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# **Order of Selection for Vocational Rehabilitation Services**

An Option for State VR Agencies Who Cannot  
Serve All Eligible Individuals

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This is one of a series of articles written for benefits specialists employed by Benefits Planning, Assistance and Outreach projects and attorneys and advocates employed by Protection and Advocacy for Beneficiaries of Social Security programs. Materials contained within this policy brief have been reviewed for accuracy by the Social Security Administration (SSA), Office of Employment Support Programs. However, the thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the SSA. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency with implementation and/or administrative responsibilities.

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## Introduction<sup>1</sup>

The services available from a state's vocational rehabilitation (VR) agency can play a critical role in assisting people with disabilities in entering the workforce. In fact, as we move through the early years of the twenty-first century, more persons with disabilities than ever before are looking to state VR agencies for services to enter or re-enter the employment market.

State VR agencies, which rely on a combination of federal and state funding to carry out their mandates, face a challenge as they attempt to meet the needs of this potentially increasing population of individuals with disabilities who seek their services. With the federal government and nearly all state governments facing fiscal challenges, VR agencies may not be able to look to budgetary increases to meet these service demands. Instead, they must look to either savings within their program structures or move to limit the number of individuals they serve each year. The latter can only be done if the state VR agency moves to what is known as an Order of Selection, creating a federally-sanctioned waiting list of sorts by which individuals with the most severe disabilities get served first.

This article will explore this federally-sanctioned Order of Selection option that is available to state VR agencies. We will explain what financial circumstances tend to lead a state to selecting this option and the alternatives that states may use to either avoid the Order of Selection or limit the individuals whose needs go unmet because the agency never gets to them on the waiting list. Specifically, we will describe how states can use a financial needs test, with consumer contribution (i.e., co-pay) requirements and/or the comparable benefits requirement to make the agency's limited resources go further, resulting in more individuals being served each year. We will then discuss the various approaches states have used to implement an Order of Selection as part of their VR agency service delivery model.

## Providing Context for the Order of Selection Discussion

### A Brief Overview of VR Agency Mandates Under Title I of the Rehabilitation Act

When faced with a shortage of funds to meet the demands of a target population, an agency generally has two choices: serve everyone and provide less service to each individual; or serve only some individuals, but provide them all needed services within the agency's mandate. Under Title I of the Rehabilitation Act, the first choice, a rationing of services, is not an option. Within the framework of Title I and the federal VR regulations, once the agency determines that an individual will be served by the VR program the individual is entitled to all necessary services in order to meet their goal. This forces the VR agency to look at only the second option.

This part of the article provides the reader with a very brief overview of the federal mandates imposed on VR agencies pursuant to Title I. This summary will provide the context for examining the Order of Selection in the next part of the article. Readers who want to read a more detailed discussion of the Title I mandates are encouraged to review an earlier Policy and Practice Brief, State and Federal Vocational Rehabilitation Programs, which is available on Cornell University's website.<sup>2</sup>

<sup>1</sup> The author acknowledges the contribution of Lucy White, a former law student intern at Neighborhood Legal Services, who assisted with research and drafting of parts of this article.

<sup>2</sup> See [www.ilr.cornell.edu/ped/PP\\_I.pdf](http://www.ilr.cornell.edu/ped/PP_I.pdf) or [www.ilr.cornell.edu/ped/depPP\\_I.txt](http://www.ilr.cornell.edu/ped/depPP_I.txt).

## A. The General Framework for State VR Agencies

Pursuant to Title I of the Rehabilitation Act, states are given federal money to provide VR services to persons with disabilities.<sup>3</sup> The Rehabilitation Services Administration (RSA), within the U.S. Department of Education, is the federal agency responsible for administering state VR programs. Every state has a VR agency to serve individuals with disabilities. Some states have a second VR agency that serves only individuals who are legally blind.

State VR agencies can fund a wide range of goods and services that are connected to a person's vocational goal. Congress has stated that VR services are designed 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."<sup>4</sup> This "maximization requirement" has been reaffirmed by the amended federal VR regulations that were published in 2001. As noted in the comments to these final regulations, States must "look beyond options in entry-level employment for VR program participants who are capable of more challenging work." Additionally, the comments note that "individuals with disabilities who are currently employed should be able to advance in their careers."<sup>5</sup>

## B. Eligibility for VR Services

*(Readers must take note: Because of the Order of Selection option, discussed in Part III, it is possible to meet the VR agency's eligibility requirement and still never get served because other individuals, determined to have more significant disabilities, get served first.)*

To receive services, an individual must be disabled and require VR services "to prepare for, secure, retain or regain employment."<sup>6</sup> Persons must show a mental, physical or learning disability that interferes with their ability to work. The disability need not be so severe as to qualify the person for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) benefits. The disability must only be a substantial impediment to employment.<sup>7</sup> Recipients of SSDI or SSI are presumed to be eligible for VR services, as individuals with a significant disability, provided they intend to achieve an employment outcome.<sup>8</sup> Some states have articulated this presumption in their policies. Wisconsin policy says that "consumers who receive Title II (SSDI) or Title XVI (SSI) from Social Security must be assessed as having at least a significant disability."<sup>9</sup> This wording does not limit those individuals from being categorized as those with a "most significant disability" for the purposes of an Order of Selection, which will be discussed below; it merely limits the state from categorizing them in a lower priority category.

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 the agency's services.<sup>10</sup> With limited exceptions, the VR agency must conduct a comprehensive evaluation, to the extent necessary to establish eligibility, and make an eligibility determination within a reasonable period of time, not to exceed 60 days (with limited exceptions), after the individual submits an application.<sup>11</sup>

<sup>3</sup> 29 U.S.C. §§ 701 et seq.; 34 C.F.R. Part 361.

<sup>4</sup> 29 U.S.C. § 701 (b)(1).

<sup>5</sup> 66 Fed. Reg. 4419.

<sup>6</sup> 29 U.S.C. § 722 (a)(1).

<sup>7</sup> 29 U.S.C. § 705 (20)(A).

<sup>8</sup> 29 U.S.C. § 722 (a)(3).

<sup>9</sup> See [www.dwd.state.wi.us/dvr/state\\_plans/2004/4\\_12\\_c\\_2\\_A.pdf](http://www.dwd.state.wi.us/dvr/state_plans/2004/4_12_c_2_A.pdf)

<sup>10</sup> 29 U.S.C. § 722 (a)(2); 34 C.F.R. § 361.42 (a)(2).

<sup>11</sup> 29 U.S.C. § 722 (a)(6).

### C. Individualized Plan for Employment

After eligibility is established, the next step is to develop a written Individualized Plan for Employment (IPE), listing the employment goal and the specific services to be provided to assist the individual in reaching that goal. The plan is to be set forth on a form provided by the VR agency.<sup>12</sup> Prior to developing the IPE there must be an additional comprehensive assessment, to the extent necessary to determine the employment outcome, objectives, nature and scope of VR services. The assessment evaluates the unique strengths, resources, priorities, abilities and interests of the individual and can cover educational, psychological, psychiatric, vocational, personal, social, and medical factors which affect the needs of the individual.<sup>13</sup>

### D. Available Services

The services available from the VR system are incredibly broad and varied. VR services are defined as 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.”<sup>14</sup> There is an extensive list of VR services that states are required to provide, but even this list is not intended to be exhaustive. In other words, if an individual needs a service, not specified on the list, to prepare to reach an employment goal, that service can also be provided.

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. Again, this “rationing of services” option is not available as a means of conserving agency funds in order to serve a larger number of eligible individuals. In fact, the comments to the 2001 regulations state explicitly that the “severity of an individual’s disability or the cost of services can have no bearing on the scope of services the individual receives.”<sup>15</sup> If the VR agency does not have the resources necessary to provide all eligible individuals with all needed services, it must go to an Order of Selection, which will be described below.

#### I. Closing the Record of Service

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.<sup>16</sup> 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. As will become clear to the reader below, the ability to keep the VR services case open may avoid the impact of an Order of Selection waiting list if the individual later needs services.

<sup>12</sup> 29 U.S.C. § 722 (b)(2)(A).

<sup>13</sup> 29 U.S.C. § 705 (2)(B).

<sup>14</sup> 29 U.S.C. § 723 (a).

<sup>15</sup> 66 Fed. Reg. 4426.

<sup>16</sup> 34 C.F.R. § 361.56.

## 2 Post-employment Services

A way to provide additional services, through an existing or previously opened VR services case is through the category of post-employment services. Post-employment services are those services provided after the person has achieved an employment outcome and which are necessary for the individual “to maintain, regain or advance in employment.”<sup>17</sup> A note to the regulations 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.<sup>18</sup>

Each IPE must indicate the expected need for post-employment services.<sup>19</sup> Prior to closing a case, the individual must be informed of the availability of post-employment services.<sup>20</sup> Post-employment services are not intended to be complex or comprehensive and should be limited in scope and duration. If more comprehensive services are required, a new rehabilitation effort should be considered.<sup>21</sup> Here again, as will become clear in the Order of Selection discussion below, keeping an existing case open under the post-employment services option may avoid the need for an individual to be placed on a waiting list for services if the new request is treated as a potential new case.

### E. Using the Option of a Financial Needs Test

A state may consider financial need in determining eligibility for VR services, but it is not required to do so.<sup>22</sup> However, if a state VR agency chooses to establish a financial needs test, it must establish written policies which govern the determination of financial need and which identify the specific VR services that will be subject to the financial needs test.<sup>23</sup> Any financial needs test must take into account the individual’s disability-related expenses.<sup>24</sup>

If a state opts to have a financial needs test, it may also create a system that requires some individuals to contribute to the cost of their services. Sometimes referred to as a co-payment system, it would typically allow the agency to set up a “sliding scale,” in which individuals with the highest income levels pay the largest percentages of the cost for services. However, the level of the individual’s participation must not be so high as to “effectively deny the individual a necessary service.”<sup>25</sup> Also, SSI and SSDI recipients are totally exempt from any financial needs test.<sup>26</sup>

<sup>17</sup> 34 C.F.R. § 361.5(b)(42) (emphasis added).

<sup>18</sup> *Id.*, Note (emphasis added).

<sup>19</sup> 34 C.F.R. § 361.46(c).

<sup>20</sup> 34 C.F.R. § 361.56(d).

<sup>21</sup> 34 C.F.R. § 361.5(b)(42), Note.

<sup>22</sup> 34 C.F.R. § 361.54(a).

<sup>23</sup> 34 C.F.R. § 361.54(b)

(2)(i).

<sup>24</sup> 34 C.F.R. § 361.54(b)(2)

(iv)(B).

<sup>25</sup> 34 C.F.R. 362.54(b)(2)

(iv)(C).

<sup>26</sup> 34 C.F.R. § 361.54(b)

(3)(ii).

The following services must be provided without regard to financial need: (1) diagnostic services; (2) counseling, guidance and referral services; (3) job placement; (4) personal assistance services; and (5) “any auxiliary aid or service,” such as interpreter or reader services, that the individual needs to participate in the VR program and which would be mandated under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act.<sup>27</sup>

A financial needs test could take several forms. For example, a state could establish a policy that individuals (or families) with income over a certain amount would not be eligible for certain services (with the required exceptions built in to such a policy). Alternatively, as noted above, the state could establish a sliding scale where the higher the income the greater consumer’s financial contribution to the cost of VR services. It could also combine both approaches, establishing an income threshold below which all services are at no cost, a middle range where there is consumer contribution and an upper income limit where the consumer would be ineligible for a VR service.

## **F. Comparable Benefits or the Duty to Use Alternative Payment Sources**

VR agencies are also considered the payer of last resort for many services. This means they will not pay for a service if a similar, or comparable, benefit is available through another provider.<sup>28</sup> For example, if an applicant qualifies for personal assistance services through Medicaid, the VR agency will not provide them. But, the VR agency cannot deny payment for college tuition because an individual could obtain student loans. Loans, which must be repaid, are not similar benefits.<sup>29</sup> Comparable benefits do not include awards and scholarships based on merit.<sup>30</sup> The comments to the 2001 regulations also make it clear that the SSI program’s Plan for Achieving Self-Support (PASS) is not a comparable benefit.<sup>31</sup> 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.<sup>32</sup> Although assistive technology (AT) is exempt from the comparable benefits requirement,<sup>33</sup> if AT is readily available from another source (e.g., Medicaid or the special education system) the VR agency can, as a practical matter, look to that source to provide the AT.

Finally, each state is to develop a comprehensive plan with its special education system,<sup>34</sup> and all other public agencies providing what could be considered VR services, including Medicaid, public colleges, and the workforce investment system, to identify who will be responsible for providing what services.<sup>35</sup> The IPE must then list all services to be provided to meet the employment goal, whether or not they are the responsibility of the VR agency. It must identify the services the VR agency is responsible for providing, any comparable benefits the individual is responsible for applying for or securing, and the responsibilities of any agencies to provide comparable benefits.<sup>36</sup> If another agency refuses to fulfill its obligations, the VR agency must provide the services, but may seek reimbursement from that agency.<sup>37</sup> Therefore, if another agency is refusing to provide a service that is within its area of responsibility, the individual does not have to wait until that dispute is resolved before obtaining the service.<sup>38</sup>

<sup>27</sup> 34 C.F.R. §

361.54(b)(3)(i).

<sup>28</sup> 29 U.S.C. § 721(a)(8).

<sup>29</sup> RSA-PD-92-02 (11/21/91).

<sup>30</sup> 29 U.S.C. § 721(a)(8)(A)(ii).

<sup>31</sup> 66 Fed. Reg. 4419. The PASS is an SSI work incentive in which the SSI recipient may, in exchange for a higher SSI check, use their own income or resources to support their vocational goal.

<sup>32</sup> 66 Fed. Reg. 4418.

<sup>33</sup> 34 C.F.R. § 361.52(a) and (b).

<sup>34</sup> 20 U.S.C. § 1412(a)(12).

<sup>35</sup> 29 U.S.C. § 721(a)(8)(B).

<sup>36</sup> 29 U.S.C. § 722(b)(3)(E).

<sup>37</sup> 29 U.S.C. § 721(a)(8)(C)(ii).

## G. Appeal Rights

Anyone who is dissatisfied with a decision by the VR agency has a right to appeal. Each state must establish procedures governing appeals, which must include the right to mediation and an administrative hearing before an impartial hearing officer.<sup>39</sup> The VR agency must notify individuals, in writing, of their right to mediation, an impartial hearing and the availability of the Client Assistance Program (CAP) at the following times: at the application; when the IPE is developed; and upon the reduction, suspension, or cessation of VR services.<sup>40</sup>

There is a CAP office in every state.<sup>41</sup> The CAP provides information to individuals concerning their rights in the VR process and, upon request, provides advocacy services in resolving disputes, including representation at informal conferences and impartial hearings. Individuals who do not understand the proposed IPE, have questions about their VR rights, or receive an adverse decision from the VR agency, should consider contacting the appropriate CAP office for assistance. Of course, PABSS programs can also provide advocacy services to SSDI and SSI recipients who are disagreeing with a decision of the state VR agency.

## Order of Selection Criteria

### A. Introduction

As noted above, if a state does not have the resources to provide all needed VR services to all eligible individuals, it must implement an “Order of Selection” to determine which consumers will receive services. Essentially, the Order of Selection amounts to the establishment of a waiting list to determine which consumers will receive services first and which consumers will have to wait until funding is available to serve them. It is entirely possible that some individuals will not be reached on the waiting list.

The state must provide justification for the Order of Selection it creates. However, it must ensure that individuals with the most significant disabilities are selected first to receive VR services.<sup>42</sup> This requirement can place VR agencies that are contemplating initiation of an Order of Selection in a difficult position, because people with comparably mild disabilities, who may not need extensive VR services, will most likely no longer be served. Therefore, the state could be forced to allocate its resources to a relatively small percentage of the potentially eligible consumers.

Nevertheless, there are very strong policy reasons for the requirement that individuals with the most significant disabilities are to be served first when a state implements an Order of Selection. This requirement was in the Rehabilitation Act when it was passed in 1973 and has remained in all subsequent amendments. The reason is well-stated in the legislative history to the 1973 Act, summarizing public testimony prior to its passage:

<sup>38</sup> See 34 C.F.R. § 361.53(c).

<sup>39</sup> 29 U.S.C. § 722(c)(1).

<sup>40</sup> 29 U.S.C. § 722(c)(2)(A).

<sup>41</sup> See 29 U.S.C. § 732(a).

Most prominent in these hearings was the testimony of witnesses that the Vocational Rehabilitation program was not reaching that population who needed services the most, those individuals with severe handicaps. These witnesses pointed out that the program in the States often served only those individuals who were easiest to serve; who could be helped by one referral. The result was exclusion from the service system of many of those individuals who were difficult to serve, and inappropriate and incomplete services for those severely handicapped individuals who were accepted by the program.<sup>43</sup>

Still, it has been the author's experience that some states have attempted to avoid the unwelcome political implications of going to an Order of Selection by marshaling their resources and not providing all needed services to all eligible individuals. Yet, there are alternatives to going to an Order of Selection based on the provisions of the Rehabilitation Act discussed above.

## **B. Alternatives: How a State Might Avoid Going to an Order of Selection**

### **I. Use of a Financial Needs Test**

First, a state may want to take a careful look at its financial needs test, if it has one. If it does not have one, it may want to consider implementing a financial needs test prior to initiating an Order of Selection. If it currently has a financial needs test but still feels pressure to go to an Order of Selection (or it has already implemented an Order of Selection), it may want to consider revising its financial needs test, perhaps by implementing more of a sliding scale fee-for-services. In this way, as a consumer's income increases, their financial contribution increases, but they remain eligible for at least some support from the VR agency, at least until some ultimate income cap is reached.

The way SSI counts earned income could even serve as a model, where slightly more than half of gross wages are excluded. Of course, any such policy must be consistent with the federal limitations discussed above — i.e., it must consider a person's disability-related expenses and must not be so high as to deny a necessary service (i.e., it must be subject to exceptions in certain circumstances).

### **2. Take Full Advantage of “Comparable Benefits” Available to the Consumer**

Second, the state should look carefully at whether it is taking full advantage of comparable benefits available to consumers to fund VR services, particularly those benefits available through Medicaid. In doing so, the state should re-examine its required inter-agency agreements. Do they truly ensure that maximum efforts are being made to capture funding from other available public resources, including special education, Medicaid, and public higher education?

<sup>42</sup> 34 C.F.R. § 361.36(a)(3)(iv)(B).

<sup>43</sup> Senate Rep. No. 93-318, July 16, 1973, as quoted in

Once again, the consumer must be protected in this process. As noted above, federal VR law requires the VR agency to list on the IPE all services necessary to reach the employment goal, including those provided by outside agencies. If another agency does not provide a listed service, the VR agency must provide it, but can seek reimbursement from that agency. A key role for advocates may be to take steps that any contemplated comparable benefits, to be funded by other sources, still appear as necessary services on the IPE.

### C. Implementation Procedures

As noted above, if a VR agency determines that it cannot provide the “full range” of VR services to all eligible individuals, it must include in its State plan “the order to be followed in selecting eligible individuals to be provided [VR] services” — the Order of Selection.<sup>44</sup> Prior to the beginning of each fiscal year, the VR agency must determine whether it will need to establish and implement an Order of Selection. A VR agency is permitted to establish an Order of Selection in its State plan and then determine that it does not need to implement it at the start of the fiscal year. For example, in New York, one of the two VR agencies, Vocational and Educational Services to Individuals with Disabilities (VESID), has an established Order of Selection policy, but has not implemented it to date.<sup>45</sup>

If the VR agency does not establish or implement an Order of Selection at the start of a fiscal year, it must continue to provide the full range of VR services to all eligible individuals. In such a case, the VR agency must reevaluate its decision whenever circumstances change or it otherwise appears it will not be able to provide all needed services to all eligible individuals.<sup>46</sup> In other words, the VR agency must implement an Order of Selection at any time during the year if it finds it can no longer provide all needed services.

Implementing an Order of Selection need not only occur at the beginning of the year. If the VR agency determines that it does not need to go to an Order of Selection it must ensure that it has: (1) provided assessment services to all applicants and the full range of needed services to all who are eligible for services; (2) “made referral forms available throughout the State”; (3) “conducted outreach efforts to identify and serve” those “who have been unserved or underserved”; and (4) “not delayed, through waiting lists or other means,” eligibility determinations, development of the IPE or the provision of services to those found eligible for VR services.<sup>47</sup>

A state’s Order of Selection must “show the order to be followed in selecting eligible individuals for” VR services and provide justification for the plan it selects. The state must also ensure that individuals with the most significant disabilities are selected first to receive VR services.<sup>48</sup> The following factors may not be used in establishing an Order of Selection: (1) any duration of residency requirement; (2) type of disability; (3) age, gender, race, color, or national origin; (4) source of referral; (5) type of expected employment outcome; (6) need for specific services or anticipated cost of services; (7) individual or family income.<sup>49</sup> Again, as noted above, the use of a financial needs test

1973 U.S. Code Cong. & Admin. News p. 2086.

<sup>44</sup> 34 C.F.R. § 361.36(a)(1).

<sup>45</sup> [www.vesid.nysed.gov/policies/250.htm](http://www.vesid.nysed.gov/policies/250.htm).

<sup>46</sup> 34 C.F.R. § 361.36(c)(2) and (3).

<sup>47</sup> 34 C.F.R. § 361.36(b)(1).

and a sliding-scale contribution system within the needs test is a permissible way to structure a VR agency's delivery system so that it reaches more individuals. However, financial need cannot be a basis for where an individual fits within the state's Order of Selection criteria.

When a state implements an Order of Selection, it must: (1) do so on a statewide basis; (2) "notify all eligible individuals of the priority categories" the State has established in its Order of Selection, "their assignment into a particular category, and the right to appeal their category assignment;" and (3) continue to provide all necessary services to all individuals who started receiving services prior to the effective date, regardless of the severity of the individual's disability.<sup>50</sup> This third point is critical, as the individual who seeks services on a previously opened case cannot be put on a waiting list before receiving those services.

While an Order of Selection is in place, the State agency is still required to provide assessment services to all individuals who apply to determine eligibility for VR services and, for those found eligible, their priority category under the State's Order of Selection.<sup>51</sup> Those who are evaluated and do not meet the criteria for the category open for services under the Order of Selection are entitled to an appropriate referral to other state and federal programs, including other providers within the state workforce investment system.<sup>52</sup> Post employment services are not affected when a state goes to an Order of Selection. This last point is also critical, as a person who is to get post-employment services as part of an existing VR services case cannot be placed on an Order of Selection waiting list as a prerequisite to getting the services.

If an individual falls into a category that is not currently being served by the Order of Selection they are put on a waiting list. While not specifically required by federal law, the practice in state VR agencies seems to be that if funds become available at a later point and the category opens up, the individuals will be given services in chronological order according to the date of their original application. For example, Wisconsin requires: "At least once a month the Bureau of Consumers Services and the Senior Leadership Team will complete a statewide analysis of the resources available to Department of Vocational Rehabilitation and determine the number of eligible new consumers that can be contacted for IPE development."<sup>53</sup> A provision such as this allows for a minimal delay in getting services to consumers who are waiting for services.

Once a State implements an Order of Selection, it may at some point determine that it is no longer necessary to continue to implement the Order of Selection. In such a case, it must establish that it will be able to provide all needed services to all eligible individuals in the coming fiscal year. This determination must be based on "circumstances that have changed that will allow" the VR agency to provide the full range of services to all eligible individuals, including: (1) an estimate of the number of such individuals and the cost of services; (2) the costs of administering the program, including personnel costs, outreach activities and required statewide studies; and (3) the projected revenue.<sup>54</sup> Given this standard, it could be anticipated that once a VR agency has implemented an Order of Selection, it may be difficult to terminate it. This has been



<sup>48</sup> 34 C.F.R. § 721(a)(5).

<sup>49</sup> 34 C.F.R. § 361.36(d)(2).

<sup>50</sup> 34 C.F.R. § 361.36(e)(1) - (3).

<sup>51</sup> 34 C.F.R. § 361.42.

<sup>52</sup> 29 U.S.C. §§ 721(a)(5)(D) and 721(a)(20).

<sup>53</sup> See [www.dwd.state.wi.us/dvr/state\\_plans/2004/](http://www.dwd.state.wi.us/dvr/state_plans/2004/)

the experience in some states. For example, Wisconsin has been operating under one since 1994.<sup>55</sup> Georgia has had an Order of Selection in place since 1979.<sup>56</sup>

#### **D. Criteria for Classification of Disability Under an Order of Selection**

As has been mentioned a number of times in this article, the eligibility criteria a State establishes must ensure that “individuals with the most significant disabilities will be selected first for the provision of” VR services.<sup>57</sup> Also, as noted above, SSI and SSDI beneficiaries are presumed eligible for VR services, as individuals with a significant disability, not a most significant disability. What this means is that it is possible that an SSI or SSDI beneficiary will not meet the criteria of an individual with a most significant disability. If a state VR agency has gone to an Order of Selection and is only serving individuals with most significant disabilities, they will not be eligible for services. Of course, as noted above, it is possible to appeal the assignment of a person into a certain priority category. So an SSI or SSDI beneficiary could seek to prove they are eligible for the most significant category.

How does all of this apply to the assignment of a Ticket? Does the Order of Selection priority category an SSI or SSDI recipient is in affect the assignment of the Ticket to the VR agency? The answer is yes. If the Ticket holder is placed in the significant disability priority category and the state VR agency is only serving individuals with most significant disabilities, the VR agency cannot accept assignment. In such a case, the Ticket holder will have to go to another employment network.

What does “individual with a most significant disability” mean? The federal regulations do not specifically define “individual with a most significant disability.” The definition merely says that the individual must be a person with a significant disability who meets the State VR agency’s definition of an individual with a most significant disability.<sup>58</sup> The only additional guidance is that the Order of Selection “must be based on a refinement of the three criteria in the definition of ‘individual with a significant disability’.”<sup>59</sup>

It is clear, therefore, that the State VR agencies are given discretion in how they determine their priority categories for eligibility. However, the three criteria used to define an “individual with a significant disability” do provide some help. The three criteria are:

- (1) The person must have “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;”
- (2) The person’s VR needs “can be expected to require multiple [VR] services over an extended period of time;” and
- (3) The person “has one or more physical or mental disabilities resulting from [a very comprehensive list of enumerated conditions], or another disability or

<sup>54</sup> 34 C.F.R. § 361.36(b)(2)(i).

<sup>55</sup> See note 53, above.

<sup>56</sup> See [www.vocrehabga.org/pln412c2.pdf](http://www.vocrehabga.org/pln412c2.pdf) (p.1).

<sup>57</sup> 34 C.F.R. § 361.36(a)(3)(iv) (A) (emphasis added).

<sup>58</sup> 34 C.F.R. § 361.36(a)(3)(iv) (A) (emphasis added).

<sup>59</sup> 34 C.F.R. § 361.36(a)(3)(iv) (A) (emphasis added).

combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitation.”<sup>60</sup>

So, what does this all mean? First, and most basic, when the State sets up its priority categories, the less severe a person’s disability is the lower the priority category that person will be in and the less likely that person will receive services. Second, although the law does not mandate a set number of priority categories for a State, it does create three categories of eligibility — individual with a disability, individual with a significant disability, individual with a most significant disability. Therefore, States are very likely to use these three priority categories, or something similar. Finally, although the States are given discretion in how they define an individual with a most significant disability, their definition must be based on the same three prongs as the definition for an individual with a significant disability: (1) the number of functional capacities affected, (2) the need for multiple VR services for an extended period of time, and (3) as would be true for any person seeking VR services, the existence of one or more physical or mental disabilities. The only difference will be that individuals with a most significant disability will need to have more severe needs or more functional limitations in these areas than individuals with significant disabilities.

States have primarily used the first two prongs to determine which individuals are to be categorized as those with the “most significant disabilities.” The most common number of “severe limitations in functional capacities” used by states in their definition of “most significant disabilities” is three. Some states, such as Georgia, have chosen to require only two.<sup>61</sup> Others, like Kentucky, have required as many as four limitations before an individual is considered in the “most significant” category.<sup>62</sup> Regarding the “multiple VR services” criteria, the states refer to “primary” services only. Primary means a service that will “reduce the impact of functional limitations on employment outcome ... as opposed to supportive services which complement the provision of primary services.”<sup>63</sup> Supportive services are services such as transportation and personal assistance, which by definition, can only be provided in conjunction with another VR service.<sup>64</sup> Referral services fall under the “primary” categorization.<sup>65</sup> Regarding the requirement that the VR services be needed for “an extended period of time,” all of the states that have been researched for this article have defined the “extended period of time” to mean six months or more.

Some states have set up special provisions for specific groups to be given priority. For example, Oregon has a provision which states; “Public safety officers whose disabling conditions were sustained while performing in the line of duty shall be given special consideration as a group and shall be served first within whatever category of priority they appear.”<sup>66</sup>

If the needs of all members of the “most significant disability” group have been met, the Order of Selection moves to provide services to the next priority category, those with a “significant disability.” As noted above, “individual with a significant disability” is defined in the Act. Based on this definition, state policies have made the requirements to be a

<sup>58</sup> 34 C.F.R. § 361.5(b)(30) (emphasis added).

<sup>59</sup> 34 C.F.R. § 361.36(d)(1).

<sup>60</sup> 34 C.F.R. § 361.5(b)(31).

<sup>61</sup> See [www.vocrehabga.org/pln412c2.pdf](http://www.vocrehabga.org/pln412c2.pdf) (p.1).

<sup>62</sup> See [www.lrc.state.ky.us/kar/781/001/030.htm](http://www.lrc.state.ky.us/kar/781/001/030.htm).

<sup>63</sup> See [www.ors.ri.gov/pdf/files/115PT22.rev.pdf](http://www.ors.ri.gov/pdf/files/115PT22.rev.pdf) (4).

<sup>64</sup> 34 C.F.R. §§ 361.5(b)(39) and 361.48(h) and (n).

<sup>65</sup> *Id.*

<sup>66</sup> See [www.arcweb.sos](http://www.arcweb.sos).

member of this group very similar to the “most significant disability group,” only with a fewer number of “severe limitations in functional capacities” and services needed to meet the outcome goal.

When setting up the Order of Selection the state gives projected numbers for how many individuals they expect to serve in each priority category. They also include the projected expenditures for each category, and how many individuals they expect to be rehabilitated. In Wisconsin, they expect to serve more individuals classified as those with a “significant disability” than any other category. But, only 10.5 percent of those with a “significant disability,” and 7.2 percent of those with a “most significantly disability” are expected to be rehabilitated. At the same time, 44.4 percent of the “other eligible” group is projected to be rehabilitated. With the Order of Selection that is being implemented in Wisconsin for the 2004 fiscal year, 3,000 individuals were anticipated being left on the waiting list that will not receive VR services.<sup>67</sup>

## Conclusion

This article has discussed the federal requirements if a state VR agency decides that it must implement an Order of Selection because it is unable to provide all needed services to all eligible consumers. It has also discussed options, including a financial needs test or similar benefits requirement, which might enable a state to avoid going to an Order of Selection, or to minimize the impact of an Order of Selection, by maximizing the use of other available resources.

BPA&O advocates will need to be aware of the Order of Selection criteria as they counsel beneficiaries on the availability of VR services. PABSS advocates will have the additional opportunity to review Order of Selection policies to see if they are consistent with federal requirements. At the policy level, advocates may be able to work with the VR agency to maximize the use of alternatives to an Order of Selection to minimize the impact it may have on the availability of VR services to beneficiaries. Many have found that this policy work is most affectively done through the mandated State Rehabilitation Council, a mandated body that should be in place in every state.

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<sup>67</sup> See [www.dwd.state.wi.us/dvr/state\\_plans/2004/4\\_12\\_c\\_2\\_A.pdf](http://www.dwd.state.wi.us/dvr/state_plans/2004/4_12_c_2_A.pdf) (p.4).

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