

RSA: Integrated Location Criteria of the Definition of “Competitive Integrated Employment” (1.18.2017)

1. What are the criteria that an employment setting must satisfy to be considered an integrated location?

With respect to an employment outcome for purposes of the VR program, under 34 CFR §§361.5(c)(9)(ii) and 361.5(c)(32)(ii), an employment setting must meet two criteria to be considered an integrated location and satisfy the definition of “competitive integrated employment.” The employment setting must be:

Typically found in the community; and

Where the employee with a disability interacts, for the purpose of performing the duties of the position, with other employees within the particular work unit and the entire work site, and, as appropriate to the work performed, other persons (e.g., customers and vendors) who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons.

2. Is the regulatory definition of “competitive integrated employment,” with respect to the integrated location criteria, consistent with the statutory definition?

Yes, the regulatory definition of the term “competitive integrated employment” is consistent with the statutory definition. The definition of this term in section 7(5) of the Rehabilitation Act, as amended by WIOA, for the most part incorporates the prior regulatory definition of “integrated setting.” This latter term and its definition have existed in the VR program regulations since at least 1997 (62 FR 6308, 6337 (February 11, 1997)). Therefore, the substance of the definitions of “competitive integrated employment” in 34 CFR §361.5(c)(9)(ii) and “integrated setting” in 34 CFR §361.5(c)(32)(ii), for purposes of the VR program, with respect to the integrated nature of the employment location is familiar to VR agencies and does not diverge from prior regulations, long-standing Department policy, VR agency practice, and the heightened emphasis on competitive integrated employment throughout the Rehabilitation Act, as amended by WIOA.

Further, there is no indication in the Rehabilitation Act, as amended by WIOA, or the limited legislative history, that Congress intended to alter the scope of the integrated setting criteria of the definition of “competitive integrated employment.” Therefore, the definition of “competitive integrated employment” in 34 CFR §361.5(c)(9)(ii), while not verbatim, is nonetheless consistent with the definition of the term at section 7(5) of the Rehabilitation Act, prior regulations, and long-standing Department policy.

3. Do the integrated location criteria in the definition of “competitive integrated employment” restrict the informed choice of individuals with disabilities?

No. Two of the core purposes of WIOA are to ensure that: (1) individuals who face barriers to employment, such as individuals with disabilities, receive the services and supports they need

to acquire the skills necessary to obtain competitive integrated employment; and (2) employers receive the training, technical assistance, and other services they need to understand and tap into the full potential of individuals with disabilities in the workforce, for example through supported employment or customized employment (see section 100(a)(2) of the Rehabilitation Act). Through these efforts, individuals with disabilities, including those with the most significant disabilities, have more employment opportunities. However, if an individual chooses to pursue employment in a non-integrated setting, he or she may still do so with assistance from other programs, as has been true since October 1, 2001, when the Department limited the definition of “employment outcome,” for purposes of the VR program, to jobs in integrated settings (see 66 FR 7249, 7252 (January 22, 2001)). In addition, section 102(b)(4) of the Rehabilitation Act, as amended by WIOA, and 34 CFR §361.46(a)(1) require that each individualized plan for employment contain an employment goal consistent with the general goal of competitive integrated employment (see also 34 CFR §361.45(b)(2)). Thus, individuals have the opportunity to exercise informed choice in the selection of employment goals that satisfy the definition of “employment outcome” and “competitive integrated employment,” consistent with section 102(d) of the Rehabilitation Act and 34 CFR §361.52 (Informed choice).

The overarching objective is to enable all individuals with disabilities participating in the VR program to pursue competitive integrated employment, and still exercise informed choice as to the kind of employment they want to pursue. Under 34 CFR §361.37(b), VR agencies must refer individuals with disabilities to appropriate programs and service providers best suited to address the specific rehabilitation, independent living, and employment needs of an individual with a disability who makes an informed choice not to pursue an employment outcome under the VR program (i.e., competitive integrated employment or supported employment), as defined in 34 CFR §361.5(c)(15). Prior to making the referrals, VR agencies must: (1) explain to the individuals that the purpose of the VR program is to assist individuals to achieve an employment outcome as defined in §361.5(c)(15); (2) provide the individuals with information concerning the availability of employment options, and of VR services, to assist the individuals to achieve an appropriate employment outcome; (3) inform the individuals that services under the VR program can be provided to eligible individuals in an extended employment setting if necessary for purposes of training or otherwise preparing for employment in an integrated setting; (4) inform the individuals that, if they initially choose not to pursue an employment outcome as defined in §361.5(c)(15), they can seek services from the VR agency at a later date if, at that time, they choose to pursue an employment outcome; and (5) refer the individuals, as appropriate, to the Social Security Administration in order to obtain information concerning the ability of individuals with disabilities to work while receiving benefits from the Social Security Administration (34 CFR §361.37(b)(1) through (5)).

Non-integrated employment remains a viable, interim option for purposes of preparing participants in the VR program for employment in integrated settings, and continues to be a long-term employment option through sources other than the VR program for those individuals who prefer to work in these employment settings. For these reasons, providers of non-

integrated employment have served, and will continue to serve, as a source of employment for individuals with significant disabilities. The definition of “competitive integrated employment” reflects the heightened emphasis throughout the Act, as amended by WIOA, that individuals with disabilities, including those with the most significant disabilities, can achieve employment in the community and economic self-sufficiency if provided appropriate services and supports. Because VR agencies have been unable to assist individuals with disabilities to obtain sheltered employment through the VR program since October 2001, the vast majority of individuals have accessed sheltered employment through other sources or on their own initiative. Therefore, §361.5(c)(9) will not affect the availability of sheltered employment for individuals who choose this form of employment, or for whom it is a legitimate and necessary option.

4. Who is responsible for determining whether an employment setting is in an integrated location and satisfies the definition of “competitive integrated employment”?

VR agencies - not OSERS - must determine on a case-by-case basis in light of the facts presented whether an employment setting meets both criteria for an integrated location. VR agencies have the ability to visit employment sites and gather the facts necessary for these determinations. Therefore, the VR agency is responsible for determining whether the jobs performed by individuals with disabilities employed by community rehabilitation programs satisfy the definition of “competitive integrated employment” when individuals seek the VR agency’s assistance in obtaining these positions. If the VR agency, after applying the criteria to the facts related to the particular job, determines that a position is in non-integrated employment, under 34 CFR §361.37(b), it must refer the individual interested in the position to other programs, including community rehabilitation programs, for assistance in obtaining his or her chosen employment goal. In considering whether a position is in non-integrated employment, VR agencies should consider the guidance provided in the preamble to the 2016 final regulations (81 FR at 55641-55645) as summarized in pertinent part in these FAQs.

5. What is meant by “typically found in the community,” as used in the definition of “competitive integrated employment”?

Employment settings that are “typically found in the community” are those in the competitive labor market (81 FR at 55642). Settings established by community rehabilitation programs specifically for the purpose of employing individuals with disabilities (e.g., sheltered workshops) do not constitute integrated settings because these settings are not typically found in the competitive labor market--the first of two criteria that must be satisfied if a VR agency is to determine that a work setting is an integrated location under 34 CFR §361.5(c)(9).

The Department has long considered several factors that generally would result in a business being considered “not typically found in the community,” which include: (1) the funding of positions through Javits-Wagner-O’Day (JWOD) Act contracts or State purchase programs; (2) allowances under the Fair Labor Standards Act for compensatory subminimum wages; and (3) compliance with a mandated direct labor-hour ratio of persons with disabilities. It is the

responsibility of the VR agency to take these factors into account when determining if a position in a particular work location is an integrated setting.

6. What does RSA mean by “work unit,” as used in the definition of “competitive integrated employment”?

The use of the phrase “work unit” in the definition of “competitive integrated employment,” is consistent with the Department’s long-standing policy on integrated settings. The term “work unit” properly focuses the consideration of the interaction of the individual with the disability with employees without disabilities on the particular job and the environment in which the work is performed. As used in the definition, “work unit” may refer to all employees in a particular job category or to a group of employees working together to accomplish tasks, depending on the employer’s organizational structure (81 FR at 55643). The level of integration experienced by all individuals with disabilities employed by a community rehabilitation program is not the same and is dependent on the circumstances of the particular job within each work unit of the organization. Therefore, some employment opportunities offered by community rehabilitation programs may be considered to be in “integrated locations,” and thus satisfy the definition of “competitive integrated employment,” while others may not.

For example, a community rehabilitation program may consist of two divisions or “work units.” In one division, individuals with disabilities are congregated together to perform work in a call center under JWOD contracts. Such a work unit would not likely satisfy the integrated location criteria of the definition of “competitive integrated employment” because it is operated for the express purpose of employing individuals with disabilities under JWOD contracts and, thus, is not typically found in the community. In addition, the high percentage of individuals with disabilities employed with these entities most likely would result in little to no opportunities for interaction between individuals with disabilities and non-disabled individuals. Conversely, the other division in the community rehabilitation program employs individuals with disabilities to provide vocational and independent living services, but the sole purpose of the division is not to employ individuals with disabilities. Such work unit would likely satisfy the integrated location criteria of the definition of “competitive integrated employment” because it is not operated for the primary purpose of employing persons with disabilities, but rather to provide services to individuals with disabilities.

7. Do group employment settings, such as janitorial crews in which individuals with disabilities earn competitive wages, satisfy the definition of “competitive integrated employment”?

Under 34 CFR §361.5(c)(9)(ii)(B), through application of the integrated location criteria, individuals with disabilities hired by community rehabilitation programs to perform work under service contracts, either alone, in mobile work crews, or in other group settings (e.g., landscaping or janitorial crews) whose interaction with persons without disabilities (other than their supervisors and service providers), while performing job responsibilities, is with persons working in or visiting the work locations (and not with employees of the community

rehabilitation programs without disabilities in similar positions) would not be performing work in an integrated setting. Even if such group employment in a community rehabilitation program provides for competitively paid wages, this fact does not change the non-integrated nature of the employment and may result in a less desirable level of integration (e.g., interaction with non-disabled co-workers), which supports the autonomy and self-sufficiency of individuals with disabilities.