSISTIVE TECHNOLOGY SERIES**

# **Work, Assistive Technology and State Vocational Rehabilitation Agencies**

**The Vocational Rehabilitation Agency's Obligation  
to Fund AT to Support Employment Preparation**

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## Preface

This version of the publication, "Work, Assistive Technology and State Vocational Rehabilitation Agencies: The Vocational Rehabilitation Agency's Obligation to Fund AT to Support Employment Preparation," is published by the National Disability Rights Network. It is geared for advocates in the Client Assistance Program (CAP), the Protection and Advocacy (P&A) Program for Assistive Technology (AT), and other P&A programs.

Each state's vocational rehabilitation (VR) system is a source of a wide range of services, special supports, and even AT that may be needed by people with disabilities to prepare for, retain, regain, or advance in employment. These rights are grounded in a federal statute, the Rehabilitation Act of 1973, that has been in place for over 40 years. The VR mandates have been implemented by a comprehensive set of federal regulations, and through a number of policy interpretations issued through the Rehabilitation Services Administration (RSA), within the U.S. Department of Education. They have also been interpreted in numerous court decisions.

Although this AT funding manual is published to reach an audience of attorneys and advocates who assist persons with disabilities who need AT through the VR system, the publication should also be viewed as a comprehensive treatise on the rights of people with disabilities to VR services under the Rehabilitation Act. Since so much of AT-related advocacy will deal with core Rehabilitation Act legal concepts, we go through all the core issues in great detail, referencing the federal law and regulations, case law, and federal policy letters as relevant. In each section, we analyze how the concepts discussed have implications for AT advocacy.

Since 1986, the Rehabilitation Act has required VR agencies to "maximize the employment" outcome for those receiving VR services. This emphasis has been maintained in subsequent amendments to the Rehabilitation Act. As currently stated:

The foundation of the VR program is the principle that individuals with disabilities, including those with the most significant disabilities, are capable of achieving high quality, competitive integrated employment when provided the necessary services and supports. To increase the employment of individuals with disabilities in the competitive integrated labor market, the workforce system must provide individuals with disabilities opportunities to participate in job-driven training and to

pursue high quality employment outcomes. The amendments to the Act—from the stated purpose of the Act, to the expansion of services designed to maximize the potential of individuals with disabilities, including those with the most significant disabilities, to achieve competitive integrated employment, and, finally, to the inclusion of limitations on the payment of subminimum wages to individuals with disabilities—reinforce the congressional intent that individuals with disabilities, with appropriate supports and services, are able to achieve the same kinds of competitive integrated employment as non-disabled individuals.<sup>1</sup>

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<sup>1</sup>81 Fed. Reg. 55631

## **Publication Credits and Disclaimer**

This AT funding manual, "Work, Assistive Technology and State Vocational Rehabilitation Agencies: The Vocational Rehabilitation Agency's Obligation to Fund AT to Support Employment Preparation," was originally published in 1999 and again in 2013 through the National Assistive Technology (AT) Advocacy Project, a special project of Neighborhood Legal Services, Inc. (NLS) in Buffalo, New York. This 2018 version fully replaces the earlier versions. The author of the 1999 and 2013 versions, and author of this publication, is Ronald M. Hager, a senior staff attorney at the National Disability Rights Network in Washington, D.C. Mr. Hager continues to work on AT technical assistance at NDRN and is a national expert on the legal issues associated with vocational rehabilitation, in general and funding AT through the vocational rehabilitation system, specifically. He has presented on this topic to many audiences at national conferences and throughout the country.

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## **A Listing of Acronyms and Abbreviations**

<b>AT:</b>	Assistive technology
<b>ADA:</b>	The Americans with Disabilities Act
<b>IDEA:</b>	Individuals with Disabilities Education Act
<b>IEP:</b>	Individualized education program
<b>IPE:</b>	Individualized plan for employment, formerly referred to as the IWRP
<b>IWRP:</b>	Individualized written rehabilitation plan
<b>OCR:</b>	The Office of Civil Rights (within U.S. Department of Education)
<b>Rehab '98:</b>	1998 amendments to the Rehabilitation Act
<b>RSA:</b>	Rehabilitation Services Administration
<b>Section 504:</b>	Section 504 of the Rehabilitation Act of 1973
<b>SSA:</b>	Social Security Administration
<b>SSDI:</b>	Social Security Disability Insurance
<b>SSI:</b>	Supplemental Security Income
<b>VR:</b>	Vocational rehabilitation
<b>WIA:</b>	Workforce Investment Act, 1998 federal law that included amendments to the VR laws
<b>WIOA:</b>	Workforce Innovation and Opportunity Act, 2014 federal law that included amendments to the VR laws

## 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. Assistive technology (AT) can greatly enhance the employment options for many people with disabilities. How does one enter the VR system? What are the obligations of state VR agencies to provide AT for individuals with disabilities? This publication reviews VR eligibility criteria, specific goods and services that can be provided, issues to keep in mind when using this system to obtain AT, appeal procedures, and the advocacy services available through Client Assistance Programs (CAP).

The Rehabilitation Act was first passed in 1973. 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 (ED), is the federal agency with 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 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, including "rehabilitation technology" (i.e., AT), that are connected to a person's vocational goal.

On August 7, 1998, President Clinton signed into law the Workforce Investment Act of 1998 (WIA).<sup>3</sup> Included within the WIA were the Rehabilitation Act Amendments of 1998 (Rehab '98), reauthorizing the Rehabilitation Act through 2003. On July 22, 2014, President Obama signed the Workforce Innovation and Opportunity Act (WIOA) into law.<sup>4</sup> Final regulations implementing WIOA were published on August 19, 2016 and went into effect on September 19, 2016.<sup>5</sup>

Congress has stated that VR services are "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society through statewide workforce development systems ... that include, as integral components, comprehensive and coordinated *state-of-the-art*

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

<sup>3</sup>P.L. 105-220, 112 Stat. 936.

<sup>4</sup>P.L. 113-128, 128 Stat. 1425.

<sup>5</sup>81 Fed. Reg. 55630.



programs of vocational rehabilitation.”<sup>6</sup>

A major focus of the WIOA amendments to the VR program is the emphasis on people with disabilities, including people with the most significant disabilities, achieving competitive employment in an integrated setting:

Individuals with disabilities represent a vital and integral part of our society, and we are committed to ensuring that individuals with disabilities have opportunities to compete for and enjoy high quality employment in the 21<sup>st</sup> century global economy. Some individuals with disabilities face particular barriers to employment in integrated settings that pays competitive wages, provides opportunities for advancement, and leads to economic self-sufficiency. Ensuring workers with disabilities have the supports and the opportunities to acquire the skills that they need to pursue in-demand jobs and careers is critical to growing our economy, assuring that everyone who works hard is rewarded, and building a strong middle class.<sup>7</sup>

The vocational training opportunities of the state workforce development system are clearly intended to be available to individuals with disabilities.<sup>8</sup> WIOA strengthens the connection between the VR program and the larger workforce development system:

WIOA strengthens the alignment of the VR program with other core components of the workforce development system by imposing requirements governing unified strategic planning, common performance accountability measures, and the one stop delivery system. This alignment brings together entities responsible for administering separate workforce and employment, educational, and other human resource programs to collaborate in the creation of a seamless customer focused service delivery network that integrates service delivery across programs, enhances access to the programs’ services, and improves long term employment outcomes for individuals receiving assistance. In so doing, WIOA places heightened emphasis on coordination and collaboration at the Federal, State, and local

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<sup>6</sup>29 U.S.C. § 701(b)(1)(emphasis added).

<sup>7</sup>*Id.*

<sup>8</sup>See 29 U.S.C. §§ 701(b)(1)(A), 720(a)(2).

levels to ensure a streamlined and coordinated service delivery system for job-seekers, including those with disabilities, and employers.<sup>9</sup>

The state VR agency must enter into an agreement with other providers within the statewide workforce investment system, which may include intercomponent staff training and technical assistance regarding:

[T]he promotion of equal, effective, and meaningful participation by individuals with disabilities in workforce development activities in the State through the promotion of program accessibility (including programmatic accessibility and physical accessibility), the use of nondiscriminatory policies and procedures, and the provision of reasonable accommodations, auxiliary aids and services, and rehabilitation technology, for individuals with disabilities<sup>10</sup>

Most of these requirements are already mandatory for recipients of federal funds pursuant to Section 504 of the Rehabilitation Act of 1973<sup>11</sup> and for providers that are covered by the Americans with Disabilities Act.<sup>12</sup>

## **II. Eligibility for Vocational Rehabilitation Services**

### **A. Basic Eligibility Criteria**

To receive services, an individual must have a disability which results in a “substantial impediment” to employment and require VR services “to prepare for, secure, retain, advance in or regain employment.”<sup>13</sup> The addition of the provision of VR services to enable an individual with a disability to advance in employment is new in WIOA. The comments to the regulations indicate that this requirement should be interpreted broadly:

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<sup>9</sup>81 Fed. Reg. 55630.

<sup>10</sup>29 U.S.C. § 721(a)(11)(A)(i)(II).

<sup>11</sup>*Id.* § 794

<sup>12</sup>42 U.S.C. §§ 12101 *et seq.*

<sup>13</sup>34 C.F.R. § 361.42(a)(1)(iii).

[T]o include advancement within an individual's *current employment or advancement into new employment*. In this way, the VR program ensures that individuals with disabilities obtain the services necessary so they can pursue and engage in high-demand jobs available in today's economy.<sup>14</sup>

Any service an individual is to receive from the VR system must be connected to an ultimate employment goal. Persons must also 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 Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits. The disability must only be a substantial impediment to employment.<sup>15</sup> The comments to the regulations indicate that "impediment" should be interpreted broadly, not just in relation to the individual's specific employment goal.<sup>16</sup>

However, it is important not to ignore the requirement that a disability must be a substantial impediment to employment. For example in *Miller v. Ohio Rehab. Serv. Comm.*,<sup>17</sup> the court affirmed a finding by the VR agency that a person with a disability was no longer eligible for VR services because her disability was not a substantial impediment to employment. Even though the court agreed that her current job was not consistent with her ability, her disability did not serve as a barrier to her achieving her employment goal.

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>18</sup> However, completing an application is sufficient evidence of this intent.<sup>19</sup> The regulations allow VR agencies to make interim eligibility decisions and provide interim services

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<sup>14</sup>81 Fed. Reg. 55672.

<sup>15</sup>34 C.F.R. § 361.42(a)(1)(ii).

<sup>16</sup>81 Fed. Reg. 55672.

<sup>17</sup>85 Ohio All.3d 701, 621 N.E.2d 437 (Ct. of App. of OH, 10<sup>th</sup> Dist. 1993).

<sup>18</sup>34 C.F.R. § 361.42(a)(3) and (4).

<sup>19</sup>34 C.F.R. § 361.42(a)(4)(ii).

pending a final decision for individuals they reasonably believe will be eligible.<sup>20</sup> The comments to the proposed regulations in 2000 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>21</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>22</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 benefitting from services in terms of an employment outcome.”

The clear and convincing standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case-by-case basis. The term *clear* means unequivocal. For example, the use of an intelligence test result alone would not constitute clear and convincing evidence. Clear and convincing evidence might include a description of assessments, including situational assessments and supported employment assessments, from service providers who have concluded that they would be unable to meet the individual’s needs due to the severity of the individual’s disability. The demonstration of “clear and convincing evidence” must include, if appropriate, a functional assessment of skill development activities, with any necessary supports (including assistive technology), in real life settings.<sup>23</sup>

Prior to determining that a person is incapable of benefitting 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 in realistic work situations. They must be in “competitive integrated employment settings to the maximum extent appropriate.” They can include “supported employment, on-the-job training, and other experiences using realistic work settings.” These trial work experiences must “be of sufficient variety and

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<sup>20</sup>34 C.F.R. § 361.42(b).

<sup>21</sup>65 Fed. Reg. 10626.

<sup>22</sup>34 C.F.R. § 361.42(a)(2) and (e)(2)(iii)(B).

<sup>23</sup>34 C.F.R. § 361.42, Note.

over a sufficient length of time to determine” whether the individual is eligible. The VR agency must provide appropriate supports, including AT and personal assistance services.<sup>24</sup> For individuals denied services because they are determined to be incapable of benefitting, the decision must be reviewed within 12 months by the VR agency and thereafter, if requested.<sup>25</sup> Individuals determined to be incapable of benefitting under this standard must be referred to other programs including independent living programs and extended employment providers (*i.e.*, sheltered workshops), “best suited to meet their rehabilitation needs.”<sup>26</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.” 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>27</sup> 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>28</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>29</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 development system.<sup>30</sup> Additionally, those who were receiving pre-employment transition services must continue to receive those

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<sup>24</sup>34 C.F.R. § 361.42(e).

<sup>25</sup>34 C.F.R. § 361.43(e).

<sup>26</sup>34 C.F.R. § 361.43(d)(2).

<sup>27</sup>34 C.F.R. § 361.36(a)(3)(iv)(A).

<sup>28</sup>34 C.F.R. § 361.36(d)(2).

<sup>29</sup>34 C.F.R. § 361.36(e)(3)(ii).

<sup>30</sup>34 C.F.R. § 361.37(a)(1).

services until they are determined eligible for VR services.<sup>31</sup> Finally, at its option, a State may elect to serve individuals who need “specific services or equipment to maintain employment” whether or not they are receiving VR services under the order of selection.<sup>32</sup>

## **B. Evaluation of Eligibility**

The state VR agency must determine eligibility within a reasonable period of time, not to exceed 60 days, after the individual submits an application for services.<sup>33</sup> The VR agency can exceed 60 days for its determination under two circumstances: (1) if the individual requires trial work experiences to determine eligibility; or (2) if the individual is notified that exceptional and unforeseen circumstances beyond the control of the agency preclude it from completing the determination within 60 days and the individual agrees that an extension of the time is warranted.<sup>34</sup>

Information used to determine eligibility includes: (1) existing data, such as counselor observations, 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>35</sup> The assessment may include trial work experiences, AT devices and services, personal assistant services, and “any other support services that are necessary to determine whether an individual is eligible.”<sup>36</sup>

## **III. The Individualized Plan for Employment**

After eligibility is established, the next step is to develop a written plan setting forth the individual’s employment goal and the specific services to be provided to assist the individual to reach that goal. This plan is known as the individualized plan for

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<sup>31</sup>34 C.F.R. § 361.36(e)(i).

<sup>32</sup>34 C.F.R. § 361.36(a)(3)(v).

<sup>33</sup>34 C.F.R. § 361.41(b)(1).

<sup>34</sup>34 C.F.R. § 361.41(b)(1)(i) and (ii).

<sup>35</sup>34 C.F.R. § 361.42(d)(1).

<sup>36</sup>34 C.F.R. § 361.42(d)(1)(ii).

employment (IPE).<sup>37</sup> This plan, which is to be developed by the client, with or without assistance from the VR counselor, is to be set forth on a form provided by the state VR agency.<sup>38</sup> The IPE must be developed as soon as possible, but no later than 90 days after the eligibility determination. However, the VR agency and client can agree to an extension to a specified later date.<sup>39</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 is to evaluate the unique strengths, resources, priorities, abilities and interests of the individual. The assessment can cover educational, psychological, psychiatric, vocational, personal, social and medical factors that affect the employment and rehabilitation needs of the individual.<sup>40</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>41</sup>

In *Rance v. Dept. of Education*,<sup>42</sup> after the client was found eligible for services, the Department of Vocational Rehabilitation (DVR) determined that before developing the IPE it needed to conduct an assessment of educational skills as well as a psychological evaluation based on evidence of the client's volatile nature. When the client refused, DVR closed his case. On appeal, the court agreed with DVR that the evaluation was necessary:

The Court concludes, as a matter of law, that Plaintiff has failed to demonstrate DVR should have approved the proposed IPE prior to receiving the results from the TABE test and psychological evaluation. Both of these evaluations would have served the purpose of determining whether the proposed training and desired employment outcome was

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<sup>37</sup>34 C.F.R. § 361.45. Prior to Rehab '98 this was known as the individualized written rehabilitation plan (IWRP).

<sup>38</sup>34 C.F.R. § 361.45(c)(1) and (d)(1).

<sup>39</sup>34 C.F.R. § 361.45(e).

<sup>40</sup>34 C.F.R. § 361.5(c)(5).

<sup>41</sup>34 C.F.R. § 361.5(c)(5)(iii).

<sup>42</sup>2011 WL 1099262 (S.D. Fla. Mar. 2, 2011).

consistent with Plaintiff's "unique strengths, resources, priorities, concerns, abilities, and capabilities." Florida Statute § 413.30(5); see 29 U.S.C. § 720(a)(2); 34 C.F.R. § 361.1(b). Moreover, the record supports a finding, as a matter of law, that these evaluations were appropriate.<sup>43</sup>

Individuals must be told of their rights and remedies, including their rights to a due process hearing, which will be discussed below. They also must be told of the availability of the Client Assistance Program, also discussed below.<sup>44</sup> Finally, recipients of SSI or SSDI must be told of the availability of assistance with benefits planning.<sup>45</sup>

## **A. Employment Goal**

Employment outcomes are defined as "entering, *advancing in*, or retaining" full-time or part-time competitive integrated employment." They include "customized employment, self-employment, telecommuting, or business ownership," or "supported employment ... that is consistent with an individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice."<sup>46</sup> A note to the regulation indicates that uncompensated employment goals, such as homemaker, may be continued for IPEs approved prior to September 19, 2016 until June 30, 2017, or longer if required based on the needs of the individual.<sup>47</sup>

### **1. Competitive Integrated Employment**

The term "competitive integrated employment" had not been defined before. It is defined as work that--

- (i) Is performed on a full-time or part time basis (including self-employment) and for which an individual is compensated at a rate that--

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<sup>43</sup>*Id.* at \*8.

<sup>44</sup>34 C.F.R. § 361.45(c)(2)(iii) and (iv).

<sup>45</sup>34 C.F.R. § 361.45(c)(3).

<sup>46</sup>34 C.F.R. § 361.5(c)(15) (emphasis added).

<sup>47</sup>34 C.F.R. § 361.5(c)(15), note.



- (A) Is not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the rate required under the applicable State or local minimum wage law for the place of employment;
  - (B) Is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; and
  - (C) In the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities and who are self-employed in similar occupations or on similar tasks and who have similar training, experience, and skills; and
  - (D) Is eligible for the level of benefits provided to other employees; and
- (ii) Is at a location—
    - (A) Typically found in the community; and
    - (B) Where the employee with a disability interacts for the purpose of performing the duties of the position with other employees within the particular work unit and the entire work site, and, as appropriate to the work performed, other persons (e.g., customers and vendors), who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons; and
    - (iii) Presents, as appropriate, opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions.<sup>48</sup>

The comments to the regulations note that there is no minimum hours a person must work for employment to be considered full- or part-time, nor is there a requirement that employment be “regularly scheduled.” therefore, temporary and on-call positions are appropriate.<sup>49</sup> They also note that subsistence occupations, when “culturally relevant”

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<sup>48</sup>34 C.F.R. § 361.5(c)(9).

<sup>49</sup>81 fed. Reg. 55638.

would meet the definition of competitive employment, but that hobbies would not.<sup>50</sup> Finally, the comments also note that “enclave employment settings” would not meet the criteria for integrated employment.<sup>51</sup>

## **2. Customized Employment**

Customized employment is also now included as an appropriate employment outcome. It is defined as competitive, integrated employment for an individual with a significant disability based on an individualized determination of the individual’s “strengths, needs and interests.” It is to be designed to meet the specific abilities of the individual and the business needs of the employer and carried out with “flexible strategies.” “Flexible strategies” are defined to include: (1) job exploration by the client or his/her chosen representative; (2) creating a job description based on current employer needs or previously unidentified employer needs; (3) using a professional representative (chosen by the client) to work with the employer to facilitate job placement and (4) providing needed services and supports at the job location.<sup>52</sup>

## **3. Supported Employment**

Supported employment is also included as an employment outcome. The supported employment program is designed to serve individuals with a most significant disability who are pursuing competitive integrated employment, including customized employment, “for whom competitive employment has not historically occurred or for whom competitive integrated employment has been interrupted or intermittent as a result of a significant disability” and, who, “because of the nature and severity of their disability, need intensive supported employment services and extended services.”<sup>53</sup>

Supported employment should not be considered automatically as the first choice for individuals with significant or the most significant disabilities. It should be considered after a comprehensive assessment of the rehabilitation needs of the individual when determining an individual's employment goal consistent with his or her unique strengths,

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<sup>50</sup>81 Fed. Reg. 55641.

<sup>51</sup>81 Fed. Reg. 55642.

<sup>52</sup>34 C.F.R. § 361.5(c)(11).

<sup>53</sup>34 C.F.R. § 361.5(c)(53).

priorities, concerns, abilities, capabilities, interests, and informed choice."<sup>54</sup>

Supported employment services are defined as ongoing support services, including customized employment, and other appropriate services needed to support and maintain an individual with a most significant disability. They must be "organized and made available, singly or in combination, in such a way as to assist an eligible individual to achieve competitive integrated employment." They are to be based upon the needs specified in the IPE.<sup>55</sup> They may include:

[S]upplementary assessments of rehabilitation needs, the provision of skilled job trainers for the individual at the worksite, social skills training, follow-up services, facilitation of natural supports at the worksite, and other applicable services defined within the scope of services in 34 CFR §361.48(b).<sup>56</sup>

As noted above, the expected employment outcome under WIOA is competitive integrated employment. However, an individual can achieve a supported employment outcome if currently employed in an integrated setting, but not making competitive wages (at least minimum wage). This must be on a "short-term basis."<sup>57</sup> An individual can be considered working toward competitive integrated employment on a short term basis if it can reasonably be anticipated that the individual will achieve competitive employment within six months, with the limited possibility of an extension of up to an additional 12 months.<sup>58</sup>

The standard supported employment services time frame has been extended from 18 to 24 months, with an option to increase it, if needed:<sup>59</sup>

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<sup>54</sup>RSA Supported Employment FAQs, page 3 (May 2017).

<sup>55</sup>34 C.F.R. §361.5(c)(54).

<sup>56</sup>RSA Supported Employment FAQs, page 4 (May 2017).

<sup>57</sup>34 C.F.R. § 361.5(c)(53)(i).

<sup>58</sup>34 C.F.R. § 361.5(c)(53)(ii).

<sup>59</sup>34 C.F.R. § 361.5(c)(54)(iii).

The extension provides additional time for individuals with the most significant disabilities to receive the services and supports necessary to achieve an employment outcome in supported employment, either in competitive integrated employment or working on a short-term basis to achieve competitive integrated employment.<sup>60</sup>

Additionally, extended services, which are provided after an individual has completed receiving supported employment services, may be:

(v) Provided to a youth with a most significant disability by the designated State unit in accordance with requirements set forth in this part and part 363 for a period not to exceed four years, or at such time that a youth reaches age 25 and no longer meets the definition of a youth with a disability under paragraph (c)(58) of this section, whichever occurs first. The designated State unit may *not* provide extended services to an individual with a most significant disability who is not a youth with a most significant disability.<sup>61</sup>

## **B. Informed Choice**

It is the policy of the United States that all activities of the VR program are to be 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>62</sup>

Rehab’98 revolutionized informed choice and the WIOA maintained this emphasis. 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>63</sup> The VR agency must still approve the IPE, but the individual decides the level of involvement, if

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<sup>60</sup>81 Fed. Reg. 55705.

<sup>61</sup>34 C.F.R. § 361.5(c)(19) (emphasis added).

<sup>62</sup>29 U.S.C. § 701(c)(1) (emphasis added).

<sup>63</sup>34 C.F.R. § 361.52.

any, of the VR counselor in developing the IPE. In fact, those using VR services can develop the IPE by themselves or with the assistance of others outside of the state VR program.<sup>64</sup> However, since the VR agency must still approve the IPE, we suggest that clients work with the VR counselor in most instances.

The stated reason for such an expanded role for the client was Congress' belief "that a consumer-driven program is most effective in getting people jobs."<sup>65</sup> To foster effective informed choice, the state must "develop and implement flexible procurement policies and methods that facilitate the provision of services, and that afford eligible individuals *meaningful choices* among the methods used to procure services."<sup>66</sup> Finally, to facilitate the individual's exercise of informed choice, the VR agency must make information available to the individual:

This information must include, at a minimum, information relating to the—

- (1) Cost, accessibility, and duration of potential services;
- (2) Consumer satisfaction with those services to the extent that information relating to consumer satisfaction is available;
- (3) Qualifications of potential service providers;
- (4) Types of services offered by the potential providers;
- (5) Degree to which services are provided in integrated settings; and
- (6) Outcomes achieved by individuals working with service providers, to the extent that such information is available.<sup>67</sup>

The legislative history underscores the impact of these provisions:

The Conferees expect that these changes will fundamentally change the role of the client-counselor relationship, and that in many cases counselors will serve more as facilitators of plan development.<sup>68</sup>

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<sup>64</sup>34 C.F.R. § 361.45(c)(1).

<sup>65</sup>Congressional Record—House, H6693, July 29, 1998.

<sup>66</sup>29 U.S.C. § 722(d)(3) (emphasis added).

<sup>67</sup>34 C.F.R. § 361.52(c).

<sup>68</sup>Congressional Record—House, H6693, July 29, 1998.

While the rules on informed choice have been rewritten, this does not mean that an individual is free to select whatever employment goal he or she wants. The goal must still be consistent with the individual's abilities. Further, because the ultimate objective of the VR system is employment, there must be some likelihood that the goal will lead to a viable employment outcome.

In *Matter of Wenger*,<sup>69</sup> the court affirmed the VR agency's rejection of the petitioner's desired VR objective. The court found that there was substantial evidence in the record that the petitioner's desired VR goal "was not likely to lead to gainful employment."<sup>70</sup> Because the case was decided prior to the changes in informed choice made by Rehab '98, the references in the case to the IWRP (now IPE) being "jointly developed" are no longer applicable. Nevertheless, the court's decision, that the VR objective was not likely to lead to employment and, therefore, the VR agency was justified in rejecting it, is still viable.

#### **IV. Developing the Individualized Plan for Employment**

Any service to be provided to meet the employment goal must be specified on the IPE. The IPE should enable the individual to achieve the agreed upon employment objectives and must include the following:

1. The specific employment outcome, *chosen by the individual*, consistent with the unique strengths, concerns, abilities and interests of the individual;
2. The specific VR services to be provided, in the most integrated setting appropriate to achieve the employment outcome, including appropriate AT and personal assistance services;
3. For eligible students or youth with disabilities, the specific transition services needed to meet the employment, or projected employment, outcome, which must be coordinated with the student's individualized education program or Section 504 services;
4. The timeline for initiating services and for achieving the employment

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<sup>69</sup>504 N.W.2d 794 (Minn. Ct. of App. 1993).

<sup>70</sup>*Id.* at 799.

outcome;

5. The specific entity, *chosen by the individual*, to provide the VR services and the method chosen to procure those services;
6. The criteria for evaluating progress toward achieving the employment outcome;
7. The responsibilities of the VR agency, the individual (to obtain comparable benefits) and any other agencies (to provide comparable benefits);
8. In states which have a financial needs test (see below), any costs for which the individual will be responsible;
9. For individuals with the most significant disabilities that are expected to need supported employment, the supported services to be provided as well as the expected extended services needed;
  - a. The IPE must also identify the source, or expected source, of extended services, if applicable, and the basis for concluding there is a reasonable expectation they will be available;
  - b. It must provide for periodic monitoring to ensure the individual is making satisfactory progress;
  - c. Services must be coordinated with other services and be in an integrated setting for the maximum number of hours possible; and
10. The projected need for post employment services, if necessary.<sup>71</sup>

The IPE must be reviewed at least annually and, if necessary, amended if there are substantive 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>72</sup>

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<sup>71</sup>34 C.F.R. § 361.46.

<sup>72</sup>34 C.F.R. § 361.45(d)(5) - (7).

## **A. 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. To close a record of services, the individual would have to 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>73</sup>

## **V. 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, advancing in, or regaining an employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual."<sup>74</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>75</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 applicant for services 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 which are available from the VR system are incredibly broad and varied. Essentially, whatever an individual with a disability needs to overcome a barrier to employment can be covered. In fact, the comments to the regulations explicitly state that the list of available services is not exhaustive and that VR agencies "may provide

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<sup>73</sup>34 C.F.R. § 361.56.

<sup>74</sup>34 C.F.R. § 361.48(b).

<sup>75</sup>66 Fed. Reg. 4426.



other services, not specifically listed, if necessary for the individual to achieve an employment outcome.”<sup>76</sup>

In *Turbedsky v. PA Dept. of Labor and Industry*,<sup>77</sup> the court ordered the VR agency to provide a full-time attendant for the petitioner. He was respirator dependent and a quadriplegic, living in an institution. He needed a full-time attendant to monitor his ventilation system and attend to his needs so he could live in the community. The VR agency was funding his attendance at college. The petitioner argued that his likelihood for success in college and, ultimately, employment would be enhanced by living in the community. The court agreed. It found that the full-time attendant care was a covered service and necessary for the individual to receive the “full benefit” of college. The court rejected the VR agency’s argument that it had discretion to determine the services to be provided to eligible individuals. According to the court, the VR agency is not free to limit VR services to one individual in order to provide other services to other people. In such cases, the VR agency must resort to the Order of Selection.

Services must include, but are not limited to, the following:<sup>78</sup>

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 other agencies including others within the statewide workforce development system.
3. Vocational and other training, including higher education and the purchase of tools, materials and books.
  - a. This includes graduate level training in any field.<sup>79</sup>
  - b. It also includes “tuition and other services for students with

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<sup>76</sup>81 Fed. Reg. 55678.

<sup>77</sup>65 Pa.Cmwlt. 363, 442 A.2d 849 (Pa. Cmwlt. Ct. 1982).

<sup>78</sup>29 U.S.C. § 723(a); 34 C.F.R. § 361.48.

<sup>79</sup>81 Fed. Reg. 55677.

intellectual or developmental disabilities in a Comprehensive Transition and Postsecondary Program for Students with Intellectual Disabilities, as defined by the Higher Education Act of 2008.<sup>80</sup>

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. Dentistry;
  - b. Nursing services;
  - c. Corrective surgery or therapeutic treatment;
  - d. Diagnosis and treatment for emotional disabilities;
  - e. Necessary hospitalization;
  - f. Drugs and supplies;
  - g. Prosthetic and orthotic devices;
  - h. Eyeglasses and visual services;
  - i. Podiatry;
  - j. Physical therapy, occupational therapy and speech or hearing therapy;
  - k. Treatment of either acute or chronic medical complications or emergencies;
  - l. Services for individuals with end-stage renal disease, including dialysis, transplants and artificial kidneys;
  - m. Diagnosis and treatment for mental or emotional disorders; and
  - n. Other medical or medically related rehabilitative services.<sup>81</sup>
5. Maintenance for additional costs incurred during rehabilitation.<sup>82</sup>
6. Transportation, defined as "travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a [VR]

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<sup>80</sup>81 Fed. Reg. 55678.

<sup>81</sup>34 C.F.R. § 361.5(c)(39).

<sup>82</sup>34 C.F.R. § 361.5(c)(34).

service.”<sup>83</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>84</sup>

7. Personal assistance services while receiving VR services.<sup>85</sup>
8. Interpreter services for individuals who are deaf, and 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. Customized employment.
15. Services to the family to assist an individual with a disability to achieve an employment outcome.
16. Other goods and services determined necessary to enable the individual with a disability to achieve an employment outcome.
17. Post-employment services necessary to assist an individual to maintain,

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<sup>83</sup>34 C.F.R. § 361.5(c)(56).

<sup>84</sup>34 C.F.R. § 361.5(c)(56)(i), Example 2.

<sup>85</sup>34 C.F.R. § 361.5(c)(38).

regain or *advance* in employment.<sup>86</sup>

VR agencies may also provide services to employers who have hired, or are interested in hiring individuals with disabilities, including:

(a) Providing training and technical assistance to employers regarding the employment of individuals with disabilities, including disability awareness, and the requirements of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) and other employment-related laws;

(b) Working with employers to—

(1) Provide opportunities for workbased learning experiences (including internships, short-term employment, apprenticeships, and fellowships);

(2) Provide opportunities for preemployment transition services, in accordance with the requirements under § 361.48(a);

(3) Recruit qualified applicants who are individuals with disabilities;

(4) Train employees who are individuals with disabilities; and

(5) Promote awareness of disability related obstacles to continued employment.

(c) Providing consultation, technical assistance, and support to employers on workplace accommodations, assistive technology, and facilities and workplace access through collaboration with community partners and employers, across States and nationally, to enable the employers to recruit, job match, hire, and retain qualified individuals with disabilities who are recipients of vocational rehabilitation services under this part, or who are applicants for such services; and

(d) Assisting employers with utilizing available financial support for hiring or accommodating individuals with disabilities.<sup>87</sup>

States must develop policies concerning the provision of VR services. These policies must ensure that services are provided based on each person's individual needs. They

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<sup>86</sup>34 C.F.R. § 361.5(c)(41) (emphasis added).

<sup>87</sup>34 C.F.R. § 361.32.

may not place “any arbitrary limits on the nature and scope of” VR services to be provided to achieve an employment outcome.<sup>88</sup> The state may establish reasonable time periods for the provision of services, but they must not be so short as to effectively deny a service and they must “permit exceptions so individual needs can be addressed.”<sup>89</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>90</sup> Finally, the policies must include provisions for the timely authorization of services, “including any conditions under which verbal authorization can be given.”<sup>91</sup>

## **B. Assistive Technology**

The Rehabilitation Act uses the definitions of AT devices and services<sup>92</sup> contained in the Assistive Technology for Individuals with Disabilities Act (AT Act):<sup>93</sup>

The term “assistive technology device” means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.<sup>94</sup>

The term “assistive technology service” means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes—

(A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual’s customary

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<sup>88</sup>34 C.F.R. § 361.50(a).

<sup>89</sup>34 C.F.R. § 361.50(d).

<sup>90</sup>34 C.F.R. § 361.50(c).

<sup>91</sup>34 C.F.R. § 361.50(e).

<sup>92</sup>34 C.F.R. § 361.5(c)(6).

<sup>93</sup>29 U.S.C. §§ 3001 *et seq.*

<sup>94</sup>29 U.S.C. § 3002(4).

environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for an individual with disabilities, or, where appropriate, the family members, guardians, advocates, or authorized representatives of such an individual; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.<sup>95</sup>

The legislative history to the AT Act (originally known as the Technology Related Assistance for Individuals with Disabilities Act of 1988) indicates the broad range of AT devices that were contemplated:

The Committee includes this broad definition to provide maximum flexibility to enable States to address the varying needs of individuals of all ages with all categories of disabilities and to make it clear that simple adaptations to equipment are included under the definition as are low and high technology items and software.<sup>96</sup>

The availability of AT devices and services are expressly included in the definition of "rehabilitation technology" in Title I of the Rehabilitation Act. Rehabilitation technology is defined as:

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<sup>95</sup>*Id.* § 3002(5).

<sup>96</sup>Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405.

[T]he systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of and address the barriers confronted by individuals with disabilities in areas which include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services.<sup>97</sup>

The use of AT to assist in preparing individuals with disabilities for employment permeates the VR process. The state VR Plan must describe:

[T]he methods to be used to expand and improve services to individuals with disabilities, including how a *broad range* of assistive technology services and assistive technology devices will be provided to such individuals at each stage of the rehabilitation process and how such services and devices will be provided to such individuals on a statewide basis;<sup>98</sup>

The plan must also include in its program of comprehensive personnel development:

[A] system for the continuing education of rehabilitation professionals and paraprofessionals within the designated State unit, particularly with respect to rehabilitation technology, including training implemented in coordination with entities carrying out State programs under section 3003 of [the AT Act];<sup>99</sup>

Finally, the state plan must ensure collaboration with the State AT programs:

The State plan shall include an assurance that the designated State unit, and the lead agency and implementing entity (if any) designated by the Governor of the State under section 3003 of this title, have developed working relationships and will enter into agreements for the coordination of their activities, including the referral of individuals with disabilities to

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<sup>97</sup>34 C.F.R. § 361.5(c)(45).

<sup>98</sup>29 U.S.C. § 721(a)(15)(D)(I) (emphasis added).

<sup>99</sup>29 U.S.C. § 721(a)(7)(A)(v)(I).

programs and activities described in that section.<sup>100</sup>

As noted above, the services to employers can include technical assistance on AT.<sup>101</sup> Moreover, the assessments to determine eligibility,<sup>102</sup> the services for individuals in trial work experiences<sup>103</sup> and the assessments to determine rehabilitation needs all may include AT.<sup>104</sup> Finally, the regulations for post-employment services now also include a reference to AT as a potentially available service.<sup>105</sup>

Specifically enumerated VR services which may meet the definition of AT include:<sup>106</sup>

1. Prosthetic and orthotic devices;
2. Eyeglasses;
3. Orientation and mobility services, which can include AT;
4. Transportation;
5. Rehabilitation technology services, which can include vehicular modifications;<sup>107</sup>
6. Telecommunications;
7. Sensory devices; and

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<sup>100</sup>29 U.S.C. § 721(a)(11)(I).

<sup>101</sup>34 C.F.R. § 361.32(c).

<sup>102</sup>34 C.F.R. § 361.42(d)((1)(ii).

<sup>103</sup>34 C.F.R. § 361.42(3)(2)(iv).

<sup>104</sup>34 C.F.R. § 361.5(c)(5)(iii).

<sup>105</sup>34 C.F.R. § 361.5(c)(41), Note.

<sup>106</sup>34 C.F.R. § 361.48(b).

<sup>107</sup>34 C.F.R. § 361.5(c)(56)(i), Example 2.



8. Other technological aids and devices.

Any such service must be listed on the IPE.<sup>108</sup>

Several examples of AT can be gleaned from the court decisions. For example, in *Chirico v. Office of Voc. and Educ. Services*,<sup>109</sup> the court approved funding for a voice-activated computer for job-related paperwork at home to enable the individual to advance in his employment. In *Brooks v. Office of Vocational Rehabilitation*,<sup>110</sup> the VR agency agreed to provide an individual with Multiple Chemical Sensitivities funding for: "1) full dental filling replacements; 2) a sauna for her home to allow her to 'detoxify'; 3) a computer, modem, and software packages; and 4) typing services."<sup>111</sup> The court denied her request for chiropractic services, however, finding that the individual did not demonstrate that it would benefit her.

As with any other VR service, the standard for obtaining AT is whether it is necessary to assist an "individual with a disability in preparing for, securing, retaining, *advancing in* or regaining an employment outcome."<sup>112</sup> For example, in *Zingher v. Dept. of Aging and Disabilities*,<sup>113</sup> the court agreed with the VR agency that it was appropriate to wait until petitioner had a job before purchasing compensatory computer hardware and software. The petitioner had a degree in accounting and had learning, emotional and physical disabilities. A computer expert, hired by the VR agency, recommended that compensatory computer hardware and software should not be purchased until the petitioner had a job so that the compensatory equipment could be tailored to the job site and the actual equipment being used by the employer. The court agreed. Moreover, the court noted that the comprehensive accounting system sought by the petitioner would be consistent with a goal of self-employment. However, the petitioner's goal had never been self-employment. The court also noted that once petitioner obtained a job,

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<sup>108</sup>34 C.F.R. § 361.46(a)(2)(i).

<sup>109</sup>211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995).

<sup>110</sup>682 A.2d 850 (Pa. Cmwlth. Ct. 1996).

<sup>111</sup>*Id.* at 851.

<sup>112</sup>34 C.F.R. § 361.48(b) (emphasis added).

<sup>113</sup>163 Vt. 566, 664 A.2d 256 (Vt. S.Ct. 1995).

any equipment necessary for him to do the job must be provided promptly by the VR agency, because “any delay in obtaining equipment necessary for petitioner to do the job will jeopardize a position he succeeds in securing.”<sup>114</sup>

### **C. Post-Employment Services**

Post-employment services are provided after the person has achieved an employment outcome, which are necessary for the individual “to maintain, regain or *advance* in employment.”<sup>115</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 coworkers, and the individual needs mental health services and counseling to maintain the employment, or the individual requires *assistive technology* 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 unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.<sup>116</sup>

Each IPE must indicate the expected need for post-employment services.<sup>117</sup> Prior to closing a case, the individual must be informed of the availability of post-employment services.<sup>118</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>119</sup>

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<sup>114</sup>*Id.*, 664 A.2d at 260.

<sup>115</sup>34 C.F.R. § 361.5(c)(41) (emphasis added).

<sup>116</sup>34 C.F.R. § 361.5(c)(41), Note (emphasis added).

<sup>117</sup>34 C.F.R. § 361.46(c).

<sup>118</sup>34 C.F.R. § 361.56(d).

<sup>119</sup>34 C.F.R. § 361.5(c)(41), Note.

In *Chirico v. Office of Voc. and Educ. Services*,<sup>120</sup> the individual sought funding for a voice-activated computer for job-related paper work at home to enable him to advance in his employment. The court rejected the VR agency's "implicit view that they can best determine the bounds of petitioner's potential and judgement that petitioner's present position (attained before he was 40) is all he should ever expect to achieve."<sup>121</sup>

#### **D. Out-of-State Services**

What if a VR client needs to attend a program out-of-state because there is no program within the state to prepare the individual for the agreed upon employment goal? What if there is a program within the state, but, for personal reasons, the individual prefers to attend the out-of-state program? May the VR agency refuse to fund the program? The regulations provide some guidance.

A state cannot establish policies that "effectively prohibit the provision of out-of-state services."<sup>122</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>123</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). In *Grant v. Mountjoy*,<sup>124</sup> the court noted that "Kentucky has no discretion under the statute to deny a necessary out-of-state service or effectively prohibit out-of-state services." But, the ultimate question, whether or not the out-of-state service was necessary, was not before the court at this point in the litigation.

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

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<sup>120</sup>211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995).

<sup>121</sup>*Id.*, 211 A.D. 2d at 261.

<sup>122</sup>34 C.F.R. § 361.50(b)(2).

<sup>123</sup>34 C.F.R. § 361.50(b)(1).

<sup>124</sup>2009 WL 1211006 (W.D. Ky. 2009).

the costs of the out-of-state program, up to the cost of the in-state program.<sup>125</sup>

## **VI. Financial Need Criteria**

There is no requirement that a state consider financial need when providing VR services.<sup>126</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>127</sup>

Any financial needs test must be reasonable and take into account the individual's disability-related expenses.<sup>128</sup> The level of the individual's participation must not be so high as to "effectively deny the individual a necessary service."<sup>129</sup> The following services must be provided without regard to financial need: (1) diagnostic services; (2) counseling, guidance and referral services; (3) job placement; (4) personal assistance services; and (5) "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 (Section 504) or the Americans with Disabilities Act (ADA).<sup>130</sup>

Additionally, individuals "determined eligible for Social Security benefits under Titles II [SSDI] and XVI [SSI] of the Social Security Act" must be exempt from the financial needs test.<sup>131</sup> It is clear that this definition not only applies to cash beneficiaries of SSI and SSDI but also to former SSI cash beneficiaries who continue to receive Medicaid under section 1619(b). Section 1619(b) is located within Title XVI of the Social Security Act and states that for the purposes of Medicaid eligibility, a 1619(b) recipient "shall be considered to

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<sup>125</sup>34 C.F.R. § 361.50(b)(1).

<sup>126</sup>34 C.F.R. § 361.54(a).

<sup>127</sup>34 C.F.R. § 361.54(b)(2)(i).

<sup>128</sup>34 C.F.R. § 361.54(b)(2)(iv)(A) and (B).

<sup>129</sup>34 C.F.R. § 362.54(b)(2)(iv)(C).

<sup>130</sup>34 C.F.R. § 361.54(b)(3)(i).

<sup>131</sup>34 C.F.R. § 361.54(b)(3)(ii).

be receiving [SSI] benefits under" Title XVI.<sup>132</sup>

## **VII. Maximization of Employment**

### **A. Pre-1986 Standard**

When the Rehabilitation Act was first passed in 1973, the preamble to the entire Act, not just Title I (which addresses VR services), included the following as the stated purpose:

[T]o develop and implement comprehensive and continuing state plans for meeting the current and future needs for providing [VR] services to handicapped individuals ... so that they may prepare for and engage in gainful employment.<sup>133</sup>

There was a separate section stating that the purpose of Title I of the Act was to:

[A]ssist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their *capabilities*.<sup>134</sup>

In *Cook v. PA Bureau of Vocational Rehabilitation*,<sup>135</sup> the court noted that the above-quoted statutory language did not equate to being employed at "any job." The employment goal had to be consistent with the individual's abilities. The petitioner had a bachelor's degree and conceded that he could "get a job," but sought VR funding for law school. The court did not make a final decision, however, and remanded the case for further proceedings because the record was incomplete.

### **B. The Post-1986 Maximization Developments**

The requirement that VR services are to be designed to maximize the employment of VR clients was first added by 1986 amendments. As first stated in 1986, the standard was "to

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<sup>132</sup>42 U.S.C. § 1382h.

<sup>133</sup>Former 29 U.S.C. § 701(1).

<sup>134</sup>Former 29 U.S.C. § 720(a) (emphasis added).

<sup>135</sup>45 Pa.Cmwlt. 415, 405 A.2d 1000 (Pa. Cmwlt. Ct. 1979).

develop and implement ... comprehensive and coordinated programs of VR ... to *maximize* ... employability, independence, and integration into the workplace and the community.”<sup>136</sup> This language was added to the preamble covering the entire Act, not just Title I.

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>137</sup>

As currently stated in the preamble, 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 vocational rehabilitation.<sup>138</sup>

The purpose of Title I of the Act is to assist states in operating effective VR systems designed to:

[P]rovide [VR] services for individuals with disabilities, *consistent with* their strengths, resources, priorities, concerns, abilities, *capabilities*, interests, and informed choice, so that such individuals may prepare for and engage in

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<sup>136</sup>Pub. L. 99-506, § 101, 100 Stat. 1808 (emphasis added).

<sup>137</sup>S. Rep. No. 388, 99th Cong., 2d Sess. 5 (1986) (emphasis added), as quoted in *Polkabla 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>138</sup>29 U.S.C. § 701(b)(1)(A) (emphasis added).

gainful employment.<sup>139</sup>

It would seem that this current statutory language, which was added in 1992, strengthens the standard, as it now requires the VR agency to maximize an individual's economic self-sufficiency. Presumably, this means that if an individual with a disability 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." However, to date, the courts which have addressed the issue have not picked up on this new requirement to maximize economic self-sufficiency. Instead, as will be seen, the courts have focused on the word "empower" to find that the VR agency is not required to guarantee an "optimal level of employment."

### **C. RSA Policy Directive**

Further support for the argument that the VR program is intended to maximize client potential was laid out in a Policy Directive from RSA in 1997, interpreting the 1992 amendments.<sup>140</sup> As of January 2017, however, RSA withdrew this policy directive, but indicated that it would be reissuing it at a later time.<sup>141</sup> As will be seen, subsequent amendments to the Rehabilitation Act support many of the provisions of this directive, so the discussion of it is being retained in this manual, pending issuance of new guidance from RSA.

This directive required state VR agencies to approve vocational goals and the services to meet these goals to enable persons with disabilities to maximize their employment potential. It represented, at the time, a dramatic shift in RSA policy. The August 1997 Policy Directive concerns the "employment goal" for an individual with a disability. It rescinded a 1980 policy and describes the standard for determining an employment goal under Title I. RSA's 1980 policy, 1505-PQ-100-A, identified "suitable employment" as the standard for determining an appropriate vocational goal for an individual with a disability. In that policy and in an earlier, 1978 policy (1505-PQ-100), RSA described

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<sup>139</sup>*Id.* § 720(a)(2)(B) (emphasis added).

<sup>140</sup>RSA-PD-97-04.

<sup>141</sup>RSA-PD-17-01.

“suitable employment” as “reasonable good entry level work an individual can satisfactorily perform.”

The 1997 policy was, in part, a response to the fact that many state VR agencies would not approve the training and other services needed to allow a person to maximize their employment potential. RSA’s clear change in policy is best expressed in the following quote from the August 1997 Policy Directive:

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.<sup>142</sup>

This directive clarified that cost or the extent of VR services an individual may need to achieve a particular employment goal should not be considered in identifying the goal in the IPE. The 1997 directive also clarified that a person who is currently employed will, in appropriate cases, be eligible for VR services to allow for “career advancement” or “upward mobility.”

The Policy Directive emphasized that the state 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, state 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). In many cases, these trial work or educational placements should be accompanied by the availability of AT as a means of overcoming a disability-related deficit.

#### **D. WIA and WIOA Amendments**

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<sup>142</sup>*Id.* (emphasis added).



The comments to the 2001 regulations, implementing the WIA, reaffirm the principles laid out in the 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 advance in their careers.”<sup>143</sup>

Further, WIOA amendments reinforce the principles of the policy directive and would significantly undercut, if not reverse, a large number of the court decisions discussed below. First, WIOA includes the following additional stated purpose of Title I: “to maximize opportunities for individuals with disabilities, including individuals with significant disabilities, for competitive integrated employment.”<sup>144</sup> The comments to the regulations note that all of the regulatory changes were:

[I]ntended to maximize the potential for individuals with disabilities to prepare for, obtain, retain, and *advance* in the same high quality jobs and high-demand careers as persons without disabilities.<sup>145</sup>

Second, the WIOA amended the provisions governing eligibility for VR services. Under WIOA, an individual with a disability is eligible if that individual:

[R]equires vocational rehabilitation services to prepare for, secure, retain, *advance* in, or regain employment that is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.<sup>146</sup>

Prior to WIOA, the availability of VR services to enable a person to advance in one's career was only explicitly included in the definition of post-employment services which are available to assist an individual to *advance* in employment.<sup>147</sup> These requirements can

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<sup>143</sup>66 Fed. Reg. 4419.

<sup>144</sup>29 U.S.C. § 701(b)(2).

<sup>145</sup>81 Fed. Reg. 55631 (emphasis added).

<sup>146</sup>29 U.S.C. § 722(a)(1)(B) (emphasis added).

<sup>147</sup>34 C.F.R. § 361.5(c)(41) (emphasis added).

have no meaning if the obligation of the VR agency ceases when an individual merely becomes employed full-time.

Finally, added to the VR services available to clients is the following:

[E]ncouraging qualified individuals who are eligible to receive services under this subchapter to pursue advanced training in a science, technology, engineering, or mathematics (including computer science) field, medicine, law, or business.<sup>148</sup>

The regulations implementing this provision make it clear that the list in the statute is not intended to be exhaustive.<sup>149</sup> The comments to this regulation underscore the importance of this decision and emphasize that this position is consistent with long-standing VR policy:

While section 103(a)(18) of the Act specifically mentions advanced education in certain fields, that does not exclude advanced training in other fields under section 103(a)(5) of the Act. In reviewing proposed § 361.48(b)(6), the Department recognizes that it could be interpreted as allowing advanced training in only certain fields. This was not our intent, and that restriction would not be consistent with section 103(a) of the Act or long-standing Department policy. Therefore, we have revised final § 361.48(b)(6) to clarify that DSUs [VR agencies] may provide advanced training in any field, not just the specific fields listed in section 103(a)(18) of the Act.

We do not believe that a definition of “advanced training” is necessary. Neither section 7, nor section 103(a), of the Act, as amended by WIOA, defines “advanced training.” We understand that “advanced training” may have multiple meanings, such as degrees conferred by institutions of higher education and advanced certifications in certain fields, all of which may be permissible under the VR program. Therefore, we will not define this term in final § 361.48(b)(6) or elsewhere in final part 361 to avoid limiting the meaning of “advanced training.”

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<sup>148</sup>29 U.S.C. § 723(a)(18).

<sup>149</sup>34 C.F.R. § 361.48(b)(6).

As stated earlier, final § 361.48(b)(6) continues the long-standing availability of financial support for advanced training through the VR program. Therefore, though comparable benefits for graduate-level education may be limited, we anticipate that DSUs will experience little, if any, increase in the costs of providing this existing service.

The Secretary agrees that providing vocational rehabilitation services is not limited only to helping an individual with a disability obtain entry-level employment. Under section 102(a)(1) of the Act, as amended by WIOA, and final § 361.48(b), DSUs are to provide vocational rehabilitation services to help eligible individuals advance in employment, consistent with each individual's approved individualized plan for employment and his or her unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

Changes: We have revised § 361.48(b)(6) to clarify that DSUs may provide advanced training in any field.<sup>150</sup>

Therefore, whatever can be said about the requirement to "maximize employment," the obligations placed on the VR system are no less than as stated by the court in *Cook*: the VR system has not met its responsibility when an individual is capable of being employed at "any job."<sup>151</sup>

## **E. Court Decisions**

What have the courts had to say about the obligations of the VR system? Several courts have applied the maximization standard to fund VR services which a VR agency had initially denied. However, as time has gone on, the decisions have become decidedly more negative.

In *Buchanan v. Ives*,<sup>152</sup> the parties agreed that applying a "cost efficiency analysis" to the

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<sup>150</sup>81 Fed. Reg. 55677.

<sup>151</sup>45 Pa.Cmwlth. 415, 405 A.2d 1000 (Pa. Cmwlth. Ct. 1979).

<sup>152</sup>793 F.Supp. 361 (D. Me. 1991).

determination of an individual's goals and needs would violate the Act. The court held that a "cost efficiency analysis" cannot be the major determinant to deny funding of services. The court noted that the intent of Congress, in adding the maximization language, was:

[T]o establish a program which would provide services to assist clients in achieving their highest level of achievement or a goal which is consistent with their maximum capacities and abilities.<sup>153</sup>

Accordingly, the court ruled that the goal of "maximizing employability" cannot be equated with the ability to do any job. It held that Title I requires a highly individualized analysis of the individual's goals and, within reason (considering the economy and market potential), services to enable the client to reach the highest possible level of achievement.

In *Indiana Dept. of Human Services v. Firth*,<sup>154</sup> the issue was the individual's eligibility for VR services while attending law school. He did not apply for VR services until after he started attending law school. The VR agency found the person's deafness was not a substantial impediment to employment, as he had the present capacity to work as a writer.

On appeal, the court ruled for the plaintiff and held that in interpreting "capacities and abilities" the Act requires an analysis of potential, not current capabilities, particularly in light of the maximization requirement. Notwithstanding the individual's present writing abilities, the court cited the need for VR-funded interpreter services for him to become a lawyer.

In *Polkaba v. Commission for the Blind*,<sup>155</sup> the court held that Title I requires services to enable a blind paralegal to reach the highest achievable vocational goal, college and law school, and not merely "suitable employment." The fact that the individual initially requested and was approved for paralegal training was not considered relevant to the current issue of her goal to become a lawyer. It should be noted that the IPE may be

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<sup>153</sup>*Id.* at 365.

<sup>154</sup>590 N.E.2d 154 (Ind. Ct. of App., First Dist. 1992).

<sup>155</sup>183 A.D.2d 575, 583 N.Y.S. 2d 464 (N.Y. App. Div. 1<sup>st</sup> Dept. 1992).

amended to change the employment goal.<sup>156</sup>

In *Chirico v. Office of Voc. and Educ. Services*,<sup>157</sup> the individual sought funding for a voice-activated computer for job-related paperwork at home to enable him to reach his highest level of achievement. The court held that attainment of a position as a guidance counselor by working two to four extra hours per day at home, six days a week, was not his full potential. The court noted that without the requested AT, the individual's ability to consider advancement was severely compromised.

In *Romano v. Office of Voc. and Educ. Services*,<sup>158</sup> the court held that funding for a Masters in Social Work degree, prior to entry into the plaintiff's chosen profession, was not required to enable the individual to reach the agreed upon goal of social work in therapeutic counseling. The court specifically reasoned:

In providing the empowerment necessary for petitioner to ultimately achieve maximum employment as generally provided for by the stated purpose of the Rehabilitation Act, there is no requirement that [the state VR agency] sponsor every possible credential desired by petitioner.<sup>159</sup>

The court also pointed out that the individual's disability did not preclude advancement in her chosen profession. Therefore, according to the court, the achievement of her IPE goal empowered her to ultimately reach higher levels.

In *Murphy v. Voc. and Educ. Services*,<sup>160</sup> New York's highest court declined to order the state's VR agency to fund law school education because the individual "has been assisted in gaining access to employment in the agreed-upon field of legal services, to the point of being employable competitively with nondisabled persons."<sup>161</sup> The court stated that

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<sup>156</sup>29 U.S.C. § 722(b)(2)(E).

<sup>157</sup>211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995).

<sup>158</sup>223 A.D.2d 829, 636 N.Y.S.2d 179 (N.Y. App. Div. 3rd Dept. 1996).

<sup>159</sup>*Id.*, 223 A.D.2d at 830.

<sup>160</sup>92 N.Y.2d 477, 683 N.Y.S.2d 139 (N.Y. Ct. of Appeals 1998).

<sup>161</sup>*Id.*, 92 N.Y.2d at 487.

the maximization standard is met when “the recipient is aided to the point, level and degree that allows the *opportunity* for personal attainment of maximum employment.”<sup>162</sup> The “goal is to empower eligible individuals with the opportunity to access their maximum employment, not to provide individuals with idealized personal preferences for actual optimal employment.”<sup>163</sup>

In *Berg v. Florida Department of Labor*,<sup>164</sup> the court ruled against the plaintiff. The primary focus of the case was whether Florida’s VR agency discriminated on the basis of disability, in violation of Section 504 of the Rehabilitation Act of 1973, when denying funding for law school. However, the court also looked at the maximization language in Title I of the Rehabilitation Act. The court stated that “the purpose of ‘maximiz[ing] employment’ does not refer to obtaining some sort of premium employment.”<sup>165</sup> The court’s decision does not refer to the 1997 RSA Policy Directive and, in looking at the Act’s stated purposes, ignores the requirement that “meaningful” employment be consistent with the client’s abilities and capabilities.

In *Hedgepeth v. North Carolina Div. Of Services for Blind*,<sup>166</sup> the court affirmed the VR agency’s decision not to fund a bachelor’s degree after it had funded two associate degrees. The individual had relied on the decision in *Polkabra* in support of her position that the Rehabilitation requires the VR agency to maximize employment consistent with the individual’s capabilities. The court relied on the decision in *Murphy* for the position that the language relied on by the court in *Polkabra* had been removed from the Rehabilitation Act. The court held that the law did not require the VR agency to provide the best education possible. It agreed that with the agency’s determination that the individual was “employable.”

In *Toise v. Rowe*,<sup>167</sup> the court denied the individual’s request for undergraduate tuition

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<sup>162</sup>*Id.* at 481 (emphasis added).

<sup>163</sup>*Id.*

<sup>164</sup>163 F.3d 1251 (11<sup>th</sup> Cir. 1998).

<sup>165</sup>*Id.* at 1256.

<sup>166</sup>153 N.C.App. 652, 571 S.E.2d 262 (N.C.App. 2002).

<sup>167</sup>82 Conn.App. 306, 845 A.2d 437 (Conn.App. 2004).

reimbursement. First, the court held that the Rehabilitation Act did not authorize a VR agency to reimburse an individual for tuition payments made prior to the approval of an IPE. Second, relying on *Murphy*, the court held that the Act does not guarantee actual optimal employment.

When looking at the cases which have declined to follow the individual's request for further VR assistance, a few things stand out. First, a number of the courts criticized the individual for either starting the program before seeking VR assistance or for seeking to amend the VR plan to obtain more services than initially requested. The courts which approved an individual's request for additional services did not seem bothered by this conduct.

Second, the courts seemed reluctant to give the maximization language its full effect. For example, the court in *Stevenson* called it "unreasonable and impractical" to fund the highest level of achievement for which an individual was capable. The courts seem to read into the VR laws a requirement to conserve resources by limiting services, rather than pushing for a move to an Order of Selection, which is how the VR laws are meant to deal with insufficient resources to fully meet the needs of all eligible individuals.

Third, none of the decisions declining additional services discussed the 1997 RSA Policy Directive, none of them have considered the revolution in informed choice created by Rehab '98, and none of them address the changes made by the WIOA. A fair reading of these requirements is that the individual's choice of an employment goal, while not without any review by the VR agency, should be approved if it is within the client's capability and it is likely to lead to a successful employment outcome. This is what the court in *Buchanan* referred to as consideration of the economy and market potential.<sup>168</sup> In other words, the VR agency should approve the goal if it is one which the individual is capable of achieving and is one which is likely to lead to employment. The availability of resources should not be part of the analysis. Additionally, the employment goal should not be limited to entry level positions for those capable of more challenging work. Finally, funding college and even advanced degrees should no longer be an obstacle so long as it is tied to the individual's employment goal and is consistent with their abilities. This would be true whether the individual seeks an advanced degree at the outset or initially chooses an undergraduate degree and then decides to seek an advanced degree to advance in their career.

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<sup>168</sup>793 F.Supp. 361 (D. Me. 1991).

## VIII. Comparable Services Requirement

### 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>169</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>170</sup> Comparable benefits do not include awards and scholarships based on merit.<sup>171</sup> The comments to the 2001 regulations also make it clear that SSI's Plan for Achieving Self-Support (PASS) is *not* a comparable benefit.<sup>172</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 to the 2001 regulations note that services an individual receives from a "ticket" under the Ticket to Work program would be a comparable benefit.<sup>173</sup> The WIOA added accommodations and auxiliary aids and services to the services subject to the comparable benefit analysis.<sup>174</sup> The implications of this change will be discussed in the section on college students, below.

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

1. If consideration of the similar benefit would interrupt or delay:

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<sup>169</sup>34 C.F.R. § 361.53(a).

<sup>170</sup>RSA-PD-92-02 (11/21/91) (This policy directive has been withdrawn, but RSA has indicated that does not view loans as a comparable benefit.).

<sup>171</sup>29 U.S.C. § 721(a)(8)(A)(ii).

<sup>172</sup>66 Fed. Reg. 4419. The PASS is an SSI work incentive which allows the SSI recipient, in exchange for a higher SSI check, to use their own income or resources to support their vocational goal.

<sup>173</sup>66 Fed. Reg. 4418.

<sup>174</sup>34 C.F.R. § 361.53(a).



- a. Progress toward achieving the employment outcome;
  - b. An immediate job placement; or
  - c. Services to an individual at extreme medical risk;<sup>175</sup> or
2. If assessments, VR counseling, referral to other services, job related services, rehabilitation technology (*i.e.*, AT), or post-employment services in any of these areas is involved.<sup>176</sup>

What if a potential funding source, such as Medicaid, is refusing to pay for a speech generating device (SGD), which is needed for the person to meet the employment objective and the person cannot proceed while waiting for the device?<sup>177</sup> States must develop a comprehensive plan involving all of the public agencies providing what could be considered VR services, including the state's Medicaid agency, public colleges and the workforce development system, to identify who will be responsible for providing what services. 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.<sup>178</sup>

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>179</sup> If another agency refuses to fulfill its obligations, the VR agency must provide the services, but may seek reimbursement from that agency.<sup>180</sup>

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<sup>175</sup>34 C.F.R. § 361.53(a)(1) - (3).

<sup>176</sup>34 C.F.R. § 361.53(b).

<sup>177</sup>Note that an SGD, as AT, is exempt from the comparable benefits requirements. Nevertheless, one might choose to consider obtaining funding from other agencies even though not required.

<sup>178</sup>34 C.F.R. § 361.53(d) and (e); 81 Fed. Reg. 55680.

<sup>179</sup>34 C.F.R. § 361.46(a)(7).

<sup>180</sup>34 C.F.R. § 361.53(e)(2).

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>181</sup> In the above example, the IPE would list an SGD as a service to be provided and indicate that it would be provided by Medicaid, as a comparable benefit. If Medicaid then refused to provide the SGD, the VR agency would be responsible for obtaining the device, pending resolution with Medicaid.

## **B. Defaulted Student Loans**

Many individuals with disabilities may have attempted college either before or after they became disabled. If prior 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 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?

VR agencies may fund higher education, if 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 education.<sup>182</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>183</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

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<sup>181</sup>34 C.F.R. § 361.53(c)(2).

<sup>182</sup>29 U.S.C. § 723(a)(3); 34 C.F.R. § 361.48(f).

<sup>183</sup>RSA-PD-92-02 (11/21/91) (This policy directive has been withdrawn, so it is not certain whether or not RSA will continue to apply this policy, but it is consistent with the intent of the comparable benefits requirements so the reference to it has been retained).

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>184</sup>

## **IX. Purchase of AT for Students With Disabilities in Transition: Who Pays?**

What responsibility does a VR agency have to an individual with a disability who is still in a public school special education program? Many VR agencies are unwilling to get involved with students until their right to an appropriate special education is over, citing the comparable benefits requirement. Where AT is involved, this can be a significant problem. Schools do not normally consider AT devices purchased to ensure an appropriate education to be the student’s property.<sup>185</sup> If the AT device will also be essential for college or employment, significant delays will result if the VR process does not begin until after a student leaves school. It also makes little fiscal sense for a school to provide AT, merely to be surrendered upon graduation with the student then seeking another device from the VR agency.

May the VR agency simply refuse to get involved until the student graduates or ages out of the school system? To attempt to answer this question, we will first look at what the school system’s responsibilities are under the special education laws. We will then look at the VR system’s responsibilities and, finally, we will examine how the two systems interact with each other.

### **A. Transition Services under the Individuals with Disabilities Education Act**

The Individuals with Disabilities Education Act (IDEA),<sup>186</sup> requires school districts to include in each student’s individualized education program (IEP) a plan to aid in the student’s transition to adult life. Beginning at age 16, or younger if appropriate,

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<sup>184</sup>*Id.*

<sup>185</sup>See 64 Fed. Reg. 12540 (comments to the 1999 federal special education regulations).

<sup>186</sup>20 U.S.C. §§ 1400 *et seq.*

transition services are to begin.<sup>187</sup>

Transition services are defined as a coordinated set of activities for a student, designed:

[W]ithin a results-oriented process, that is focused on improving the academic and functional achievement of a child with a disability to facilitate the child's movement from school to post-school activities. The areas of adult living to be considered include preparation for post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living and community participation.<sup>188</sup>

Services are to be based on the individual student's needs, taking into account the *student's* preferences and interests. The specific services to be offered include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills and a functional vocational evaluation.<sup>189</sup> The schools are expected to become familiar with "the post-school opportunities and services available for students with disabilities in their communities."<sup>190</sup>

If an IEP meeting is to consider transition services for a student, the school must invite the student and a representative of any other agency that is likely to be responsible for providing or paying for transition services. If the student does not attend, the school must take other steps to ensure that the student's preferences and interests are considered.<sup>191</sup>

It is clear that when transition planning was added to IDEA in 1990, VR agencies, and other public agencies with responsibilities for students, were intended to be involved both in the planning process with schools and in the actual provision of services. The

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<sup>187</sup>34 C.F.R. § 300.320(b).

<sup>188</sup>20 U.S.C. § 1401(34).

<sup>189</sup>*Id.*

<sup>190</sup>House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News p. 1733.

<sup>191</sup>34 C.F.R. § 300.321(b).

legislative history states that the statement of needed transition services “should include a commitment by any participating agency (i.e., the State or local *rehabilitation agency*)” to meet any financial responsibility it may have in the provision of transition services.<sup>192</sup>

VR agencies are also specifically referred to in the IDEA regulations. The definition of rehabilitation counseling includes services provided by the VR agency.<sup>193</sup> The IDEA definition of AT services includes coordinating other services with AT devices “such as those associated with existing education and *rehabilitation plans* and programs.”<sup>194</sup> The IDEA regulations also note that nothing in the transition services requirements relieves any participating agency, “including a State [VR] agency,” of the responsibility to provide or pay for any transition service that the agency would otherwise provide.<sup>195</sup>

Amendments to IDEA in 1997 strengthened the obligations of other public agencies to provide services to students while they are still in school. All states must now have interagency agreements to ensure that all public agencies responsible for providing services that are also considered special education services, fulfill their responsibilities. The financial responsibility of these public agencies must precede that of the school. If an agency does not fulfill its obligation, the school must provide the needed services, but has the right to seek reimbursement from the public agency. The agreement must also specify how the various agencies will cooperate to ensure the timely and appropriate delivery of services to the students.<sup>196</sup>

## **B. Transition Obligations Under the Rehabilitation Act**

Under Title I, state VR agencies are to play an active role in special education transition planning. As noted above, Title I was amended in 1998 and final regulations implementing the changes were published on January 17, 2001. The comments to the regulations note that the 1998 law requires state VR agencies to “*increase* their

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<sup>192</sup>House Report No. 101-544, p. 11, 1990 U.S. Code Cong. & Admin. News, p. 1733 (emphasis added).

<sup>193</sup>34 C.F.R. § 300.34(c)(12).

<sup>194</sup>20 U.S.C. § 1401(2)(D) (emphasis added).

<sup>195</sup>34 C.F.R. § 300.324(c)(2).

<sup>196</sup>20 U.S.C. § 1412(a)(12).

participation in transition planning and related activities."<sup>197</sup> The WIOA increases these expectations. VR agencies must now spend at least 15% of their budget on pre-employment transition services. In addition transition services to students with disabilities remain a separate VR service.

## **1. Pre-employment transition services**

WIOA mandates that 15% of each state's public VR funds now be used for "pre-employment transition services,"<sup>198</sup> often referred to as Pre-ETS. Pre-ETS are in addition to transition services, which remain a separate VR service and will be discussed below. They are to be provided to all "students with disabilities" regardless of whether they have applied or have been found eligible for VR services.<sup>199</sup>

A "student with a disability"<sup>200</sup> is defined as an individual with a disability who is enrolled in a school, including post-secondary education and homeschoolers as well as other non-traditional post-secondary educational programs.<sup>201</sup> The student must be between the ages of 16 - 21, unless a state chooses to provide transition services within a different age range under the IDEA. The individual must be eligible for services under either the IDEA or Section 504.<sup>202</sup> The reason for such expanded eligibility is to increase the potential for VR agencies "to maximize the use of the funds reserved for pre-employment transition services by increasing the number of students who may receive these services."<sup>203</sup>

The comments to the regulations note that Pre-ETS services are covered by the comparable benefits provisions. Therefore, VR agencies may meet their Pre-ETS

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<sup>197</sup>66 Fed. Reg. 4424 (emphasis added).

<sup>198</sup>34 C.F.R. § 361.65(a)(3).

<sup>199</sup>34 C.F.R. § 361.48(a)(1).

<sup>200</sup>34 C.F.R. § 361.5(c)(51).

<sup>201</sup>81 Fed. Reg. 55631.

<sup>202</sup>34 C.F.R. § 361.5(c)(51).

<sup>203</sup>81 Fed. Reg. 55631.

obligation by arranging for another public entity to provide the services.<sup>204</sup>

The following are required pre-employment transition services:<sup>205</sup>

1. Job exploration counseling;
2. Work-based learning experiences in integrated settings, in and out of school;
3. Counseling on post-secondary opportunities;
4. Comprehensive transition programs;
5. Programs at institutions of higher education;
6. Workplace readiness training;
7. Social skills;
8. Independent living skills; and
9. Self-advocacy skills, including peer mentoring and instruction in person-centered planning.

VR agencies are also required to undertake the following pre-employment transition coordination activities:<sup>206</sup>

- (i) Attending individualized education program meetings for students with disabilities, when invited;
- (ii) Working with the local workforce development boards, one-stop centers, and employers to develop work opportunities for students with disabilities, including internships, summer employment and other employment opportunities available throughout the school year, and apprenticeships;
- (iii) Working with schools, including those carrying out activities under section 614(d) of the IDEA, to coordinate and ensure the provision of pre-employment transition services under this section; and
- (iv) When invited, attending person-centered planning meetings for individuals

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<sup>204</sup>81 Fed. Reg. 55679-80.

<sup>205</sup>34 C.F.R. § 361.48(a)(2).

<sup>206</sup>34 C.F.R. § 361.48(a)(4).

receiving Social Security benefits.

Finally, any remaining funds may be used to improve the transition of students with disabilities by undertaking the following activities:<sup>207</sup>

- (i) Implementing effective strategies to increase the likelihood of independent living and inclusion in communities and competitive integrated workplaces;
- (ii) Developing and improving strategies for individuals with intellectual disabilities and individuals with significant disabilities to live independently; participate in postsecondary education experiences; and obtain, advance in, and retain competitive integrated employment;
- (iii) Providing instruction to vocational rehabilitation counselors, school transition personnel, and other persons supporting students with disabilities;
- (iv) Disseminating information about innovative, effective, and efficient approaches to achieve the goals of this section;
- (v) Coordinating activities with transition services provided by local educational agencies under the IDEA
- (vi) Applying evidence-based findings to improve policy, procedure, practice, and the preparation of personnel, in order to better achieve the goals of this section;
- (vii) Developing model transition demonstration projects;
- (viii) Establishing or supporting multistate or regional partnerships involving States, local educational agencies, designated State units, developmental disability agencies, private businesses, or other participants to achieve the goals of this section; and
- (ix) Disseminating information and strategies to improve the transition to postsecondary activities of individuals who are members of traditionally

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<sup>207</sup>34 C.F.R. § 361.48(a)(3).



unserved and underserved populations.

## **2. Transition Requirements**

The regulations make it clear that state VR agencies are to be actively involved in the transition planning process with the school districts, including: (1) outreach to and identification of students with disabilities who may need transition services, as early as possible during the process; (2) consultation and technical assistance to assist school personnel in transition planning; and (3) involvement in transition planning with school personnel that facilitates development of the special education IEP.<sup>208</sup> In discussing the importance of the early involvement of the VR system in the transition planning process, the comments to the 2001 regulations stress that the VR agency should “participate actively throughout the transition planning process, not just when the student is nearing graduation.”<sup>209</sup>

The VR system is also expected to provide services to at least some students with disabilities while they are still in school. The legislative history to the 1998 amendments to Title I emphasizes that, subject to the state VR Plan, the VR agency is required to provide services to students to facilitate achievement of the employment outcome as spelled out in the IPE.<sup>210</sup> Transition services are specifically listed as an available VR service.<sup>211</sup>

Moreover, as noted above, one of the obligations of the VR system is to provide outreach to students with disabilities. As part of the mandated outreach, the VR agency must:

[I]nform these students of the purpose of the VR program, the application procedures, the eligibility requirements, and the potential scope of services that may be available ... as early as possible during the transition planning

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<sup>208</sup>34 C.F.R. § 361.22(b).

<sup>209</sup>66 Fed. Reg. 4424.

<sup>210</sup>Congressional Record—House, H6693, July 29, 1998.

<sup>211</sup>34 C.F.R. § 361.48(b)(18).

process.<sup>212</sup>

The stated reason for this requirement is “to enable students with disabilities to make an informed choice on whether to apply for VR services while still in school.”<sup>213</sup> In other words, it is the student’s, and family’s choice about whether to apply for VR services while still in school.

Of course, when transition services are provided by the VR system, as with any other VR service, they must be designed to “promote or facilitate the achievement of the employment outcome identified in the student’s [IPE].”<sup>214</sup> As with any other person with a disability who is receiving services from the VR system, VR transition services will only be provided to “students who have been determined eligible under the VR program and who have an approved IPE.”<sup>215</sup> Additionally, “the IPE for a student with a disability who is receiving special education services must be coordinated with the IEP for the individual in terms of the goals, objectives, and services identified in the IEP.”<sup>216</sup>

Finally, for those students who have not received VR services while still in school, the VR regulations require the VR system to determine eligibility and develop an IPE, for students eligible for VR services, as soon as possible during transition planning but, at the latest, by the time the student leaves the public school setting.<sup>217</sup> The comments to the 2001 regulations explain, again, how critical this is:

Requiring the IPE to be in place before the student exits school is *essential* toward ensuring a smooth transition process, one in which students do not suffer *unnecessary* delays in services and can continue the progress toward

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<sup>212</sup>66 Fed. Reg. 4424.

<sup>213</sup>*Id.*

<sup>214</sup>34 C.F.R. § 361.5(c)(55).

<sup>215</sup>66 Fed. Reg. 4424.

<sup>216</sup>34 C.F.R. § 361.46(d).

<sup>217</sup>*Id.* § 361.22(a)(2).

employment that they began making while in school.<sup>218</sup>

### **3. Interagency Coordination**

The state VR Plan must also include policies for coordination between the VR agency and education officials to facilitate the transition from the special education system to the VR system, including development of a formal interagency agreement. The agreement must include: (1) provisions for consultation and assistance to, and planning with, the educational agencies in preparing students for transition and in developing the transition plan in the IEP; (2) the relative roles and financial responsibilities of the special education and VR systems to provide services; and (3) provisions for outreach to and identification of students with disabilities who need transition services.<sup>219</sup>

What services the VR agency will provide to students with disabilities and the circumstances under which they will be provided are to be consistent with the mandated state interagency agreement between the state VR and special education systems.<sup>220</sup> The comments to the 2016 regulations provide some guidance about who would generally be responsible for what services. A number of services could qualify as VR or IDEA funded services and neither the VR nor special education agency should shift the burden of paying for what they would otherwise be responsible to the other agency.<sup>221</sup> Decisions “as to which entity will be responsible for providing services that are both special education services and vocational rehabilitation services must be made at the State and, as appropriate, local level as part of the collaboration” agreement.<sup>222</sup>

They note that the interagency agreement “could address such criteria as:”

1. The purpose of the service. Is it related more to an employment outcome or education? That is, is the service usually considered a special education or related service, such as transition planning necessary for the provision of

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<sup>218</sup>66 Fed. Reg. 4424 (emphasis added).

<sup>219</sup>20 U.S.C. § 721(a)(11)(D).

<sup>220</sup>34 C.F.R. § 361.22.

<sup>221</sup>81 Fed. Reg. 55687.

<sup>222</sup>*Id.*

a free appropriate public education?

2. Customary Services. Is the service one that the school customarily provides under part B of the IDEA? For example, if the school ordinarily provides job exploration counseling or work experiences to its eligible students with disabilities, the mere fact that those services are now authorized under the Act as pre-employment transition services does not mean the school should cease providing them and refer those students to the VR program. However, if summer work experiences are not customarily provided by a local educational agency, the DSU and local educational agency may collaborate to coordinate and provide summer workbased learning experiences.<sup>223</sup>

### **C. Reading the Special Education and VR Laws Together**

What is the effect of all of these requirements for the student who needs an AT device? First, the VR agency should participate in the transition planning meetings with the school. Second, if the graduating student clearly will need the AT device to prepare for employment, a reasonable approach would be to have the VR agency purchase the device in the first instance or purchase it from the school when the student graduates. The need for the device would continue to be reflected in the special education IEP, with reference to the VR agency as payer (or purchaser) of the existing device upon the student's graduation. The AT device would also appear in the IPE, which must be developed by the VR agency before the child finishes school.

Nothing prohibits the VR agency from purchasing the AT outright for the student while still in special education or from purchasing it from the school when the student graduates.<sup>224</sup> The IDEA regulations envision other agencies providing services to students in transition, including VR agencies.<sup>225</sup> The VR regulations require that the state VR Plan specify the financial responsibility of the various state agencies serving the

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<sup>223</sup>81 Fed. Reg. 55687.

<sup>224</sup>See *Letter to Goodman II*, 30 Indiv. with Disabilities Educ. Law Rpts. 611 (U.S. Dept. of Educ., Office of Spec Educ. Programs, 6/21/98) (authorizing states to arrange for the transfer of AT from the special education system to the VR system for the former student's continued use).

<sup>225</sup>34 C.F.R. § 300.324(c).

student.<sup>226</sup>

#### **D. Section 511 and Subminimum Wages**

As of 2001, “extended employment” (or sheltered workshops) was eliminated as a final employment outcome. However, extended employment remains an alternative. First, extended employment continues to be a VR service as an interim step toward achieving integrated employment. Second, for those choosing extended employment as a long term option, it remains available “outside the VR program.”<sup>227</sup> In such cases, the VR agency must inform them that extended employment can be provided to prepare for employment in an integrated setting and that they may later return for VR services to prepare for integrated employment. Additionally, the VR program must refer SSI and SSDI recipients seeking long term extended employment to the SSA for information about available work incentives.<sup>228</sup>

The purpose of the referral to SSA is to ensure they are “informed of recent reforms that are designed to reduce a key work disincentive by enabling individuals with disabilities to work and continue receiving Social Security benefits.” The RSA believes “the need for this critical information, and its potential effect on an individual’s interest in pursuing integrated work in the community, justifies” this requirement. In this way, individuals will be able to “make truly informed choices among the wide scope of employment options—both integrated and non-integrated—available to persons with disabilities.”<sup>229</sup>

Section 511 of the WIOA placed additional restrictions on students with disabilities entering sheltered workshops upon completion of their school years.<sup>230</sup> The stated purpose of Section 511 is:

To ensure that the federal government plays a leadership role in promoting the employment of individuals with disabilities by assisting states and

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<sup>226</sup>81 Fed. Reg. 55680.

<sup>227</sup>66 Fed. Reg. 7254.

<sup>228</sup>34 C.F.R. § 361.37(b)(5).

<sup>229</sup>66 Fed. Reg. 7257.

<sup>230</sup>29 U.S.C. § 794g.

service providers in fulfilling the aspirations of such individuals to obtain gainful employment.<sup>231</sup>

Section 511 applies to “youth with a disability” which is defined as an individual with a disability between the ages of 14 and 24.<sup>232</sup> Before a youth with a disability can be allowed to work at a rate which is less than the minimum wage, the youth must receive pre-employment transition services, be referred to the VR agency for services and receive career counseling.<sup>233</sup> The individual must provide proof that the following steps have been completed: the individual received pre-employment transition services and has applied for VR services and been found ineligible, or been found eligible and has been working on an employment outcome for a “reasonable period of time” without success.<sup>234</sup>

## **X. AT for the College Student: Who Pays?**

A similar problem regarding who is responsible for providing services arises when a VR agency refuses to provide services for a college student, arguing that the college’s responsibility under the ADA or Section 504 is a comparable benefit.<sup>235</sup>

### **A. Obligations of Colleges and Universities**

Section 504 prohibits discrimination on the basis of disability in any program or activity receiving federal funds.<sup>236</sup> Since virtually every college and university in the country receives federal funds, they are bound to comply with the terms of the law. Ironically, Section 504 comes from the same law, the Rehabilitation Act of 1973, which covers VR services.

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<sup>231</sup>34 C.F.R. § 397.1.

<sup>232</sup>34 C.F.R. § 361.5(c)(59).

<sup>233</sup>34 C.F.R. § 397.20.

<sup>234</sup>*Id.*

<sup>235</sup>See “Several Vocational Agencies Stop Paying For Auxiliary Aids,” *Section 504 Compliance Handbook*, Supp. No. 213, p. 1 (Thompson Publishing Group, August 1996).

<sup>236</sup>29 U.S.C. § 794.

The ADA prohibits discrimination on the basis of disability whether or not a covered entity receives federal funds. Title II of the ADA covers programs operated by state and local governments. Public colleges and universities are covered by Title II.<sup>237</sup> Title III of the ADA covers private entities which are considered places of public accommodation. Private colleges and universities are specifically included in the list of examples of places of public accommodation.<sup>238</sup> Therefore, all colleges and universities in the country will be covered by either Section 504, the ADA, or both.

There are Section 504 regulations which specifically cover colleges and universities. The ADA does not have a similar set of requirements. However, the requirements of the ADA will be virtually identical to those under Section 504. Therefore, we will briefly review the Section 504 regulations. We will then discuss how the responsibilities of colleges interact with the responsibilities of the VR system.

The regulations under Section 504 set out a general standard for colleges and universities. No qualified student with a disability shall, on the basis of disability, "be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination."<sup>239</sup> Colleges and universities are also required to operate their programs and activities in the most integrated setting appropriate.<sup>240</sup>

Colleges must make modifications to their academic requirements, such as modifying the length of time to complete a degree, substituting courses, and adapting the manner in which courses are conducted. There is an exception to the obligation to modify course requirements if the college can show that the academic requirement is essential to the student's program of instruction or to a directly related licensing requirement.<sup>241</sup>

All course examinations or other procedures for evaluating student performance must be modified so that they measure the student's achievement rather than the effects of the

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<sup>237</sup>42 U.S.C. § 12131.

<sup>238</sup>*Id.* § 12181(7)(J).

<sup>239</sup>34 C.F.R. §§ 104.42 and 104.43(a).

<sup>240</sup>*Id.* § 104.43(d).

<sup>241</sup>*Id.* § 104.44(a).

disability.<sup>242</sup> Additionally, colleges cannot impose rules, such as prohibiting tape recorders or service dogs, which limit the participation of people with disabilities in the program.<sup>243</sup>

Colleges must provide auxiliary aids and services to enable students with impaired sensory, manual, or speaking skills to participate in the program.<sup>244</sup> The requirement to provide auxiliary aids is the broadest statement of the obligation for colleges and universities to provide AT. Auxiliary aids can include taped texts, interpreters, readers in libraries, adapted classroom equipment and other similar services and actions.<sup>245</sup> A 1998 publication by the U.S. Department of Education's Office for Civil Rights (OCR), which enforces Section 504, noted a number of additional examples of auxiliary aids and services, such as electronic readers, open and closed captioning, assistive listening systems and specialized gym equipment.<sup>246</sup>

Schools must ensure that auxiliary aids are provided in a timely manner to ensure effective participation by students with disabilities.<sup>247</sup> Although a college is not required to provide the most sophisticated auxiliary aid available, it must ensure that the aids provided are effective. Additionally, they should select auxiliary aids in consultation with the student.<sup>248</sup> Colleges must provide auxiliary aids to students who are auditing classes as well as those taking courses for credit.<sup>249</sup>

As colleges and universities have increasingly required students to use e-readers such as

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<sup>242</sup>*Id.* § 104.44(c).

<sup>243</sup>*Id.* § 104.44(b).

<sup>244</sup>*Id.* § 104.44(d)(1).

<sup>245</sup>*Id.* § 104.44(d)(2).

<sup>246</sup>*Higher Education's Obligations Under Section 504 and Title II of the ADA* (OCR September 1998), p. 2, <http://www2.ed.gov/about/offices/list/ocr/docs/auxaids.html>, last accessed 1/3/2013.

<sup>247</sup>*Id.*

<sup>248</sup>*Id.*

<sup>249</sup>*Id.*, p. 5.



the Kindle or the Nook for accessing course materials, questions have arisen regarding the accessibility of these types of devices. The Justice Department (DOJ) and OCR issued a joint “dear colleague” letter to college and university presidents concerning the need to ensure that course materials are accessible to students with disabilities.<sup>250</sup> In it, DOJ and OCR asked that colleges and universities refrain from requiring the use of e-readers that are not accessible to individuals who are blind or have low vision.<sup>251</sup> They also made it clear that it would be impermissible to use e-readers in classroom settings that were not accessible unless students with disabilities were provided with an equally effective accommodation that would allow these students “to receive all the educational benefits of the technology.”<sup>252</sup>

Personal services (including readers for personal study) or individually prescribed devices are not the responsibility of the college.<sup>253</sup> Therefore, a library and some of its basic materials must be accessible and individuals with disabilities must be able to access the library’s index of holdings. Additionally, materials that are required for course work must be accessible to all students enrolled in the course. However, materials for individual student study are not the obligation of the college.<sup>254</sup>

## **B. Obligations of the Vocational Rehabilitation System**

The U.S. Department of Education (ED) enforces both Title I of the Rehabilitation Act, governing VR agencies, and Title V, which includes Section 504. In fact, the ED wrote both the regulations covering VR agencies and those covering Section 504.

Prior to the passage of the WIOA, the regulatory history to the Section 504 regulations governing colleges indicates the role the ED envisioned for colleges in providing auxiliary aids. The Department stressed that colleges could normally meet their obligation:

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<sup>250</sup>*Joint “Dear Colleague” Letter: Electronic Book Readers* (DOJ and OCR June 29, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html>, last accessed 1/3/2013.

<sup>251</sup>*Id.*, p. 2.

<sup>252</sup>*Id.*, attached Q&A, p. 2.

<sup>253</sup>34 C.F.R. § 104.44(d).

<sup>254</sup>*Higher Education’s Obligations*, p. 4.

[B]y assisting students in using existing resources for auxiliary aids such as *state vocational rehabilitation agencies* and private charitable organizations. Indeed, the Department anticipates that the *bulk* of auxiliary aids will be paid for by state and private agencies, not by colleges or universities.<sup>255</sup>

The purpose of these comments was to highlight that the provision of auxiliary aids would not be an undue burden on the colleges.<sup>256</sup>

However, the WIOA reversed that. As noted above, auxiliary aids and services are now part of the comparable benefits analysis. Accordingly, colleges would be required to provide auxiliary aids and services to fulfill their obligations under the ADA and Section 504. Of course, the provision of auxiliary aids and services is still subject to the comparable benefits exceptions noted above.

Additionally, *public* colleges and universities must be included in developing a comprehensive plan to ensure the coordination and timely delivery of services.<sup>257</sup> They remain responsible for providing services mandated by other state laws or policy, or federal laws, such as the ADA and Section 504.<sup>258</sup> If they refuse to provide services, the VR agency must provide the services, but may seek reimbursement from the college or university.<sup>259</sup> "However, State [VR] agencies should not interpret these 'interagency agreement' provisions as shifting the obligation for paying for specific [VR] services to colleges and universities. State [VR] agencies still have that responsibility."<sup>260</sup>

### **C. Reading the Two Sets of Requirements Together**

How does all of this apply to a college student needing AT? Let's say a college student

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<sup>255</sup>*Id.* Part 104, App. A, note 31 (emphasis added); *see also Higher Education's Obligations*, p.3.

<sup>256</sup>*See U.S. v. Board of Trustees for U. of Ala.*, 908 F.2d 740, 745 (11th Cir. 1990).

<sup>257</sup>34 C.F.R. § 361.53(d) (emphasis added).

<sup>258</sup>34 C.F.R. § 361.53(e)(1).

<sup>259</sup>34 C.F.R. § 361.53(e)(2).

<sup>260</sup>Congressional Record—House, H6692, July 29, 1998.

who is deaf is funded by the VR system to attend college to study to become an accountant. Everyone agrees that for certain courses, the only way the student will be successful is to have real time captioning during classes. As noted above, AT (rehabilitation technology) is exempt from the comparable benefit requirement. Therefore, one approach would be to say that since real time captioning is AT, it is the sole responsibility of the VR agency to provide this service. However, this could certainly be seen as "pushing the envelope." Therefore, the state, in its VR Plan, could decide to indicate that the VR agency and public colleges will share this cost. In such a case, the IPE will indicate that the real time captioning will be the joint responsibility of the VR agency and college.<sup>261</sup> If the college does not provide its agreed upon support, the VR agency must still ensure that the real time captioning is provided to the student, but may seek reimbursement from the college for its costs.

What about a student who is blind and uses a computer with voice output to read? The college would have an independent obligation, under Section 504, to ensure that its programs are accessible. Therefore, it would be responsible for ensuring that the library's resources are available to the student. It could meet its obligation by providing its card catalogue on computer with a dedicated computer with voice output to allow the student to have access to the materials in the library.

What if this same student was working on a term paper and needed to read a book located in the library? Would the college have to provide a reader or otherwise make that book accessible to the student for individual research? As noted above, the regulations under Section 504 exempt colleges from providing auxiliary aids and services for personal use or study.<sup>262</sup> The relevant ADA regulations also exempt personal devices and services.<sup>263</sup> One could argue that reading a book to write a term paper is for personal study, even though the book is located in the library. Under this analysis, the college would not be required to provide this service to the student. If a college is under no obligation to provide assistance in such circumstances, there is no comparable benefit and it becomes the sole responsibility of the VR agency. Another way to resolve this question would be to have the VR agency provide a hand held scanner for the student and for the college to assure that there would be a location within the library for the

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<sup>261</sup>See 34 C.F.R. § 361.46(a)(7)(iii).

<sup>262</sup>34 C.F.R. § 104.44(d)(2).

<sup>263</sup>28 C.F.R. §§ 35.135 and 36.306.

student to use the device.

## **XI. Hearing and Appeal Rights**

### **A. Hearings**

Anyone seeking or receiving VR services 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>264</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>265</sup>

CAP is also funded under the Rehabilitation Act,<sup>266</sup> and there is a CAP office in every state. CAP is designed to provide information to individuals concerning their rights in the VR process and to provide advocacy services in resolving disputes, including representation at impartial hearings. Individuals who do not understand the proposed IPE, have questions about their rights under the Rehabilitation Act, or receive an adverse decision from the VR agency, should consider contacting the appropriate CAP office for assistance.

Mediation can be a helpful means of resolving disputes between those using VR services and the VR agency. It must be offered to resolve disputes, at a minimum, whenever an impartial hearing is requested. Participation must be voluntary and 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>267</sup>

At an impartial hearing, the individual has the right to be represented by an attorney or other advocate. Both the individual and the agency can present evidence and cross

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<sup>264</sup>29 U.S.C. § 722(c)(1).

<sup>265</sup>*Id.* § 722(c)(2)(A).

<sup>266</sup>*Id.* § 732(a).

<sup>267</sup>*Id.* § 722(c)(4).

examine witnesses.<sup>268</sup> The hearing officer has the authority to render a decision and require actions concerning the VR services to be provided.<sup>269</sup> The hearing decision is final and must be implemented, unless appealed.<sup>270</sup> Pursuant to what is known as the “stay-put” provision, pending a decision by a mediator or the final level of administrative review, the VR agency may not reduce, suspend or terminate services being provided to the individual unless the individual requests or unless the services were obtained through fraud.<sup>271</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 state VR agency or an official from the office of the Governor. If the state does establish a second level of administrative review, either party may appeal within 20 days of the hearing officer’s 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 state VR Plan, federal law or state law or policy that is consistent with federal law.<sup>272</sup>

## **B. Court Appeals**

A private right of action under Title I was added in 1998.<sup>273</sup> Therefore, either party may appeal a final administrative decision to state or federal court. However, pending review in court, the final administrative decision shall be implemented.<sup>274</sup> The right to bring a court action under Title I of the Rehabilitation Act bears a striking resemblance to the language under the IDEA.<sup>275</sup> As a result, the case law interpreting the IDEA right to bring court cases has been applied to these provisions.

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<sup>268</sup>34 C.F.R. § 361.57(b)(3).

<sup>269</sup>29 U.S.C. § 722(c)(5).

<sup>270</sup>34 C.F.R. § 361.57(e)(4).

<sup>271</sup>29 U.S.C. § 722(c)(7).

<sup>272</sup>*Id.* § 722(c)(5)(D)-(F).

<sup>273</sup>*Id.* § 722(c)(5)(J).

<sup>274</sup>*Id.* § 722(c)(5)(I).

<sup>275</sup>20 U.S.C. § 1415.

For example, in *Board of Education v. Rowley*,<sup>276</sup> the United States Supreme Court held that when a court is reviewing an administrative hearing decision under the IDEA it is required to give "due weight" to the administrative decision and to avoid substituting its own view of "educational policy for those of the school authorities."<sup>277</sup> In *Reaves v. Missouri Dept. of Elementary and Secondary Educ.*,<sup>278</sup> the Eighth Circuit held that the *Rowley* standard of review applied to VR cases because of the virtually identical language in the VR statute. Similarly, in *Wasser v. New York State Office of Vocational and Educational Svcs. for Individuals with Disabilities*,<sup>279</sup> the court stated that while "district courts must engage in an independent review of the administrative record and render a decision based on a preponderance of the evidence ... the Rehabilitation Act requires substantial deference ... and district courts must give due weight to the findings of the state administrative proceedings."

In *Diamond v. Michigan*,<sup>280</sup> the Sixth Circuit looked to IDEA cases to determine several procedural issues. First, it held that a person would only be entitled to relief because of a failure to comply with a procedural requirement of the Rehabilitation Act if it resulted in substantive harm. In the case before it, even though the VR agency had failed to conduct an annual review of the IPE it actually benefitted the plaintiff, so she was not entitled to any relief. The court also held that the Rehabilitation Act's "stay-put" requirement, referred to above, only applies to services provided pursuant to an "extant IPE."<sup>281</sup>

A potential benefit of the similarity between the IDEA and VR private right of action is the availability of reimbursement as a remedy if the VR agency fails to provide an appropriate service and the client pays for it him or herself. In 1985 the Supreme Court decided

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<sup>276</sup>458 U.S. 176 (1982).

<sup>277</sup>*Id.* at 206.

<sup>278</sup>422 F.3d 675, 681 (8<sup>th</sup> Cir. 2005).

<sup>279</sup>602 F.3d 476, 480 (2<sup>d</sup> Cir. 2010).

<sup>280</sup>431 F.3d 262, 266-7 (6<sup>th</sup> Cir. 2005).

<sup>281</sup>*Id.* at 267.

*Burlington Sch. Comm. v. Department of Educ.*,<sup>282</sup> which allowed parents to be reimbursed for unilateral placements in private schools when the School District did not offer a free appropriate public education (FAPE) under the IDEA. The Court set up a three prong test. The parents must establish: (1) that the District did not offer an appropriate placement; (2) that the program selected by the parents is appropriate; and (3) that equity factors favor reimbursement. In *Florence County School Dist. Four v. Carter*,<sup>283</sup> the Supreme Court held that if the other prongs of the test were met the parents could obtain reimbursement even if the program was not approved by the State's educational agency.

This rationale has been applied in a VR case. In *Millay v. Maine*,<sup>284</sup> the question before the court was whether the plaintiff was entitled to equitable reimbursement equivalent to the amount he would have received from the VR agency had it provided a service to him in the first instance. The court, following the principles articulated under *Burlington*, found that the plaintiff was entitled to equitable reimbursement for travel expenses in the amount he would have received from the VR agency had it not rejected his requests.<sup>285</sup>

Unfortunately, a proper analysis of the right to obtain reimbursement from a State VR agency should find that Congress has not waived State's Sovereign Immunity and it would therefore not be responsible for reimbursement. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) the Supreme Court held that Section 504 did not waive a State's Sovereign immunity and that to do so under a spending clause statute (such as Section 504, the IDEA and the Rehab. Act), the intent to do so must be clear in the statute itself. Following this decision Congress amended Section 504 to include an explicit waiver of immunity. The Supreme Court reached the same conclusion under the IDEA in *Dellmuth v. Muth*, 491 U.S. 223 (1989), and Congress followed up by amending the IDEA to explicitly waive immunity. But, when a private right of action was added to Title I of the Rehabilitation Act it did not include this language, so it will most likely

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<sup>282</sup>471 U.S. 359 (1985).

<sup>283</sup>510 U.S. 7 (1993).

<sup>284</sup>986 F.Supp.2d 57 (D. Me. 2013).

<sup>285</sup>*Id.* at 76-77, citing *Burlington*, 471 U.S. 359, 370-71 ("holding that identically worded relief provision in the IDEA empowered district court to grant equitable reimbursement to plaintiff for expenses that [the state] should have paid all along and would have borne in the first instance had it developed a proper IEP".) (Internal quotations omitted).

experience the same fate as Section 504 and the IDEA.

Nevertheless, the case law has been mixed. In *Millay v. Maine*, the court explicitly held the Eleventh Amendment did not bar reimbursement:

The Plaintiff is entitled to equitable reimbursement equivalent to the amount he would have received from the DBVI had it not rejected his request that it pay his travel expenses. *Millay v. Me. Dep't of Labor*, No. 1:11-CV-00438-NT, 2012 WL 6044775 (D.Me. Sept. 21, 2012) (Mag. J. Kravchuk's recommended decision, also available at ECF No. 31), adopted by *Millay v. Me. Dep't of Labor*, No. 1:11-CV00438-NT, 2012 WL 6043964 (D.Me. Dec. 5, 2012) (also available at ECF No. 35) (Eleventh Amendment does not bar granting equitable reimbursement under Title I's relief provision); see also *Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370-71, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) (holding that identically worded relief provision in the IDEA empowered district court to grant equitable reimbursement to plaintiff for "expenses that [the state] should have paid all along and would have borne in the first instance had it developed a proper IEP").<sup>286</sup>

Similarly, in *White v. Vocational Rehabilitation*,<sup>287</sup> the court found "no merit in defendant's argument that this action is precluded by the Eleventh Amendment." However, *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*,<sup>288</sup> found that Title I, unlike Section 504, contained no clear waiver of a state's Eleventh Amendment immunity.

Congress has not established any clear intent that would put the states on notice that they are waiving Eleventh Amendment immunity under § 102. The 1998 amendments to § 102 of the Rehabilitation Act, specifically § 722(c)(5)(J)(i), simply do not rise to the level of a clear statement that is required of legislation enacted through Congress's Article I Spending Clause powers.<sup>289</sup>

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<sup>286</sup>986 F.Supp.2d 57, 76.

<sup>287</sup>No. Civ.04-842-HU, 2004 WL 3049760 at \*2 (D. Or. 2004)

<sup>288</sup>392 F Supp 2d 794, (WD Tex. 2005)

<sup>289</sup>*Id.* at 801.



Additionally, under the IDEA the courts have held that one cannot bypass the administrative hearing process under the IDEA and bring a case directly to court.<sup>290</sup> It is likely that courts will also require exhaustion of the administrative process before a court action can be started under Title I of the Rehabilitation Act. For example, in *El v. VESID*,<sup>291</sup> the court dismissed the plaintiff's case for failure to exhaust the administrative hearing process in Title I. Finally, because the statute is silent on the issue, it can be presumed there is no right to attorneys' fees.<sup>292</sup>

## **XII. Conclusion**

The VR system can be a crucial resource for AT for people with disabilities who are planning to enter the workforce. Over the years, Congress has continued to strengthen the rights of people with disabilities in the VR process and enhance the availability of AT.

Congress and RSA have also, over time, strengthened the mandate of state VR agencies to provide a range of services to maximize employability and economic self-sufficiency. Although the reading of the maximization requirements by the courts to date has yielded mixed results, the language of the law, regulations and policy directives continues to support a reading that favors maximization of employment in individual cases. Nevertheless, given the reluctance of the courts to embrace the maximization standard, we advise advocates to refer to the changes made by the WIOA, as well as the language from the comments to the 2001 regulations--a person's employment goal should not be limited to an entry level position for those capable of more challenging work.

Overall, Title I of the Rehabilitation Act provides a very comprehensive set of services, including AT, that can be funded to prepare individuals for the world of work. Hopefully, this publication will provide the reader with a good reference tool for accessing those services.

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<sup>290</sup>See *Riley v. Ambach*, 668 F.2d 635 (2<sup>nd</sup> Cir. 1981); *Thomas v. East Baton Rouge Parish Sch. Bd.*, 29 Individuals with Disabilities Law Reporter 954 (M.D. La. 1998).

<sup>291</sup>2011 WL 288512 (E.D.N.Y. Jan. 27, 2011).

<sup>292</sup>See *Smith v. Robinson*, 468 U.S. 992 (1984).