

“Funding of State Randolph-Sheppard Programs: An Impending Crisis”

A White Paper

Prepared By

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BACKGROUND

Funding for state Randolph-Sheppard programs vary from state to state and can be a point of contention between State Licensing Agencies (SLA) and the blind entrepreneurs. As state resources to fund their Vocational Rehabilitation (VR) programs dwindle, there is increasing pressure on state administrators. The passage of the Workforce Innovations and Opportunities Act (WIOA), which requires a state VR agency to spend 15% of its federal allotment of VR dollars on Pre-Employment Transition Services, has added even more stress to the situation. State VR agencies in most cases have no choice except to take federal dollars being spent in other program areas and redirect those funds to Pre-Employment Transition Services. State Randolph-Sheppard programs are vulnerable in this regard.

The purpose of this white paper is to present the position of the National Association of Blind Merchants in regards to funding for state business enterprises programs. It is our position that when a state VR agency for the blind signs on to be a State Licensing Agency, there are certain financial obligations that it assumes and it cannot ignore these requirements under the Randolph-Sheppard Act.

FUNDING SOURCES

Most SLA's fund their business enterprises program through at least one or a combination of the following sources:

- State Appropriations
- Set Aside Fees Paid by Blind Licensees
- Federal Unassigned Income
- State Unassigned Income
- Interstate Rest Area Income
- Federal VR Dollars

Just to ensure that these terms are clearly understood, we may need to elaborate on each of the above.

State Appropriations – These are dollars designated by the state legislature, Governor's Office, and/or Finance Department for use in the management of that state's business enterprises program. These funds are generally allocated by line item in a budget and their use is generally restricted by budget categories. In most cases, state agencies use these state appropriated dollars to draw down federal VR dollars. In many cases, the business enterprises program may not be identified in the official state budget document. The budget may only identify the dollars being allotted to the larger agency and that agency determines how to allocate those resources amongst the various programs. In other states, the business enterprises program is specifically referenced in the budget document.

Set Aside Funds – 34 C.F.R. 395.1(s) defines set aside funds as ‘funds which accrue to a State licensing agency from an assessment against the net proceeds of each vending facility in the State’s vending facility program and any income from vending machines on federal property which accrues to the State licensing agency.’ The purpose of set aside dollars is to support the overall administration of the program which would include the purchase and maintenance of equipment and management services. A state is not required to assess blind entrepreneurs set aside fees. In fact, approximately one-third of the states currently do not assess set aside fees. In some states, state laws or regulations require such assessments. In general, the SLA and Committee of Blind Vendors jointly determine whether or not to assess a set aside fee and the amount thereof based upon the needs of the program. The set aside schedule must be approved by the Secretary of Education prior to its implementation.

There are restrictions on how these funds can be expended. Set aside dollars can only be used for the following purposes:

- 1) Maintenance and replacement of equipment;
- 2) Purchase of new equipment;
- 3) Management services;
- 4) Assuring a fair minimum of return of vendors; and/or,
- 5) Retirement, health insurance benefits, paid sick leave, and/or vacation pay.

See the discussion below on the requirement that vendors must vote to establish any of the benefit programs described above.

Federal Unassigned Income – These are funds that accrue to the SLA from vending machines on federal property from third party vendors. If there are one or more Randolph-Sheppard entrepreneurs on the same property from which these funds are received, the SLA must distribute these funds to those blind entrepreneurs in an amount not to exceed the average net income of all licensed blind vendors in that state or the national average whichever is less. Any funds not distributed to blind entrepreneurs pursuant to this requirement may be used for the same purposes as set aside funds. The use of federal unassigned funds is determined by a majority vote of all licensed blind vendors in the program. The use of these funds is the only place where the vendors at large vote rather than the Committee of Blind Vendors actively participating with the SLA in the decision. The vote of the vendors at large is binding upon the SLA. The funds are generally used for one of the fringe benefits outlined above but not in all cases. For example, the vendors at large may vote to use all dollars for programmatic purposes in lieu of having a set aside assessment. Any dollars remaining after funds have been allocated for benefits may be used for programmatic purposes provided the vendors at large have voted to do so. If an SLA uses any federal unassigned dollars for any programmatic purpose other than benefits, it must reduce the set aside assessments on a pro rata basis in the amount of such vending machine income being used for purposes other than benefits.

We mentioned earlier that set aside dollars can be used for benefits as well provided the vendors at large have voted to do so. The vendor body does not have the same authority to determine how set aside funds will be expended. This is the responsibility of the SLA with the active participation of the Committee of Blind Vendors. However, if funds are remaining and not needed for programmatic purposes, the vendors at large may vote to spend these excess dollars for benefits. These votes do not have to take place annually. The vendors may vote as a general policy to allocate all dollars for benefits and that policy can be continued until circumstances change and there is reason to have another vote.

State Unassigned Dollars – This is revenue from vending machines located on state or local government properties that accrues to the State Licensing Agencies. State law or regulations govern the use of these funds. Most states use these funds to support the Randolph-Sheppard Program.

Interstate Rest Area Income – In 1982, the Kennelly Amendments to the Surface Transportation Act granted a priority to State Licensing Agencies to service vending machines located at interstate rest areas. Although the intent of the amendment was to provide employment opportunities for people who are blind, many states use the vending at these sites as a revenue stream. State laws and regulations control the use of these dollars.

Federal VR Dollars - Federal VR dollars can be used to support the business enterprises program. These dollars require a match. The State must put up 21.3% to draw down 78.7% in federal dollars. Set aside dollars and unassigned vending income can be used as match to draw down the federal dollars provided they are used for an allowable expenditure. Examples of how VR dollars can be used in support of the business enterprises program include but are not limited to:

- Purchase of equipment;
- Maintenance and/or refurbishing of equipment;
- Renovating vending facilities;
- Management services including salaries, benefits, travel, and related costs associated with BEP employees;
- Outside consultants and experts to help support the blind entrepreneurs;
- Expenses incurred by the Committee of Blind Vendors;
- Training;
- Merchandise Inventory;
- Initial supplies; and,
- Other start-up costs

There are restrictions on the use of these VR dollars. The most notable are that federal dollars cannot be spent for:

- Day-to-day ongoing expenses of any vending facility;

- Vendor benefits (retirement, health insurance, sick pay, vacation pay);
- Fair minimum return;
- Building construction;
- Cost of legal fees to defend the SLA against blind vendor appeals; and,
- Damages awarded to a blind vendor as the result of a due process hearing.

Ongoing expenses are considered to be those that would be considered a cost of doing business. The best example would be merchandise purchased, employee wages, utilities, liability insurance, pest control, bookkeeping services, etc. It is the responsibility of the blind entrepreneurs to cover such expenses. The only exception would be initial start up costs. For example, VR dollars could be used to pay some start-up costs for a new vendor for a short period of time generally considered to be less than six months. State agencies that use nominee agencies must be especially careful in this regard. Most nominees provide services for the vendors such as payroll, payment of taxes, etc. These are considered to be ongoing business obligations of the blind entrepreneurs and the SLA cannot use set aside dollars, federal unassigned, or federal VR dollars to pay for these services.

Likewise, set aside or federal VR dollars cannot be used by the SLA to pay for legal expenses associated with a blind vendor appeal. These dollars can be used for legal fees associated with supporting the business enterprises program. For example, legal fees associated with a federal arbitration against a federal entity would be allowable. Attorneys are routinely asked to review documents such as contracts and/or review proposed rules for legal sufficiency. These costs would be allowable. However, if Vendor A files an appeal over an agency action, the SLA cannot use set aside or federal VR dollars to defend itself against such complaints. If we set aside for a moment the technical reasons SLA's cannot use these funds for these types of legal services for a moment, there is also the moral issue. It is inherently unfair to take set aside dollars paid by a blind vendor to pay for legal expenses to defend the SLA against an appeal by that same blind vendor while requiring the blind vendor to pay his/her own legal fees.

The most successful business enterprises programs use a combination of all of the above funding sources.

SLA's should be cautioned as to how they account for these funds. States must track revenue and expenditures by each category above. There should be no comingling of funds. If all funds are lumped in together, all dollars must be treated in the most restrictive manner. For example, there may not be any restrictions on how state unassigned dollars are spent. However, if these funds are deposited into the same account as federal unassigned dollars and there is no way to distinguish between sources of funds, the restrictions placed on federal unassigned funds apply to all dollars in that account.

The Conflict

In many states, conflict arises between a state's blind entrepreneurs and the SLA over funding for the state business enterprises program. This occurs most often in states that require the business enterprises programs to be "self-sufficient" without any or minimal state funds and/or federal VR dollars. The SLA takes the federal dollars it draws down from dollars expended in the business enterprises program and spends these funds in the VR Program. As a result, blind entrepreneurs may pay excessive amounts in set aside fees because the funds are necessary to perpetuate the program. In some of these states, the business enterprises program must generate all dollars to run the program, which would include operating the entry-level training program, opening new vending facilities, purchasing new or replacement equipment, maintaining equipment in good repair, refurbishing of equipment, all management related services, etc. This is inherently unfair.

NABM takes the position that unilaterally requiring a business enterprises program to be self-sufficient is illegal. There are two key components of this position to consider:

1. Budget decisions are subject to active participation by the Committee of Blind Vendors. Active participation is an ongoing process of collaborative joint decision-making and unilaterally taking all federal dollars from the program is in direct conflict with the concept of joint decision-making.
2. When the VR agency for the blind applied to be the State Licensing Agency, it assumed certain obligations. It cannot pass these obligations on to the blind entrepreneurs.

Active Participation - 34 C.F.R. 395.14(b)(1) requires that the Committee of Blind Vendors actively participate with the SLA in all major administrative decisions affecting the overall administration of the program. There is no better example of a major administrative decision that affects the overall program than budgeting. The intent of this white paper is not to provide a tutorial on active participation; however, the term suggests a process of joint decision-making. The Committee of Blind Vendors is not advisory. It was Congress' intent that the Committee be engaged in the decision-making process. It didn't say the role of the Committee was to 'advise' or provide "input." The Committee is to "actively participate" in making the decision. The SLA must provide the Committee with all financial information, including projected revenue from all sources. This would include the amount of federal dollars being drawn down by BEP expenditures. 34 C.F.R. 395.12 **requires** that the SLA provide such financial reports both quarterly and annually. Most Committees of Blind Vendors meet quarterly so a financial report should be on the agenda for every meeting. Additionally, an annual recap should be provided. Additionally, the SLA should provide a copy of the RSA-15 report it submits to the Rehabilitation Services Administration each year. NABM has been surprised to learn just how many SLA's never share the RSA-15 with their Elected Committees and this is somewhat puzzling. The SLA and Committee work jointly to determine the program's budgetary needs for the next fiscal year and how to allocate the

resources to meet those needs. Admittedly, this is an oversimplification of the process but it provides a broad view of how the process is intended to work. SLA's that are not providing the Committee regular financial updates that include revenue from all sources and expenditures by categories are in violation of the law. SLA's that dictate how dollars are to be expended without the active participation of the Committee of Blind Vendors are in violation of the law.

SLA's Obligations – As noted earlier, when the agency serving the blind was designated as the SLA, it agreed to provide basic support services to its business enterprises program. NABM believes that the SLA has the responsibility to provide the following:

Training – 34 C.F.R. 395.11 require that the SLA provide training as a vocational rehabilitation service. The section refers to the entry-level training provided to all prospective Randolph-Sheppard vendors. This training is no different than sponsoring a client in college or trade school. In the opinion of NABM, the SLA cannot require the Committee of Blind Vendors to agree to use set aside dollars or federal unassigned dollars to pay for such training or to match with federal dollars to pay for the service. Training is a basic VR service and the sole responsibility of the VR Agency. Some states lump training costs for prospective blind entrepreneurs into management services when reporting expenditures to RSA. This would not be appropriate.

New Vending Facilities – The purpose of the Vocational Rehabilitation Program is to create employment opportunities for people with disabilities. This would include creating entrepreneurial opportunities for persons who are blind. This obligation cannot be passed on to the blind entrepreneur community and the Committee cannot be forced to agree to use set aside or federal unassigned dollars to pay for the total cost of these new facilities.

Program Supervision – 34 C.F.R. 395.3(11)(ii) dictates that the SLA “carry out full responsibility for supervision and management.” We are primarily talking about BEP staff here. The SLA cannot commit to assuming full responsibility for the supervision of the program and then say, “But we are going to make the blind vendors pay for it.” Such a position by an SLA has the potential to create all sorts of conflict. The Committee may think adequate supervision can be provided with 5 staff while the SLA insists on 15. The SLA cannot force the vendors to underwrite the cost of staff especially if the Committee feels that many staff are not necessary.

The fundamental issue here is some states require that set aside and/or unassigned dollars support the program in its entirety. The top priority is always the SLA staff. But blind entrepreneurs are forced to use old outdated and unreliable equipment. The SLA says it has no dollars to buy equipment. In many cases, outdated equipment leaves the blind entrepreneur unable to provide the same

quality of service as private purveyors, which creates a negative image of blind people and the Randolph-Sheppard Program. Likewise, the program sits stagnant because the SLA doesn't have resources to open new facilities. This is fundamentally wrong.

How do we reconcile the above when 34 C.F.R. 395.9(b) and 34 C.F.R. 395.9(c) specifically state that both set aside dollars and federal unassigned dollars can be expended on new equipment and management services? We do not equate new vending facilities to new equipment. Creating new opportunities is the responsibility of the SLA. Buying new equipment for an existing or renovated vending facility is entirely different. Likewise, we do not equate management services to supervision. Yes, supervision is part of management services but there is a lot that goes into management services over and beyond supervision. The SLA assumed responsibility for the supervision piece and again we maintain it cannot require the vendors to pay for that supervision.

To summarize this section, NABM believes that it is the SLA's responsibility to pay for training of new vendors, opening new vending facilities, and providing supervision for its business enterprises program. Federal dollars (with the appropriate matching dollars) are the most likely source of funds to utilize for these purposes. Under no circumstances should the blind entrepreneurs in a state be required to pay 100% of the costs of these services.

One might note that we did not mention maintenance and repair or replacement equipment. We have no problem with using set aside dollars to help pay for these services. The amount to be allocated for such use would be subject to active participation by the Committee of Blind Vendors. The same would be true for replacement equipment. However, the SLA and Committee of Blind Vendors must jointly decide on the use of federal VR dollars to help offset these costs.

Income Versus Employment

As noted earlier, there are multiple streams of income available to financially support a state business enterprises program. NABM and the NFBEI are very concerned that some states place a higher priority on generating income than creating viable opportunities for blind entrepreneurs. The very first sentence of the Randolph-Sheppard Act states that the purpose of the Act is "providing blind persons remunerative employment, enlarging the economic opportunities for the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." Maximizing the potential of current blind entrepreneurs and creating new opportunities should be at the forefront of what every SLA is doing. Unfortunately, too many states focus on creating program income.

The critical issue here is unassigned vending particularly from non-federal sources such as state properties / interstate rest areas. Many states are content to third party out these sites in order to generate revenue. But this is not the purpose of the Randolph-Sheppard Act. The first priority should always be to first look at establishing vending facilities to be operated by licensed blind entrepreneurs. Some state VR Directors would shiver at the prospects of losing the income being

generated by this unassigned vending. Why? Because they are taking those dollars to match federal dollars that are being spent in the VR Program. We sympathize with these state directors who face enormous challenges in running a state agency in an era of diminishing resources and increasing demands. However, it is not the responsibility of the blind entrepreneurs to fund a state's VR program. When Congress passed the Kennelly Amendments, it's clear intent was to create new opportunities for blind entrepreneurs. States that simply use third parties to service these locations strictly to generate revenue for its VR Program are, in our opinion, at least in conflict with the spirit of the law. Likewise, when a state legislature passes a Mini-Randolph-Sheppard Act, the motivation is most assuredly to create opportunities for blind entrepreneurs. Yes, many of these state laws allow the SLA to collect income from third party vending machines on properties governed by the law. But that is the second priority. Third party vending should be utilized primarily when a site will not support a blind licensee or there are other reasons the site is not suitable for a blind licensee.

Q&A

Q: What is wrong with expecting the business enterprises program to be self-sufficient rather than being subsidized?

A: NABM has absolutely no objection to business enterprise programs being self-sufficient provided the programs are meeting their full potential in terms of providing meaningful opportunities for blind entrepreneurs. However, we do not believe that the program is being subsidized when the agency is fulfilling its obligation under the Vocational Rehabilitation Program by providing training and creating new opportunities for blind entrepreneurs.

Q: Why does NABM feel this is such an important issue at this time?

A: NABM has been frustrated by state agencies that do not devote appropriate resources to their business enterprises programs. We believe there is a direct correlation between the commitment of resources and the over all quality of a business enterprises program. Programs that do not devote resources are generally stagnant with little growth and low incomes for their blind entrepreneurs. Additionally, vending facilities are substandard which impacts the quality of customer service and the reputation of blind people to be successful, independent members of society. Simply put, we want to see the program in each state fulfill its potential and for blind people to be successful.

Q: The Randolph-Sheppard Act and implementing regulations require the SLA to perform certain functions. If we take dollars that you believe should be spent on the Randolph-Sheppard Program, it will mean fewer dollars available to provide VR services to blind and visually impaired persons. How do you justify our doing that?

A: There are several ways to answer this question. First, we do not accept the premise of the question that there will automatically be fewer dollars available for the VR Program. NABM is of the opinion that dollars spent in the business enterprises program represent an investment and like any good investment there should be a return on that investment. If there are more vending facilities and blind entrepreneurs are making more money, there should be more dollars generated in terms of tax revenue for the state and set aside fees in those states that assess a set aside fee. These additional dollars can create additional match for the SLA. Also, one must consider why states choose to use business enterprises dollars to fund the VR Program. There is only one reason. Those states are short on state appropriations to match enough federal dollars to provide VR services to individuals who are blind or visually impaired. Also, these states are generally the same ones reverting federal dollars back to RSA at the end of the fiscal year. Governors and state legislatures tend to appropriate dollars as needed. They want an effective VR program. They know the SLA is using business enterprises dollars to draw down the federal dollars to spend in the VR Program. If they were told these funds were no longer available to be spent in VR, they will come up with more dollars for match. Everyone wins in this scenario. The economy benefits as more federal dollars are kept in state rather than being sent back to the federal government. VR benefits by having a stable source of funding. And BEP benefits as it has funds available to expand and enhance the program. Interestingly, state agencies generally fail to use the greatest asset available to them to get increased funding – the consumers. NABM believes that Randolph-Sheppard entrepreneurs and consumer groups could work together to lobby for additional match dollars for the VR Program.

Q: You say the SLA cannot pass the cost of training, new facilities, etc. on to the blind vendors. Can we use BEP funds as match for federal dollars to pay for these services?

A: Admittedly, NABM believes that such decisions are subject to active participation by the Committee of Blind Vendors on a state-by-state basis. By active participation in this regard, we mean joint agreement.

Q: Are you saying set aside dollars and federal unassigned income can never be used to match with federal dollars to support the VR Programs/

A: No. If the SLA is meeting all of its obligations under the law and after active participation by the Committee of Blind Vendors it is determined there are excess funds, then there would be no objection to using the excess funds in the VR Program. Admittedly, we do not necessarily agree with the interpretation that federal dollars matched with BE funds can be spent in another program, it is not our intent to block such practices in their entirety provided the Agency is doing right by its blind entrepreneurs.

Q: You say states should not use unassigned income as an income stream when those locations could be assigned to a blind entrepreneur. Our vendors are the ones who want us to do this because we use the money to finance the program and put money in their benefits program. Are you suggesting we override the wishes of our Committee of Blind Vendors?

A: First, we have less concern when the dollars are being kept in the program. We strongly believe in the concept of active participation. Sometimes Committees need to be educated about the purpose of the program. Our experience is that blind entrepreneurs generally want what is best for the program and favor program expansion and improvement. However, if after considering all of the facts, the SLA and Committee agree that third party vending is the best option, then we support that. We don't support an SLA mandating it or unilaterally deciding to use that money to match federal dollars to provide services it is mandated to do under the law.

Q: Why shouldn't vendors who are benefitting from the program and making \$100,000 per year be required to pay back so we can help other blind people?

A: First, few blind entrepreneurs are making \$100,000 per year. In fact, the median income of Randolph-Sheppard entrepreneurs is not much over \$30,000 per year, which puts them right at poverty level if they are trying to support a family of four. The focus needs to be on assisting those entrepreneurs to greater success.

Conclusion

In conclusion, the National Association of Blind Merchants believes the following:

- *Determining how dollars being generated by the business enterprises program are to be expended is to be determined jointly by the SLA and Committee of Blind Vendors;*
- *SLA's on a quarterly basis must provide to the Committee of Blind Vendors a financial report that details revenue and expenditures;*
- *The SLA should provide to all members of the Committee of Blind Vendors a copy of the annual RSA-15 at the time it is submitted to the Rehabilitation Services Administration;*
- *The SLA is responsible for providing training to prospective new Randolph-Sheppard entrepreneurs, opening new vending facilities, and staffing for the program and the SLA cannot unilaterally choose to pass the cost for providing these services on to the blind entrepreneurs;*

- *The blind entrepreneurs in a state have no obligation, as a condition for participating in the business enterprises program, to help fund a state's VR Program;*
- *States who use unassigned income as a source of funding for their VR Programs rather than creating new opportunities when feasible are at least in violation of the spirit of the law;*

For questions or inquiries, contact Terry C. Smith at terrysmith@epbf.com

The National Federation of the Blind knows that blindness is not the characteristic that defines you or your future. Every day we raise the expectations of blind people, because low expectations create obstacles between blind people and our dreams. You can live the life you want; blindness is not what holds you back.