



# **A DESCRIPTION OF THE FEDERAL POLICY FRAMEWORK REGARDING ORDER OF SELECTION UNDER TITLE I OF THE REHABILITATION ACT**

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## I. INTRODUCTION

Under the vocational rehabilitation (VR) program authorized under Title I of the Rehabilitation Act of 1973, as amended, a State VR agency must implement an “order of selection” policy 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.

The purpose of this paper is twofold—first, to provide a comprehensive description of the federal policy framework governing the order of selection provision and second, to include a recitation of the actual language of the policies governing order of selection.

Section I is the introduction.

Section II provides the background/legislative history of the order of selection provision by summarizing the key changes made by Congress over time.

Section III provides an overview of the order of selection policy.

Section IV describes the standards governing the determination of whether a State VR agency must establish an order of selection.

Section V describes the standards governing the establishment, implementation, and administration of an order of selection.

Section VI describes the responsibility of the State VR agency to consult with the State Rehabilitation Council regarding the order of selection requirement.

The Appendix includes a recitation of the key policies regarding order of selection set out in the Code of Federal Regulations. For the convenience of the reader, the key policies are bolded.

This paper, which describes the federal policy framework, is part of a series of papers prepared by the author regarding the order of selection provision. A policy analysis of the federal and selected state policy frameworks regarding order of selection may be found in a separate report entitled: *A DESCRIPTION AND ANALYSIS OF THE FEDERAL AND SELECTED STATE POLICY FRAMEWORKS REGARDING ORDER OF SELECTION UNDER TITLE I OF THE REHABILITATION ACT* (October 10, 2008).

## II. BACKGROUND

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.

Over the years, Congress has refined the order of selection provision, including the definition of the term “person with the most significant disability”. The Rehabilitation Act of 1973 specified that the state plan must contain plans, policies, and methods to be followed in carrying out the state plan and in its administration and supervision, including in the event that vocational rehabilitation services cannot be provided to all eligible handicapped individuals who apply for such services, show the order to be followed in selecting individuals to whom vocational rehabilitation services will be provided and the outcomes and service goals and the time within which they may be achieved for the rehabilitation of such individuals, which order of selection for the provision of vocational rehabilitation services shall be determined on the basis of serving first those individuals with the most severe handicaps and shall be consistent with priorities in such order of selection so determined, and outcome and service goals for serving handicapped individuals, established in regulations prescribed by the Commissioner.

The Rehabilitation Act Amendments of 1986 (P.L. 99-506) included three amendments to strengthen the policy of serving persons with the most significant disabilities and the order of selection provision. First, the 1986 Amendments specified that the state plan must include the results of a comprehensive, state-wide assessment of the rehabilitation needs of all individuals with severe handicaps residing within the state and the state’s response to the assessment. Second, the 1986 Amendments amended the order of selection provision to direct the state plan to not only “show” the order to be followed but to “show and provide the justification for” the order to be followed. The 1986 Amendments also specified that the state plan must “show” the outcome and services goals and the time within which they will be achieved.

The House bill accompanying the 1986 Amendments (H. Rpt. No. 99-571) explains that the current regulations include a section (34 CFR 361.36(b) (1985) that is inconsistent with the amendment and current law relating to order of selection and therefore should be modified. This section of the regulations states that “the state plan must assure that those groups of individuals with the most severe handicaps are selected for services before any other groups of handicapped individuals.” The report explains, “This section is inconsistent with the Act because it focuses on ‘groups’ rather than individuals.” [Page 20]

The Rehabilitation Act Amendments of 1992 (P.L. 102-569) includes two substantive amendments to the order of selection provision. First, the 1992 Amendments Act adds the requirement that the state plan must include an “explanation of the methods by which the state

will provide vocational rehabilitation services to all individuals with disabilities within the state who are eligible for such services”.

Second, the 1992 Amendments Act clarifies that the determination regarding serving first those individuals with the most significant disabilities are to be made “in accordance with criteria established by the state”. The Senate Report accompanying the 1992 Amendments Act makes it clear that “the Committee does not intend for the Commissioner to prescribe criteria in this regard. It is the Committee’s intent that determinations pertaining to ‘order of selection’ and the definition of the term ‘individuals with the most severe disabilities’ will be made by the designated state unit after obtaining input from individuals with disabilities, their families, and organizations advocating on their behalf, particularly input from the newly established State Rehabilitation Advisory Council”. [S. Rpt. No. 102-357 at pages 27-28]

It should be noted that the 1992 Amendments Act directs the Secretary to “promulgate regulations regarding the requirements for the implementation of an order of selection for vocational rehabilitation services under section 105(a)(5)(A) if such services cannot be provided to all eligible individuals with disabilities who apply for such services.” It should also be noted that the 1992 Amendments substitutes the phrase “community rehabilitation providers” for the phrase “rehabilitation facilities”.

Title IV of the Workforce Investment Act of 1998 [P.L. No. 105-220] includes amendments to the Rehabilitation Act in general and the order of selection provision in particular. The short title of Title IV is “the Rehabilitation Act Amendments of 1998”. The 1998 Amendments Act streamlined and modified the state plan provisions and the provisions specifically applicable to order of selection. The primary substantive change was to specify the obligation of State VR agencies to eligible individuals not selected i.e., “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...” The Conference Report [H. Rpt. No. 105-659] explains [page 352] that:

“The intent is to alleviate the backlog of eligible individuals who do not receive services from the state vocational rehabilitation program because they do not meet the state’s order of selection criteria. Many of these individuals do not receive services from the state workforce system and are inappropriately referred back to the state vocational rehabilitation program because they have a disability. The Conferees expect that through the changes made throughout the Conference agreement in integrating the state workforce system, states will serve individuals with disabilities throughout the entire state workforce system, not only through the state vocational rehabilitation program.”

The current provision in 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 time, the Rehabilitation Services Administration (RSA) has issued regulations and developed guidelines implementing the order of selection policy consistent with the changes to the statute.

### **III. OVERVIEW OF THE ORDER OF SELECTION POLICY**

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)*]

An order of selection consists of priority categories to which eligible individuals are assigned based on the significance of their disability. [*34 CFR 361.36(d)(1)*] Under an order of selection, individuals with the most significant disabilities are selected first for the provision of vocational rehabilitation services. [*Section 101(a)(5)(C) of the Act and 34 CFR 361.36(a)(3)(iv)(A)*] An "individual with a significant disability" is defined in *Section 7(21)(A) of the Act and 34 CFR 361.5(b)(31)* as an individual with a disability –

- 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.

An "individual with a most significant disability" is defined by each State VR agency, using criteria consistent with the statutory definition of "individual with a significant disability." [*Section 101(a)(5)(C) and 34 CFR 361.36(a)(3)(iv)(A)*] The order of selection must be based on a refinement of the three criteria in the definition of "individual with a significant disability." [*34 CFR 361.36(d)(1)*] No other factors, including type of disability, referral source, and income,

can be used to determine significance of disability or assignment to a priority category. [34 CFR 361.36(d)(2)]

If a State VR agency establishes an order of selection, but does not implement the order at the beginning of the fiscal year, it must continue to serve all eligible individuals or it must implement the order by closing one or more priority categories. State VR agencies that are experiencing scarce resources may have one, some, or all priority categories closed. [34 CFR 361.36(c)(3)]

In a state operating under an order of selection, the individualized plan for employment (IPE) will be developed and implemented only for those eligible individuals to whom the State VR agency is able to provide services. Thus, an IPE will not be developed for individuals on waiting lists. [Section 101(a)(9)(A) of the Act and 34 CFR 361.45(a)(1)] Eligible individuals who do not meet the State VR agency's order of selection criteria, i.e., individuals on waiting lists, must be provided with access to the services available through the agency's information and referral system. [Section 101(a)(5)(D) of the Act and 34 CFR 361.37]

#### **IV. DETERMINING WHETHER TO ESTABLISH AN ORDER OF SELECTION**

##### **A. In General—Circumstances Under Which Order of Selection is Not Required**

The designated state unit is not required to establish an order of selection if it can demonstrate that it is able to provide the full range of vocational rehabilitation services, as appropriate, to all “eligible individuals.” [34 CFR 361.36(a)]

An “eligible individual” means an applicant for vocational rehabilitation services who meets the following eligibility requirements. The designated state unit's determination of an applicant's eligibility for vocational rehabilitation services must be based only on the following requirements [34 CFR 361.42(a)]:

1. A determination by qualified personnel that the applicant has a physical or mental impairment.
2. A determination by qualified personnel that the applicant's physical or mental impairment constitutes or results in a substantial impediment to employment for the applicant.
3. A determination by a qualified vocational rehabilitation counselor employed by the designated state unit that the applicant requires vocational rehabilitation services to prepare for, secure, retain, or regain employment consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.
4. A presumption that the applicant can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

**B. Bases for Determining the Ability of the Designated State Unit to Provide the Full Range of VR Services to All Eligible Individuals; Re-evaluation.**

The determination that an agency does not need to establish an order of selection because it can serve all eligible individuals is made on the basis of an assurance and a determination that the State VR agency's projected fiscal and personnel resources are sufficient to enable the agency to:

1. Continue to provide services to all individuals currently receiving services under an individualized plan for employment (IPE) who are expected to continue to need services during the coming fiscal year;
2. Provide assessment services to all individuals expected to apply for services during the coming fiscal year;
3. Provide services to all individuals who are expected to be determined eligible in the next fiscal year; and
4. Meet all other program requirements. *[34 CFR 361.36(a)(2)]*

To support the determination that the State VR agency can fully serve all eligible individuals during the current fiscal year, the agency must have, in fact:

1. Provided assessment services to all applicants and the full range of services, as appropriate, to all eligible individuals;
2. Made referral forms widely available throughout the state;
3. Conducted outreach efforts to identify and serve unserved or underserved persons; and
4. Not delayed, through waiting lists or other means, determinations of eligibility, the development of IPEs for individuals determined eligible for vocational rehabilitation services, or the provision of services for eligible individuals for whom IPEs have been developed. *[34 CFR 361.36(b)(1)]*

An agency determination that it can serve all eligible individuals during this current fiscal year must also have met these requirements during the previous fiscal year *[34 CFR 361.36(b)(1)]* or must meet additional requirements related to changed circumstances. In accordance with *34 CFR 361.36(b)(2)*, an agency that did not meet the applicable requirements during the previous fiscal year, but determines that it can serve all eligible individuals during the current fiscal year, must describe the changed circumstances that support the determination that it can fully serve all individuals.

The description of changed circumstances must include *[34 CFR 361.36(b)(2)(i)]*:

1. An estimate of the number of and projected costs of serving, in the next fiscal year, individuals with existing individualized plans for employment;
2. The projected number of individuals with disabilities who will apply for services and will be determined eligible in the next fiscal year and the projected costs of serving those individuals;



3. The projected costs of administering the program in the next fiscal year, including, but not limited to, costs of staff salaries and benefits, outreach activities, and required statewide studies; and
4. Projected revenues and projected number of qualified personnel for the program in the next fiscal year.

The determination that the designated state unit is able to provide a full range of services to all eligible individuals in the next fiscal year may also be based on any relevant comparable data from previous years and explanations for increases and decreases in costs and resources; and a determination that, for the current fiscal year, the projected revenues and personnel are adequate to cover the projected costs and to provide the full range of services to all eligible individuals. *[34 CFR 361.36(b)(2)(ii) and (iii)]*

The determination by the designated state unit whether to establish an order of selection must be made prior to the beginning of each fiscal year. *[34 CFR 361.36(c)(1)]*

If the designated state unit determines that it does not need to establish an order of selection, it must reevaluate this determination whenever changed circumstances during the course of the fiscal year indicate that it may no longer be able to provide the full range of services, as appropriate, to all eligible individuals. *[34 CFR 361.36(c)(2)]*

Changed circumstances may include decreases in fiscal or personnel resources or increases in program costs. *[34 CFR 361.36(c)(2)]* Increases in program costs may occur because of increased services costs and/or an increase in the number of individuals referred to the VR program. *[ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 15]*

## **V. ESTABLISHMENT, IMPLEMENTATION, AND ADMINISTRATION OF AN ORDER OF SELECTION.**

### **A. In General—State Plan Provisions.**

If the designated state unit is unable to provide the full range of vocational rehabilitation services to all eligible individuals in the state who apply for the services, the state plan must—

- Show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;
- Provide a justification for the order of selection;
- Identify services and outcome goals and the time within which the goals may be achieved for individuals in each priority category within the order and
- Assure 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

- Individual who do not meet the order of selection criteria will have access to services provided through the information and referral system. [34 CFR 361.36(a)(3)]

The state plan must also include the results of a comprehensive, statewide assessment describing the rehabilitation needs of individuals with disabilities residing within the state, particularly the vocational rehabilitation service needs of individuals with the most significant disabilities, including their need for supported employment services. [34 CFR 361.29(a)]

In addition, the state plan must assure that the state will annually submit a report to the Secretary that includes, among other things, estimates of the number of individuals to be served under each priority category within the order if the designated state agency uses an order of selection. [34 CFR 361.29(b)]

Furthermore, the state plan must identify the goals and priorities of the state in carrying out the program, including, service and outcome goals for categories in the order of selection. If the designated state agency uses an order of selection, the state plan must identify the state's service and outcome goals and the time within which these goals may be achieved for individuals in each priority category within the order. [34 CFR 361.29(c)]

## **B. Process Used to Establish An Order of Selection**

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)]

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.

An individual with a disability means an individual—

- Who has a physical or mental impairment;
- Whose impairment constitutes or results in substantial impediment to employment;
- and
- Who can benefit in terms of an employment outcome from the provision of vocational rehabilitation services. [34 CFR 361.5(b)(28)]

The term “substantial impediment to employment” used in the definition of “individual with a disability” means a physical or mental impairment (in light of attendant medical, psychological, vocational, educational, communication, and other related factors) hinders an individual from preparing for, entering into, engaging in, or retaining employment consistent with an individual’s abilities and capabilities. [34 CFR 361.5(b)(52)]

The term “employment outcome” used in the definition of “individual with a disability” means, with respect to an individual, entering or retaining full-time or, if appropriate, part-time competitive employment, in the integrated labor market; supported employment, or any other type of employment in an integrated setting, including self-employment, telecommuting, or business ownership, that is consistent with an individual’s strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. [34 CFR 361.5(b)(16)]

An “individual with a significant disability” means an individual with a disability—

- 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)]

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). The purpose of the criteria is to link the nature and depth of the individual’s functional limitations with the need for multiple services that require an extended time period for completion. [ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 6]

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 VR agency 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]*

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)]*

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.

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]*

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)]* 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]*

### C. Process Used to Implement Order of Selection

The order of selection provides a management tool for preventing the depletion of agency resources before the end of the fiscal year, assuring that once an eligible individual begins to receive VR services under an individualized plan for employment (IPE), sufficient resources will be available to continue to serve that individual. *[ORDER OF SELECTION/ABILITY TO SERVE ALL REVIEW GUIDE, RSA Monitoring Module (FY 2003) at page 10]*

State VR agencies implementing an order of selection must

- Implement the order of selection on a statewide basis;
- Notify all eligible individuals of the priority categories in a state's order of selection, their assignment to a particular priority category, and their right to appeal this assignment;
- Continue to provide all needed services to any eligible individual who has begun to receive services under an IPE prior to the effective date of the order of selection, irrespective of the severity of the individual's disability; and
- Ensure that its funding arrangements for providing services under the state plan, including third-party arrangements and awards under the establishment authority are consistent with the order of selection. *[34 CFR 361.36(e)]*

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]*

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]*

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]*

#### **D. Process Used to Administer Order of Selection**

1. **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 assessment must be conducted in the most integrated setting possible, consistent with the individual's needs and informed choice. *[34 CFR 361.42; 34 CFR 361.5(b)(6)]*

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)]*

In sum, State VR agencies must use and follow the eligibility process in determining whether an individual is eligible to receive VR services. In accordance with *34 CFR 361.42* an individual is eligible to receive VR services if he or she is "an individual with a disability" i.e., the individual has an impairment that results in a substantial impediment to employment and can benefit in terms of an employment outcome from VR services. The individual also must require VR services in order to prepare for, secure, retain, or regain employment. *[State Vocational Rehabilitation Services Program; Final Rule 66 Fed. Reg. at page 7255 (January 22, 2001)]* In addition, the Act establishes a clear priority for serving persons with the most significant disabilities (through the order of selection requirements).

In light of these criteria, a counselor's decision **not** to serve an individual with a disability on the basis that the individual cannot achieve integrated employment would mean, in effect, that the counselor has concluded that the individual cannot benefit in terms of an employment outcome under the VR program (i.e., integrated work) from VR services. The regulations, however, state that any individual seeking VR services is "presumed [able] to benefit in terms of an employment outcome from VR services. Moreover, for the state agency to overcome this presumption, it must demonstrate by clear and convincing evidence that the individual is incapable of benefiting in terms of an employment outcome under the VR program due to the severity of the applicant's disability. Finally,

in order to establish the requisite “clear and convincing evidence” the agency must explore the individual’s abilities, capabilities, and capacity to perform in work situations by affording the individual trial work experiences under 34 CFR 361.42. *[State Vocational Rehabilitation Services Program; Final Rule 66 Fed. Reg. at page 7255 (January 22, 2001)]*

Thus, in the absence of clear and convincing evidence following a trial work assessment of the individual’s abilities or as appropriate an extended evaluation, State VR agencies must consider each individual, including those with the most significant disabilities, capable of achieving integrated employment. In other words, the Act establishes the general expectation that individuals with the most significant disabilities, if given necessary services and supports, are able to work in integrated settings. These regulations ensure that every opportunity is afforded so that this expectation is realized. *[State Vocational Rehabilitation Services Program; Final Rule 66 Fed. Reg. at page 7255 (January 22, 2001)]*

2. **Responsibilities to Individuals Who Meet Open Categories.** 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)]*

3. **Responsibilities to Individuals Who Do Not Meet Open Categories.** 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)]*

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)]*.

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.

4. **Case Closure and Maintenance of Records.** The designated State unit may not close an applicant's record of services prior to making an eligibility determination unless the applicant declines to participate in, or is unavailable to complete an assessment for determining eligibility and priority for services, and the state unit has made a reasonable number of attempts to contact the applicant or, if appropriate, the applicant's representative to encourage the applicant's participation. *[34 CFR 361.44]*

The designated State unit must maintain for each applicant and eligible individual a record of services that include, to the extent pertinent, the following documentation:

- Documentation supporting a determination that the individual is eligible;
- Documentation supporting a determination that the individual is ineligible;
- Documentation that describes the justification for closing an applicant's or eligible individual's record of services; and
- 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]*

## VI. ROLE OF THE STATE REHABILITATION COUNCIL

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 Administration of the order of selection. *[34 CFR 361.17(h) and 34 CFR 361.36(f)]*



## APPENDIX

### KEY REGULATORY PROVISIONS RELATED TO ORDER OF SELECTION AND INDIVIDUALS WITH THE MOST SIGNIFICANT DISABILITIES

[Based on Final Regulations published in the Federal Register on January 17, 2001 and as  
amended on January 22, 2001)

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## DEFINITIONS:

**361.5(b)(6) *Assessment for determining eligibility and vocational rehabilitation needs*** means, as appropriate in each case—

(i)(A)  
a review of **existing data**—

(1) To **determine** if an individual is **eligible** for vocational rehabilitation services; **and**

(2) To **assign priority for an order of selection** described in 361.36 in the states that use an **order of selection**; and

(B)  
To the extent necessary, the provision of appropriate assessment activities to obtain necessary **additional data** to make the eligibility determination **and** assignment;

(ii) To the extent **additional data** are necessary to make a determination of the employment outcomes and the nature and scope of vocational rehabilitation services to be included in the individualized plan for employment of an eligible individual, a **comprehensive assessment** to determine the unique strengths, resources, priorities, concerns abilities, capabilities, interests, and informed choice, including the need for supported employment, of the eligible individual. The comprehensive assessment ...is limited to information that is necessary to identify the rehabilitation needs of the individual and to develop the individualized plan for employment of the eligible individual...

**361.5(b)(11) *Competitive employment*** means work—

- (i) In the competitive labor market that is performed on a full-time or part-time basis in an **integrated setting**; and
- (ii) For which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals who are not disabled.

**361.5(b)(15) *Eligible individual*** means an applicant for vocational rehabilitation services who meets the eligibility requirements of **361.42(a)**.

**361.5(b)(16) *Employment outcome*** means, with respect to an individual , entering or retaining full-time or, if appropriate, part-time **competitive employment**, as defined in 361.(b)(11), in the integrated labor market; supported employment; or any other type of employment in an **integrated setting**, including self-employment, telecommuting, or business ownership, that is

consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and **informed choice**.

**361.5(b)(19) *Extended employment*** means work in a non-integrated or sheltered setting for a public or private nonprofit agency or organization that provides compensation in accordance with the Fair Labor Standards Act and any needed support services to an individual with a disability to enable the individual to continue to train or otherwise prepare for competitive employment, unless the individual through informed choice chooses to remain in extended employment.

**361.5(b)(28) *Individual with a disability*** except as provided in 361.5(29), means an individual

- (i) who has a physical or mental impairment;
- (ii) Whose impairment constitutes or results in **substantial impediment to employment**;  
and
- (iii) Who can **benefit in terms of an employment outcome** from the provision of vocational rehabilitation services.

**361.5(b)(30) *Individual with a most significant disability*** means an individual with a significant disability who **meets the designated state unit's criteria** for an individual with a **most** significant disability. These criteria **must** be **consistent** with the requirements in 361.36(d)(1) [establishing order of selection—basis for order of selection i.e., refinement of the three criteria in the definition of individual with a significant disability] and (2) [establishing order of selection—factors that cannot be used in determining order of selection of eligible individuals].

**361.5(b)(31) *Individual with a significant disability*** means an individual with a disability

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

**361.5(b)(33) *Integrated setting*.**

- (i) With respect to the provision of services, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals other than non-disabled individuals who are providing services to those applicants or eligible individuals.
- (ii) With respect to an employment outcome, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals, other than non-disabled individuals who are providing services to those

applicants or eligible individuals, to the same extent that non-disabled individuals in comparable positions interact with other persons.

**361.5(b)(52) *Substantial impediment to employment*** means that a physical or mental impairment (in light of attendant medical, psychological, vocational, educational, communication, and other related factors) **hinders** an individual from preparing for, entering into, engaging in, or retaining employment consistent with an individual's abilities and capabilities.

## **STATE PLAN AND OTHER REQUIREMENTS**

**361.17 State Rehabilitation Council (h) Functions.** The Council must, after consulting with the State Workforce Investment Board—

- (1) Review, analyze, and advise the designated state unit regarding the performance of the state unit's responsibilities under this part, particularly responsibilities related to—... (i) Eligibility, **including order of selection**...

**361.29 Statewide assessment; annual estimates; annual state goals and priorities; strategies; and progress reports.**

(a) **Comprehensive statewide assessment.** The state plan must include--

- (i) The results of a comprehensive, statewide assessment, jointly conducted by the designated state unit and the State Rehabilitation Council every 3 years describing the rehabilitation needs of individuals with disabilities residing within the state, particularly the vocational rehabilitation service needs of--
  - (A) individuals with the **most significant disabilities**, including their need for supported employment services...

(b) **Annual Estimates.** The State plan must include, and must assure that the state will annually submit a report to the Secretary that includes, state estimates of—

- (1) The number of individuals in the state who are **eligible** for services under this part;
- (2) The number of eligible individuals who will receive services provided with funds provided under part B of Title I of the Act and under part B of Title VI of the Act, including, if the designated state agency uses an **order of selection** in accordance with 361.36, **estimates of the number of individuals to be served under each priority category within the order.**
- (3) ...

(c) **Goals and Priorities.**

- (1) The state plan must identify the goals and priorities of the state in carrying out the program.....
- (2) ...
- (3) ...

(4) ...

(5) ***Service and outcome goals for categories in order of selection.*** **If** the designated state agency uses an **order of selection** in accordance with 361.36, the State plan must identify the state's **service and outcome goals and the time within which these goals may be achieved** for individuals in **each priority category** within the order.

(d) Strategies...

(e) Evaluation and report of progress...

### **361.36 Ability to serve all eligible individuals; order of selection for services.**

#### ***(a) General Provisions***

(1) The designated state unit **either** must be able to provide the **full range of services** listed in 361.48, as appropriate, to all eligible individuals **or**, in the event that vocational rehabilitation services **cannot** be provided to all eligible individuals in the state who apply for the services, include in the state plan **the order** to be followed in selecting eligible individuals to be provided vocational rehabilitation services.

(2) The ability of the designated state unit to provide the **full range of vocational rehabilitation services to all eligible individuals** must be supported by a **determination** that satisfies the requirements of paragraphs (b) and (c) of this section **and** a **determination** that, on the basis of the designated state unit's **projected** fiscal and personnel **resources and** its **assessment** of the rehabilitation needs of individuals with significant disabilities within the state, it can—

- (i) **Continue** to provide **services** to **all** individuals **currently** receiving services;
- (ii) **Provide assessment services to all** individuals expected to apply for services in the next fiscal year;
- (iii) **Provide services to all individuals** who are expected to be determined **eligible** in the next fiscal year; and
- (iv) Meet **all** program requirements.

(3) **If** the designated state unit is **unable** to provide the full range of vocational rehabilitation services to **all eligible** individuals in the state who apply for the services, the state plan must—

- (i) **Show the order** to be followed in selecting **eligible** individuals to be provided vocational rehabilitation services;
- (ii) Provide a **justification** for the **order of selection**;
- (iii) **Identify services and outcome goals and the time** within which the goals may be achieved for individuals **in each priority category within the order** as required by 361.29(c)(5) and
- (iv) Assure that

- (A) 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
- (B) Individual who do not meet the **order of selection** criteria will have access to **services provided through the information and referral system** established under 361.37.

***(b) Basis for assurance that services can be provided to all eligible individuals.***

(1) For a designated state unit that determined, for the current fiscal year and the preceding fiscal year, that it is **able** to provide the **full range of services**, as appropriate, to all eligible individuals, the state unit, during the **current** fiscal and **preceding** fiscal year, must have in fact—

- (i) **Provided assessment services to all** applicants and the **full range of services**, as appropriate, to **all** eligible individuals;
- (ii) Made **referral forms** widely available throughout the state;
- (iii) Conducted **outreach** efforts to identify and serve individuals with disabilities who have been unserved or underserved by the vocational rehabilitation system; and
- (iv) **Not delayed**, through **waiting lists** or other means,
  - Determinations of **eligibility**,
  - The **development of individualized plans for employment** for individuals determined eligible for vocational rehabilitation services, **or**
  - **the provision of services** for eligible individuals for whom individualized plans for employment have been developed.

(2) For a designated state unit that was **unable** to provide the **full range of services to all** eligible individuals during the **current or preceding** fiscal year **or** that has not met the requirements in paragraph (b)(1) of this section, the determination that the designated state unit is **able** to provide the **full range of vocational rehabilitation services to all** eligible individuals in the **next fiscal year** must be based on—

- (i) **Circumstances that have changed** that will allow the designated state unit to meet the requirements of paragraph (a)(2) of this section in the next fiscal year, including—
  - (A) An estimate of the **number of and projected costs** of serving, in the next fiscal year, individuals with existing individualized plans for employment;
  - (B) The **projected number of individuals with disabilities who will apply** for services **and** will be determined **eligible** in the next fiscal year and the **projected costs** of serving those individuals;

- (C) The **projects costs of administering** the program in the next fiscal year, including, but not limited to, costs of staff salaries and benefits, outreach activities, and required statewide studies; and
- (D) **Projected revenues and projected number of qualified personnel** for the program in the **next fiscal year**.

- (ii) Comparable data, as relevant, for the **current or preceding fiscal year**, or for both years, of the costs listed in paragraphs (b)(2)(i)(A) through (C) of this section and the resources identified in paragraph (b)(2)(i)(D) of this section and an explanation of any projected increases or decreases in these costs and resources; and
- (iii) A determination that the **projected revenues and the projected number of qualified personnel** for the program in the **next fiscal year** are adequate to cover the costs identified in paragraphs (b)(2)(i)(A) through (C) of this section to ensure the provision of the full range of services, as appropriate, to all eligible individuals.

***(c ) Determining need for establishing and implementing an order of selection.***

- (1) The designated state unit must determine, **prior to the beginning of each fiscal year, whether to establish and implement an order of selection.**
- (2) **If** the designated state unit determines that it does **not** need to establish an order of selection, it must **reevaluate** this determination whenever **changed circumstances** during the course of the fiscal year, such as a decrease in its fiscal or personnel resources or an increase in its program costs, indicate that it may no longer be able to provide the full range of services, as appropriate, to all eligible individuals, as described in paragraph (a)(2) of this section.
- (3) **If** the designated state unit **established an order of selection, but** determines that it does **not** need to implement that order at the **beginning** of the fiscal year, it must continue to meet the requirements of paragraph (a)(2) of this section, **or** it must **implement the order of selection by closing one or more priority categories.**

***(d ) Establishing an order of selection.***

- (1) **Basis for order of selection.** An order of selection must be based on a **refinement of the three criteria** in the definition of “individual with a **significant** disability” in 361.5(b)(31).
- (2) **Factors that cannot be used in determining order of selection of eligible individuals.** An order of selection may not be based on any other factors, including
  - (i) Any duration of **residency** requirement; provided the individual is presently in the state;



- (ii) **Type of disability;**
- (iii) Age, gender, race, color or national origin;
- (iv) **Source of referral;**
- (v) **Type of expected employment outcome;**
- (vi) The need for **specific services or anticipated cost** of services required by an individual; or
- (vii) The **income level** of an individual or an individual's family.

**(e) Administrative requirements.** In administering the order of selection, the designated state unit must—

- (1) Implement the order of selection on a **statewide basis**;
- (2) **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;
- (3) **Continue** to provide **all** needed services to any eligible individual who has **begun** to receive services under an individualized plan for employment **prior** to the effective date of the **order of selection**, irrespective of the severity of the individual's disability; and
- (4) Ensure that its **funding arrangements** for providing services under the state plan, including third-party arrangements and awards under the establishment authority, are **consistent with the order of selection**. If any funding arrangements are inconsistent with the order of selection, the designated state unit must renegotiate these funding arrangements so that they are consistent with the order of selection.

**SEE EXAMPLE FOLLOWING 361. 60 Matching funds:**

**(b)(3) Contributions by private entities.** 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) **consistent with the state's order of selection**, if applicable; providing services to special groups that state or federal law permits (e.g., students with disabilities who are receiving special education services, **consistent with the state's order of selection, if applicable**.

**(f) State Rehabilitation Council.** The designated state unit **must consult** with the State Rehabilitation Council regarding the—

- (4) **Need to establish an order of selection**, including any **reevaluations** of the need under paragraph (c)(2) of this section;
- (5) **Priority categories** of the particular order of selection;
- (6) **Criteria for determining individuals with the most significant disabilities**; and
- (7) **Administration** of the order of selection.

**COMMENTS AND RESPONSES [66 FED. REG. AT PAGE 4426]:**

The order of selection requirements must be followed in the course of participating in **One-stop system activities**. If the state is operating on an order of selection because it cannot serve all eligible individuals given its current level of VR program resources, then the state unit can pay only for services (i.e., service beyond intake and assessment that are necessary to determine the individual's priority category under the order of selection) for the individuals who qualify for services under that order, regardless of whether those services are provided within or apart from the One-stop system center. The severity of an individual's disability or the cost of the individual's program of services can have no bearing on the scope of services the individual receives.

### **361.37 Information and referral services.**

**(a) General provisions.** The state plan must assure that—

(1) The designated state agency will implement an information and referral system adequate to ensure that individuals with disabilities, **including eligible individuals who do not meet the agency's order of selection criteria** for receiving vocational rehabilitation services **if** the agency is operating on an **order of selection**, **are provided** accurate vocational rehabilitation information and guidance (which **may** include **counseling and referral for job placement**) using appropriate modes of communication to assist them in preparing for, securing, retaining, or regaining employment; and

(2) The designated state unit will **refer** individuals with disabilities to other appropriate federal and state programs, including other components of the statewide workforce investment system.

**(b)...**

**(c)...**

**(d ) Order of selection.** In providing the information and referral services under this section to eligible individuals who are **not** in the **priority category or categories** to receive vocational rehabilitation services under the state's **order of selection**, the state unit must identify, as part of its **reporting** under 361.40 the number of eligible individuals who did **not** meet the agency's order of selection criteria for receiving vocational rehabilitation services and did receive information and referral services under this section.

### **361. 39 State-imposed requirements**

The designated state unit must, upon request, identify those regulations and policies relating to the administration or operation of its vocational rehabilitation program that are state-imposed, including any regulation or policy based on state interpretation of any federal law, regulation, or guideline.

### **361. 42 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 assessment must be conducted in the most integrated setting possible, consistent with the individual's needs and informed choice, and in accordance with the following provisions:

**(a) Eligibility requirements.**

(1) The designated state unit's determination of an applicant's **eligibility** for vocational rehabilitation services must be based **only** on the following requirements:

- (i) A determination by qualified personnel that the applicant has **a physical or mental impairment**;
- (ii) A determination by qualified personnel that the applicant's physical or mental impairment **constitutes or results in a substantial impediment to employment** for the applicant.
- (iii) A determination by a qualified vocational rehabilitation counselor employed by the designated state unit that the **applicant requires vocational rehabilitation services** to prepare for, secure, retain, or regain employment consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.
- (iv) A **presumption** in accordance with paragraph (a)(2) of this section that the applicant can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

**(2) Presumption of benefit.** The designated state unit must **presume** that an applicant who meets the eligibility requirements in paragraphs (a)(1)(i) and (ii) of this section **can benefit** in terms of an employment outcome **unless** it demonstrates by **clear and convincing evidence**, that the applicant is **incapable of benefiting** in terms of an employment outcome from vocational rehabilitation services due to the **severity** of the applicant's disability.

**(3) Presumption of eligibility for Social Security recipients and beneficiaries.** Any applicant who has been determined eligible for SSI or SSDI is presumed eligible for vocational rehabilitation services and considered an individual with a **significant** disability...

**SEE LENGTHY DISCUSSION OF PURPOSES OF PROVISION [66 FED REG AT PAGE 4427-4428 (01/17/2001)]**

**(4) Achievement of an employment outcome.** Any eligible individual... **must intend to achieve an employment outcome** that is consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice... The applicant's **completion of the application process** for vocational rehabilitation

services is **sufficient evidence** of the individual's intent to achieve an employment outcome **and** no additional demonstration on the part of the applicant is required.

**(5) Entitlement to services.** Nothing in this section is to be construed to create an entitlement to any vocational rehabilitation service.

SEE DISCUSSION 66 Fed. Reg at page 4427 (January 17, 2001)]. The 1998 Amendments specify that those who qualify for SSI or SSDI are presumed eligible for the VR program. This amendment was adopted to streamline eligibility and expedite necessary VR services for those Social Security recipients since each category of recipients already has met **stringent** disability criteria under the Social Security Act. And clearly needs VR services in order to achieve appropriate employment.

The regulations specify that nothing in presumptive eligibility requirement creates an entitlement to VR services, meaning that individuals with disabilities are not automatically entitled to VR services but, rather, must expect to achieve an employment outcome as a result of receiving those services. The final regulations implement this expectation by ensuring that all applicants, including those receiving SSI and SSDI are informed of the employment-related nature of the VR program during the application process.

**(b) Interim determination of eligibility.**

- (1) The designated state unit **may** initiate the provision of vocational rehabilitation services for an applicant on the basis of an interim determination of eligibility prior to the 60 day period described in 361.41(b)(2).
- (2) ...If a state elects to use an interim eligibility determination, the designated state unit must make a final determination of eligibility within 60 days of the individual submitting an application for services.

**(c) Prohibited factors**

- (1) In making a determination of eligibility, the state must assure that the state unit will **not** impose a duration of **residence** requirement that excludes from services any applicant who is present in the state.
- (2) In making a determination of eligibility, the designated state unit **must** ensure that
  - No applicant or group of applicants is excluded or found eligible **solely on the basis of type of disability**;
  - The eligibility requirements are applied **without regard** to
    - Age, gender, race, color, or national origin of the applicant;
    - Type of expected employment outcome;
    - Source of referral for vocational rehabilitation services; and
    - Particular service needs or anticipated cost of services required by an applicant or the income level of an applicant or applicant's family.

**(d) Review and assessment of data for eligibility determination.**

1. The designated state unit must base its determination of each of the basic eligibility requirements in paragraph (a) on a review and assessment of **existing data**... and to the extent existing data do **not** describe the current functioning of the individual or are unavailable, insufficient, or inappropriate to make an eligibility determination, an assessment of **additional data** resulting from the provision of vocational rehabilitation services... and any other support services that are necessary to determine whether an individual is eligible.
2. Must base its presumption of eligibility for SSI and SSDI recipients on ...determinations made by the Social Security Administration.

**(e) Trial work experiences for individuals with significant disabilities.**

1. Prior to any determination that an individual with a disability is **incapable of benefiting** from vocational rehabilitation services in terms of an employment outcome because of the severity of that individual's disability, the designated state unit must conduct an exploration of the individual's abilities, capabilities, and capacity to perform in realistic work situations to determine whether or not there is a **clear and convincing** evidence to support such a determination.
2. The designated state unit must develop a written plan to assess periodically the individual's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences, which must be provided in the most integrated setting possible, consistent with the informed choice and rehabilitation needs of the individual. ..

**(f) Extended evaluation for certain individuals with significant disabilities.** Under limited circumstances if an individual cannot take advantage of trial work experiences or if options for trial work experiences have been exhausted before the state unit is able to make the determinations, the designated state unit must conduct an extended evaluation to make these determinations...

**(g) Data for determination of priority for services under an order of selection.** **If** the designated state unit is operating under an **order of selection** for services, the state unit **must base it priority assignments on:**

- (1) A review of the data that was developed under paragraphs (d) and (e) to make the eligibility determination and
- (2) An assessment of additional data, to the extent necessary.

**DISCUSSION FOLLOWING REGS [66 FR AT PAGE 7255 (JANUARY 12, 2001)]**

The Act establishes a clear priority for serving persons with the most significant disabilities (through the order of selection requirements) and requires that the eligibility process specified in

the Act be followed in determining whether an individual is to receive VR services. In accordance with 361.42 an individual is eligible to receive VR services if he or she is “an individual with a disability” i.e., the individual has an impairment that results in an impediment to employment and can benefit in terms of an employment outcome from VR services. The individual also must require VR services in order to prepare for, secure, retain, or regain employment.

In light of these criteria, a counselor’s decision **not** to serve (but rather refer to an extended employment provider) an individual with a disability on the basis that the individual cannot achieve integrated employment would mean, in effect, that the counselor has concluded that the individual cannot benefit in terms of an employment outcome under the VR program (i.e., integrated work) from VR services. The regulations, however, state that any individual seeking VR services is “presumed [able] to benefit in terms of an employment outcome from VR services. Moreover, for the state agency to overcome this presumption, it must demonstrate by clear and convincing evidence that the individual is incapable of benefiting in terms of an employment outcome under the VR program due to the severity of the applicant’s disability. Finally, in order to establish the requisite “clear and convincing evidence” the agency must explore the individual’s abilities, capabilities, and capacity to perform in work situations by affording the individual trial work experiences under 361.42.

Thus, in the absence of clear and convincing evidence following a trial work assessment of the individual’s abilities or as appropriate an extended evaluation, VR agencies must consider each individual, including those with **the most significant disabilities**, capable of achieving integrated employment. In other words, the Act establishes the general expectation that individuals with the **most significant disabilities**, if given necessary services and supports, are able to work in integrated settings. These regulations ensure that every opportunity is afforded so that this expectation is realized.

### **361.43 Procedures for ineligibility determination**

If the state unit determines that an applicant is **ineligible** for vocational rehabilitation services or determines that an individual receiving services under an IPE is no longer eligible for services, the state unit must—

- a) Make the determination only after providing an opportunity for **full consultation** with the individual or as appropriate his or her representative;
- b) **Inform** the individual in writing, supplemented as necessary by other appropriate modes of communication consistent with the informed choice of the individual, of the ineligibility determination, including the reasons for that determination, the requirements under this section, and the means by which the individual may express and seek remedy for any dissatisfaction...
- c) [Describe services available under **CAP**].
- d) **Refer** to One-stop service delivery system **or** to local extended employment providers **if** the ineligibility determination is based on a finding that the individual is incapable of achieving an employment outcome.
- e) **Review determination** within 12 months and annually thereafter...

### **361.44 Closure without eligibility determination.**

The designated state unit may **not** close an applicant's record of services prior to making an **eligibility determination unless** the applicant declines to participate in, or is unavailable to complete, **an assessment** for determining **eligibility and priority for services**, and the state unit has made a reasonable number of attempts to contact the applicant or, if appropriate, the applicant's representative to encourage the applicant's participation.

### **361.45 Development of the individualized plan for employment.**

(a) **General requirements.** The state plan must assure that an individualized plan for employment 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**.

(b) **Purpose.** 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...

**361.47 Record of services.** (a) The designated state unit must maintain for each applicant and eligible individual a record of services that include, to the extent pertinent, the following documentation:

- (1) ...documentation supporting a determination that the individual is **eligible**;
- (2) ...documentation supporting a determination that the individual is **ineligible**;
- (3) Documentation that describes the **justification for closing** an applicant's or eligible individual's record of services...;
- (4) ...documentation supporting a determination that an individual is an individual with a **significant disability or an individual with the most significant disability**...

### **361. 60 Matching funds.**

**SEE DISCUSSION IMMEDIATELY FOLLOWING REG**

(b)(3) **Contributions by private entities.** 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) **consistent with the state's order of selection**, if applicable; providing services to special groups that state or federal law permits (e.g., students with disabilities who are receiving special education services, **consistent with the state's order of selection, if applicable**).