

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 through the National Assistive Technology (AT) Advocacy Project as part of its Funding of AT manual series. Information about the AT Advocacy Project, and the federal grant which supports it, appears in the Publication Credits and Disclaimer on page iii, below.

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 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 a primary 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. While there were a number of initial court decisions employing this requirement to affirm additional services for individuals with disabilities served by VR agencies, more recently courts have shied away from this provision. Nevertheless, the law requires VR agencies to establish VR goals that are based on the individual’s interests and capabilities. Additionally, RSA has stated that VR agencies must establish employment goals that are beyond entry level positions for those capable of more challenging work. In advocating for services, rather than relying on the maximizing employment standard, it may be more effective to rely on this RSA standard. All of this is discussed in greater detail in the pages that follow.

Publication Credits and Disclaimer

This publication or 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 through the National Assistive Technology (AT) Advocacy Project, a special project of Neighborhood Legal Services, Inc. (NLS) in Buffalo, New York. This 2013 version fully replaces the 1999 version. The author of the 1999 version 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 part-time with the National AT Advocacy Project 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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The RESNA *Catalyst Project* is funded to provide technical assistance to the AT Act Grantees to assist them in increasing awareness, access, acquisition, and advocacy to AT devices and services for individuals with disabilities of all ages. The project works with the 56 statewide AT programs, the 57 Protection and Advocacy for AT (PAAT) programs, and the 33 alternative financing programs. It also works with 19 access to telework financial loan programs. Our National AT Advocacy Project, as a *Catalyst Project* partner provides technical assistance, training, and a range of other support services, nationwide, to a primary audience of attorneys and advocates who work at PAAT programs and specialize in AT funding. For access to our many publications, you can go to our website at www.nls.org/Disability/NationalAssistiveTechnologyAdvocacyProject.

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A Listing of Acronymns and Abbreviations

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

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.¹ The Rehabilitation Services Administration (RSA), within the U.S. Department of Education (DOE), 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. Congress has stated that VR services are to empower individuals to maximize employability, economic self-sufficiency, independence and integration into the work place and the community through "comprehensive and coordinated *state-of-the-art* programs."²

On August 7, 1998, President Clinton signed into law the Workforce Investment Act of 1998 (WIA).³ Included within the WIA were the Rehabilitation Act Amendments of 1998 (Rehab '98), reauthorizing the Rehabilitation Act through 2003. After our original VR manual was published in 1999, RSA issued proposed regulations to implement Rehab '98 on February 28, 2000.⁴ Final regulations were published on January 17, 2001.⁵ Additional final regulations went into effect on October 1, 2001, concerning appropriate employment outcomes for those using VR services.⁶ All of these changes are incorporated into this publication.

¹29 U.S.C. §§ 701 *et seq.*; 34 C.F.R. Part 361.

²*Id.* § 701(b)(1)(emphasis added).

³P.L. 105-220, 112 Stat. 936.

⁴65 Fed. Reg. 10620.

⁵66 Fed. Reg. 4380.

⁶*Id.* 7250.

Although Congress had contemplated merging the VR system into the WIA, VR is maintained as a separate program to meet the vocational training needs of people with disabilities. But, the vocational training opportunities of the state workforce investment system are clearly intended to be available to individuals with disabilities.⁷

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

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

II. Eligibility for Vocational Rehabilitation Services

A. Basic Eligibility Criteria

⁷See 29 U.S.C. § 701(b)(1)(A).

⁸65 Fed. Reg. 10620.

⁹See 29 U.S.C. § 701(b)(1)(A).

¹⁰65 Fed. Reg. 10624.

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 or regain employment.”¹¹ 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.*,¹² 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.

Any service an individual is to receive from the VR system must be connected to an ultimate employment goal. Employment outcomes include full or part-time competitive employment in an integrated setting, supported employment, or other employment in an integrated setting such as self-employment, telecommuting and business ownership, that is consistent with the individual’s strengths, abilities, interests and informed choice.¹³ The comments note that “homemaker” and “unpaid family worker” are acceptable employment outcomes under this definition because individuals with disabilities should be “able to pursue the same type of outcomes that are available to the general public.”¹⁴

Persons must show a mental, physical or learning disability that interferes with the ability to work. The disability need not be so severe as to qualify the person for SSDI or SSI benefits. The disability must only be a substantial impediment to employment.¹⁵ 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.¹⁶ The regulations allow VR agencies to make interim eligibility decisions and provide interim services pending a final decision, for individuals they reasonably believe will be eligible.¹⁷ The comments to the 2000 proposed regulations note that these interim services may be used for SSI or SSDI recipients while the VR system is waiting for documentation from the Social Security Administration (SSA).¹⁸

¹¹29 U.S.C. § 722(a)(1).

¹²85 Ohio All.3d 701, 621 N.E.2d 437 (Ct. of App. of OH, 10th Dist. 1993).

¹³34 C.F.R. § 361.5(b)(16).

¹⁴66 Fed. Reg. 7255.

¹⁵29 U.S.C. § 705(20)(A).

¹⁶*Id.* § 722(a)(3).

¹⁷34 C.F.R. § 361.42(b).

¹⁸65 Fed. Reg. 10626.

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.¹⁹ 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.”²⁰

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, with appropriate supports. These trial work experiences must “be of sufficient variety and over a sufficient length of time to determine” whether the individual is eligible.²¹ The only exception is for the “limited circumstances” in which the individual cannot take advantage of such experiences, even with support.²² 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.²³ Individuals determined to be incapable of benefitting under this standard must be referred to local extended employment providers (*i.e.*, sheltered workshops).²⁴

¹⁹29 U.S.C. § 722(a)(2); 34 C.F.R. § 361.42(a)(2).

²⁰34 C.F.R. § 361.42(a)(2), Note.

²¹29 U.S.C. § 722(a)(2)(B).

²²*Id.*

²³*Id.* § 722(a)(5)(D).

²⁴34 C.F.R. § 361.43.

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.²⁵ 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.²⁶ 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.²⁷ Those who are not served are entitled to an appropriate referral to other state and federal programs, including other providers within the state workforce investment system.²⁸

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 investment activities in the State through the promotion of program 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.²⁹

Most of these requirements are already mandatory for recipients of federal funds pursuant to Section 504 of the Rehabilitation Act of 1973³⁰ and for providers that are covered by the Americans with Disabilities Act.³¹

B. Evaluation of Eligibility

²⁵29 U.S.C. § 721(a)(5).

²⁶34 C.F.R. § 361.36(d)(2).

²⁷*Id.* § 361.36(e)(3).

²⁸29 U.S.C. §§ 721(a)(5)(D) and 721(a)(20).

²⁹*Id.* § 721(a)(11)(A)(i)(II).

³⁰*Id.* § 794

³¹42 U.S.C. §§ 12101 *et seq.*

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.³² The VR agency can exceed 60 days for its determination under two circumstances: (1) if the individual requires an extended evaluation 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.³³

Information used to determine eligibility includes: (1) existing data, such as medical reports, SSA records and education records; and (2) to the extent existing data is insufficient to determine eligibility, an assessment done by or obtained by the VR agency.³⁴

³²29 U.S.C. § 722(a)(6).

³³*Id.*

³⁴*Id.* § 722(a)(4)(C).

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 employment (IPE).³⁵ This plan, which is to be developed by the consumer, with assistance from the VR counselor, is to be set forth on a form provided by the state VR agency.³⁶

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.³⁷ 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."³⁸

A. Informed Choice

It has been the policy of the VR system that all activities 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."³⁹

³⁵*Id.* § 722(b). Prior to Rehab '98 changes this was known as the individualized written rehabilitation plan (IWRP).

³⁶*Id.* § 722(b)(2)(A).

³⁷*Id.* § 705(2)(B).

³⁸*Id.* § 705(2)(C).

³⁹*Id.* § 701(c)(1) (emphasis added).

Rehab'98 revolutionizes informed choice. 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.⁴⁰ The VR agency must still approve the IPE, but the individual decides the level of involvement, if any, of the VR counselor in developing the IPE.⁴¹ In fact, those using VR services can develop the IPE by themselves or with the assistance of others outside of the state VR program.⁴²

The stated reason for such an expanded role for the consumer was Congress' belief "that a consumer-driven program is most effective in getting people jobs."⁴³ 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."⁴⁴

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.⁴⁵

While Rehab '98 rewrites the rules on informed choice, this does not mean that 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*,⁴⁶ 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

⁴⁰*Id.* §§ 720(a)(3)(C) and 722(d)(1)-(5).

⁴¹*Id.* §§ 722(b)(1)(A) and 722(b)(2)(C).

⁴²34 C.F.R. § 361.45(c)(1)(ii)(B) & (C).

⁴³Congressional Record—House, H6693, July 29, 1998.

⁴⁴29 U.S.C. § 722(d)(3) (emphasis added).

⁴⁵Congressional Record—House, H6693, July 29, 1998.

⁴⁶504 N.W.2d 794 (Minn. Ct. of App. 1993).

employment.”⁴⁷ 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.

⁴⁷*Id.* at 799.

“Extended employment” (or sheltered workshops) has been eliminated as a final employment outcome. However, consistent with the principle of informed choice, extended employment remains a viable 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.”⁴⁸ 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.⁴⁹

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.”⁵⁰

B. 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. The timeline for initiating services and for achieving the employment outcome;

⁴⁸66 Fed. Reg. 7254.

⁴⁹34 C.F.R. § 361.37(b)(5).

⁵⁰66 Fed. Reg. 7257.

4. The specific entity, *chosen by the individual*, to provide the VR services and the method chosen to procure those services;
5. The criteria for evaluating progress toward achieving the employment outcome;
6. The responsibilities of the VR agency, the individual (to obtain comparable benefits) and any other agencies (to provide comparable benefits);
7. In states which have a financial needs test (see below), any costs for which the individual will be responsible;
8. For individuals with the most significant disabilities that are expected to need supported employment, the extended services to be provided; and
9. The projected need for post employment services, if necessary.⁵¹

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.⁵²

C. Closing the Record of Services

The regulations also specify the conditions which must be met before the VR agency can close a case for an individual who has achieved an employment outcome.⁵³ 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.

⁵¹29 U.S.C. § 722(b)(3).

⁵²*Id.* § 722(b)(2)(E).

⁵³34 C.F.R. § 361.56.

IV. Available Services

A. Required Services

VR services are any services, described in an IPE, necessary to assist an individual with a disability in “preparing for, securing, retaining, or regaining an employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual.”⁵⁴ 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 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.”⁵⁵ 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. For example, in *Turbedsky v. PA Dept. of Labor and Industry*,⁵⁶ 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:

⁵⁴29 U.S.C. § 723(a).

⁵⁵66 Fed. Reg. 4426.

⁵⁶65 Pa.Cmwlt. 363, 442 A.2d 849 (Pa. Cmwlt. Ct. 1982).

1. The assessment to determine eligibility and needs, including, if appropriate, by someone skilled in rehabilitation technology (i.e., AT).
2. Counseling, guidance and job placement services and, if appropriate, referrals to the services of WIA providers.
3. Vocational and other training, including higher education and the purchase of tools, materials and books.
4. Diagnosis and treatment of physical or mental impairments to reduce or eliminate impediments to employment, to the extent financial support is not available from other sources, including health insurance or other comparable benefits. This may include:
 - a. corrective surgery;
 - b. therapeutic treatment;
 - c. necessary hospitalization;
 - d. prosthetic and orthotic devices;
 - e. eyeglasses and visual services;
 - f. services for individuals with end-stage renal disease, including dialysis, transplants and artificial kidneys; and
 - g. diagnosis and treatment for mental or emotional disorders.
5. Maintenance for additional costs incurred during rehabilitation.
6. “Transportation, including adequate training in the use of public transportation vehicles and systems, that is provided in connection with the provision of any other service described in this section and needed by the individual to achieve an employment outcome (emphasis added).” Transportation may include vehicle purchase. Under the regulations, transportation is defined as “travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a [VR] service.”⁵⁷ 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.⁵⁸
7. Personal assistance services while receiving VR services.

⁵⁷34 C.F.R. § 361.5(b)(57).

⁵⁸*Id.* § 361.5(b)(57)(i), Ex.2.

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. Services to the family to assist an individual with a disability to achieve an employment outcome.
15. Other goods and services determined necessary to enable the individual with a disability to achieve an employment outcome.
16. Post-employment services necessary to assist an individual to retain, regain or *advance* in employment.⁵⁹

⁵⁹29 U.S.C. § 723(a); 34 C.F.R. § 361.48.

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 may not place "any arbitrary limits on the nature and scope of" VR services to be provided to achieve an employment outcome.⁶⁰ 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."⁶¹ 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.⁶² Finally, the policies must include provisions for the timely authorization of services, "including any conditions under which verbal authorization can be given."⁶³

B. Assistive Technology

The Rehabilitation Act uses the definitions of AT devices and services⁶⁴ contained in the Assistive Technology for Individuals with Disabilities Act (AT Act).⁶⁵

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.⁶⁶

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 environment;

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

⁶⁰34 C.F.R. § 361.50(a).

⁶¹*Id.* § 361.50(d).

⁶²*Id.* § 361.50(c).

⁶³*Id.* § 361.50(e).

⁶⁴29 U.S.C. § 705(3) and (4).

⁶⁵29 U.S.C. §§ 3001 *et seq.*

⁶⁶29 U.S.C. § 3002(4).

(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.⁶⁷

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.⁶⁸

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:

[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.⁶⁹

⁶⁷*Id.* § 3002(5).

⁶⁸Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405.

⁶⁹29 U.S.C. § 705(30).

The rehabilitation technology services envisioned by Title I of the Rehabilitation Act can take many forms and are in no way limited by the Act. The state VR Plan must describe the “manner in which the *broad range* of rehabilitation technology services will be provided,” including training and the provision of AT.⁷⁰

The use of AT to assist in preparing individuals with disabilities for employment permeates the VR process. As noted above, the assessments to determine eligibility and rehabilitation needs may include an assessment by someone skilled in rehabilitation technology.⁷¹ Available VR services which may meet the definition of AT include:

⁷⁰34 C.F.R. § 361.48(b) (emphasis added).

⁷¹29 U.S.C. §§ 705(2)(C) and 723(a)(1).

1. Prosthetic and orthotic devices;
2. Eyeglasses;
3. Orientation and mobility services, which can include AT;
4. Rehabilitation technology services, which can include vehicular modifications;⁷²
5. Telecommunications;
6. Sensory devices; and
7. Other technological aids and devices.⁷³

Any such service must be listed on the IPE.⁷⁴

Several examples of AT can be gleaned from the court decisions. For example, in *Chirico v. Office of Voc. and Educ. Services*,⁷⁵ 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*,⁷⁶ 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.”⁷⁷ The court denied her request for chiropractic services, however, finding that the individual did not demonstrate that it would benefit her.

⁷²34 C.F.R. § 361.5(b)(49), Note.

⁷³29 U.S.C. § 723(a).

⁷⁴*Id.*

⁷⁵211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995).

⁷⁶682 A.2d 850 (Pa. Cmwlth. Ct. 1996).

⁷⁷*Id.* at 851.

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, securing, retaining, or regaining an employment outcome.”⁷⁸ For example, in *Zingher v. Dept. of Aging and Disabilities*,⁷⁹ 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, 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.”⁸⁰

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.”⁸¹ A note to the regulation indicates some possible circumstances in which post-employment services may be appropriate:

Post-employment services are available to assist an individual to *maintain* employment, *e.g.*, the individual’s employment is jeopardized because of conflicts with supervisors or co-workers and the individual needs mental health services and counseling to maintain the employment; to *regain* employment, *e.g.*, the individual’s job is eliminated through reorganization and new placement services are needed; and to *advance* in employment, *e.g.*, the employment is no longer consistent with the individual’s strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.⁸²

⁷⁸29 U.S.C. § 723(a).

⁷⁹163 Vt. 566, 664 A.2d 256 (Vt. S.Ct. 1995).

⁸⁰*Id.*, 664 A.2d at 260.

⁸¹34 C.F.R. § 361.5(b)(42) (emphasis added).

⁸²*Id.*, Note (emphasis added).

Each IPE must indicate the expected need for post-employment services.⁸³ Prior to closing a case, the individual must be informed of the availability of post-employment services.⁸⁴ 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.⁸⁵

In *Chirico v. Office of Voc. and Educ. Services*,⁸⁶ 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."⁸⁷

D. Out-of-State Services

What if a VR consumer 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."⁸⁸ 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.⁸⁹ Therefore, if there is no program within the state that will enable the individual to meet the employment goal, the state must have a process to fully fund the out-of-state program (subject to any financial need criteria the state may have established).

On the other hand, if the out-of-state program costs more than an in-state service, and either service would meet the individual's rehabilitation needs, the VR system is not responsible for costs in excess of the cost of the in-state service. The individual must still

⁸³*Id.* § 361.46(c).

⁸⁴*Id.* § 361.56(d).

⁸⁵*Id.* § 361.5(b)(42), Note.

⁸⁶211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995).

⁸⁷*Id.*, 211 A.D. 2d at 261.

⁸⁸34 C.F.R. § 361.50(b)(2).

⁸⁹*Id.* § 361.50(b)(1).

be able to choose an out-of-state service, and the VR system would be responsible for the costs of the out-of-state program, up to the cost of the in-state program.⁹⁰

⁹⁰*Id.*

V. Financial Need Criteria

There is no requirement that a state consider financial need when providing VR services.⁹¹ 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.⁹²

Any financial needs test must take into account the individual's disability-related expenses.⁹³ The level of the individual's participation must not be so high as to "effectively deny the individual a necessary service."⁹⁴ The following services must be provided without regard to financial need: (1) diagnostic services; (2) counseling, guidance and referral services; (3) job placement; and personal assistance services.⁹⁵ The regulations also add "any auxiliary aid or service," such as interpreter or reader services, that the individual needs to participate in the VR program and which would be mandated under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act, to the list of services that are exempt from the financial needs test.⁹⁶

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.⁹⁷ 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 be receiving [SSI] benefits under" Title XVI.⁹⁸

⁹¹*Id.* § 361.54(a).

⁹²*Id.* § 361.54(b)(2)(i).

⁹³*Id.* § 361.54(b)(2)(iv)(B).

⁹⁴*Id.* § 362.54(b)(2)(iv)(C).

⁹⁵*Id.* § 361.54(b)(3)(i).

⁹⁶*Id.* § 361.54(b)(3)(i)(G).

⁹⁷*Id.* § 361.54(b)(3)(ii).

⁹⁸42 U.S.C. § 1382h.

VI. 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.⁹⁹

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*.¹⁰⁰

In *Cook v. PA Bureau of Vocational Rehabilitation*,¹⁰¹ 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 Requirements

The requirement that VR services are to be designed to maximize the employment of those using VR services was first added by 1986 amendments. As first stated in 1986, the standard was “to develop and implement ... comprehensive and coordinated programs of VR ... to *maximize* ... employability, independence, and integration into the workplace and the community.”¹⁰² This language was added to the preamble covering the entire Act, not just Title I.

The legislative history emphasized Congressional intent:

⁹⁹Former 29 U.S.C. § 701(1).

¹⁰⁰Former 29 U.S.C. § 720(a) (emphasis added).

¹⁰¹45 Pa.Cmwlth. 415, 405 A.2d 1000 (Pa. Cmwlth. Ct. 1979).

¹⁰²Pub. L. 99-506, § 101, 100 Stat. 1808 (emphasis added).

[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*.¹⁰³

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.¹⁰⁴

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."

Similar to, but stronger than, the standard announced when the Rehabilitation Act was first enacted, 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 gainful employment.¹⁰⁵

¹⁰³S. Rep. No. 388, 99th Cong., 2d Sess. 5 (1986)(emphasis added), as quoted in *Polkaba 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).

¹⁰⁴29 U.S.C. § 701(b)(1)(A) (emphasis added).

¹⁰⁵*Id.* § 720(a)(2)(B) (emphasis added).

In keeping with the dual obligations of the VR system to maximize employment and ensure that the employment goal is consistent with a person's interests and capabilities, post-employment services are available to assist an individual to *advance* in employment.¹⁰⁶ As noted above, this obligation applies when "the employment is no longer consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests."¹⁰⁷ This requirement can have no meaning if the obligation of the VR agency ceases when an individual merely becomes employed full-time.

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."¹⁰⁸

C. Rehabilitation Services Administration Policy Directive

Consistent with the increased statutory obligations placed on state VR agencies, on August 19, 1997, the RSA issued a Policy Directive.¹⁰⁹ This directive requires 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 "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 employment potential. RSA's clear change in policy is best expressed in the following quote from the August 1997 Policy Directive:

¹⁰⁶34 C.F.R. § 361.5(b)(37).

¹⁰⁷*Id.*, Note.

¹⁰⁸See note 101, above.

¹⁰⁹RSA-PD-97-04.

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.¹¹⁰

This directive clarifies 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 clarifies that a person who is currently employed will, in appropriate cases, be eligible for VR services to allow for “career advancement” or “upward mobility.”

The Policy Directive emphasizes 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.

The comments to the 2001 regulations reaffirm this policy directive. They note that states must “look beyond options in entry-level employment for VR program participants who are capable of more challenging work.” Additionally, “individuals with disabilities who are currently employed should be able to advance in their careers.”¹¹¹

D. 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.

¹¹⁰*Id.* (emphasis added).

¹¹¹66 Fed. Reg. 4419.

In *Buchanan v. Ives*,¹¹² the parties agreed that applying a “cost efficiency analysis” to the 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.¹¹³

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*,¹¹⁴ 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*,¹¹⁵ 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 amended to change the employment goal.¹¹⁶

¹¹²793 F.Supp. 361 (D. Me. 1991).

¹¹³*Id.* at 365.

¹¹⁴590 N.E.2d 154 (Ind. Ct. of App., First Dist. 1992).

¹¹⁵183 A.D.2d 575, 583 N.Y.S. 2d 464 (N.Y. App. Div. 1st Dept. 1992).

¹¹⁶29 U.S.C. § 722(b)(2)(E).

In *Stevenson v. Dept. of Labor and Industry*,¹¹⁷ the court upheld the VR agency's denial of funding for a master's degree. The VR agency had funded the individual's bachelor's degree in accounting and she sought funding for an MBA program. The VR agency believed that the federal VR laws did not give it the authority to fund the master's level degree. The court agreed, but relied on the old RSA policy memorandum which was overturned by the 1997 RSA Policy Directive referred to above. However, at the time of the decision, the 1986 maximization standard referred to above was in effect. Nevertheless, the court made the following observation:

It would be unreasonable and impractical to require that the "highest level of education achievable" be granted in every case of providing an individual with rehabilitation services. Rather, the goal of attaining suitable employment is a highly individualized determination which is to be made on a case-by-case basis.¹¹⁸

In *Chirico v. Office of Voc. and Educ. Services*,¹¹⁹ 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*,¹²⁰ 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.¹²¹

¹¹⁷167 Pa.Cmwlth. 394, 648 A.2d 344 (Pa. Cmwlth. Ct. 1994).

¹¹⁸*Id.*, 648 A.2d 347.

¹¹⁹211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995).

¹²⁰223 A.D.2d 829, 636 N.Y.S.2d 179 (N.Y. App. Div. 3rd Dept. 1996).

¹²¹*Id.*, 223 A.D.2d at 830.

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*,¹²² 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."¹²³ The court stated that 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."¹²⁴ 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."¹²⁵ In reaching this decision, however, the court does not discuss the 1997 RSA Policy Directive, referred to above.

In *Berg v. Florida Department of Labor*,¹²⁶ 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."¹²⁷ 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.

¹²²92 N.Y.2d 477, 683 N.Y.S.2d 139 (N.Y. Ct. of Appeals 1998).

¹²³*Id.*, 92 N.Y.2d at 487.

¹²⁴*Id.* at 481 (emphasis added).

¹²⁵*Id.*

¹²⁶163 F.3d 1251 (11th Cir. 1998).

¹²⁷*Id.* at 1256.

In *Hedgepeth v. North Carolina Div. Of Services for Blind*,¹²⁸ 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 *Polkaba* 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 *Polkaba* 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*,¹²⁹ the court denied the individual's request for undergraduate tuition 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 discuss the 1997 RSA Policy Directive and none of them have considered the revolution in informed choice created by Rehab '98. 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.¹³⁰ 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

¹²⁸153 N.C.App. 652, 571 S.E.2d 262 (N.C.App. 2002).

¹²⁹82 Conn.App. 306, 845 A.2d 437 (Conn.App. 2004).

¹³⁰See note 112, above.

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.

VII. 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.¹³¹ 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.¹³² Comparable benefits do not include awards and scholarships based on merit.¹³³ The comments to the regulations also make it clear that SSI's Plan for Achieving Self-Support (PASS) is *not* a comparable benefit.¹³⁴ This is particularly noteworthy because there had been a question in some states about whether or not a PASS would be considered a comparable benefit. On the other hand, the comments note that services an individual receives from a "ticket" under the Ticket to Work program would be a comparable benefit.¹³⁵

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

1. If consideration of the similar benefit would interrupt or delay:
 - a. Progress toward achieving the employment outcome;
 - b. An immediate job placement; or
 - c. Services to an individual at extreme medical risk; or
2. If diagnostic services, VR counseling, referral to other services, job placement or rehabilitation technology (*i.e.*, AT) is involved.¹³⁶

¹³¹29 U.S.C. § 721(a)(8).

¹³²RSA-PD-92-02 (11/21/91).

¹³³29 U.S.C. § 721(a)(8)(A)(ii).

¹³⁴66 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.

¹³⁵*Id.* 4418.

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

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? 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 investment system, to identify who will be responsible for providing what services.¹³⁷ The plan must ensure the coordination and timely delivery of services. All public agencies in the state remain responsible for providing services mandated by other state laws or policy, or federal laws.

The IPE must list all services to be provided to meet the employment goal, whether or not they are the responsibility of the VR agency. It must identify the services the VR agency is responsible for providing, any comparable benefits the individual is responsible for applying for or securing, and the responsibilities of any agencies to provide comparable benefits.¹³⁸ If another agency refuses to fulfill its obligations, the VR agency must provide the services, but may seek reimbursement from that agency.¹³⁹

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.¹⁴⁰ 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?

¹³⁷29 U.S.C. § 721(a)(8)(B).

¹³⁸*Id.* § 722(b)(3)(E).

¹³⁹*Id.* § 721(a)(8)(C)(ii).

¹⁴⁰See 34 C.F.R. § 361.53(c).

1. Effect of Defaulted Student Loans on VR Funding for College

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.¹⁴¹ 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.¹⁴²

RSA’s policy provides that if an individual with the financial means to do so fails to repay a loan, the VR agency may determine that the financial assistance for which the student is ineligible is, in any event, “available.” Accordingly, the VR agency would deduct from the amount of assistance it will provide the value of the grants for which the student would have been eligible. But, when a student with limited financial means cannot make repayment arrangements with the lender, the VR agency may conclude that “maximum efforts” have been made and full VR assistance would be appropriate. When confronted with this question, VR counselors must make individualized determinations, based on all of the circumstances.¹⁴³

2. Forgiveness of Student Loans

Under the federal student loan program, borrowers with Federal Family Education Loans, Direct Loans, and Perkins Loans are eligible for a discharge of their loan if they become totally and permanently disabled.¹⁴⁴ Beginning on July 1, 2010, the definition of total and permanent disability significantly changed. The new definition is more favorable to borrowers. To be considered totally and permanently disabled, the individual must be unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death, can be expected to last for a continuous period of 60 months or has lasted for a continuous period of 60 months.¹⁴⁵ The definition also covers individuals who have been determined to be unemployable due to a service-connected condition by the Secretary of Veterans Affairs.¹⁴⁶

¹⁴¹29 U.S.C. § 723(a)(3); 34 C.F.R. § 361.48(f).

¹⁴²RSA-PD-92-02 (11/21/91).

¹⁴³*Id.*

¹⁴⁴34 C.F.R. §§ 674.61, 682.402(c), 685.213.

¹⁴⁵34 C.F.R. § 682.200.

¹⁴⁶*Id.*

Beginning July 1, 2010, a new process for disability discharges exists. As of this date, the conditional discharge period is eliminated. Eligible borrowers will get final discharges but the Department of Education (DOE) will continue to monitor these borrowers for three years. Since the loan is discharged, the borrower is not required to make any payments. The evaluation criteria during the three-year period is the same as the criteria that was used during the conditional discharge period. The borrower is obligated to report earnings to the DOE that are above the federal poverty level for a household of two. The difference is that under the old conditional discharge period, if the borrower did not meet the criteria during those three years, he would be no longer in conditional discharge status and the loans would be put back in repayment; interest did not accrue during this conditional period. However, under the new system, a borrower who has earnings that exceed the poverty level during the three year period will have his or her loan reinstated.¹⁴⁷

3. Repayment of Defaulted Student Loans

The law also makes it relatively easy to develop a repayment plan which will take the loan out of default. Each guaranty agency under the federal student loan program must allow a borrower with defaulted loans to renew eligibility for all federal financial assistance. The borrower must make six consecutive monthly payments for it to be taken out of default. The guaranty agency cannot demand from a borrower a monthly payment amount that is “more than is reasonable and affordable based upon the *borrower’s total financial circumstances*.” A borrower may only use this provision once.¹⁴⁸

The payments must be voluntary and on-time. “On-time” means payments are made within 15 days of the scheduled due date. “Voluntary payments” “do not include payments obtained by income tax offset, garnishment, or income or asset execution.”¹⁴⁹

VIII. Purchase of AT for Special Education Students in Transition: Who Pays?

¹⁴⁷34 C.F.R. § 682.402(c)(5).

¹⁴⁸20 U.S.C. § 1078-6(b)(emphasis added).

¹⁴⁹34 C.F.R. § 685.102(b).

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.¹⁵⁰ 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),¹⁵¹ 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, transition services are to begin.¹⁵²

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

within 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.¹⁵³

¹⁵⁰See 64 Fed. Reg. 12540 (comments to the 1999 federal special education regulations).

¹⁵¹20 U.S.C. §§ 1400 *et seq.*

¹⁵²34 C.F.R. § 300.320(b).

¹⁵³20 U.S.C. § 1401(34).

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.¹⁵⁴ The schools are expected to become familiar with "the post-school opportunities and services available for students with disabilities in their communities."¹⁵⁵

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.¹⁵⁶

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 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.¹⁵⁷

VR agencies are also specifically referred to in the IDEA regulations. The definition of rehabilitation counseling includes services provided by the VR agency.¹⁵⁸ 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."¹⁵⁹ 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.¹⁶⁰

¹⁵⁴*Id.*

¹⁵⁵House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News p. 1733.

¹⁵⁶34 C.F.R. § 300.321(b).

¹⁵⁷House Report No. 101-544, p. 11, 1990 U.S. Code Cong. & Admin. News, p. 1733 (emphasis added).

¹⁵⁸34 C.F.R. § 300.34(c)(12).

¹⁵⁹20 U.S.C. § 1401(2)(D) (emphasis added).

¹⁶⁰34 C.F.R. § 300.324(c)(2).

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.¹⁶¹

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 participation in transition planning and related activities.*”¹⁶² Accordingly, the state VR Plan must 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.¹⁶³

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.¹⁶⁴ In discussing the importance of the early involvement of the VR system in the transition planning process, the comments to the regulations stress that the VR agency should “participate actively throughout the transition planning process, not just when the student is nearing

¹⁶¹20 U.S.C. § 1412(a)(12).

¹⁶²66 Fed. Reg. 4424 (emphasis added).

¹⁶³20 U.S.C. § 721(a)(11)(D).

¹⁶⁴34 C.F.R. § 361.22(b).

graduation.”¹⁶⁵

¹⁶⁵66 Fed. Reg. 4424.

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.¹⁶⁶ Transition services are specifically listed in the VR regulations as an available VR service.¹⁶⁷

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

inform 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 process.¹⁶⁸

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.”¹⁶⁹ 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].”¹⁷⁰ 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.”¹⁷¹

¹⁶⁶Congressional Record–House, H6693, July 29, 1998.

¹⁶⁷34 C.F.R. § 361.48(r).

¹⁶⁸66 Fed. Reg. 4424.

¹⁶⁹*Id.*

¹⁷⁰34 C.F.R. § 361.5(b)(55).

¹⁷¹66 Fed. Reg. 4424.

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.¹⁷² “However, State [VR] agencies should not interpret the ‘interagency agreement’ provisions as shifting the obligation for paying for specific transition services normally provided by those agencies to local school districts. State [VR] agencies still have that responsibility.”¹⁷³ 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.”¹⁷⁴

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.¹⁷⁵ The comments to the VR 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 employment that they began making while in school.¹⁷⁶

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 may 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.

¹⁷²34 C.F.R. § 361.45(d)(8)(ii).

¹⁷³Congressional Record—House, H6693, July 29, 1998.

¹⁷⁴34 C.F.R. § 361.46(d).

¹⁷⁵*Id.* § 361.22(a)(2).

¹⁷⁶66 Fed. Reg. 4424 (emphasis added).

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.¹⁷⁷ The IDEA regulations envision other agencies providing services to students in transition, including VR agencies.¹⁷⁸ The VR regulations require that the state VR Plan specify the financial responsibility of the various state agencies serving the student.¹⁷⁹

IX. AT for the College Student: Who Pays?

A similar problem arises when a VR agency refuses to provide services for a college student, arguing that the college's responsibility under the Americans with Disabilities Act (ADA) or Section 504 is a comparable benefit.¹⁸⁰

A. Obligations of Colleges and Universities

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in any program or activity receiving federal funds.¹⁸¹ 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.

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.¹⁸² 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.¹⁸³ Therefore, all colleges and universities in the country will be

¹⁷⁷ 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).

¹⁷⁸ 34 C.F.R. § 300.324(c).

¹⁷⁹ *Id.* § 361.22(a)(2)(v).

¹⁸⁰ See "Several Vocational Agencies Stop Paying For Auxiliary Aids," *Section 504 Compliance Handbook*, Supp. No. 213, p. 1 (Thompson Publishing Group, August 1996).

¹⁸¹ 29 U.S.C. § 794.

¹⁸² 42 U.S.C. § 12131.

¹⁸³ *Id.* § 12181(7)(J).

covered by either Section 504, the ADA, or both.

There are regulations under Section 504 which specifically deal with 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.”¹⁸⁴ Colleges and universities are also required to operate their programs and activities in the most integrated setting appropriate.¹⁸⁵

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.¹⁸⁶

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 disability.¹⁸⁷ Additionally, colleges cannot impose rules, such as prohibiting tape recorders or service dogs, which limit the participation of people with disabilities in the program.¹⁸⁸

¹⁸⁴34 C.F.R. §§ 104.42 and 104.43(a).

¹⁸⁵*Id.* § 104.43(d).

¹⁸⁶*Id.* § 104.44(a).

¹⁸⁷*Id.* § 104.44(c).

¹⁸⁸*Id.* § 104.44(b).

Colleges must provide auxiliary aids to enable students with impaired sensory, manual, or speaking skills to participate in the program.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹

Schools must ensure that auxiliary aids are provided in a timely manner to ensure effective participation by students with disabilities.¹⁹² 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.¹⁹³ Colleges must provide auxiliary aids to students who are auditing classes as well as those taking courses for credit.¹⁹⁴

As colleges and universities have increasingly required students to use e-readers such as 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.¹⁹⁵ 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.¹⁹⁶ They also made it clear that it would be impermissible to use e-readers in classroom settings

¹⁸⁹*Id.* § 104.44(d)(1).

¹⁹⁰*Id.* § 104.44(d)(2).

¹⁹¹*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.

¹⁹²*Id.*

¹⁹³*Id.*

¹⁹⁴*Id.*, p. 5.

¹⁹⁵*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.

¹⁹⁶*Id.*, p. 2.

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.”¹⁹⁷

¹⁹⁷ *Id.*, attached Q&A, p. 2.

Personal services (including readers for personal study) or individually prescribed devices are not the responsibility of the college.¹⁹⁸ 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.¹⁹⁹

B. Obligations of the Vocational Rehabilitation System

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

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

[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.²⁰⁰

The purpose of these comments was to highlight that the provision of auxiliary aids would not be an undue burden on the colleges.²⁰¹

Addressing this question relative to Section 504, the Seventh Circuit, in *Jones v. Illinois Dept. of Rehabilitation Services*,²⁰² held that the state VR agency has the *primary* responsibility to provide auxiliary aids in the form of interpreter services. In *dicta*, the court also noted its approval of the district court's opinion that the similar benefits requirement did not even apply to colleges or universities.²⁰³ Likewise, in *Schorstein v. N.J. Div. of Voc. Rehab.*,²⁰⁴ the court held that the VR agency's policy of refusing to

¹⁹⁸34 C.F.R. § 104.44(d).

¹⁹⁹*Higher Education's Obligations*, p. 4.

²⁰⁰*Id.* Part 104, App. A, note 31 (emphasis added); see also *Higher Education's Obligations*, p.3.

²⁰¹See *U.S. v. Board of Trustees for U. of Ala.*, 908 F.2d 740, 745 (11th Cir. 1990).

²⁰²689 F.2d 724 (7th Cir. 1982).

²⁰³*Id.* at note 7.

provide interpreter services to college students violated Title I of the Rehabilitation Act.

²⁰⁴519 F.Supp. 773 (D.N.J. 1981), *aff'd*, 688 F.2d 824 (3rd Cir. 1982).

Rehab '98 clarifies, to some extent, the relative responsibilities of colleges and VR agencies in these situations. As noted above, the IPE not only is supposed to list the services that the VR agency will be providing, but also those services which will be provided by other agencies as comparable benefits.²⁰⁵ This way everyone will know, in advance, who is responsible for what services.

Additionally, *public* colleges and universities must be included in developing a comprehensive plan to ensure the coordination and timely delivery of services.²⁰⁶ They remain responsible for providing services mandated by other state laws or policy, or federal laws, such as the ADA and Section 504.²⁰⁷ If they refuse to provide services, the VR agency must provide the services, but may seek reimbursement from the college or university.²⁰⁸ “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.”²⁰⁹

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 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.²¹⁰ 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.

²⁰⁵29 U.S.C. § 722(b)(3)(E).

²⁰⁶*Id.* § 721(a)(8)(C) (emphasis added).

²⁰⁷*Id.* § 721(a)(8)(C)(i).

²⁰⁸*Id.* § 721(a)(8)(C)(ii).

²⁰⁹Congressional Record—House, H6692, July 29, 1998.

²¹⁰See 29 U.S.C. § 722(b)(3)(E).

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.²¹¹ The relevant ADA regulations also exempt personal devices and services.²¹² 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 student to use the device.

X. Hearing and Appeal Rights

Anyone seeking or receiving VR services who is dissatisfied with a decision by the VR agency has a right to appeal. Rehab '98 makes some significant changes in the appeal process. Each state must establish procedures governing appeals, which must include the right to mediation and an administrative hearing before an impartial hearing officer.²¹³ 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.²¹⁴

²¹¹34 C.F.R. § 104.44(d)(2).

²¹²28 C.F.R. §§ 35.135 and 36.306.

²¹³29 U.S.C. § 722(c)(1).

²¹⁴*Id.* § 722(c)(2)(A).

CAP is also funded under the Rehabilitation Act.²¹⁵ Therefore, 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.

Rehab '98 added mediation as an available 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.²¹⁶

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 examine witnesses.²¹⁷ The hearing decision is final and must be implemented, unless appealed.²¹⁸ 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.²¹⁹

Rehab '98 also makes significant changes in the availability of a second level of administrative review. Under prior law, the VR agency could review a hearing decision on its own motion. This is no longer true. 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.²²⁰

²¹⁵*Id.* § 732(a).

²¹⁶*Id.* § 722(c)(4).

²¹⁷34 C.F.R. § 361.57(b)(3).

²¹⁸*Id.* § 361.57(b)(3).

²¹⁹29 U.S.C. § 722(C)(7).

²²⁰*Id.* § 722(c)(5)(D)-(F).

Rehab '98 also adds a private right of action under Title I.²²¹ 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.²²² The right to bring a court action under Title I of the Rehabilitation Act bears a striking resemblance to the language under the IDEA.²²³ As a result, the case law interpreting the IDEA right to bring court cases has been applied to these provisions.

For example, in *Board of Education v. Rowley*,²²⁴ 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.”²²⁵ In *Reaves v. Missouri Dept. of Elementary and Secondary Educ.*,²²⁶ the Eighth Circuit held that the *Rowley* standard of review applied to VR cases because of the virtually identical language in the VR statute.

In *Diamond v. Michigan*,²²⁷ 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.”²²⁸

²²¹*Id.* § 722(c)(5)(J).

²²²*Id.* § 722(c)(5)(I).

²²³20 U.S.C. § 1415.

²²⁴458 U.S. 176 (1982).

²²⁵*Id.* at 206.

²²⁶422 F.3d 675, 681 (8th Cir. 2005).

²²⁷431 F.3d 262, 266-7 (6th Cir. 2005).

²²⁸*Id.* at 267.

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.²²⁹ 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. Finally, because the statute is silent on the issue, it can be presumed there is no right to attorneys' fees.²³⁰

XI. 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 role of people with disabilities in the VR process and enhance the availability of AT.

Congress and the federal 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 language from the 1997 RSA Policy Directive and 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.

²²⁹ See *Riley v. Ambach*, 668 F.2d 635 (2nd Cir. 1981); *Thomas v. East Baton Rouge Parish Sch. Bd.*, 29 Individuals with Disabilities Law Reporter 954 (M.D. La. 1998).

²³⁰ See *Smith v. Robinson*, 468 U.S. 992 (1984).