



OHIO LEGAL RIGHTS SERVICE

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for people with disabilities

January 20, 2009

John Connelly
Executive Director
Ohio Rehabilitation Services Commission
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Dear Mr. Connelly:

This letter is to submit the Ohio Legal Rights Service (OLRS) written testimony to the rules that are the subject of the January 20, 2009 public hearing.

OLRS is the federally designated protection and advocacy system for Ohio. OLRS is also the designated Client Assistance Program (CAP). Pursuant to 29 USC Section 732, CAP is charged with providing assistance in informing and advising all clients and client applicants of all available benefits under the Rehabilitation Act of 1973, as amended (29 USC Sec. 701 et seq).

OLRS will discuss each rule upon which we will comment in the order they appear in the Ohio Administrative Code. Please note specifically that OLRS believes that proposed OAC 3304-2-52(I) (consumer contribution) and OAC 3304-2-61(D) (continued services during the pendency of an appeal) are not in compliance with federal law.

OAC 3304-2-51 Vocational rehabilitation program.

Section (D) should define timely eligibility to be within sixty (60) days of applying for services as required by 29 USC 722 (a)(6). It should also state the time limit for developing an Individualized Plan for Employment (IPE). OLRS is aware that RSC has a policy regarding time lines for developing an IPE. Consumers have been asked to sign waivers of the time line for developing an IPE and this time line should therefore be in a rule.

The rule should state that RSC shall collaborate with partners to assist in implementing the vocational rehabilitation program as required by 29 USC 721(a)(8), 34 CFR 361.53(d), 34 CFR 363.11(e), and 34 CFR 363.50.

Section (E) should be amended to state that for consumers with cognitive impairments the appropriate mode of communication might be to have the notices written in plain language. This acknowledges RSC's affirmative duty to simplify these notices so as to effectively communicate with consumers as required by section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act.

OAC 3304-2-52 Least cost, use of comparable benefits, consumer contribution, and fees for services.

Section (G) should be eliminated because it conflicts with the federal requirement that RSC have flexible procurement policies that permit a consumer to exercise informed choice at every stage of the process including choosing service providers 29 USC 722(d).

Section (H) should be amended to include that if comparable services or benefits exist under any other program, but are not available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, RSC must provide vocational rehabilitation services until those comparable services and benefits become available 34 CFR 361.53(c)(2).

Section (I) is a clear violation of federal law and should be redrafted to comply with 34 CFR 361.54(b). In *Mosholder v. Ohio Rehab. Serv. Comm.* (1991), 75 Ohio App. 3d 134, 136, 598 N.E.2d 1271, the Court of Appeals for the Tenth District determined that the language of this rule in effect at that time, "A client shall be expected to pay for services to the extent possible." violated the federal regulations that required that if RSC chose to consider the financial need of an eligible individual it had to adopt written policies explaining the method for determining the financial need of an eligible individual; and specifying the types of vocational rehabilitation services for which it has established a financial needs test (*Mosholder* at 136-37). Except for OAC 3304-2-58(H), Ohio does not maintain any written policies covering the determination of financial need, nor does Ohio specify the type of vocational rehabilitation services for which a financial needs test is necessary.

In these trying economic times it is understandable that RSC wishes to be fiscally responsible and compel individuals to help with the cost of their vocational rehabilitation services if they can afford to do it. However, federal law clearly requires that it adopt rules that comply with 34 CFR 361.54(b)(2). These rules must exempt social security beneficiaries from the financial needs test and assure that the test is applied uniformly to all consumers.

Section (J) should include the criteria under which the Bureau Director or his designee will determine to grant exceptions to this rule and the method for requesting such exceptions.

OAC 3304-2-54 Eligibility for services, assessment, and trial work experiences.

Section (A)(4) should include the federal language that trial work experiences must be of sufficient variety and over a sufficient period of time to determine the eligibility of the individual as stated in 29 USC 722(a)(2)(B).

The definition of employment outcome in Section (A)(5) should be expanded to include self-employment, telecommuting or business ownership to comply with 29 USC 705(11)(C). This section should also specifically state that an employment outcome includes career advancement 29 U.S.C. 723(a)(18).

The Department of Education has issued a policy directive to clarify that the goal of vocational rehabilitation services is no longer to place an individual in an entry level job but the job must be at the level of the person's abilities, capabilities and informed choice which includes career advancement or upward mobility (RSA PD 97 04, August 19, 1997).

OLRS has encountered several situations where RSC staff were confused as to whether an applicant who was employed and needed services to obtain a better job was eligible for vocational rehabilitation services and this should be clarified in this rule.

OAC 3304-2-56 Conditions for providing services; and the individualized plan for employment (IPE).

The first sentence should be amended to state that the consumer will receive counseling and guidance and support services to enable the individual to exercise informed choice as required by 34 CFR 361.48(c).

Section (B) should contain a definition of the "timely manner" for IPE development as explained previously.

Section (B)(1)(a) should eliminate "for consumers in supported employment, a minimum, weekly work goal that maximizes the consumer's vocational potential at the time of transition to extended services." Federal law still defines an employment outcome for an individual in supported employment as being competitive employment in the integrated labor market. 34 CFR 361.5(b)(16 and (53)), 34 CFR 361.46(a)(1).

Section (1)(b) should include a statement that the IPE is to contain all the vocational rehabilitation services needed by the consumer to reach the employment outcome regardless of the source of payment for the service. OLRs has observed that many plans only contain the services paid for by RSC and other needed services such as therapy, transportation, interview clothes, following a diabetic or other treatment plan, etc. are often not listed. 29 USC 722(b)(2)(B) and (3)(B). Vocational Rehabilitation Services are defined as any services needed by the individual to achieve the employment outcome 29 USC 723(a), 34 CFR 361.48(t).

Additionally this section should be expanded to include the IPE requirements for an individual in supported employment as listed in 34 CFR 361.48(b). It is both OLRs and the Rehabilitation Services Administration's (RSA) observation that RSC is either under utilizing or under reporting the number of consumers who are in supported employment. Including all the federal requirements for an IPE for individuals in supported employment will hopefully eliminate this problem.

OAC 3304-2-59 Services.

OLRS suggests that in the interests of clarity this section be renamed "Vocational rehabilitation services" instead of "Services".

This rule should be revised to include all of the vocational rehabilitation services that are listed in 34 CFR 361.48 that must be included in the state plan. The following services listed in that regulation should be added to this rule:

- (c) vocational counseling and guidance
- (d) referral and other services necessary to assist applicants and eligible individuals to secure needed services from other agencies
- (f) vocational and other training services including books, tools and other training material
- (m) supported employment

Section (B)(7) should include supplies as well as occupational licenses to conform to federal law 34 CFR 361.48(p).

Section (C) should be revised to include a waiver to the prohibition on the purchase of vehicles to conform to the federal prohibition against any absolute limit on a vocational rehabilitation service 34 CFR 361.50(a).

OAC 3304-2-62 Consumer appeals.

Section (D) is not in conformity with federal law. Federal law requires that all services including evaluation and assessment services and plan development be continued pending resolution of the appeal by a hearing officer, through mediation or through the informal process 29 USC 722 (c)(7), 34 CFR 361.57(b)(4).

OAC 3304-2-67 Home Modifications.

Section (A) should be redrafted to replace "acceptable" employment outcome with the employment outcome listed on the Individualized Plan for Employment. Federal law does not provide any basis for distinguishing between an "acceptable" employment outcome and the one listed on an IPE

The last sentence of Section (A) "Home modifications should be regarded as being provided only when not providing them would make it impossible for the consumer to reach the employment outcome." should be deleted. Federal law requires that RSC provide whatever vocational rehabilitation services are necessary for an individual to reach the employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests,

and informed choice of the individual, 29 USC 722(b)(3), 29 USC 723(a). If the individual needs the home modifications to reach the employment outcome, then R.S.C. has an obligation to provide it.

Section (J) should be amended to eliminate the provision that the consumer is responsible for upgrading any building code violations because federal law defines vocational rehabilitation services as any services needed to enable the individual to reach his employment outcome 29 USC 723(a), 34 CFR 361.48(t).

Section (L) should include a provision for a waiver because federal law requires that the policies not have any arbitrary limits on the nature and scope of vocational rehabilitation services 34 CFR 361.50(a)

Conclusion.

OLRS urges the Commissioners to revise the rules as outlined above. The Rehabilitation Act does permit RSC to adopt measures to address its fiscal constraints. The methods that may be adopted and conform to federal law are: an order of selection; a financial needs test that would encompass consumer contribution in a fair and equitable manner; and limits on specific vocational rehabilitation services as long as adequate provisions for waivers are incorporated into the rules. The proposed rules are not in compliance with the measures that are permitted by federal law.

OLRS would be happy to meet with RSC staff to discuss our comments and help draft language that conforms with federal law. Please contact me to schedule such a meeting. Thank you for this opportunity to comment on the rules.

Sincerely,



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