

FREQUENTLY ASKED QUESTIONS

The Need for an Eligibility/Ineligibility Determination for VR Services for Youth Considering Subminimum Wage Employment Under Section 511

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FAQ 21-02

The Rehabilitation Services Administration (RSA) within the Office of Special Education and Rehabilitative Services issues this Frequently Asked Questions (FAQ) document to support State Vocational Rehabilitation (VR) agencies in their continued implementation of the requirements for youth with disabilities under Section 511(a) of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by Title IV of the Workforce Innovation and Opportunity Act (WIOA) and to respond to questions that RSA has received.

Specifically, these FAQs address the application and eligibility determination¹ processes under Section 102(a) of the Rehabilitation Act that a youth with a disability must satisfy when he or she chooses to pursue subminimum wage work (Section 511(a)(2)(B) of the Rehabilitation Act). In addition, as explained in detail through the questions and answers below, youth who, through the exercise of informed choice, intend to pursue subminimum wage employment are not eligible for VR services because this outcome is not within the scope of employment outcomes allowable under the program.

Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. The key sections of the statute discussed below are the following: Sections 7(11), 7(20)(A), 7(42), 102(a), 102(b)(3)(B), 102(d), 511(a)(2)(B), and 511(d) of the Rehabilitation Act (29 U.S.C. §§ 705(11), 705(20)(A), 705(42), 722(a), 722(b)(3)(B), 722(d), 794g(a)(2)(B), and 794g(d)).

General Information and Definitions

Q1. Who is a “youth with a disability” for purposes of the VR program and Section 511 requirements?

A “youth with a disability” is an individual with a disability who is not younger than 14 years old or older than 24 years old (Section 7(42) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(58)). An “individual with a disability,” for purposes of the VR program, is an individual who—

¹ This FAQ focuses solely on the eligibility/ineligibility determination process that must be followed when a youth expresses an interest in pursuing subminimum wage work, and does not describe all other requirements that must be satisfied, pursuant to Section 511(a)(2)(B) of the Rehabilitation Act, when a youth with a disability wants to pursue or maintain subminimum wage work.

- Has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and
- Can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to Titles I, III, or VI of the Rehabilitation Act (Section 7(20)(A) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(27)).

Q2. What does it mean to earn a subminimum wage?

“Subminimum wage” is a wage that is less than the Federal minimum wage (Section 511(a) of the Rehabilitation Act). The “Federal minimum wage” is defined at Section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. § 206(a)(1) and referenced in 34 C.F.R. § 397.5 (c)(1), which for covered nonexempt employees is \$7.25 per hour effective July 24, 2009.

Q3. Does subminimum wage work constitute an “employment outcome” under the VR program?

No. Subminimum wage employment does not satisfy the definition of an “employment outcome” under Section 7(11) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(15).

For purposes of the VR program, an individual achieves an “employment outcome” when he or she enters, advances in, or retains full-time or part-time “competitive integrated employment”² (including customized employment, self-employment, telecommuting, or business ownership), or “supported employment,”³ that is consistent with his or her unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

Although under Section 102(a)(1)(B) of the Rehabilitation Act and 34 C.F.R. § 361.42(a)(1)(iii) all individuals with disabilities are presumed to be able to benefit in terms of an employment outcome from VR services, the individuals must want to achieve an employment outcome, which subminimum wage work is not.

Q4. What is the purpose of the VR program?

The goal of the VR program is to provide individuals with disabilities, including youth with disabilities, through the provision of VR services, with opportunities to maximize employment that is consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. This is true even during the COVID-19 pandemic, when services can be provided virtually and telework opportunities exist. The VR program is based on the

² “Competitive Integrated employment” means work that is performed on a full-time or part-time basis that satisfies three criteria related to wages/benefits, integrated employment location, and opportunities for advancement. The wages/benefits and opportunities for advancement and interaction provided to individuals with disabilities must be comparable to those provided to individuals without disabilities performing the same or similar work (Section 7(5) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(9)).

³ “Supported employment” means employment in an integrated work setting in which individuals with most significant disabilities are working in competitive employment or on a short-term basis toward competitive integrated employment. The employment is individualized and customized consistent with the strengths, abilities, interests, and informed choice of the individuals involved and for whom intensive supported employment services and extended services are needed Section 7(38) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(53)).

presumption that an individual with a disability, including a youth with a disability, can benefit in terms of an employment outcome, and on the requirement that the individual has the opportunity to make informed choices about possible employment outcomes.

Q5. Can a youth with a disability choose the kind of employment to pursue, including subminimum wage work?

Yes. Section 102(d) of the Rehabilitation Act and 34 C.F.R. § 361.52 require a VR agency to have policies and procedures in place that ensure each applicant and eligible individual, including a youth with a disability, is provided the necessary information and support services to exercise informed choices throughout the entire VR process. This means that a youth with a disability must be provided the necessary information and support to exercise informed choice with respect to employment, as well as all parts of the VR process.

The VR agency should make every effort to assist a youth applicant for VR services and his or her parent or representative, as applicable, in a manner that facilitates independent decision-making and supports informed choice regarding employment opportunities (Sections 102(b)(3)(B) and 102(d) of the Rehabilitation Act). A full discussion by VR personnel of the purpose of the VR program and the role that it can play in assisting youth with disabilities to achieve competitive integrated employment, or supported employment with reasonable accommodations and appropriate services and supports, will assist applicants in making an informed choice regarding the full range of their employment opportunities.

Despite the Rehabilitation Act's heightened emphasis on the achievement of competitive integrated employment as an employment outcome under the VR program, we recognize there are times when a youth with a disability, and his or her parent or legal representative, as applicable, will choose to pursue subminimum wage work after discussing the available options with a VR counselor. When a youth with a disability chooses to pursue subminimum wage work, the requirements of Section 511 must be satisfied.

Applying for the VR Program

Q6. When must a youth with a disability seeking subminimum wage employment apply for the VR program?

Section 511(a)(2)(B) of the Rehabilitation Act requires a youth with a disability to satisfy certain service-related requirements, including applying for VR services. The applicant must then be determined eligible or ineligible for VR services, before being employed at or paid a subminimum wage. The youth with a disability must satisfy these requirements regardless of whether he or she intends to pursue subminimum wage work on a temporary or long-term basis.

Q7. What must a VR counselor do when a youth with a disability applies for the VR program?

A VR agency must follow its application and eligibility determination processes whenever an individual with a disability, including a youth with a disability, applies for the VR program

(Section 102(a) of the Rehabilitation Act and 34 C.F.R. §§ 361.41 and 361.42). As noted above, when a youth with a disability expresses an interest in pursuing subminimum wage work, Section 511(a)(2)(B) of the Rehabilitation Act requires the youth to apply to the VR program and be determined eligible or ineligible before starting such work. The VR counselor must provide sufficient information throughout the application process to ensure the youth with a disability is able to exercise informed choice from among the full range of employment options available to him or her. The VR counselor must determine whether the individual is eligible or ineligible in accordance with the VR agency's policies and procedures.

Eligibility Determination Process

Q8. When is an applicant, including a youth with a disability, determined eligible for the VR program?

An applicant is eligible for services under the VR program if he or she—

- Is an “individual with a disability,” as defined in Section 7(20)(A) of the Rehabilitation Act; and
- Requires VR services to prepare for, secure, retain, advance in, or regain an employment outcome that is consistent with his or her strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice (Section 102(a)(1) of the Rehabilitation Act).

For purposes of the VR program, the definition of an “individual with a disability” makes clear that the individual must be able to “benefit in terms of an employment outcome” from the receipt of VR services (Section 7(20)(A)(ii) of the Rehabilitation Act). As noted above, an “employment outcome” means, with respect to an individual, full- or part-time competitive integrated employment (including customized employment, self-employment, telecommuting, or business ownership), or supported employment, that is consistent with an individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice (Section 7(11) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(15)).

Therefore, to be eligible for the VR program, a youth with a disability must intend to achieve an “employment outcome,” as that term is defined for purposes of the VR program (34 C.F.R. § 361.42 (a)(4)). This requirement is consistent with the statutory requirements governing the mandatory components of the individualized plan for employment (IPE), which is developed once an applicant is determined eligible for the VR program and which provides the approved agreement for the relationship that exists between the VR agency and the eligible individual with a disability. Pursuant to Section 102(b)(4) of the Rehabilitation Act, the IPE must contain, among other things, a description of the eligible individual's employment outcome that is consistent with the general goal of competitive integrated employment and the VR services needed by the individual to achieve that employment outcome. Subminimum wage work would not be consistent with the general goal of competitive integrated employment.

Q9. Would a youth with a disability who wants to pursue subminimum wage work be determined eligible for the VR program?

No. As stated in Q8, an applicant is eligible for the VR program only if he or she intends to achieve an employment outcome, as that term is defined at Section 7(11) of the Rehabilitation Act and 34 C.F.R. § 361.5(c)(15). Subminimum wage work does not satisfy the definition of an “employment outcome.”

Ineligibility Determination Process

Q10. When would a youth with a disability pursuing work at subminimum wage be determined ineligible for the VR program?

A VR counselor may decide, after complying with the requirements of the Rehabilitation Act, that a youth that seeks only subminimum wage work is ineligible for VR services. Before making that ineligibility determination in accordance with the requirements of 34 C.F.R. § 361.43, however, a VR counselor would need to provide an opportunity for full consultation with the youth or, as appropriate, the youth’s representative (34 C.F.R. § 361.43(a)). Section 102(d) of the Rehabilitation Act requires the VR agency to develop written policies and procedures that enable applicants and eligible recipients under the VR program to exercise informed choice throughout the VR process, including the selection of their employment outcome. Implicit in this requirement is the need to ensure that an individual can exercise informed choice in deciding not to seek an employment outcome.

Q11. What happens if a VR counselor determines that a youth with a disability seeking subminimum wage employment is ineligible for the VR program?

In the event that a VR counselor determines that a youth with a disability is not eligible for the VR program because he or she has chosen not to pursue an employment outcome as that term is defined for purposes of the VR program, and instead has chosen to pursue subminimum wage work, the VR counselor must refer that individual to other programs and service providers better suited to meet his or her needs (34 C.F.R. § 361.43(d)(2)). This regulatory requirement makes clear two critical points: (1) the individual can choose not to pursue an employment outcome, as that term is defined; and (2) such a choice will be the foundation of an ineligibility determination for purposes of the VR program. By being determined ineligible for the VR program, the youth with a disability has satisfied the minimum requirement of Section 511(a)(2)B(i)(I) of the Rehabilitation Act and would be able to engage in subminimum wage work.⁴

Q12. Can a youth with a disability change his or her mind after being determined ineligible for the VR program?

⁴ The “Type of Exit” (Element Number 354) in the Case Service Report (RSA-911) would be coded “7” (Individual exited as an applicant after being determined ineligible for VR services); and the “Reason for Exit” (Element Number 355) “21” (Ineligible: The individual applied for VR services pursuant to Section 511 of the Rehabilitation Act and was determined ineligible because he or she did not wish to pursue competitive integrated employment) (RSA-PD-19-03).

Yes. There is no limit to the number of times an individual with a disability, including a youth with a disability, can apply for the VR program. If a youth later decides to pursue work that would meet the definition of an “employment outcome,” for purposes of the VR program, he or she could reapply at any time. At that time, the VR counselor would provide the necessary information to ensure the youth has all the information necessary to make an informed choice about the full range of opportunities available to him or her with respect to employment. The VR counselor would then process the new application in accordance with the agency’s procedures described above.

Q13. Can a youth with a disability who chooses to pursue subminimum wage employment refuse to apply to the VR program?

Yes. However, if a youth with a disability refuses to apply to the VR program but wants to engage in subminimum wage work, he or she would not be permitted to be employed at subminimum wage or start such work (Section 511(a)(2)(B) of the Rehabilitation Act).