

# Postsecondary Supports and Services through Vocational Rehabilitation

Emily Munson, MA, JD, LLM  
Senior Attorney, Indiana Disability Rights

June 15, 2020

# [CONVERT to POLL QUESTION]

Do you have concerns about the way your VR program handles postsecondary services and supports?

- Absolutely; I believe my VR program regularly violates postsecondary students' rights.
- Yes; there have been a few postsecondary students whose rights have been violated by my VR program.
- No; my VR program fully complies with federal requirements.

# Objectives

- Review federal and state regulations and policies about VR-funded postsecondary supports and services
- Consider the range of advocacy options to enforce the VR participant's postsecondary rights
  - Informal advocacy
  - Formal advocacy
  - Litigation
    - Administrative
    - State court
    - Federal court
- Obtain best practices for resolving postsecondary supports and services disputes

# Authority for availability of postsecondary supports and services

“As appropriate to the vocational rehabilitation needs of each individual and consistent with each individual’s individualized plan for employment, the designated State unit must ensure that the following vocational rehabilitation services are available to assist the individual with a disability in preparing for, securing, retaining, advancing in, or regaining an employment outcome that is consistent with the individual’s unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice: . . .

(3) Vocational rehabilitation and guidance, including information and support services in accordance with § 361.52. . . .

# Authority for availability of postsecondary supports and services (cont.)

. . . (6) Vocational and other training services, including personal and vocational adjustment training, advanced training in, but not limited to: a field of science, technology, engineering, mathematics (including computer science), medicine, law, or business; books, tools, and other training materials . . .

(7) Maintenance, in accordance with the definition of that term in § 361.5(c)(34). . . .”

34 C.F.R. § 361.48(b).

# What does maintenance have to do with postsecondary supports and services?

- Maintenance services are defined as “monetary support provided to an individual for expenses, such as food, shelter, and clothing, that are in excess of the normal expenses of the individual and that are necessitated by the individual’s receipt of vocational services under an individualized plan for employment.” 34 C.F.R. § 361.5(c)(34).
- Will going to school cause the participant to accrue room and board expenses in excess of what they would normally spend on food and housing? If so, consider framing these expenses as maintenance services.

# Further detail regarding scope likely provided in state rules

- Indiana, for example, offers VR participants postsecondary training that includes, but is not limited to, “assistance needed to obtain: (1) an academic degree; (2) a vocational skills certificate; (3) selected the course work necessary to develop, update, or improve specific occupational skills and competencies; or (4) industry-recognized licensing, certification, or . . . credentialing.” 460 Ind. Admin. Code § 14-18-1(a).
- Similarly, “[t]he VR program may pay for room and board expenses, not to exceed the amount documented: (1) for institutional room and board; or (2) for private housing other than the individual’s own residence. The VR program shall not pay for housing or [sic] meal assistance for any eligible individual who does not incur additional room and board expenses for his or her postsecondary education.” 460 Ind. Admin. Code § 14-18-4(b).

# Federal regulations about the scope of VR services and supports

- VR's "written policies may not establish any arbitrary limits on the nature and scope of vocational rehabilitation services to be provided to the individual to achieve an employment outcome." 34 C.F.R. § 361.50(a).
- Preferences for in-state services are acceptable, but "[t]he State unit may not establish policies that effectively prohibit the provision of out-of-State services." 34 C.F.R. § 361.50(b)(2).



# [CONVERT to POLL QUESTION]

Which of the following does your VR program consider when determining how much it will contribute to the cost of a participant's postsecondary services? (Check all that apply.)

[For Amy's benefit, I know student loans are not comparable benefits – this is a trick question.]

- The Expected Family Contribution, as determined by the FAFSA
- A fee schedule with in-state preferences
- A fee schedule with expense limits
- Scholarships and grants, as comparable benefits
- Student loans, as comparable benefits
- SSI/SSDI status
- The participant's disability-related expenses

# Federal regulations about cost-sharing and financial need

Generally, details about funding postsecondary supports and services can found in state rules, with two overarching federal caveats

- VR cannot require individuals receiving Supplemental Security Insurance (SSI) or Social Security Disability Insurance (SSDI) from sharing in the cost of their VR services.
- States can adopt fee schedules, but, generally, these schedules must:
  - Be written;
  - Not be absolute/offer participants an exception process;
  - Be reasonable; and
  - Not effectively deny a participant a necessary service.

# Federal carve-out for SSI/SSDI beneficiaries

In providing services to VR participants, “[t]he designated State unit may not apply a financial needs test, or require the financial participation of the individual . . . [a]s a condition for furnishing any vocational rehabilitation services if the individual in need of the service has been determined eligible for Social Security benefits under titles II or XVI of the Social Security Act.”

34 C.F.R. § 361.54(b)(3).

# Federal limits regarding financial need

“If the State chooses to consider financial need –

(i) It must maintain written policies –

(A) Explaining the method for determining the financial need of an eligible individual; and

(B) Specifying the types of vocational rehabilitation services for which the unit has established a financial needs test;

(ii) The policies must be applied uniformly to all individuals in similar circumstances;

(iii) The policies may require different levels of need for different geographic regions in the State, but must be applied uniformly to all individuals within each geographic region; and . . .

# Federal limits regarding financial need (cont.)

. . . (iv) The policies must ensure that the level of an individual's participation in the cost of vocational rehabilitation services is –

(A) Reasonable;

(B) Based on the individual's financial need, including consideration of any disability–related expenses paid by the individual; and

(C) Not so high as to effectively deny the individual a necessary service.”

34 C.F.R. § 361.54(b)(2).

# Federal limits regarding fee schedules

“(1) The State unit must establish and maintain written policies to govern the rates of payment for all purchased vocational rehabilitation services.

(2) The State unit may establish a fee schedule designed to ensure a reasonable cost to the program for each service, if the schedule is –

- (i) Not so low as to effectively deny an individual a necessary service; and
- (ii) Not absolute and permits exceptions so that individual needs can be addressed.

(3) The State unit may not place absolute dollar limits on specific service categories or on the total services provided to an individual.”

34 C.F.R. § 361.50(c).

# State rules may contain cost-sharing and lowest-cost provider requirements

- Remember, fee schedules requiring cost-sharing by the VR participant is optional; States need not impose cost-sharing requirements upon VR participants. *See* 34 C.F.R. § 361.54(a).
- Indiana examples
  - A VR participant “must attend the lowest-cost provider that meets his or her vocational rehabilitation needs and is appropriate to the employment outcome specified in the eligible individual’s IPE.” 460 Ind. Admin. Code § 14-18-3(a).
  - “The VR program may pay for the lesser of the following documented postsecondary education expenses: (1) The published fees and tuition costs of the training institution or program attended. (2) The fees established by the VR program. . . .” 460 Ind. Admin. Code § 14-18-4(a).

# The devil is in the details

- Regulations, which must be formally promulgated, are typically affected by stakeholder feedback.
- On the other hand, VR policies, which are usually drafted internally and without the benefit of stakeholder feedback, may contain unlawful restrictions on the scope of supports and services or cost-sharing requirements that go beyond what federal law permits.
- Examples
  - Indiana Vocational Rehabilitation Postsecondary Training Services Handbook
  - Indiana's Information Regarding Postsecondary Training Services for the 2020 Summer Term



# Issues with policy examples

- “[P]articipants who choose to attend a private or out-of-state postsecondary institution are responsible for additional costs, such as room and board, that exceed the cost of a public in-state alternative.”
- “The VR program may pay for room and board expenses up to the amount listed on the rate schedule below *if the VR program determines that there is no in-state or local postsecondary institution that offers the certificate or degree* that meets the participant’s vocational rehabilitation needs.” (Emphasis added.)
- “VR . . . *excludes the Expected Family Contribution* from its calculation of postsecondary assistance for participants who have been deemed eligible for Social Security benefits . . . .” (Emphasis added.)

# Issues with interpretation of law and policy

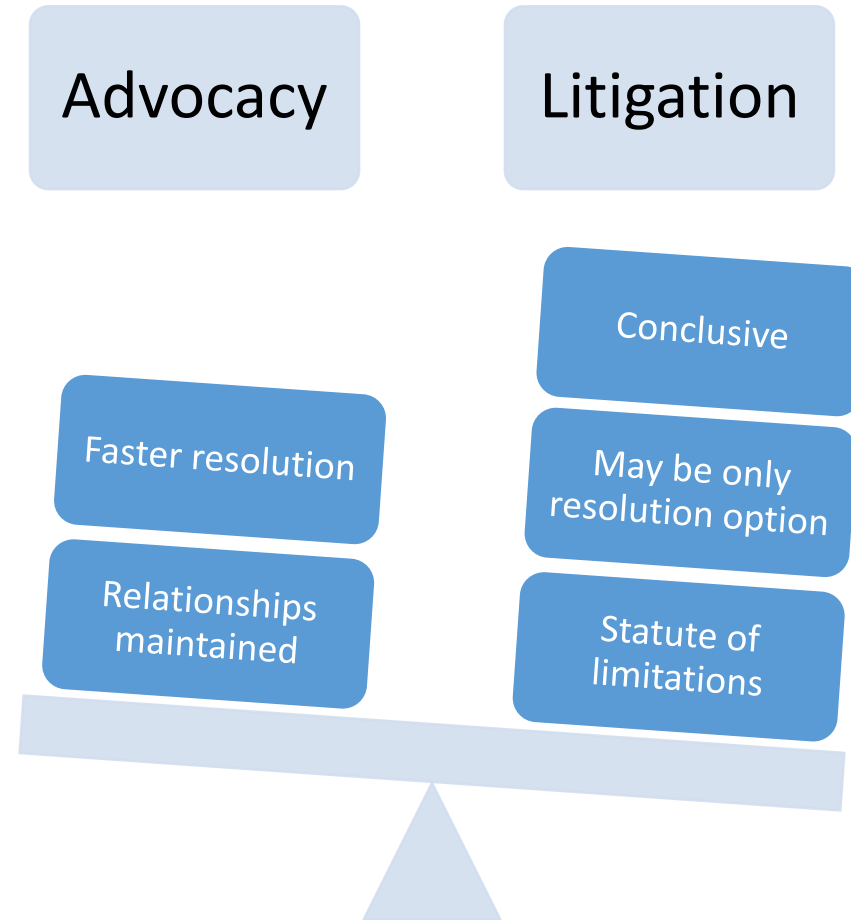
- Comparable services and benefits (*see* 34 C.F.R. § 361.53)
  - Some VR counselors erroneously assert that student loans are comparable benefits, especially after RSA rescinded its Technical Assistance Circular on the subject.
  - Some VR counselors do not distinguish between merit-based and non-merit-based scholarships. RSA's guidance on merit-based scholarships in the context of the VR program being the last resource further confuses the issue.
- What is a resource, and must resources be available to the participant to be considered by the VR program?
- What is a vocational rehabilitation need?
- Do there need to be established standards for when the VR program may grant an exception to a participant?

# [CONVERT to POLL QUESTION]

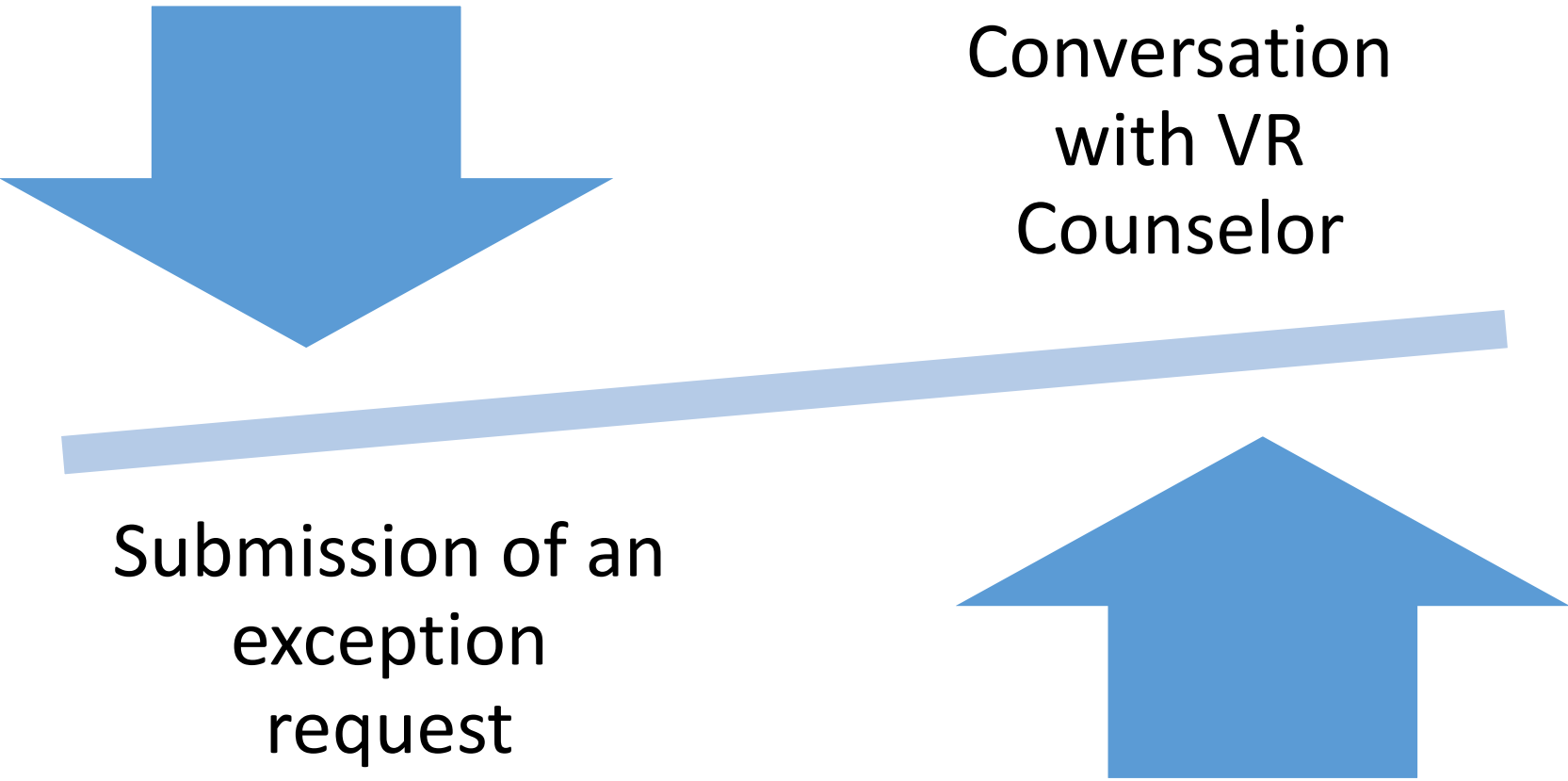
The highest level of intervention I have used to resolve a conflict over postsecondary services and supports with my VR program was engaging in or filing with or for...

- Informal advocacy
- Formal advocacy
- An administrative appeal
- Agency review
- Judicial review in state court
- Judicial review in federal court
- Appellate-level review of a lower court decision
- The US Supreme Court

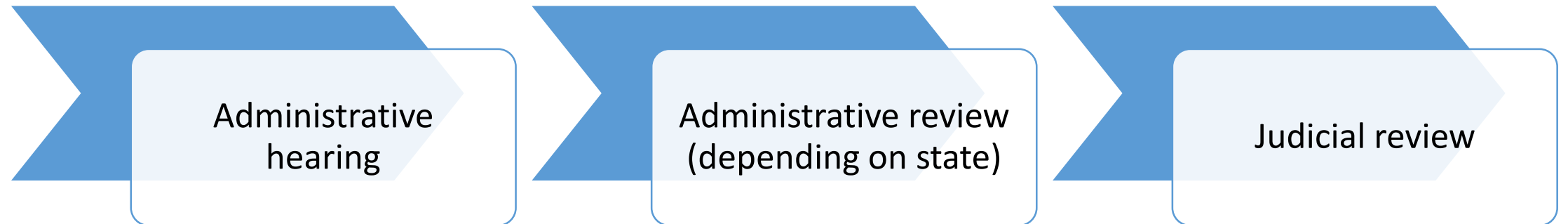
# Addressing postsecondary rights violations



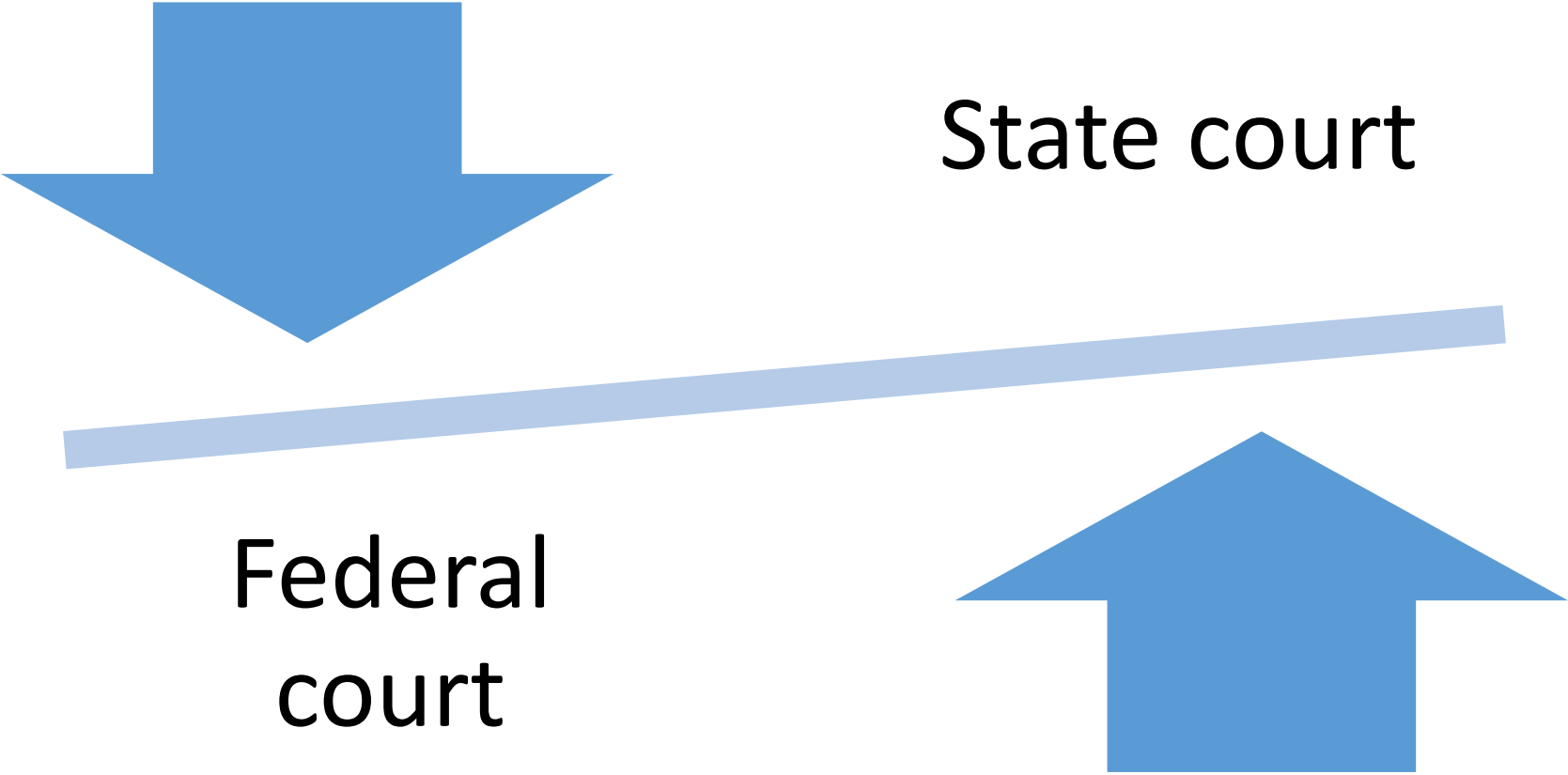
# Advocacy opportunities



# Litigation opportunities



# Judicial review options



# Track record of Indiana's CAP since 2018

- One case resolved through informal advocacy
- Handful of cases resolved through formal advocacy (i.e., submission of an exception request)
- Nine cases settled pending judicial review in State court
- Settled a multi-semester case pending judicial review and other claims in the US District Court for Southern Indiana
- Unsuccessful in an administrative appeal regarding VR's application of the Expected Family Contribution, despite participant's parents signing an affidavit that they will not pay for his college expenses



EMunson1@IndianaDisabilityRights.org  
317-504-2578 (cell)

\*Please note that I prefer email communication, and sending me an email is the best way to guarantee a response from me.\*