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## FISCAL IMPACT REPORT

SPONSOR Lopez/Ortiz y Pino LAST UPDATED \_\_\_\_\_  
ORIGINAL DATE 2/23/23  
SHORT TITLE Vocational Rehabilitation Act BILL NUMBER Senate Bill 437  
ANALYST Esquibel

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Commissioners' per diem and milage		Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	General Fund, Federal Funds

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

Commission for the Blind (CFB)

Division of Vocational Rehabilitation (DVR)

Public Education Department (PED)

## SUMMARY

### Synopsis of Senate Bill 437

Senate Bill 437 (SB437) proposes to move the Division of Vocational Rehabilitation and place it under an independent commission that would be responsible for providing vocational rehabilitation services to people with disabilities.

The bill would enact the Vocational Rehabilitation Act and create an independent Vocational Rehabilitation Office and Vocational Rehabilitation Commission no longer attached as a division of the Public Education Department (PED). The bill would eliminate the existing Vocational Rehabilitation Division of PED and require all federal funds for vocational rehabilitation flow directly to the newly created office rather than to the Department of Finance and Administration (DFA).

The effective date would be July 1, 2023.

## FISCAL IMPLICATIONS

DVR reports federal financial requirements will not allow for some of the requested changes in the bill, resulting in a substantial increase in general fund dollars being necessary to implement the provisions of the bill.

Under the provisions of the bill, the members of the Commission for Vocational Rehabilitation would be eligible to receive per diem and mileage for meetings, and meeting notices would need to be published pursuant to the Open Meetings Act.

## **SIGNIFICANT ISSUES**

DVR notes the bill includes language inconsistent with several federal regulations, including recent amendments to the Rehabilitation Act contained in Title IV of the Workforce Innovation and Opportunity Act.

PED notes the bill contains outdated language not aligned with current federal law, which could lead to problems in the implementation of federally aligned programs.

PED reports DVR has accomplished significant gains, including eliminating the waiting list for services, updating the rule for counselor licensure to allow for a larger pool of qualified applicants, partnering with PED to build transition planning capacities with the help of the National Technical Assistance Center for Transition, and establishing access to the PED database to confirm student information and improve its reach to those who require services. From PED:

Outreach to state-funded schools and students with disabilities depends on a close working relationship between DVR and PED, which is facilitated by DVR existing within PED. Further, the federal Workforce Innovation and Opportunity Act (WIOA) mandates DVR set aside 15 percent of its budget for students with disabilities to provide pre-employment transition services, which is efficiently accomplished as an integral part of PED. Under a Corrective Action Plan with the federal Rehabilitation Services Administration (RSA), DVR must also continue to collaborate across agency units. DVR depends on PED for support in the process of scheduling public meetings to address upcoming changes to the Manual of Operating Procedures. These partnerships are crucial to DVR continuing its successful work, and maintenance of DVR under PED is the best and most efficient way to accomplish this. Creation of the new Vocational Rehabilitation Commission to oversee the proposed Vocational Rehabilitation Office essentially creates a new and unnecessary layer of bureaucracy. DVR's relationship with PED is constructive and effective.

## **ADMINISTRATIVE IMPLICATIONS**

PED reports to move to an independent office, the agency would have to complete the following administrative tasks before July 1, 2023, including:

- Update memoranda of understanding and agreement and contracts that reference PED;
- Update the interagency New Mexico WIOA Plan;
- Hold meetings with public input;
- Submit all required federal reports;
- Work with the RSA to discuss funding;
- Confer with the State Rehabilitation Council and State Independent Living Council;
- Update the account with the U.S. Department of Education G5 Grants Management

System;

- Liquidate remaining obligations and submit a final federal financial report;
- Review statute, rule, and policy for other needed updates;
- Communicate to address the transition with the union.

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

DVR notes the Independent Living Program is not mentioned in the bill. DVR utilizes program income from the Ticket to Work program to fund seven centers for independent living. A Statewide Independent Living Council (SILC) is also federally mandated and not included in the bill.

## TECHNICAL ISSUES

PED notes HB437 removes the definition of “person with a disability” from Section 22-14-1 NMSA 1978, which defines terms for Sections 22-14-2 through 22-14-16 NMSA 1978 yet fails to remove that term from Section 22-14-16 NMSA 1978, leaving that term undefined.

The Commission for the Blind reports the following:

Under Section 2, Paragraph E, the current language of “person with a disability means a person with a physical or mental disability other than blindness that constitutes a substantial handicap to employment” should use current Rehabilitation Act language of “substantial impediment to employment.”

Section 3 creates a commission, but the commission needs to be made up of a majority of individuals with disabilities to qualify as an “independent state commission” under federal law vocational rehabilitation law. Such a membership would be in keeping with the intent of having an independent state commission that is “consumer controlled.” Having a “consumer controlled” commission would also mean that the Commission for Vocational Rehabilitation would not have to have a separate state rehabilitation council (SRC) under federal law. An SRC comprises at least 15 members and must meet at least quarterly. It also has very specific duties prescribed by statute and regulations. Having an independent commission would mean the Commission for Vocational Rehabilitation could function more efficiently and at less cost.

Under Section 3, Paragraph A, the commission consists of six members, which creates the potential for a “three-to-three vote” and a deadlocked commission.

Under Section 3, Paragraph A (1), the commission would include two members who are “licensed healthcare providers of disabilities treatment.” This language seems both vague and overly prescriptive. It may be very difficult to find persons who meet this requirement and who are willing to serve. There are also many other professions that could have even more relevant or useful expertise, including current or former educators, current or former vocational rehabilitation counselors, current or former social workers, current or former assistive technology specialists, or people knowledgeable in business, industry, and labor.

Under Section 3, Paragraph A (2), the commission is to be made up of two members who are “recipients of vocational rehabilitation services.” This creates the potential for a real or perceived conflict of interest because these individuals would be current recipients of vocational

rehabilitation services. If these two members had to recuse themselves from a vote, that would only leave four voting members. If only one of the remaining four members were absent, there would not be a majority of members to constitute a quorum.

Under Section 3, Paragraph A (3), the requirement that “one member shall be the director of the Medical Assistance Division of the Human Services Department” is limiting. There are many other agency heads who would bring similar knowledge to the commission.

Under Section 3, Paragraph A (4), the requirement that “one member shall be a person with expertise in vocational education” does not cover the full scope of vocational rehabilitation services provided, or the types of education services that may be necessary.

Some of the language in Section 4 of the bill is outdated, vague, needlessly detailed, or prescriptive, or no longer relevant. For instance, in Section 4 Paragraph B (2), it states the commission shall “establish standards to which agencies shall conform in receiving federal aid funds.” This would entail duties beyond the scope or authority of the commission, and which are currently addressed in federal regulations.

Under Section 4, Paragraph B(4), the commission would be required to provide disability determination services, whereas the commission might at some point in the future wish to cease providing such services, which are currently being provided through an agreement with the Social Security Administration.

Section 5 Paragraph C (5) says the commission will “provide for reports to be made to the commission from a person receiving federal aid funds.” This language is vague and unclear as to the meaning or purpose and may impose an obligation that is inconsistent with federal law.

Section 6 Paragraph A, says, “The office is designated the sole state agency to administer and receive federal aid funds.” This is inconsistent with federal and state law because there are two vocational rehabilitation agencies in the state. The Commission for the Blind is the “sole state agency” to deliver vocational rehabilitation services to persons who are blind.

The last sentence of Section 6, Paragraph C, does not recognize the Commission for the Blind as a recipient of federal vocational rehabilitation funds. Vocational rehabilitation counselors are also employed by school districts.

Section 7, Paragraph A, imposes a residency requirement, which is inconsistent with RSA TAC 12-04, which allows for joint cases with other state vocational rehabilitation agencies.

Section 8 says “A fair hearing shall be provided for a person applying for or receiving vocational rehabilitation who is aggrieved by an action or inaction of the commission or office pursuant to the Administrative Procedures Act.” However, the federal Rehabilitation Act already requires that an “impartial due process hearing” be available to applicants and recipients of vocational rehabilitation services. The language of Section 8 could create a right that is not subject to reasonable filing deadlines or hearing procedures and that is, therefore, more expansive than what is required under the federal act.

Section 9 requires subrogation of costs to third parties, and it should be reviewed to make sure it is not in conflict with the federal Rehabilitation Act. For people receiving either supplemental

security income (SSI) or social security disability insurance (SSDI), it would be in potential conflict with federal law that says the state “may not apply a financial needs test, or require the financial participation of the individual ... As a condition for furnishing any vocational rehabilitation service if the individual in need of the service has been determined eligible for Social Security benefits under titles II or XVI of the Social Security Act.” The subrogation of any personal injury or malpractice claim would result in an SSI or SSDI recipient receiving a reduced amount in the personal injury or malpractice claim. It is also possible that wrongful discharge or employment discrimination claims might also be subject to subrogation. This requirement would also be difficult to administer and would be considered program income under federal law.

Section 10 needs to be examined to determine if it is inconsistent with the appointment of representative provisions of the federal Rehabilitation Act.

Section 16, Paragraph B, uses “substantial handicap to employment” instead of the “substantial impediment to employment” contained in the federal Rehabilitation Act.

Section 17, Paragraph B, does not recognize that the Commission for the Blind and local school districts provide vocational rehabilitation counseling services.

Section 17, Paragraph D, says, “All federal aid funds received by the state to be used for vocational education [or vocational rehabilitation] programs may be expended in any succeeding year from the year received.” This language is not necessarily consistent with federal period of performance regulations as there may be circumstance in which federal funds are not eligible for carryover to the following year.

Section 19 appears to be language that dates back to the 1970s or early 1980s that transferred property used by the New Mexico School for the Blind and Visually Impaired to what is now the Commission for the Blind. The specific properties were facilities in Alamogordo and Albuquerque that were functioning as “sheltered shops” that were being operated by entities affiliated with what was then the New Mexico School for the Blind. The Commission for the Blind is today using this property to operate the Orientation Center in Alamogordo and as office space and the Skills Center in Albuquerque. Passing this language as a part of SB437 could have unintended consequences.

## **OTHER SUBSTANTIVE ISSUES**

The Commission for the Blind suggests the following amendments:

It is recommended that a new statute be enacted that simply creates the Vocational Rehabilitation Commission which is authorized to provide vocational rehabilitation services to individuals with disabilities other than blindness pursuant to the federal Rehabilitation Act, and to provide such services for persons with disabilities as may be allowable under state and federal law. Simple language could be included that would give the Commission for Vocational Rehabilitation the necessary powers and duties, such as the adoption of regulations and the hiring of a director. The language of Section 3 would need to be included in the bill, but it is recommended that it be modified as set forth below so as to create an independent state commission.

Under Section 2, Paragraph E, the current language of “person with a disability means a

person with a physical or mental disability other than blindness that constitutes a substantial handicap to employment” should be changed to “person with a disability means a person with a physical or mental disability other than blindness or visual impairment that constitutes a substantial impediment to employment.”

Under Section 3, Paragraph A, it is recommended that the number of commissioners be changed from six to either 5 or seven. It is also recommended that language be included that requires that a majority of the commissioners be persons with disabilities.

Under Section 3, Paragraph A (1), it is recommended that “two members shall be licensed health care providers of disabilities treatment” be changed to “at least two members shall be licensed health care providers, therapists, educators, social workers, disability advocates, or members of business, industry, or labor.”

Under Section 3, Paragraph A (2), it is recommended that “two members shall be recipients of vocational rehabilitation services” be changed to “at least two members shall be current or former recipients of vocational rehabilitation or independent living services.” This would greatly expand the number of potential members, and significantly reduce the risk of a real or perceived conflict of interest while still maintaining the desired knowledge and background. It also reflects the fact that the Division of Vocational Rehabilitation is the Designated State Entity for the federal independent living program.

Under Section 3, Paragraph A (3), it is recommended that the requirement that “one member shall be the director of the medical assistance division of the human services department” be dropped in favor of adding additional members with disabilities who are current or former recipients of vocational rehabilitation or independent living services. Alternatively, and less preferably, it could be changed to “at least one member shall be either the director of the medical assistance division of the human services department, the director of the Behavioral Health Services Division of the Human Services Department, the director of the Special Education Division of the Public Education Department, the director of the Commission for Deaf and Hard of Hearing, the Director of the Governor’s Commission on Disabilities, the Director of the developmental Disabilities Council, or their designees.”

Under Section 3, Paragraph A (4), it is recommended that “one member shall be a person with expertise in vocational education” be changed to “at least one member shall be a person with expertise in special education, vocational education, or higher education.”

In Section 4 Paragraph B (2), it is recommended that “establish standards to which agencies shall conform in receiving federal aid funds” be deleted.

Section 5 Paragraph C (5) is recommended to be deleted as it is unclear and vague: “provide for reports to be made to the commission from a person receiving federal aid funds.”

Section 6 Paragraph A is recommended to be revised to read “The office is designated the sole state agency to administer and receive federal aid funds for individuals with disabilities other than blindness.”

It is recommended that Section 6 Paragraph C be deleted. It is unnecessary and creates potential conflict with other laws and funding. For instance, the Commission for the Blind receives vocational rehabilitation funds, and vocational rehabilitation services are also provided by public schools. It currently reads, “All state funds, federal aid funds or grants to the state relating to vocational rehabilitation shall be budgeted and accounted for as provided by law. These funds or grants shall be disbursed by warrants of the secretary of finance and administration on vouchers issued by the director or the director's authorized representative.”

It is recommended that Section 8 be deleted or modified. It creates a right to a “fair hearing” that is not subject to reasonable filing deadlines or hearing request procedures. Under federal law, recipients of vocational rehabilitation services currently have a right to an “impartial due process hearing.” There are extensive federal regulations addressing this issue at 34 CFR 361.57, and there is also established case law on the subject that requires exhaustion of administrative remedies.

It is recommended that Section 9 be considered for deletion. Section 9 requires subrogation of costs to third parties, and it may be in conflict with the federal Rehabilitation Act, 34 CFR 361.54 Participation of individuals in cost of services. The regulations at 34 CFR 361.54(b)(3)(ii) says that the state “may not apply a financial needs test, or require the financial participation of the individual ... As a condition for furnishing any vocational rehabilitation service if the individual in need of the service has been determined eligible for Social Security benefits under titles II or XVI of the Social Security Act.”

The language in Section 16 Paragraph B, “substantial handicap to employment” should be changed to “substantial impediment to employment” so as to use language that is consistent with the Rehab Act.

It is recommended that Section 19 be deleted. There are no programs or properties at the New Mexico School for the Blind or Visually impaired that should be transferred to the Commission on Vocational Rehabilitation.