

**THE OBLIGATION OF
THE STATE VOCATIONAL REHABILITATION (VR) AGENCY TO
PROVIDE ASSISTIVE TECHNOLOGY**

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I. Introduction

- A. Congress, pursuant to Title I of the Rehabilitation Act, gives money to states to provide vocational rehabilitation (VR) services for persons with disabilities. 29 U.S.C. §§ 701 *et seq.*; 34 C.F.R. Part 361.
- B. Final amendments to the vocational rehabilitation regulations appeared in the Federal Register on February 11, 1997. 62 Fed. Reg. 6308 (Feb. 11, 1997). These amendments are effective March 13, 1997. *Id.* Citations to the regulations are as amended.
- C. On August 7, 1998, President Clinton signed into law the Workforce Investment Act of 1998. Included within the Workforce Investment Act were the Rehabilitation Act Amendments of 1998 (Rehab '98), reauthorizing the Rehabilitation Act through 2003.
1. The Workforce Investment Act (WIA) is a major federal effort to incorporate a myriad of federal job training programs into a coordinated, comprehensive system.
 2. States are required to develop statewide and local plans and to include the vocational rehabilitation (VR) system in that process.
 3. 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.
 4. But, the vocational training opportunities of the state workforce investment system are clearly intended to be available to individuals with disabilities. *See* Section 2(b)(1)(A).¹
 5. Citations are to the Rehabilitation Act as amended by Rehab '98.
- D. To receive funding, a state must submit a plan consistent with the law. 29 U.S.C. § 721.
- E. It must designate a single state agency to administer the plan unless it designates a second agency to provide services to individuals who are blind. *Id.* § 721(a)(2).

¹References without U.S.C. citations are to the uncodified version of the law.

- F. VR agencies can fund a wide range of goods and services, including "rehabilitation technology," [i.e., assistive technology (AT)] that are connected to a person's vocational goal.
- G. 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. *Id.* § 701(b)(1)(emphasis added).

II. Basic Eligibility Criteria

- A. To receive services an individual must be disabled [*see id.* § 720(20)(A)] and require VR services to prepare for, enter, engage in, or retain gainful employment. *Id.* § 722(a)(1).
- B. Potential employment outcomes were expanded by Rehab '98.
 - 1. Employability had been defined as full or part-time competitive employment to the greatest extent practicable, supported employment or other employment consistent with the individual's strengths, abilities, interests and informed choice. 34 C.F.R. § 361.5(b)(15).
 - 2. Rehab '98 adds self-employment, telecommuting and business ownership as successful employment outcomes. 29 U.S.C § 705(11)(C).
- C. Persons must show a mental, physical or learning disability that interferes with the ability to work.
 - 1. The disability need not be so severe as to qualify the person for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits.
 - 2. The disability must only be a substantial impediment to employment. 29 U.S.C. § 705(20)(A).
 - 3. The Rehabilitation Act Amendments of 1998 (Rehab '98) change the designation of individual with a severe or most severe disability to individual with a significant or most significant disability. 20 U.S.C. § 705(21).
 - 4. 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. 29 U.S.C. § 722(a)(3).
- D. 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 from services. 29 U.S.C. § 722(a)(2); 34 C.F.R. § 361.42(a)(2).

- E. Prior to determining that a person with a severe disability is incapable of benefitting from VR services, the state VR agency must conduct an extended evaluation. 34 C.F.R. § 361.42(d).
- F. In order of selection states, where not all potentially eligible individuals with disabilities will be able to receive VR services, Rehab '98 makes some provision for those who are not served.
 - 1. They are entitled to an appropriate referral to other State and Federal programs, including other providers within the State workforce investment system. 29 U.S.C. § 721(a)(5)(D) and (20).
 - 2. 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 U.S.C. § 721(a)(11)(A)(i)(II).

- 3. Most of these requirements are already mandatory for recipients of Federal funds pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and for providers that are covered by the Americans with Disabilities Act.

III. The Individualized Plan for Employment (IPE)

A. Introduction

- 1. The Individualized Written Rehabilitation Plan (IWRP) has been changed to the Individualized Plan for Employment (IPE). 29 U.S.C. § 722(b).
- 2. After eligibility is established, the next step is to develop the IPE.
- 3. 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. 29 U.S.C. § 722(b)(2)(A).

B. Informed Choice

- 1. Rehab'98 revolutionizes informed choice.
- 2. 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. 29 U.S.C. § 722(d)(1) - (5).

3. The VR agency must still approve the Individualized Plan for Employment (IPE), but the individual decides the level of involvement, if any, of the VR counselor in developing the IPE. 29 U.S.C. § 722(b)(1)(A) & (2)(C).
4. 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." Congressional Record—House, H6693, July 29, 1998.
5. 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" 29 U.S.C. § 722(d)(3).
6. 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. Congressional Record—House, H6693, July 29, 1998.

C. Developing the IPE

1. Any service to be provided or funded by the VR agency must be specified on the IPE.
2. The IPE should enable the individual to achieve the agreed upon employment objectives and must include the following [29 U.S.C. § 722(b)(3)]:
 - a. The specific employment outcome, chosen by the individual, consistent with the unique strengths, concerns, abilities and interests of the individual (emphasis added).
 - b. The specific VR services to be provided, in the most integrated setting appropriate to achieve the employment outcome, including appropriate assistive technology (AT) and personal assistance services.
 - c. The timeline for initiating services and for achieving the employment outcome.
 - d. The specific entity, chosen by the individual, to provide the VR services and the method chosen to procure those services.
 - e. The criteria for evaluating progress toward achieving the employment outcome.

- f. The responsibilities of the VR agency, the individual (to obtain comparable benefits) and any other agencies (to provide comparable benefits).
 - g. For individuals with the most significant disabilities that are expected to need supported employment, the extended services to be provided.
 - h. The projected need for post employment services.
3. 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.
 4. Any changes will not take effect until agreed to by the individual and the VR counselor. 29 U.S.C. § 722(b)(2)(E).

IV. Available Services

- A. VR services are defined as any services described in an IPE which are 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.” *Id.* § 723(a).
- B. Services must include, but are not limited to, the following [*Id.* § 723(a); 34 C.F.R. § 361.48(a)]:
 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 provided by Workforce Investment Act providers.
 3. Vocational and other training, including higher education and the purchase of tools, materials and books.
 4. Rehabilitation technology, including vehicular modification, telecommunications, sensory, and other technological aids and devices. (This section merely combines two provisions into one.)
 5. Supported employment.
 6. Occupational licenses, tools, equipment, initial stocks and supplies.
 7. Personal assistance services while receiving VR services.
 8. Maintenance for additional costs incurred during rehabilitation.

- a. In *Scott v. Parham*, 422 F.Supp. 111 (N.D.Ga. 1976), the Court struck down a limitation on maintenance to only those receiving VR services outside of the home or home community because it failed to account for the individualization requirements of the Act.
9. Physical or mental restoration 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.
 10. “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).”
 - a. Transportation may include van purchase.
 - b. Under the new 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." 34 C.F.R. § 361.5(b)(49).
 - c. A note, following the quoted 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. *Id.* (Note).
 11. Interpreter services for individuals who are deaf and readers for individuals who are blind.
 12. Technical assistance for those who are pursuing telecommuting, self-employment or small business operation.
 13. Transition services for students with disabilities to facilitate the achievement of the employment outcome identified in the IPE, when appropriate.
 14. Post-employment services necessary to assist an individual to retain, regain or advance in employment.
- C. 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.
 - D. The State Plan must describe the "manner in which the broad range of rehabilitation technology services will be provided," including training and the provision of AT. *Id.* § 361.48(b) (emphasis added).
 - E. Post-employment services.

1. Each IPE must indicate the expected need for post-employment services and, prior to a decision that an individual has achieved an employment outcome (see above), there must be a reassessment of the need for post-employment services. Any such services must be included on the IPE. *Id.* § 361.46(c).
2. Defined as services provided after the person has achieved an employment outcome which are necessary for the individual "to maintain, regain or advance in employment." *Id.* § 361.5(b)(37) (emphasis added).
3. A note to the regulations indicates that 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. *Id.*
4. Post-employment services are to be provided under an amended IPE. Therefore, there is no need for a re-determination of eligibility. *Id.*

V. Financial Need Criteria

- A. There is no requirement that a state consider financial need when providing VR services. *Id.* § 361.54(a).
- B. 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. *Id.* § 361.54(b)(2).
- C. The following services must be provided without regard to financial need:
 1. Diagnostic services;
 2. Counseling, guidance and referral services;
 3. And, job placement. *Id.* § 361.54(b)(3).

VI. Maximization of Employment

- A. Prior standard
 1. As initially stated, the statutory purpose of the entire VR Act was to:

[D]evelop 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. 29 U.S.C. § 701(1).
 2. The initial 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. 29 U.S.C. § 720(a).

3. In *Cook v. PA Bureau of Vocational Rehabilitation*, 45 PA. CMWLTH. 415, 405 A.2d 1000 (1979), the court noted that the above-quoted statutory language did not equate to being employed at “any job.” The petitioner had a B.A. and conceded that he could “get a job,” but sought VR funding for law school. The court remanded because the record was incomplete.

B. The maximization language was first added by 1986 amendments. Pub. L. 99-506, Title I, § 101, 100 Stat. 1808. 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."

C. The legislative history emphasized Congressional intent

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

Pub. L. 99-506, Title I, § 101, 100 Stat. 1808. S. Rep. No. 388, 99th Cong., 2d Sess. 5 (1986) (emphasis added), as quoted in *Polkabra v. Commission for the Blind*, 183 A.D.2d 575, 576, 583 N.Y.S.2d 464, 465 (1st Dept. 1992).

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

[E]mpower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through ... comprehensive and coordinated state-of-the-art programs of vocational rehabilitation. 29 U.S.C. § 701(b)(1)(A) (emphasis added).

E. The 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.

F. New Rehabilitation Services Administration (RSA) Policy Directive

1. On August 19, 1997, the federal Rehabilitation Services Administration (RSA) issued a Policy Directive, RSA-PD-97-04, which governs State Vocational Rehabilitation (VR) agencies.

2. 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. This directive represents a dramatic shift in RSA policy.
3. The August 1997 Policy Directive concerns the "employment goal" for an individual with a disability. It rescinds a 1980 policy and describes the standard for determining an employment goal under Title I.
4. 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."
5. Many agencies would not approve the training and other services needed to allow a person to maximize employment potential.
6. RSA's clear change in policy is best expressed in the following quote from the August 1997 Policy Directive:

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

7. This new 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.
8. The new 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."
9. The new 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.
10. 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).

11. 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.

G. Several courts have applied the maximization standard to fund VR services which a VR agency had denied. However, as time has gone on, the decisions have become decidedly more mixed.

1. *Buchanan v. Ives*, 793 F.Supp. 361 (D. Me. 1991).

- a. The parties agreed that applying a “cost efficiency analysis” to the determination of a client’s goals and needs would violate the Act.
- b. A "cost efficiency analysis" cannot be the major determinant to deny funding of services.
- c. 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. *Id.*, p. 365.

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

2. *Indiana Dept. of Human Services v. Firth*, 590 N.E.2d 154 (Ind. Ct. of App., First Dist. 1992).

- a. The issue was eligibility for VR services while attending law school. (The client did not apply for VR services until he started attending law school.)
- b. The VR agency found person's deafness was not a substantial handicap to employment as he had the present capacity to work as a writer.
- c. The Court held that in interpreting “capacities and abilities” the Act requires an analysis of potential, not current, capabilities, particularly in light of the maximization requirement.
- d. Notwithstanding present writing abilities, court cited need for VR-funded interpreter services for client to become a lawyer.

3. *Polkabra v. Commission for the Blind*, 183 A.D.2d 575, 583 N.Y.S. 2d 464 (1st Dept. 1992)
 - a. Title I requires services to enable blind paralegal to reach the highest achievable vocational goal, college and law school, and not merely “suitable employment.”
 - b. Fact that client initially requested and was approved for paralegal training was not relevant.

4. *Chirico v. Office of Vocational and Educational Services for Individuals with Disabilities (VESID)*, 211 A.D.2d 258, 627 N.Y.S.2d 815 (3rd Dept. 1995)
 - a. Funding for voice activated computer for job-related paper work at home to enable individual to reach highest level of achievement.
 - b. Attainment of position as guidance counselor by working two to four extra hours per day at home, six days a week, was not his full potential.

5. *Romano v. Office of Vocational and Educational Services to Individuals with Disabilities (VESID)*, 223 A.D.2d 829, 636 N.Y.S.2d 179 (3rd Dept. 1996)
 - a. Funding for Masters in Social Work degree, prior to entry into profession, not required to enable individual to reach agreed upon goal of social work in therapeutic counseling.
 - b. “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 VESID sponsor every possible credential desired by petitioner.”
 - c. The individual's disability did not preclude advancement in chosen profession. Therefore, achievement of [IPE] goal has empowered her to ultimately reach higher levels.

6. *Murphy v. VESID*, No. 143, ___ N.Y.2d ___, 1998 WL 796869 (1998).
 - a. Court declined to order VESID to fund law school education because client “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.”
 - b. Court stated that maximization standard met when “the recipient is aided to the point, level and degree that allows the opportunity for personal attainment of maximum employment.” (Emphasis added.)

- c. 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.”
 - d. Court characterizes client’s statement of the standard as: the “rehabilitation program must provide, guarantee or continue until optimal employment is actually secured.” (Emphasis added.)
 - e. Case does not discuss the 1997 RSA Policy Directive referred to above.
 - f. Case analyzes costs as a consideration, but misapplies the standard for going to order of selection.
7. *Berg v. Florida Department of Labor*, 163 F.3d 1251 (11th Cir. 1998).
- a. Primary focus of case is whether Florida’s VR agency discriminated on the basis of disability, in violation of Section 504, when denying client funding for law school.
 - b. However, Court looked at the maximization language and stated that “the purpose of ‘maximiz[ing] employment’ does not refer to obtaining some sort of premium employment.”
 - c. 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.

VII. Comparable Services Requirement

- A. VR agencies are the payer of last resort for many services. This means they will not pay for a service if a similar benefit is available through some other agency or program. 29 U.S.C. § 721(a)(8).
- B. For example, if an applicant qualifies for personal assistance services through Medicaid, the VR agency will not provide those services.
- C. By contrast, the VR agency cannot deny payment for college tuition because an individual could obtain student loans. Student loans, which must be repaid, are not similar benefits. U.S. Dept. of Educ., Rehab. Services Admin., Policy Directive RSA-PD-92-02 (11/21/91).
- D. Additionally, a person does not have to exhaust similar benefits in the following circumstances [29 U.S.C. § 721(a)(8)(A); 34 C.F.R. § 361.54(b) and (c)] (emphasis added):

1. If consideration of the similar benefit would interrupt or delay:
 - a. The progress of an individual 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.
 3. Comparable benefits do not include awards and scholarships based on merit.
- E. States must develop a comprehensive plan with all of the public agencies providing what could be considered VR services, including Medicaid, public colleges and the workforce investment system, to identify responsibility for providing services. 29 U.S.C. § 721(a)(8)(B).
1. The plan must ensure the coordination and timely delivery of services.
 2. All public agencies in the State remain responsible for providing services mandated by other State laws or policy or Federal laws.
 3. If another agency refuses to fulfill its obligations, the VR agency must provide the services, but may seek reimbursement from that agency. 29 U.S.C. § 721(a)(8)(C)(ii).

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

- A. Introduction
1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, requires that no later than age 14 school districts include in each student's Individualized Education Program (IEP) a transition plan to aid in the student's move to adult life. 34 C.F.R. § 300.346(b)(1).
 2. As part of the plan, schools must identify appropriate adult service providers and foster linkages with those agencies. *Id.*
 3. 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.
 4. Where AT is involved, this can be a significant problem.
 5. Schools do not normally consider AT devices purchased to ensure an appropriate education to be the student's property.

6. 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.
7. 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.
8. What is the VR agency's responsibility under these circumstances?

B. 1990 Amendments to IDEA

1. 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 Districts and in the actual provision of services.
 - a. The legislative history suggests that the statement of needed transition services should include a commitment by any participating agency to meet any financial responsibility it may have in the provision of transition services. See House Report No. 101-544, p. 11 (1990), as cited in 34 C.F.R. § 300.346, Note 1.
 - b. A “participating agency” means a State or local agency, other than the District, that is financially and legally responsible for providing transition services to the student. 34 C.F.R. § 300.340(b).
 - c. If a participating agency fails to provide agreed-upon transition services contained in the IEP, the District must initiate a meeting as soon as possible to identify alternative strategies to meet the transition objectives and, if necessary, revise the IEP. 34 C.F.R. § 300.347(a).
2. VR agencies were specifically referred to in the IDEA regulations.
 - a. Rehabilitation counseling includes services provided by the VR agency. 34 C.F.R. § 300.16(b).
 - b. The definition of AT services includes coordinating other services with AT devices “such as those associated with existing education and rehabilitation plans and programs.” 20 U.S.C. § 1401(2)(D) (emphasis added).
 - c. The 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. 34 C.F.R. § 300.347(b).

C. IDEA '97

1. IDEA '97 strengthened the obligations of other public agencies to provide services to students while they are still in school.
2. All States must now have interagency agreements to ensure that all public agencies, including Medicaid, that are responsible for providing services that are also considered special education services (including AT), fulfill their responsibilities.
3. The financial responsibility of these public agencies must precede that of the District.
4. If an agency does not fulfill its obligation, the District must provide the needed services, but has the right to seek reimbursement from the public agency.
5. The agreement must also specify how the various agencies will cooperate to ensure the timely and appropriate delivery of services to the students. 20 U.S.C. § 1412(a)(12).
6. It would seem, therefore, that the obligations of the VR agencies, where there is dual eligibility, would now precede the obligations of the local school districts.

D. 1992 Amendments to Title I of the VR Act

1. The VR regulations require the State Plan to develop policies to facilitate the transition from the special education system to the VR system, including the development of an IPE for students eligible for VR services before the student leaves the school setting. 34 C.F.R. § 361.22(a)(1) (emphasis added).
2. The legislative history to the Rehabilitation Act Amendments of 1992 [Pub. L. 102-569, 106 Stat. 4346.] states that school districts remain responsible for ensuring a free appropriate public education to students during the transition years. S. Rep. No. 357, 102d Cong., 2d. Sess., 33 (1992), as quoted at 34 C.F.R. § 361.22, Note.
3. However, the law's intent is to ensure that "there is no gap in services between the education system and the vocational rehabilitation system." *Id.*

E. Rehab '98

1. The law more clearly identifies the responsibilities of the VR system to students.
2. The State Plan for VR services must now include procedures to facilitate the transition of students with disabilities from the special education system to the VR system, including:

- a. Consultation and assistance to the educational agencies in preparing the transition plan in the IEP; and
 - b. Defining the relative roles and financial responsibilities of the special education and VR systems to provide services. 29 U.S.C. § 721(a)(11)(D).
3. 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. Congressional Record–House, H6693, July 29, 1998.
 4. “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.” *Id.*

F. Implications

1. If the graduating student clearly will need the AT device for educational, training or employment purposes, a reasonable approach would be to have the VR agency purchase the device in the first instance or purchase it from the school district.
2. The need for the device would continue to be reflected in the IEP with reference to the VR agency as payer (or purchaser upon transfer). The AT device would also appear in the IPE which is developed before the child finishes school.
3. There is nothing to prohibit the VR agency from purchasing the AT outright for the student while still in special education or from purchasing it from the school district.
 - a. The IDEA regulations envision other agencies providing services to students in transition, including VR agencies. 34 C.F.R. § 300.347.
 - b. The VR regulations require that the State Plan specify the respective financial responsibility of the various state agencies serving the student. 34 C.F.R. § 361.22(a)(2)(v).

IX. AT for the College Student: Who Pays?

A. Introduction

1. A similar problem arises when a VR agency refuses to provide AT for a college student, arguing that the college's responsibility under the ADA or Section 504 is a comparable benefit. *See* "Several Vocational Agencies Stop Paying For Auxiliary Aids," *Section 504 Compliance Handbook*, Supp. No. 213, p. 1 (Thompson Publishing Group, August 1996).

2. The Department of Education's Rehabilitation Services Administration is preparing a policy on the VR agency's role in providing auxiliary aids for college students. *See Id.*, p. 3.

B. Section 504 Regulations

1. The U.S. Department of Education enforces both Title I of the Rehabilitation Act, governing VR agencies and Title V, which includes Section 504.
2. The regulatory history to the Section 504 regulations governing colleges indicates that the Department of Education envisioned that colleges could normally meet their obligation to provide auxiliary aids "by 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." 34 C.F.R. Part 104, App. A, note 31 (emphasis added).
3. The purpose of these comments was to highlight that the provision of auxiliary aids would not be an undue burden on the colleges. *See U.S. v. Board of Trustees for U. of Ala.*, 908 F.2d 740, 745 (11th Cir. 1990).

C. Court Decisions

1. Addressing this question relative to Section 504, the Seventh Circuit, in *Jones v. Illinois Dept. of Rehabilitation Services*, 689 F.2d 724 (7th Cir. 1982), 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. *Id.* at note 7.
2. In *Schorstein v. N.J. Div. of Voc. Rehab.*, 519 F. Supp. 773 (D. N.J. 1981), *aff'd*, 688 F.2d 824 (3d Cir. 1982), the court held that the VR agency's policy of refusing to provide interpreter services to college students violated Title I of the Rehabilitation Act.

D. Personal Use Exemption

1. The regulations under Section 504 exempt colleges from providing auxiliary aids and services for personal use or study. 34 C.F.R. § 104.44(d)(2).
2. The relevant ADA regulations also exempt personal devices and services. 28 C.F.R. §§ 35.135 and 36.306.
3. Therefore, if a college is under no obligation to provide AT in such circumstances, there is no comparable benefit.

- E. Finally, as noted above, AT (rehabilitation technology) is exempt from the comparable benefit requirement.
- F. Rehab '98
 - 1. Rehab '98 clarifies, to some extent, the relative responsibilities in these situations.
 - 2. Public colleges and universities must be included in developing the comprehensive plan to ensure the coordination and timely delivery of services. 29 U.S.C. § 721(a)(8)(C) (emphasis added).
 - 3. They remain responsible for providing services mandated by other State laws or policy or Federal laws, such as the ADA and Section 504. 29 U.S.C. § 721(a)(8)(C)(i).
 - 4. If they refuse to provide services, the VR agency must provide the services, but may seek reimbursement from the college or university. 29 U.S.C. § 721(a)(8)(C)(ii).
 - 5. "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." Congressional Record–House, H6692, July 29, 1998.

X. Appeal and Hearing Rights

- A. Introduction
 - 1. Anyone seeking or receiving VR services who is dissatisfied with a decision by the VR agency has a right to appeal.
 - 2. 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. 29 U.S.C. § 722(c)(1).
 - 3. 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:
 - a. At the application,
 - b. When the IPE is developed, and
 - c. Upon the reduction, suspension or cessation of VR services. 29 U.S.C. § 722(c)(2)(A).

- B. Mediation. 29 U.S.C. § 722(c)(4).
1. Mediation is added as an available means of resolving disputes between consumers and the VR agency.
 2. It must be offered to resolve disputes, at a minimum, whenever an impartial hearing is requested.
 3. Participation must be voluntary and involvement in mediation cannot be used to deny or delay the right to an impartial hearing.
 4. The State bears the costs of mediation.
 5. All discussions that occur during mediation are confidential and cannot be used at any subsequent hearing.
- C. Impartial Hearings. 29 U.S.C. § 722(c)(5).
1. The individual has the right to be represented at the hearing by an attorney or other advocate.
 2. Both the individual and the agency can present evidence and cross examine witnesses. 34 C.F.R. § 361.57(b)(3).
 3. The hearing decision is final and must be implemented unless appealed. 34 C.F.R. § 361.57(b)(3).
- D. Administrative Review. 29 U.S.C. § 722(c)(5)(D) - (F).
1. Rehab '98 also makes significant changes in the availability of a second level of administrative review.
 2. A State may establish a procedure for a second level of administrative review.
 3. The review officer must be the chief official of the designated State agency or an official from the office of the Governor.
 4. Either party may appeal within 20 days of the hearing officer's decision.
 5. 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 plan, Federal law or State law or policy that is consistent with Federal law.
- E. Court. 29 U.S.C. § 722(c)(5)(J).

1. Rehab '98 adds a private right of action under Title I, which bears striking resemblance to the language under IDEA, 20 U.S.C. § 1415.
2. As a result, all of the case law interpreting IDEA will be applicable when interpreting these provisions.
3. Either party may appeal to State or Federal court.
4. However, pending review in court, the final administrative decision shall be implemented. 29 U.S.C. § 722(c)(5)(I).
5. Finally, because the statute is silent on the issue, it can be presumed there is no right to attorneys' fees. *See Smith v. Robinson*, 468 U.S. 992 (1984).
6. Under IDEA, a parent could maintain an action under 42 U.S.C. § 1983, with its attendant attorneys' fees provision, where the issue was denial of access to the procedures under IDEA. *See Quackenbush v. Johnson City School Dist.*, 716 F.2d 141 (2nd Cir. 1983).

XI. Access to Electronic and Information Technology in Federal Agencies

A. Introduction

1. Rehab '98 adds strong teeth to what had been a relatively benign provision within Title V of the Rehabilitation Act.
2. Formerly, this section required the Secretary of Education to:

[D]evelop and establish guidelines for Federal agencies for electronic and information technology accessibility designed to ensure, regardless of the type of medium, that individuals with disabilities, can produce information and data, and have access to information and data, comparable to the information and data, and access, respectively, of individuals who are not individuals with disabilities. 29 U.S.C. § 794d(a).

B. Rehab '98

1. Now, all Federal agencies and departments, including the United States Postal Service, which provide information via electronic information technology to employees or the public must ensure that this information is accessible to people with disabilities, comparable to the accessibility to people who are not disabled.
2. If providing accessibility would pose an undue burden, the agency must provide the information via alternative means. Section 508(a)(1).
3. Each Federal agency is to evaluate the extent to which electronic information technology is currently accessible to people with disabilities and report to the

Attorney General by February 4, 1999. Section 508(c).

4. By February 4, 2000, the Architectural and Transportation Barriers Compliance Board (Access Board) shall issue guidelines to implement this requirement and, within six months of that date, each Federal agency shall revise its procurement policies to comply with these standards. Section 508(a)(2) & (3).
5. By August 4, 2000, individuals may file administrative complaints or court actions for violations of these provisions for any information technology acquired by a Federal agency after that date. Section 508(f).