



EXECUTIVE SUMMARY

A DESCRIPTION AND ANALYSIS OF THE FEDERAL AND SELECTED STATE POLICY FRAMEWORKS REGARDING ORDER OF SELECTION UNDER TITLE I OF THE REHABILITATION ACT

Report Prepared for

**The Rehabilitation Research and Training Center
On Vocational Rehabilitation
Institute for Community Inclusion
University of Massachusetts, Boston
100 Morrissey Blvd.
Boston, MA 02125**

Prepared by

**Robert “Bobby” Silverstein, J.D.
POWERS PYLES SUTTER & VERVILLE, P.C.
1501 M Street, N.W., 7th Floor
Washington, D.C. 20005
Bobby.Silverstein@ppsv.com**

In Partnership with

The Council of State Administrators of Vocational Rehabilitation

SEPTEMBER 22, 2008

This paper was funded, in part, by a grant (Grant No. H133VO70001B) from the National Institute on Disability and Rehabilitation Research (NIDRR) and the Rehabilitation Services Administration (RSA). The opinions contained in this paper are those of the author and do not necessarily reflect those of NIDRR, RSA or any other office or agency of the U.S. Department of Education.

INTRODUCTION

The Vocational Rehabilitation (VR) program authorized under Title I of the Rehabilitation Act of 1973, as amended, is a microcosm of the quintessential U.S. social policy dilemma: should resources be devoted to serving those “most in need” or those “most able to benefit”? With respect to the VR program, Congress has made a clear choice—a State VR agency must implement an “order of selection” when it anticipates that it will not have sufficient fiscal and/or personnel resources to fully serve all individuals eligible for vocational rehabilitation services. Under an order of selection, individuals with the most significant disabilities are selected first for the provision of VR services.

More specifically, the current provision in Title I of the Rehabilitation Act, as amended, specifically applicable to order of selection reads as follows:

“In the event that vocational rehabilitation services cannot be provided to all eligible individuals with disabilities in the state who apply for the services, the state plan shall—

- (A) Show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;
- (B) Provide justification for the order of selection;
- (C) Include an assurance that, in accordance with criteria established by the state for the order of selection, individuals with the most significant disabilities will be selected first for the provision of vocational rehabilitation services; and
- (D) Provide that eligible individuals, who do not meet the order of selection criteria, shall have access to services provided through the information and referral system, implemented under paragraph (20).”

Over the past several years various stakeholder groups, including the Council of State Administrators of Vocational Rehabilitation (CSAVR), community rehabilitation providers and representatives of individuals with disabilities have been meeting as part of what is known as the “Future’s Workgroup on the Definition of Most Significant Disability” (Workgroup). The Workgroup’s stated mission is to discuss, among other things, whether and how to modify the order of selection policy and whether Congress should prescribe a national definition for persons with the most significant disabilities and if so, what criteria should Congress adopt. The overall intent of the Workgroup is to increase the national VR program order of selection consistency and portability of services.

The Office of Special Education and Rehabilitation Services (OSERS), U.S. Department of Education, in announcing the funding opportunity for the Rehabilitation and Research Training Center (RRTC) on vocational rehabilitation, specified that the RRTC must focus on increasing knowledge of “best practices” for prioritizing and providing services to individuals with the most significant disabilities when the State VR agency cannot serve all eligible individuals. The RRTC must contribute to this outcome by conducting research on the administration and implementation of an order of selection in serving individuals with the most significant disabilities by their respective State VR programs, and identifying best practices among State VR

programs for ensuring that individuals with the most significant disabilities receive services on a priority basis.

The purpose of this policy analysis is to help inform policymakers and other stakeholders, including State VR agencies, State Rehabilitation Councils (SRC), community rehabilitation providers, and individuals with disabilities and their representatives, about alternative approaches for addressing order of selection policy when a State VR agency anticipates that it will not have sufficient fiscal and/or personnel resources to fully serve all individuals eligible for vocational rehabilitation services. Under order of selection, individuals with the most significant disabilities are selected first for the provision of vocational rehabilitation services.

The approach and methodology used to conduct the policy analysis of the order of selection provision included the following components. First, I reviewed the recent Order of Selection Survey conducted by CSAVR and the papers prepared and used by the Future's Workgroup over the past two years on the topic of "order of selection" and the definitions of "individual with a significant disability" and "individual with the most significant disability" under Title I of the Rehabilitation Act. Second, I used these documents as the platform from which to conduct my policy analysis. In order to ensure that the analysis would be of maximum utility to stakeholders interested in the issues of "order of selection" and the definition of "individual with the most significant disability", I scheduled regular and frequent communications with representatives from CSAVR and other stakeholders before the policy analysis design was finalized.

Third, I researched and described the federal policy framework concerning the establishment, implementation, and administration of "order of selection" including definitions of the terms "individual with a significant disability" and "individual with the most significant disability." The analysis included a review of the legislation, regulations, and policy guidance issued by the U.S. Department of Education in general and the Rehabilitation Services Administration in particular.

Fourth, I selected eight states for the policy analysis. The states selected included California, Iowa, Massachusetts, Michigan, Tennessee, Virginia, West Virginia, and Wisconsin. The states were selected jointly by RRTC project staff and CSAVR staff based on a review of responses to a national survey of all State VR agencies. In the survey, we explained that for purposes of the OOS policy analysis we were looking for State VR agencies that had the broadest breadth of experience determining whether to establish an order of selection and designing, implementing and administering order of selection. Thus, a primary criterion used to select states was whether the State VR agency had developed written policies, guidelines, tools, and training materials. We also inquired as to whether a state had established an order of selection, had ever been in an active order of selection where the state assigned individuals to OOS categories, and whether a state used its order of selection to waitlist eligible individuals.

Fifth, I researched and described state policy frameworks concerning the establishment, implementation, and administration of "order of selection" including a description of state policies relating to the definitions of the terms "individual with a significant disability" and "individual with the most significant disability" (state-by-state analysis). The state-by-state descriptions were based on a review of state regulations, policy guidelines, handbooks, manuals,

and training materials. Each state description included a review of key policy elements, including elements relevant to the design/establishment, implementation, and administration of order of selection. Finally, I analyzed the key policy elements but this time I conducted the analysis across the states i.e., identified the key policy elements and then described how the various states addressed each element (thematic analysis). Under each key policy element I described the applicable federal policy and then described how the selected states addressed each element and included specific examples of state policies.

Set out below is the results of my thematic analysis of key policy elements across the eight states included in the analysis.

SUMMARY OF THEMATIC ANALYSIS

I. Determination of Whether to Establish an Order of Selection.

The federal policy framework specifies that a State VR agency is required to implement an order of selection when it anticipates that it will not have sufficient fiscal and/or personnel resources to fully serve all eligible individuals. [*Section 101(a)(5)(A) of the Rehabilitation Act of 1973 (Act) and 34 CFR 361.36(a)(1)*] The decision to establish and implement an order of selection must be made prior to the beginning of each fiscal year and reevaluated whenever changed circumstances indicate that the agency's resources are not sufficient to fully serve all eligible individuals. [*34 CFR 361.36(c)*]

The states implement this provision through varying approaches ranging from statements in the state plan (e.g., Virginia and Wisconsin) to actual provisions in official state regulations (e.g., California). Michigan established a work group to determine "red flags/indicators to determine how the State VR agency would know if the state is approaching an order of selection. Red flags are indicators that require interventions to correct. Triggers would be insufficient money or staff to provide assessment or IPE services anywhere in the state that cannot be rectified by a shift in staff, resources, or other means.

II. Establishment of Order of Selection.

A. Establishment of Priority Categories.

The federal policy framework explains that establishing an order of selection for services provides an organized and equitable method for State VR agencies to serve individuals with disabilities if it is anticipated that the agency will not have enough fiscal or personnel resources to serve all eligible persons. [*ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 5*] Under the order of selection requirements, first priority for services is given to individuals with the most significant disabilities. [*Section 101(a)(5)(C) of the Act and 34 CFR 361.36(a)*] Individuals are determined to be "individuals with the most significant disabilities" in accordance with criteria established by the State VR agency. [*Section 101(a)(5)(C) of the Act and 34 CFR 361.36(a)(3)*]

Several states (e.g., California, Iowa, Massachusetts, Michigan, and Wisconsin) use a three priority category system:

Priority Category 1: Eligible individuals determined to be most significantly disabled.

Priority Category 2: Eligible individuals determined to be significantly disabled.

Priority Category 3: All other eligible individuals determined to be disabled.

Three states use a four priority category system:

Tennessee uses a category for “most significant disability” and a category for “significant disability” and then includes two categories for “other eligible individuals”:

Priority Category 1: Eligible individuals determined to have a most significant disability.

Priority Category 2: Eligible individuals determined to have a significant disability.

Priority Category 3: Eligible individuals who do not have a significant disability and whose vocational rehabilitation is expected to require multiple services.

Priority Category 4: Eligible individuals who do not have a significant disability and who cannot be classified into a higher priority category.

Similarly, West Virginia uses a category for “most significantly disabled”, a category for “significantly disabled” and then includes two categories for “other eligible individuals”:

Priority Category 1: Eligible applicants with the most significant disabilities.

Priority Category 2: Eligible applicants with significant disabilities.

Priority Category 3: Eligible applicants with non-significant disabilities which result in “permanent” functional limitation. A permanent functional limitation is an impairment of physical or mental activities or functions which either is not amenable to or is not likely to be eliminated through the provision of surgical or other medical services.

Priority Category 4: Eligible applicants with non-significant disabilities which do not result in permanent functional limitations.

Virginia uses a category for “most significantly disabled”, then divides the “significantly disabled” into two distinct categories, with a fourth category for “other eligible individuals”:

Priority Category 1: An individual with the most significant disability.

Priority Category 2: An individual with a significant disability that results in serious functional limitation in 2 functional areas and who requires 2 or more substantial vocational rehabilitation services for at least 6 months.

Priority Category 3: An individual with a significant disability that results in a serious function limitation in 1 functional area and who requires 2 or more substantial vocational rehabilitation services for at least 6 months.

Priority Category 4: All other individuals determined eligible for the VR program.

B. Terminology

1. **Individual with a significant disability.** According to the federal policy framework, an “individual with a significant disability” means an individual—
 - Who has a severe physical or mental impairment which 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;
 - Whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and
 - Who has one or more listed physical or mental disabilities 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 CFR 361.5(b)(31)]

Individuals who are receiving SSI and SSDI benefits as a result of having been determined by the Social Security Administration to be disabled or blind are considered to be at least “individuals with significant disabilities” [Section 102(a)(3)(A) of the Act and 34 CFR 361.42(a)(3)] and should be evaluated to determine whether they meet the state’s criteria for “individuals with the most significant disabilities”. There is no statutory authority for assigning a special priority category for individuals receiving SSI and SSDI benefits or for selecting these individuals before other individuals with most significant or significant disabilities.

Under the federal policy framework, in developing a definition for the term “individual with a significant disability”, the criteria that may be refined by the State VR agency include:

- the number and degree of functional limitations in terms of an employment outcome (an impairment seriously limits one or more functional capacities),
- the number of vocational rehabilitation services needed (whose vocational rehabilitation can be expected to require multiple vocational services), and

- the amount of time needed for the VR services (over an extended period of time).

An agency may also establish functional capacities in addition to the seven capacity areas listed in the definition of “individual with a significant disability”. In addition, the state agencies may develop definitions for terms such as “severe” physical or mental impairment that “seriously” limits one of more functional capacities.”

Set out below is a chart that describes the variations among states in defining “individual with a significant disability” or “significantly disabled.” The chart includes:

- the number of functional areas in which there is a serious limitation in terms of an employment outcome;
- multiple vocational rehabilitation services; and
- extended period of time.

State	Functional Capacity	Multiple Services	Extended Period
California	At least 1	2 or more	More than 6 months
Iowa	1 or more	More than 1	More than 1 year
Massachusetts	At least 1		No less than 6 months
Michigan	1 or more	More than 2	At least 6 months
Tennessee	At least 1	2 or more	6 months or more
Virginia	1 or more	2 or more	Longer than 6 months
West Virginia	1 or more	2 or more	6 months or more
Wisconsin	1 or more	2 or more	6 months or more

2. **Individual with the most significant disability.** According to the federal policy framework, the State VR agency’s definition for “individuals with the most significant disabilities” and its descriptions of its priority categories must meet the requirements of 34 CFR 361.36(d):

- the order of selection must be based on a refinement of the three criteria in the definition of “individual with a significant disability” and
- no other factors may be used.

In other words, in developing a definition for the term “individual with the most significant disability”, the criteria that may be refined by the State VR agency include:

- the number and degree of functional limitations in terms of an employment outcome (an impairment seriously limits one or more functional capacities),
- the number of vocational rehabilitation services needed (whose vocational rehabilitation can be expected to require multiple vocational services), and
- the amount of time needed for the VR services (over an extended period of time).

Set out below is a chart that describes the variations among states in defining “individual with the most significant disability” or “most significantly disabled.” The chart includes:

- the number of functional areas in which there is a serious limitation in terms of an employment outcome;
- multiple vocational rehabilitation services; and
- extended period of time.

State	Functional Capacity	Multiple Services	Extended Period
California	At least 4 areas	2 or more	More than 6 months
Iowa	*3 or more	More than 1 service	Longer than 1 year
Massachusetts	3 or more	2 or more separate and distinct	Not less than 6 months
Michigan	2 or more	More than 2	At least 6 months
Tennessee	2 or more	2 or more	6 months or more
Virginia	3 or more	2 or more	6 months or more
West Virginia	2 or more	2 or more	9 months or more
Wisconsin	3 or more	2 or more	6 months or more

*Iowa—In addition to serious limits in 3 or more functional capacities, Iowa includes an additional criteria—if an individual is seriously limited in **one** functional area to the degree it caused him/her to lose a job, to have never worked, or to only be able to work intermittently (due to the disability), then the individual is considered to have one of the most significantly disabling conditions and is considered an individual with the most significant disability.

3. **Extended period of time.** As set out above in the charts describing the criteria for significant and most significant disability, most states define extended period in terms of 6 months, with Iowa using 1 year, and West Virginia using 6 months for significant disability and 9 months for most significant disability.
4. **Functional capacity areas.** All of the states except California include the 7 categories identified in the federal regulations (i.e., mobility, communication, interpersonal skills, mobility, self-care, self-direction, work skills, and work tolerance). California does not include self-direction. No state included additional

functional capacity areas. Several states include comprehensive definitions for each functional capacity area and required documentation (see e.g., Tennessee). States have developed comprehensive manuals related to functional capacity areas (e.g., Iowa) and checklist (e.g., Massachusetts).

5. **Multiple vocational rehabilitation services.** The states include varying definitions of the term.

California excludes counseling and guidance, services to family members, and transportation. Iowa defines the term to mean services required in order for the individual to be competitively employed. Iowa considers maintenance and transportation as auxiliary services that must be provided only in combination with specific service categories. Tennessee excludes support services such as transportation, maintenance, and the routine counseling and guidance that should take place for every case. Virginia includes ongoing guidance and counseling, placement assistance, and other services which address the substantial loss of functional capacity. West Virginia includes physical restoration, mental health services, rehabilitation training, counseling, placement, rehabilitation technology and assessment. Massachusetts includes a comprehensive list of 14 vocational services. Wisconsin includes services needed to achieve a successful rehabilitation outcome.

6. **Serious limitation in terms of employment.** Several states included definitions for the term “serious limitations” in terms of employment.

California defines the term to mean a reduction of one’s capacity to perform, due to severe physical or mental impairment, to the degree that the individual requires services or accommodations in order for the individual to work or be a fully functioning member of the community.

Iowa explains that a serious functional limitation in a functional area is indicated when the individual’s functioning in the area is well below common expectations, or that the individual due to the disability, may require employability/work accommodations not typically made for other individuals. A serious limitation must be directly related to the disability. Iowa also specifies that in determining whether an individual has a serious limitation in a functional area, the limitation must be directly related to the disability. Limitations may result from or be compounded by external factors, such as geographical location, poor public transportation, or lack of training; but if they are not disability-related should not be the basis of the limitation for purposes of defining significant disability.

Michigan defines seriously limits to mean that the individual’s impairment limits function in a functional area to poor or well below what is typically expected, or that the individual requires accommodations (such as special working conditions, rehabilitation technology or substantial support or supervision) typically not made

for other individuals in training or employment. Michigan also includes specific definitions of serious limitation for each of the seven functional areas.

Tennessee and Virginia include distinct definitions applicable to each of the seven functional areas. Virginia also specifies that for purposes of determining whether an individual has a significant disability under order of selection, while serious functional limitations may result from or be compounded by external factors such as geographical location, poor public transportation, or lack of training, these factors are not a basis for determining that an individual has a serious functional limitation.

Wisconsin takes an approach that differs from the other states. In Wisconsin, functional limitations are determined with the consumer's current accommodations and mitigating factors in place. For example, if the consumer wears a hearing aid, the functioning with the hearing aid is the basis for determining which functional limitations currently exist. If a person uses a wheelchair, functioning with the wheelchair is the basis for determining which functional limitations currently exist. A functional limitation is an activity which the consumer cannot perform which meets the following criteria: is caused by the disability, is related to work, and is something the general working population can do at work. Severe functional limitation meets all of the above criteria for functional limitation and in addition is something the general working population must do to obtain, maintain, or advance in employment.

C. Acceptable and Unacceptable Factors.

As explained above, under the federal policy framework, State VR agencies may develop definitions for terms such as "severe" physical or mental impairment that "seriously" limits one of more functional capacities." In establishing the additional criteria, the State VR agency must:

- Apply the criteria equitably to all eligible individuals;
- Ensure consistency with the three criteria in the definition of "individual with a significant disability;" and
- Meet all other program requirements. *[ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 6]*

The federal policy framework also specifies that an order of selection may not be based on any other factors, including:

- Any duration of residency requirement, provided the individual is presently in the state;
- Type of disability;
- Age, gender, race, color, or national origin;
- Source of referral;
- Type of expected employment outcome;

- The need for specific services or anticipated cost of services required by an individual; or
- The income level of an individual or the individual's family. [34 CFR 361.36(d)(2)]

Several states include or incorporate by reference factors set out in the federal policy framework. California adds "sexual orientation" to the list.

D. Ranking Individuals Within a Priority (Waiting Lists).

Under the federal policy framework, 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. [ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 6]

All of the states adopt the individual's date of application as an equitable and reasonable factor for ranking individuals within a priority (waiting list). Some states explain that individuals are taken off the waiting list in the same manner (e.g., Iowa).

III. IMPLEMENTATION OF ORDER OF SELECTION.

A. Statewide Basis.

Under the federal policy framework, implementing an order of selection on a statewide basis means that, within the state, the same priority categories are closed in all State VR agency offices. State VR agencies must notify all eligible individuals of their priority category assignment and their right to appeal the assignment. [ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 10]

All of the states explain that the order of selection must be implemented on a statewide basis. For example, Michigan policy explains that waiting lists are developed on a statewide basis for eligible individuals, regardless of location, based on their significance of disability priority order, and on the date of application. The order of selection is managed centrally.

B. Authority to Open and Close Priority Categories, as Needed.

Under the federal policy framework, State VR agencies have the authority to open and close priority categories as needed, so long as the order of the categories is maintained and continuity of services to all individuals selected for services is assured. In determining whether to open priority categories, an agency should ensure that sufficient resources are available throughout the year to serve individuals in higher priority

categories. *[ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 10]* A State VR agency that establishes an order of selection but does not implement the order by keeping all priority categories open, must continue to be able to provide the full range of services, as appropriate, or it must implement the order of selection by closing one or more priority categories. *[34 CFR 361.36(c)(3)]* In other words, a state agency that is operating on an order of selection with all priority categories open must meet the same requirements as an agency that did not establish an order of selection or must close one or more categories. *[ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 16]*

The states have adopted policies that reflect the federal policy framework. For example, West Virginia specifies that the VR director has the authority to open and close priority categories as needed, so long as the order of the categories is maintained, continuity of services to all individuals selected for services is assured. Iowa includes a policy that specifies that once determined to be severely disabled or most severely disabled an individual classification is never downgraded during the time that the file is open.

C. Continuation of Services.

As explained above, under the federal policy framework, State VR agencies have the authority to open and close priority categories as needed, so long as the order of the categories is maintained and continuity of services to all individuals selected for services is assured. *[ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 10]*

All of the states include the policy regarding continuation of services. For example, California specifies that upon implementation of the order of selection for vocational rehabilitation services, individuals whose IPE was written and signed prior to implementation of an order of selection shall continue to receive services, including additional services subsequently identified as necessary to complete their IPE. Individuals who were determined eligible prior to implementation, but for whom the IPEs have not been written and signed, shall be assigned to a priority category.

D. Funding Arrangements.

Under the federal policy framework, with respect to funding arrangements, contributions may be earmarked for providing particular services (e.g., rehabilitation technology) serving individuals with certain types of disabilities (e.g., individuals who are blind). The contributions however must be used in a manner consistent with the state's order of selection, if applicable. Similarly, contributions may be earmarked to provide services to special groups that state and federal law permits (e.g., students with disabilities who are receiving special education services so long as the contributions are used in a manner consistent with the state's order of selection, if applicable. *[See example following 34 CFR 361.60, 66 Fed. Reg. at page 4414 (January 17, 2001)]* In other words, an agency that receives third-party funding to serve individuals from a particular disability group or referral source may not serve any of those individuals that fall outside of the priority

categories being served under the order of selection and must renegotiate any funding arrangements that are not consistent with the order of selection requirements. [*ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 10*]

Several states include specific reference to third party funding arrangements. For example, Michigan explains that any third party funding arrangements must be consistent with the order of selection. If cooperative agreements are not consistent with order of selection, they must be re-negotiated. Iowa, Tennessee and West Virginia have similar policies.

IV. ADMINISTRATION OF ORDER OF SELECTION.

A. Assessment for Determining Eligibility and Priority for Services.

In order to determine whether an individual is eligible for vocational rehabilitation services and the individual's priority under an order of selection for services (if the state is operating under an order of selection), the designated state unit must conduct an assessment for determining eligibility and priority for services. The VR counselor determines the significance of the individual's disability and the individual's priority for services based on a review of the data developed to make the eligibility determination and an assessment of additional data, to the extent necessary. [34 CFR 361.42(g)] If the designated state unit is operating under an order of selection for services, the state unit must base its priority assignments on a review of the data that was developed to make the eligibility determination and an assessment of additional data, to the extent necessary. [34 CFR 361.42(g)]

Determinations made by officials of other agencies, such as the Social Security Administration and education officials, can be used to assist the VR counselor in determining the extent of the individual's disability and the extent to which an individual meets one or more of the agency's criteria for the various priority categories. [Section 102(a)(4)(B) of the Act and 34 CFR 361.42(d)] To assure consistency in applying agency criteria to individuals, the agency may need to develop guidance materials and provide training for VR counselors. [*ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 6*]

States have developed comprehensive policies, procedures, manuals and checklists for conducting assessments for determining priority for services.

California uses the *California Code of Regulations* and the *Rehabilitation Administrative Manual—Level of Significance of Disability*.

Iowa has developed the *Preliminary Assessment for Determining Eligibility and Waiting list Placement*.

Michigan uses the *Disability Priority—Serious Limitations Job Aid*.

Massachusetts uses the *Order of Selection Functional Capacities Checklist*.

Tennessee has adopted policies that specify specific documentation requirements for each of the seven functional capacity areas.

Virginia has policies on documentation requirements for each type of disability and a checklist with descriptions to assist counselors in determining serious functional limitations.

Wisconsin has developed a policy that highlights special issues in eligibility determinations and order of selection category placements e.g., temporary disabilities, cyclic disability, progressive disability, legacy of disability, and transition without significant work history.

B. Notification of Eligible Individuals.

Under the federal policy framework, the State VR agency must notify all eligible individuals of the priority categories in a State's order of selection, their assignment to a particular category, and their right to appeal their category assignment. [34 CFR 361.36(e)(2)]

States provide notification to eligible individuals consistent with the federal policy framework. For example, California's policy and Administrative Manual specify that The Department, through the local offices, shall notify each individual placed on the waiting list, or his/her designated representative, in writing, of all the following:

- The priority category to which he/she has been assigned.
- The priority category (ies) that are currently being served.
- His/her appeal rights.
- His/her right to a re-evaluation of his/her priority category placement.

Tennessee's policy explains the responsibility to inform clients whose cases have been placed in closed categories that they should contact the counselor if:

- Their condition has changed and they would like a re-evaluation to determine if they can be re-classified into a higher priority category.
- They have been determined eligible for SSI or SSDI benefits, after determination of eligibility and assignment to a priority category.

Most states e.g., Iowa, Virginia and Wisconsin have developed model Order of Selection letters for use by rehabilitation counselors.

C. Responsibilities to Individuals Who Meet Open Categories Under OOS.

Under the federal policy framework, the state plan must assure that an IPE is developed and implemented in a timely manner for each individual determined eligible for

vocational rehabilitation services, or if the designated state unit is operating under an order of selection, for each eligible individual whom the state unit is able to provide services. [34 CFR 361.45(a)] The designated state unit must conduct an assessment for determining vocational rehabilitation needs, if appropriate, for each eligible individual, or, if the state is operating under an order of selection, for each eligible individual to whom the state is able to provide services. The purpose of the assessment is to determine the employment outcome, and the nature and scope of vocational rehabilitation services to be included in the IPE. [34 CFR 361.45(b)]

The states all include the policy specified in the federal policy framework. For example, Michigan specifies that customers served under an IPE must be able to obtain a full range of services. Regulations do not permit provision of partial services, for example, only placement services. Massachusetts policy specifies that vocational rehabilitation services to individuals for whom an IPE has been developed, agreed to, and approved will not be affected until such time as their IPE is terminated for reasons other than achievement of the employment objectives or available funds have been exhausted.

D. Responsibilities to Individuals Who Do Not Meet Open Categories Under OOS.

Under the federal policy framework, agencies implementing an order of selection must ensure that an eligible individual who does not meet the criteria for the open categories of the order of selection has access to services provided under the information and referral system. [Section 101(a)(5)(D) of the Act and 34 CFR 361.36(a)(3)(iv)] Information and referral services include: (a) providing vocational rehabilitation information and guidance to assist individuals in achieving employment; and (b) appropriately referring individuals to other federal and state programs, including other statewide workforce investment programs, that are best suited to meet the individual's specific employment needs [Section 101(a)(20)(A) of the Act and 34 CFR 361.37].

When making a referral, the agency must provide the individual with:

- A notice of the referral;
- Information about a specific point of contact within the program to which the individual is being referred; and
- Information and advice about the most suitable services for assisting the individual to prepare for, secure, retain, or regain employment. [Section 101(a)(20)(B)(ii) of the Act and 34 CFR 361.37(b)(2)]

As part of its reporting under section 101(a)(10)(c)(ii)(I) of the Act and 34 CFR 361.37, agencies must report annually on the number of eligible individuals who received information and referral services (not under an IPE) because they did not meet the order of selection criteria.

The state policies generally restate the policies set out in the federal policy framework (see e.g., Tennessee and West Virginia) In addition, several states restate prohibitions regarding the use of Section 110 funds. For example, Iowa policy explains that no

special resources (money or staff time) may be provided to clients on the waiting list. No programs will be specifically created by the VR agency for this group of individuals. No purchase of services will be allowed under Information and Referral. Michigan policy specifies that cost-services cannot be provided to those on the waitlist; only counseling regarding referrals to other agencies. Virginia policy specifies that while a case is in “Delayed” status, counselors are limited to providing only additional diagnostic, assessment, and evaluation services need to re-evaluate the priority category assignment. If needed to access diagnostic services, the counselor may provide support services (transportation, child care, personal assistance services) and interpreters for the deaf. Any services not allowed by the previous sentence are prohibited. Virginia exempts post-employment services.

E. Case Closure and Maintenance of Records.

Under the federal policy framework, the individual’s service record must include documentation on the nature and scope of information and referral services provided by the State VR agency to the individual and documentation on the referral itself *[34 CFR 361.47(a)(13)]*. The designated state unit must maintain for each applicant and eligible individual a record of services that includes, to the extent pertinent, documentation supporting a determination that an individual is an individual with a significant disability or an individual with the most significant disability. *[34 CFR 361.47]*

The states have adopted policies consistent with the federal policy framework.

F. Monitoring and Oversight.

California has adopted specific policy requiring the VR agency to review at least annually the order of selection for all eligible individuals in priority categories, including those being served and those on the waiting list. The review must be conducted to assure that services are being provided on a statewide basis and the determination of priority category does not bar or discriminate against any eligible individual based on proscribed factors. If the Department’s review discloses the order of selection is barring or discriminating against any eligible individuals based on inappropriate factors, the Department must remedy that situation by promulgating emergency regulations within 90 days.

G. Role of State Rehabilitation Council.

Under the federal policy framework, the designated state unit must consult with the State Rehabilitation Council regarding the—

- (1) Need to establish an order of selection, including any reevaluations of the need;
- (2) Priority categories of the particular order of selection;
- (3) Criteria for determining individuals with the most significant disabilities; and
- (4) Administration of the order of selection. *[34 CFR 361.17(h) and 34 CFR 361.36(f)]*

All of the states have adopted policies consistent with the federal policy framework. For example, Tennessee policy reiterates verbatim the policy in the federal regulations.