

## **Title 34 – Education**

### **Subtitle B – Regulations of the Office of the Department of Education**

#### **Chapter III – Office of Special Education and Rehabilitative Services, Department of Education**

##### **§ 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 section 103(a) of the Act and § 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 **vocational rehabilitation services** portion of the Unified or Combined **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 paragraph (b) or (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 -

**(a)** Continue to provide services to all individuals currently receiving services;

**(b)** Provide assessment services to all individuals expected to apply for services in the next fiscal year;

**(c)** Provide services to all individuals who are expected to be determined eligible in the next fiscal year; and

**(d)** 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 vocational rehabilitation services portion of the Unified or Combined State Plan must -

(a) Show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;

(b) Provide a justification for the order of selection;

(c) Identify service and outcome goals and the time within which the goals may be achieved for individuals in each priority category within the order, as required under § 361.29(c)(5);

(d) Assure that -

(i) 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

(ii) Individuals 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; and

(e) State whether the designated State unit will elect to serve, in its discretion, eligible individuals (whether or not the individuals are receiving vocational rehabilitation services under the order of selection) who require specific services or equipment to maintain employment, notwithstanding the assurance provided pursuant to paragraph (3)(iv)(A) of this section.

**(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 -

(a) Provided assessment services to all applicants and the full range of services, as appropriate, to all eligible individuals;

(b) Made referral forms widely available throughout the State;

(c) Conducted outreach efforts to identify and serve individuals with disabilities who have been unserved or underserved by the vocational rehabilitation system; and

**(d)** 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 -

**(a)** A demonstration that circumstances 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 -

**(i)** An estimate of the number of and projected costs of serving, in the next fiscal year, individuals with existing individualized plans for employment;

**(ii)** 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;

**(iii)** 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

**(iv)** The projected revenues and projected number of qualified personnel for the program in the next fiscal year.

**(b)** 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

**(c)** 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 a 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 a **designated State unit** establishes 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 section 7(21)(A) of the Act and **§ 361.5(c)(30)**.

**(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 -

**(a)** Any duration of residency requirement, provided the individual is present in the **State**;

**(b)** Type of disability;

**(c)** Age, sex, race, color, or national origin;

**(d)** Source of referral;

**(e)** Type of expected **employment outcome**;

**(f)** The need for specific services except those services provided in accordance with 361.36(a)(3)(v), or anticipated cost of services required by an individual; or

**(g)** 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 services to any recipient who has begun to receive services irrespective of the severity of the individual's disability as follows -
  - (a) The [designated State unit](#) must continue to provide [pre-employment transition services](#) to students with disabilities who were receiving such services prior to being determined eligible for [vocational rehabilitation services](#); and
  - (b) The [designated State unit](#) must continue to provide to an eligible individual all needed services listed on the individualized plan for employment if the individual had begun receiving such services prior to the effective date of the [State's](#) order of selection; and
- (4) Ensure that its funding arrangements for providing services under the [vocational rehabilitation services](#) portion of the Unified or Combined [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.

**(F) State Rehabilitation Council.** The [designated State unit](#) must consult with the [State Rehabilitation Council](#), if the [State](#) unit has a Council, regarding the -

- (1) Need to establish an order of selection, including any reevaluation of the need under [paragraph \(c\)\(2\)](#) of this section;
- (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.

(Approved by the Office of Management and Budget under control number [1205-0522](#))

(Authority: Sections 12(d); 101(a)(5); 101(a)(12); 101(a)(15)(A), (B) and (C); 101(a)(21)(A)(ii); and 504(a) of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 709(d), 721(a)(5), 721(a)(12), 721(a)(15)(A), (B) and (C); 721(a)(21)(A)(ii), and 794(a))