

Steps and Process

When State VR Agencies Implement Order of Selection

Introduction

The Rehabilitation Act of 1973, as amended by Title IV of the Workforce Innovation and Opportunity Act (WIOA), otherwise known simply as the Rehabilitation Act, requires the Vocational Rehabilitation (VR) program to serve individuals with the most significant disabilities first when there are not enough resources to serve everyone who is eligible for VR services. Individuals with the most significant disabilities are given priority over those with less significant disabilities, which is a process called an order of selection (OOS).

In this event, an OOS process must be developed and included in the VR services portion of the Unified or Combined State Plan which must describe the order to be followed in selecting eligible individuals to be provided VR services. (34 C.F.R. § 361.36(a)(1))

Steps

1. Review agency's financial and staffing resources, including use of long-range fiscal forecasting and personnel projections which indicate that the "full range of services" can no longer be provided to all clients eligible for the VR program.
2. Notify and consult with the Rehabilitation Services Administration (RSA), and draft and submit State Plan language changes for review and approval.
3. Consult with the State Rehabilitation Council (SRC), Client Assistance Program (CAP) and other administrators in and outside agency, as needed, regarding timelines, etc.
4. Hold public meetings to inform VR applicants and clients of the order to be implemented.
5. Choose OOS priority category assignment tool to be used, which includes breakdowns and descriptions of OOS categories.
6. Notify staff and partners, including the SRC and CAP, regarding OOS implementation plan and date.
7. Provide statewide training to staff, partners and others regarding OOS implementation and use of OOS tool(s).
8. Determine how agency's case management system will capture, maintain and report out on OOS wait list.
9. Develop a comprehensive plan for clients on wait list to receive counseling and guidance and referrals to American Job Center partner services.
10. Consider and train on delivery of Pre-Employment Transition Services to be provided in an OOS.

Administrative Requirements

In administering the OOS, the designated State unit (DSU) must—

1. Implement the OOS on a statewide basis;
2. Notify all eligible individuals of the priority categories in a State's OOS, their assignment to a particular category, and their right to appeal their category assignment;
3. Continue to provide services to any recipient who has begun to receive services irrespective of the severity of the individual's disability as follows:
 - a. The VR agency must continue to provide pre-employment transition services to students with disabilities who were receiving such services prior to being determined eligible for VR services; and
 - b. The VR agency must continue to provide to an eligible individual all needed services listed on the individualized plan for employment if the individual had begun receiving such services prior to the effective date of the State's order of selection; and
4. Ensure that its funding arrangements for providing services under the VR services portion of the Unified or Combined State Plan, including third-party arrangements and awards under the establishment authority, are consistent with the OOS. If any funding arrangements are inconsistent with the OOS, the VR agency must renegotiate these funding arrangements so that they are consistent with the OOS. (34 C.F.R. § 361.36(e))

Basis for Order of Selection

An order of selection must be based on a refinement of the three criteria in the definition of “individual with a significant disability” in section 7(21)(A) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(30). The three criteria to be refined by the State VR agency include the number and degree of functional limitations, the amount of time needed for VR services, and the number of VR services needed.

“Individual with a significant disability” means an individual with a disability

- (i) Who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome;
- (ii) Whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and



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- (iii) Who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental illness, multiple sclerosis, muscular dystrophy, musculoskeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, intellectual disability, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitation. (34 C.F.R. § 361.5(c)(30))

In the event that VR services cannot be provided to all eligible individuals in the State who apply for these services, the VR agency must include in the VR services portion of the Unified or Combined State Plan the order to be followed in selecting eligible individuals to be provided VR services.

- The designated State unit (DSU) either must be able to provide the full range of services listed in section 103(a) of the Rehabilitation Act and 34 C.F.R. § 361.48, as appropriate, to all eligible individuals or, in the event that VR services cannot be provided to all eligible individuals in the State who apply for the services, include in the VR services portion of the Unified or Combined State Plan the order to be followed in selecting eligible individuals to be provided VR services. (34 C.F.R. § 361.36(a)(1))
- The ability of the designated State unit to provide the full range of VR services to all eligible individuals must be supported by a determination that satisfies the requirements of 34 C.F.R. § 361.36(b) or (c) and a determination that, on the basis of the DSU's projected fiscal and personnel resources and its assessment of the rehabilitation needs of individuals with significant disabilities within the State, it can:
 - i. Continue to provide services to all individuals currently receiving services;
 - ii. Provide assessment services to all individuals expected to apply for services in the next fiscal year;
 - iii. Provide services to all individuals who are expected to be determined eligible in the next fiscal year; and
 - iv. Meet all program requirements.

State Plan Language Changes and Obtaining RSA Review and Approval

If the agency is operating under an approved State plan that indicates it is not implementing an OOS and subsequently determines it must implement an OOS, it must submit a State plan amendment or modification to provide all necessary descriptions and assurances for RSA approval prior to implementing the OOS. Those descriptions and assurances are:

- Indicate in Description (a) of the VR Portion of the State Plan, Input of the State Rehabilitation Council, if the State VR agency has a State Rehabilitation Council, the Council's input on the decision to establish an OOS;
- Identify in Description (k) of the VR Portion of the State Plan, Annual Estimates, the estimated numbers of individuals to be served by priority category, including the estimated costs by priority category;
- Include in Description (m) of the VR Portion of the State Plan, OOS, a description of the OOS and the rationale for the order. In addition, indicate whether or not individuals outside the OOS who require specific services or equipment to maintain employment will be served;
- Indicate in assurance 1 of the VR Portion of the State Plan that the agency has provided the public with the opportunity for input regarding the implementation of the OOS;
- Indicate in assurance 4(c) of the VR Portion of the State Plan that the agency is not able to serve all eligible individuals in the State.

States Must Assure that:

- In accordance with criteria established by the State for the OOS, individuals with the most significant disabilities will be selected first for the provision of VR services; and
- Individuals who do not meet the OOS criteria will have access to services provided through the information and referral system established under 34 CFR §361.37; and
- State whether the State VR agency will elect to serve, in its discretion, eligible individuals (whether or not the individuals are receiving VR services under the OOS) who **require** specific services or equipment to maintain employment.
 - Section 101(a)(5)(D) of the Rehabilitation Act and 34 C.F.R. § 361.36(a)(3)(v) apply to those specific services or equipment that an individual **needs** to maintain current employment, but not to other services an individual may need for other purposes. *In other words, if an individual is receiving services and equipment from a State VR agency under this exemption, the individual is within the OOS for the purpose of receiving any other vocational rehabilitation services not covered by the exemption. This means that if the individual needs services that are not directly tied to maintaining current employment, the*

individual's ability to receive those services from the VR program depends on the individual's placement in the State's OOS.

- This provision applies to all eligible individuals, not just those with the most significant disabilities. It is possible that individuals with less significant disabilities would receive VR services before individuals with significant or the most significant disabilities. The Rehabilitation Act gives the DSU the option to provide services and equipment to individuals at immediate risk of losing employment outside the established order, and the DSU may consider doing so ***if financial and staff resources are sufficient.***

Pre-Employment Transition Services and OOS:

- Section 101(a)(5) of the Rehabilitation Act does not exempt students with disabilities receiving pre-employment transition services prior to the determination of eligibility from a State's OOS.
- However, 34 CFR § 361.36(e)(3) requires State VR agencies implementing an OOS to continue the provision of pre-employment transition services to students with disabilities who were receiving these services prior to the determination of eligibility and assignment to a priority category.
 - It is imperative that students with disabilities not experience a disruption in the pre-employment transition services that they are receiving and that are so critical to their transition to post-secondary education and employment. Thus, 34 C.F.R. § 361.36(e)(3) requires DSUs implementing an order of selection to continue the provision of pre-employment transition services to students with disabilities who were receiving these services prior to the determination of eligibility and assignment to a priority category. DSUs may use the funds reserved under section 110(d) of the Rehabilitation Act and 34 C.F.R. § 361.65(a)(3) for the continuation of these services. This change does not permit the DSU to provide any other transition or VR services for students with disabilities assigned to closed priority categories.

Public Meetings

- The VR program regulations at 34 C.F.R. § 361.20(a)(2)(v) state that adopting or amending policies implementing an OOS constitutes a substantive change that requires public input. However, a DSU need not conduct a public meeting each time it opens or closes a priority category if doing so is consistent with the information describing the implementation of the OOS in that agency's currently approved VR services portion of the Unified or Combined State Plan.

- By contrast, closing one or more priority categories would be a substantive change in the administration of the VR program, and require a public meeting, if it represents a significant departure from the manner in which the DSU has implemented the order of selection under the approved State Plan. For example, if a DSU implements an order of selection and closes one or more priority categories after one or more years without closing priority categories, that action would constitute a substantive change in the administration of the VR program and would require a public meeting.

A Typical OOS Consists of Three Priority Categories

- **Priority Category I:** Eligible individuals with most significant disabilities
- **Priority Category II:** Eligible individuals with significant disabilities
- **Priority Category III:** All other eligible individuals with disabilities

Ranking Individuals Within a Priority Category

- A State VR agency can establish a policy for ranking individuals within a priority category.
- The policy should be based on use of an equitable and reasonable factor, such as the individual's date of application. This provides a method for selecting individuals from a waiting list for a priority category when the agency has enough resources to serve some, but not all, individuals in that priority category.

State Rehabilitation Council

The designated State unit must consult with the State Rehabilitation Council, if the State unit has a Council, regarding:

- Need to establish an order of selection, including any reevaluation of the need whenever changed circumstances during the course of a fiscal year indicate that it may no longer be able to provide the full range of services, as appropriate, to all eligible individuals;
- Priority categories of the particular order of selection;
- Criteria for determining individuals with the most significant disabilities; and
- Administration of the order of selection. (34 CFR §361.36(f))

Factors that Cannot Be Used in Determining the OOS of Eligible Individuals:

- Duration of residency requirement
- Type of disability
- Personal characteristics such as age, gender, race, color or national origin
- Referral source
- Type of expected employment outcome
- Need for specific services or anticipated costs of services
- Income level of an individual or the individual's family (34 CFR §361.36(d)(2))

Contact

If further clarification of the above information is needed, please consult with your state RSA Liaison, or you can contact Betsy Hopkins from the WINTAC at bhopkins@ndi-inc.org.



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