

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
WASHINGTON, DC 20202-2800

TECHNICAL ASSISTANCE CIRCULAR

RSA-TAC-22-01

Date: December 3, 2021

ADDRESSEES: STATE VOCATIONAL REHABILITATION AGENCIES
STATE LICENSING AGENCIES
STATE ELECTED COMMITTEE OF BLIND VENDORS

SUBJECT: RSA APPROVAL OF STATE RULES

PURPOSE:

The Rehabilitation Services Administration (RSA) has received several inquiries from State licensing agencies (SLAs) and Elected Committees of Blind Vendors (ECBVs) under the Randolph-Sheppard Act (Act) seeking guidance regarding their submission for RSA review and approval of State rules and regulations affecting the operation of the Randolph-Sheppard Vending Facility Program (RSVFP) in their States.

The guidance in this technical assistance circular (TAC) describes the requirements in the Act and its implementing regulations that require SLAs to issue State rules and regulations affecting the operation of the RSVFP in their States and require RSA to review and approve those rules.¹ RSA provides this TAC to assist SLAs in developing their rules and regulations in active participation with ECBVs by answering the questions received and providing examples of common issues SLAs must address satisfactorily under the Federal requirements to obtain RSA approval of State rules and regulations.

TECHNICAL ASSISTANCE:

Section 107b(5) of the Act requires each SLA that has applied and has been approved by RSA as the designated “State Licensing Agency” for the State’s RSVFP, “[t]o issue such regulations, consistent with the provisions of [the Act], as may be necessary for the operation of [the RSVFP].” The regulation implementing Section 107b of the Act at 34 C.F.R. § 395.3(a)(1) requires an SLA to indicate its legal authority to administer the program, including its authority to promulgate rules and regulations to govern the program. Under 34 C.F.R. § 395.3(b), when an SLA submits its application for designation, it must submit its rules and regulations affecting the administration and operation of the State’s RSVFP. Section 395.3(a)(11)(iii) requires the SLA to

¹ The Secretary has delegated the administration of the Act, as the Secretary is authorized to do under the Department of Education Organization Act (20 U.S.C. § 3472), to the Assistant Secretary of the Office of Special Education and Rehabilitative Services (DOA#EA/EH/77, June 3, 1999): <https://www2.ed.gov/about/offices/or/docs/delegations/each77.doc>. The Assistant Secretary has delegated administration of the Act to the Commissioner of RSA. (DOA#EH/EHR/104, April 28, 2017): <https://www2.ed.gov/about/offices/or/docs/delegations/eh-ehr-104.doc>.

submit promptly to RSA for approval a description of any change in the rules and regulations governing the State's RSVFP. RSA designated most SLAs in the 1970s when regulations under the Act were initially published. Since then, RSA has reviewed and approved revisions to the rules and regulations of many States.

Section 107b of the Act and the implementing regulations at 34 C.F.R. §§ 395.3(a) and 395.4 list several specific topics that an SLA must address in its application and otherwise fulfill, including, but not limited to, the standards used to select suitable locations for vending facilities, the methods used to ensure the continuing and active participation of the ECBV, the relationship of the SLA to the vendors (including their selection, duties, supervision, transfer, promotion), policies on vending facility equipment and initial stocks and supplies, and the vendors' right to a full evidentiary hearing and, if dissatisfied with the hearing decision, the right to submit a complaint to the U.S. Department of Education (Department). Any SLA seeking to revise its rules and regulations should address these topics, as well as the topics in 34 C.F.R. § 395.4, in the State's revised rules and regulations.

In addition to making sure that a State's rules and regulations comply with these Federal requirements, under 34 C.F.R. § 395.4(a), RSA reviews the rules and regulations to ensure they are –

adequate to assure the effective conduct of the State's vending facility program (including State licensing agency procedures covering the conduct of full evidentiary hearings) and the operation of each vending facility in accordance with [34 C.F.R. part 395] and with the requirements and conditions of each department, agency, and instrumentality in control of the maintenance, operation, and protection of Federal property, including the conditions contained in permits, as well as in all applicable Federal and State laws, local ordinances and regulations.

States may not implement their proposed rules and regulations affecting the administration and operation of the State RSVFP until RSA approves them in accordance with 34 C.F.R. § 395.4(a), which makes clear that the SLA “shall promulgate rules and regulations which have been approved by the Secretary.”

State Submission and RSA Approval of State Rules

As States revise their rules and regulations and submit them to RSA for review, RSA must review the entire set of rules and regulations, not just the revisions, to assess how the revisions affect the “effective conduct of the State's vending facility program.”² In addition, States must ensure that evidence of active participation of the ECBVs is included with the submission of the rules.³ If a State can demonstrate that special circumstances exist that preclude the usual review process, such as occurred during the Covid-19 pandemic, a State may request an emergency review and approval of a change to a specific rule. However, even in a case of emergency review and approval, the State must demonstrate that active participation with the ECBV occurred on the requested change. RSA and other offices within the Department, as necessary, review the revised set of rules and regulations, and provide comments to, or ask for clarification from, the SLA, as appropriate. After this review, RSA will return the rules to the SLA with comments and required

² 34 C.F.R. § 395.4(a).

³ See [RSA-TAC-21-01](#) for additional information regarding active participation.

revisions or requests for clarifications to ensure compliance with the Act and implementing regulations or RSA will notify the SLA that the rules are approved.

Rule packages are considered approved once the SLA receives a letter signed by the RSA Commissioner or designee. SLAs cannot implement rules under review in whole or in part until approved by RSA. If an SLA submits changes to its set of rules, an SLA should not assume approval of the unrevised portion because RSA is undertaking a comprehensive review of the entire rule set. Additionally, verbal approval or conditional approval via any mode of communication that is not an approval letter signed by the Commissioner does not constitute approval under 34 C.F.R. § 395.4(a).

Upon request, RSA may provide technical assistance during the creation or revision of State rules. Obtaining assistance at this stage makes it less likely that significant impediments to approval will arise. See the Randolph-Sheppard State Liaisons' contact information for needed assistance: <https://rsa.ed.gov/about/programs/randolph-sheppard-vending-facility-program/contact>.

Examples of Recurring Issues that States Need to Address in State Rules

To assist SLAs in submitting rules for RSA approval that meet Federal requirements, RSA provides the following list of common issues that have required revisions in State rules and regulations (this is not an exhaustive list and additional requirements are provided in 34 C.F.R. §§ 395.3(a) and 395.4):

- The active participation of the ECBVs, including documentation demonstrating that such collaboration occurred.⁴
- The method for ensuring that licensees have access to all program information, policies, training, and other relevant material in the format of their choice, ensuring a full understanding of licensee rights and duties.
- A description that addresses on-the-job and upward mobility training.
- An assurance that licensees have access to financial information about the program on at least a quarterly and annual basis.
- A description of the transfer and promotion policy that uses criteria beyond seniority.
- A clear description of the —
 - licensing requirements, including any applicable suspension or termination procedures and policies;
 - criteria for choosing sites;
 - provision, maintenance, and repair of suitable equipment;
 - acquisition and provision of inventory;
 - vesting of title in stock and equipment;
 - set-aside policy, if applicable, including justification for the percentage assessed against the net proceeds of each vending facility in the State;
 - sources of funding for the program; and
 - arrangements with a nominee, if applicable.

⁴ Id.

- The inclusion of anti-discrimination and harassment policies (i.e., State human rights and Federal civil rights statutes).
- The application of all Federal and State anti-discrimination and health and safety statutes and regulations to dress codes and codes of conduct.
- Disciplinary policies and procedures that allow for remediation and corrective action plans.
- The use of language that avoids creating an employer-employee relationship between the SLA and the vendor (e.g., requirements that vendors' vacations be approved; however, requirements for the proper equipping and staffing of facilities in a vendor's absence is appropriate).
- Definitions, terms, and word usage that are proper, clear, consistent, and specific, such that—
 - the designated SLA is clearly indicated;
 - language is specific to avoid ambiguity and the potential for disputes. For example, “immediately” or “substantial” could be interpreted differently depending upon context;
 - subjective requirements and/or terms are avoided, e.g., “best fit”;
 - “vendor” and “licensee” are used properly (a licensee has not been assigned a facility; a vendor has. Vendors may serve on the elected committee; licensees may not; however, both are entitled to vote);
 - terms are consistent, for example, “office” or “agency” throughout rather than using such terms interchangeably; and
 - significant terms are defined — “third-party vendor” or any distinctions between “agreement” or “permit.”
- The inclusion of the State's grievance and/or due process provisions such as:
 - the opportunity for a vendor to request a full evidentiary hearing when dissatisfied with any SLA action arising from the operation or administration of the vending facility program as required by 34 C.F.R. § 395.13; and
 - any voluntary informal dispute resolution mechanisms such as agency review or mediation allowed (the Act does not allow States to mandate other dispute resolution mechanisms to access the full evidentiary hearing).
- The inclusion of language that permits properly trained vendors to determine whether to complete work independently or to hire assistance, including whether to engage the services of an accounting firm.

SUMMARY:

The Act and its implementing regulations require SLAs to have rules and regulations necessary for the operation of the State vending facility program. RSA reviews these rules to determine whether the rules comply with the Act and other Federal and State laws, as well as to make sure they are adequate to ensure the effective conduct of the State's vending facility program. This guidance explains the Federal requirements serving as the basis for the State rules requirements and for RSA's review and approval of a State's rules. In addition, it explains how RSA conducts its review and provides examples of recurring issues that RSA has found in its reviews and that SLAs should ensure are addressed to meet Federal requirements. This information should assist States in preparing any revised rules and facilitate RSA's review with minimal delay.

CITATIONS:

U.S. Department of Education Organization Act, 20 U.S.C. § 3472

Randolph-Sheppard Act, 20 U.S.C. § 107b, 107b(5)

Randolph-Sheppard Act Regulations, 34 C.F.R. §§ 395.2, 395.3(a), 395(3)(a)(1), 395.3(a)(3), 395.3(a)(11)(iii), 395.3(b), 395.4, 395.4(a), 395.13

RSA-TAC-21-01: Active Participation of Elected Committees of Blind Vendors with State Licensing Agencies in the Randolph-Sheppard Vending Facility Program

INQUIRIES:

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/s/

Carol L. Dobak

Acting Deputy Commissioner,

delegated the authority to perform the

functions and duties of the Commissioner

Rehabilitation Services Administration

Office of Special Education and Rehabilitative Services