



Lea Dias, President ▪ Daniel B. Frye, President-Elect ▪ Bill Robinson, Treasurer ▪ Katy Morris,
Secretary

December 19, 2017

The Honorable Betsy DeVos
United States Secretary of Education
400 Maryland Ave. SW
Washington, DC 20202-1510

Dear Madam Secretary:

I am writing on behalf of the National Council of State Agencies for the Blind (NCSAB). We want to first thank you and the Administration for your efforts to strip away regulations that impede the ability of the states to carry out our important work providing vocational rehabilitation services to individuals who are blind. Reviewing longstanding regulations is an important process, and we truly appreciate your consideration of our requests.

The vocational rehabilitation program annually assists nearly two hundred thousand people with disabilities to go to work. Our ability to provide effective, timely services is directly tied to our ability to manage the program with as little administrative burden as possible. While oversight of the vocational rehabilitation program is important, we wish to highlight a concern that inhibits our ability to achieve our goal of helping put Americans with disabilities to work.

The NCSAB wishes to convey our serious concerns regarding the requirement for prior written approval and to request your assistance to help reduce this excessively bureaucratic and burdensome requirement. We believe that the best way to accomplish this is to seek a waiver of the prior approval requirement under 2 CFR 200.102, which allows waivers in "unusual circumstances." We believe that such a waiver is appropriate given the "unusual circumstances" associated with purchases under the vocational rehabilitation and Randolph-Sheppard Act programs. We also ask that the Department of Education consider the extent of any discretion or flexibility it may have with respect to the application of Part 200.407.

Under 2 CFR 200.407, "25 items in the cost principles now require prior written approval from the Federal awarding agency." This requirement for Prior Approval places an excessive burden on state vocational rehabilitation agencies, as well as the Department of Education. This burden was recognized by the Department of Education, which on April 21, 1995, published a notice in the Federal Register "waiving certain prior approval requirements." That waiver worked well for over 20 years, and allowed vocational rehabilitation agencies to purchase essential equipment in a way that was efficient and timely. However, on October 2, 2015, the Rehabilitation Services Administration sent out an email that contained the following statement:

"Because there are so many differences between the principles that applied in 1995 and those that apply now under the Uniform Guidance, ED is in the process of determining what prior approval requirements in the Uniform Guidance should be waived, if any. Pending further consideration of the prior approval policy by ED, grantees must request prior approval for those management decisions and items of cost that, under the Uniform Guidance, require that approval from ED."

In general, Part 200.407 requires that vocational rehabilitation agencies request prior written approval from the Rehabilitation Services Administration for capital expenditures in excess of the lower of \$5,000 or the state policy for capitalizing expenditures. As a result, capital purchases as small as \$500 can be subject to prior approval. Requiring prior approval for vocational rehabilitation purchases will cause the Department of Education to be inundated with thousands of requests. This will either result in the Department of Education being forced to conduct inadequate or perfunctory reviews of prior approval requests, or being faced with delays of many months as requests are being processed.

The regulations implementing the vocational rehabilitation program requires states to be "developing and implementing flexible procurement policies and methods that facilitate the provision of vocational rehabilitation services and that afford eligible individuals meaningful choices among the methods used to procure vocational rehabilitation services," 34 CFR 361.52(b)(3). The regulations also require that states "develop and implement procedures to ensure that an applicant or eligible individual who is dissatisfied with any determination made by personnel of the designated State unit that affects the provision of vocational rehabilitation services may request ... a timely review of that determination," 34 CFR 361.57(a). Agencies must also apprise consumers of the "availability of the client assistance program," 34 CFR 361.57(b)(1)(v). These regulations, and the types of services that must be provided, create a set of "unusual circumstances" that we believe make a waiver appropriate under Part 200.102.

The potential for significant delays in the purchase of items requiring Prior Written Approval will be a substantial burden for State vocational rehabilitation agencies. For a single agency holding title to equipment provided to consumers, Prior Written Approval requests could number in the thousands in each federal fiscal year. Even a small agency subject to only the \$5,000 threshold may have dozens of prior approval requests each year. The prior approval process would create a delay of weeks or even months, jeopardizing educational or employment outcomes. In states with lower prior approval thresholds, long delays would become commonplace. The end result would be fewer successful employment outcomes and more requests for due process hearings, in which agencies would be forced to defend themselves by pointing to the Department of Education and the prior approval process as the cause for the delay.

Requiring Prior Written Approval also creates problems under the Americans with Disabilities Act (ADA), as well as 34 CFR 361.19, which requires that agencies take "affirmative action to employ and advance in employment qualified individuals with disabilities." For example, if an employee needed a Braille Note Touch BT 32 (\$5,495) or a ViewPlux Spot Embosser (\$7,995) as a reasonable accommodation, seeking prior written approval could significantly delay the provision of a needed reasonable accommodation. At best the delay could be several weeks, and at worst it could be several months. If an EEOC complaint or ADA lawsuit was filed over the delay, the obvious defense under the ADA would be that the agency had to first obtain prior approval from the Department of Education, and that to proceed without such approval would constitute an "undue hardship." While such a defense might avoid liability under the ADA, the reality is that employees would still not receive the needed

accommodations in a timely manner. Some agencies might be forced to purchase less expensive equipment, which might not be an effective reasonable accommodation. Such a situation could result in actual violations of the ADA. We also take pride in noting that vocational rehabilitation agencies employ large numbers of persons with disabilities, far greater than any other agencies of state government. The fact that such a large portion of our workforce is made up of persons with disabilities constitutes another "unusual circumstance" that we believe merits consideration of a waiver of the prior approval requirement.

The prior approval requirement also creates a problem for the administration of the Randolph-Sheppard Act, which provides for blind entrepreneurs to own and manage their own food service businesses. Vending machines frequently cost over \$5,000, as do large refrigerator units. The inability to purchase a vending machine in a timely basis translates into lost revenues during the immediate term, and lost customers for the long term. The situation is even more critical in the case of a large refrigerator, where immediate replacement may be necessary to avoid spoiled food and disruptions in vending services. The requirement for Prior Written Approval will cause delays in purchasing such equipment, and will result in a loss of profits to the blind vendor and a loss of funds to the State vocational rehabilitation agency. Again, this is another "unusual circumstance" that is present with the vocational rehabilitation program.

We respectfully request that vocational rehabilitation agencies be exempted from Prior Written Approval based on the "unusual circumstances" present in the vocational rehabilitation program, and the provision of Part 200.102 allowing for waivers under unusual circumstances. This will reinstate the waiver that was in place for over 20 years. Considering the impact of inflation and the fact that far more items now fall under the \$5,000 threshold, it is even more urgent and appropriate that the waiver be granted. We look to your Administration to reduce this unnecessary and inefficient administrative burden on states, and eliminate the barrier to effective consumer services.

Thank you for your attention to this pressing matter. Please do not hesitate to contact me if you have any questions or require any additional information.

Sincerely,



Lea Dias, President
National Council of State Agencies for the Blind