

**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
WASHINGTON, DC 20202**

**TECHNICAL ASSISTANCE CIRCULAR
RSA-TAC-98-03
Date: 09-29-98**

ADDRESSEES: STATE VOCATIONAL REHABILITATION AGENCIES (GENERAL)
STATE VOCATIONAL REHABILITATION AGENCIES (BLIND)
CLIENT ASSISTANCE PROGRAMS
REGIONAL REHABILITATION CONTINUING EDUCATION
PROGRAMS
AMERICAN INDIAN VOCATIONAL REHABILITATION SERVICE
PROGRAMS
RSA SENIOR MANAGEMENT TEAM

SUBJECT: Clarification of Data Requested on the RSA-722

CITATIONS: Section 102(c)(5) of the Rehabilitation Act of 1973, as amended by the
1998 amendments (1998 Act);

Section 102(d) of the Rehabilitation Act of 1973, as amended by the 1992
amendments (1992 Act);

34 CFR 361.57(b).

CONTENT: The purpose of this Technical Assistance Circular (TAC) is to clarify the
information RSA is seeking on the RSA-722, Resolution of
Applicant/Client Appeals, form. The State vocational rehabilitation (VR)
agencies must submit the RSA-722 each year to RSA by October 30
(within 30 days after the end of the fiscal year). The RSA-722 collects
data on: 1) the number of appeals filed with impartial hearing officers
(IHOs); 2) the number of IHO decisions reviewed by the State Director;
and 3) the types of complaints or issues appealed.

Types of Appeals to be Reported:

It is important to note that the RSA-722 collects information on the
number of appeals filed with IHOs under Title I of the Rehabilitation Act
of 1973, as amended (Act). The RSA-722 does not collect data on full
evidentiary hearings filed pursuant to 34 CFR 395.13. RSA recognizes
that many States use the same IHO structure for licensed blind vendors
grieving an action by the State Licensing Agency under the Randolph-
Sheppard Vending Facility Program as they do for appeals filed against the

Title I VR agency. However, the number of Randolph-Sheppard appeals and reviews of those decisions should not be reflected on the RSA-722. The annual RSA-722 should report only the number of appeals filed against the VR agency under Title I of the Act.

Reporting FY 1998 Data:

As you know, the Rehabilitation Act of 1973, as amended (Act), was reauthorized and signed into law on August 7, 1998. The 1998 amendments to the Act modified the due process requirements governing the VR agency. One key change in the law deletes the State VR Director's authority to review IHO decisions, which is one of the required elements on the RSA-722 data collection instrument. Therefore, with regard to this particular item, State VR agencies will not report any "Director reviews" of IHO decisions after August 7, 1998, which is the effective date for the 1998 amendments to the Act. However, all other data requested on the RSA-722 should be reported for the entire fiscal year from October 1, 1997 to September 30, 1998.

State VR Director's Review of IHO Decisions:

RSA recognizes that the 1998 amendments to the Act removes the State VR Director's authority to review IHO decisions. However, State agencies will be reporting "director reviews" for most of FY 1998, thus necessitating this clarification. Furthermore, RSA believes this clarification of the term "review" will be helpful as States establish "impartial review" procedures pursuant to section 102(c)(5)(D)-(H) of the newly-reauthorized Act.

RSA has noted wide variations among States in terms of the number of times the State VR agency reports State Director "reviews" of IHO decisions as compared to the number of IHO decisions reported by a State VR agency in a given year. The data suggest that some State VR agencies report that the Director "reviews" all IHO decisions, because the total of Director reviews reported equals the total number of IHO decisions reported. Conversely, other State VR agencies report a very small number of Director reviews as compared to the number of IHO decisions issued. These variations suggest that State VR agencies are classifying "Director reviews" differently, and therefore, indicate that there may be a need to clarify the term "Director review."

For purposes of reporting director reviews on the RSA-722, it is appropriate only to count a decision as having been "reviewed" when the director does more than just read the IHO decision. If the director studies and analyzes the decision in accordance with the agency's developed standards of review, then the agency should count this as an IHO decision "reviewed" by the director. If the director merely reads or declines to

comment on the IHO decision, the agency should not count this as an IHO decision "reviewed" by the director. This clarification of the term "reviewed" is consistent with the agency review authority set forth in the applicable Federal regulations.

Federal regulations at 34 CFR 361.57(b)(4) requires the IHO to issue "a full written report of the findings and grounds for the decision within 30 days of the completion of the hearing." The IHO must provide this written report to the individual (appellant), or, if appropriate, to the individual's representative, and to the director of the designated State unit (VR agency). Once the State VR director reads the IHO's written report, Section 102(d)(3) of the Act, as amended in 1992, gives the State VR director the authority to review the IHO decision.

The director's authority to review is further clarified in regulations at 34 CFR 361.57(b)(5)-(11). In particular, 34 CFR 361.57(b)(7) requires that the State VR director's decision to review the IHO decision "must be based on standards of review contained in written State unit policy." The preamble commentary to the final regulations, published in the *Federal Register*, provides some guidance to the States in developing these standards of review. The "standards developed under paragraph (b)(7) of this section [should] be consistent with RSA policy, specifically Chapter 0545 of the *Rehabilitation Services Manual* (Clients' Rights to Appeal Decisions), which specifies a number of fundamental issues that should be addressed in connection with determining whether to review a hearing officer's decision (e.g., Is the initial decision arbitrary, capricious, an abuse of discretion or otherwise unreasonable? Is the initial decision consistent with the facts of the case and applicable Federal and State policies?)." (62 FR 6332).

These regulatory requirements make it clear that the director's decision to "review" an IHO decision must be something more than mere "reading" of the IHO decision. In fact, the IHO report must trigger a concern to the VR director, upon reading it, that forces him or her to question the validity of the initial decision for some reason. These concerns and questions then give rise to the director's authority to review the decision, in other words study the IHO's decision according to the agency's "standards of review" to ensure that the IHO's decision is not arbitrary and capricious and is consistent with the facts of the case and applicable Federal and State laws and policies. As the Act and regulations require, the director's decision to review must be based on written standards of review that address fundamental issues as suggested in Chapter 0545 of the *Rehabilitation Services Manual*.

Should the State VR director decide to "review" an IHO decision, after applying the agency's established "standards of review," 34 CFR 361.57(b)(9) governs when the director may overturn or modify a decision that favors the individual. In particular, the director may not overturn or modify an IHO decision, or part of that decision, "which supports the position of the individual unless the director concludes, based on clear and convincing evidence, that the IHO's decision is clearly erroneous because it is contrary to the approved State plan, the Act, Federal vocational rehabilitation regulations, or State regulations or policies that are consistent with Federal requirements."

In summary, for purposes of the RSA-722, the VR director should count a decision as having been "reviewed" only when the director analyzes the decision in accordance with the agency's developed standards of review. State agencies should review their policies and standards for review to ensure conformity with the Act and its regulations.

INQUIRIES: RSA Regional Commissioners

Fredric K. Schroeder, Ph.D.
Commissioner
Rehabilitation Services Administration

cc: CSAVR
NAPAS
NCIL