**U.S. DEPARTMENT OF EDUCATION**

**OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES**

**REHABILITATION SERVICES ADMINISTRATION**

**RESPONSE TO SIGNIFICANT COMMENTS**

Frequently Asked Questions:

Criterion for an Integrated Employment Location

in the Definition of “Competitive Integrated Employment”

and Participant Choice

October 29, 2021

On March 9, 2021, the U.S. Department of Education (Department) published [*Frequently Asked Questions: Criterion for an Integrated Employment Location in the Definition of “Competitive Integrated Employment” and Participant Choice*](https://rsa.ed.gov/sites/default/files/subregulatory/RSA%20FAQs%2021-03%20%2803.08.21%29_0.pdf) (FAQ 21-03) in the Federal Register, providing the public with a 30-day opportunity to comment (86 FR 13511 (March 9, 2021)). The Department received comments from approximately 200 parties. The Department has taken these comments into consideration and made applicable revisions to improve the clarity of the document. We also have made other non-substantive technical changes to improve clarity, such as rephrasing and reorganizing a few questions. We have issued the final FAQ document by posting it on the Rehabilitation Services Administration website at <https://rsa.ed.gov/sites/default/files/2021-10/RSA-FAQ-22-02.docx>, FAQ 22-02, dated October 29, 2021.

To ensure transparency, we address significant changes to the document made in response to the comments received, by each topic by which the FAQs are organized.

**Overview**

Many commenters supported the Department’s guidance set forth in the proposed FAQ 21-03 document, although some expressed concern about an over-emphasis on non-competitive and non-integrated employment throughout the proposed FAQs. These commenters asked that we clarify, in the Overview section of the document and elsewhere, that the purpose of the Vocational Rehabilitation (VR) program is to assist individuals with disabilities to achieve competitive integrated employment and that competitive integrated employment is the preferred outcome, as opposed to other non-competitive and non-integrated forms of employment. Other commenters requested that the Overview clarify that individuals who choose to pursue non-competitive and/or non-integrated employment are not eligible for VR services.

In response to the request for clarity, we have added language to the Overview section of the document to clarify the purpose of the VR program and emphasize the role the VR program plays in expanding opportunities for individuals with disabilities to achieve high-quality employment and economic security, thereby furthering the full equality and integration of individuals with disabilities into American society. We also added language clarifying that individuals who choose to pursue non-competitive and/or non-integrated employment are not eligible for VR services because such employment does not meet the definition of “employment outcome” under the VR program, as that term is defined at Section 7(11) of the Rehabilitation Act of 1973 (Rehabilitation Act) (29 U.S.C. § 705(11)) and 34 C.F.R. § 361.5(c)(15). Finally, we make clear that these updated FAQs take effect on the date of issuance.

**General Information – Definition and its Connection to the VR Program**

Some commenters stated that, to improve the readability of the document, proposed Q3—“Must an individual choose competitive integrated employment?”—should be relocated to the Informed Choice section of the document. By relocating proposed Q3 to that section, a reader would more easily understand what making an informed choice entails and the steps that VR agencies must take before referring individuals who choose to pursue non-competitive and/or non-integrated employment to other Federal, State, or local programs.

We agree with this comment and have relocated proposed Q3 (now Q19) to the Informed Choice section of the document. We also have removed proposed Q4—“Who decides whether a job position is “competitive integrated employment”—RSA or the VR agency?” because it duplicates information in the Case-by-Case Analysis section of the document. The General Information – Definition and its Connection to the VR Program section now consists of Q1 and Q2, in which we have clarified that supported employment and customized employment also constitute “employment outcomes” through the VR program and made other technical changes.

**Criterion for an Integrated Employment Location – Overview**

Many commenters expressed overall support for the Department’s long-standing interpretation of the “integrated location” criterion. However, as in the past, some commenters did not support this interpretation. We discuss these specific significant comments in the Standard for “Typically Found in the Community” and Standard for “Interaction in the Work Unit and Worksite” sections of this document.

After considering all comments, the Department maintains its interpretation of the criterion for an “integrated location” found in the regulatory definition of “competitive integrated employment.” We have added text to the response to current Q5 explaining that the regulatory definition is consistent with the “Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*,” dated June 22, 2011, and updated February 25, 2020 (DOJ Statement), regarding what constitutes the “most integrated setting.” Finally, we have renumbered proposed Q5 through Q7 as Q3 through Q5.

**Standard for “Typically Found in the Community”**

Many commenters expressed support for the Department’s long-standing interpretation that employment locations are “typically found in the community” if they are in the competitive labor market andthat employment locations established specifically for the purpose of employing individuals with disabilities are not “typically found in the community” because such settings are not typically found in the competitive labor market. These commenters also supported the Department’s continued guidance that job positions for which individuals with disabilities are hired to comply with a direct labor hour ratio requirement likely are not typically found in the community. However, many commenters opposed the Department’s interpretation of what it means for an employment location to be “typically found in the community.” They asked that the Department remove from the FAQs the statement “that employment location settings established specifically for the purpose of employing individuals with disabilities are not ‘typically found in the community’ because such settings are not typically found in the competitive labor market.” They believe that the Department’s interpretation will continue to cause VR agencies to make blanket determinations that all employment provided under the Javits-Wagner-O’Day (JWOD) Act and similar State law is not in integrated locations. For the same reason, these commenters asked that we remove from the FAQs the statement that “if a job position is required by law to comply with a direct labor-hour ratio of individuals with disabilities, it is likely not considered ‘typically found in the community.’” Furthermore, some commenters requested that the FAQs state that all employment provided under the JWOD Act and similar State law satisfies the definition of “competitive integrated employment.” Alternatively, some commenters asked that the FAQs clarify that positions under the JWOD Act and similar State law are not presumptively non-integrated settings, that these positions are to be considered as satisfying the definition of “competitive integrated employment” if they otherwise satisfy all criteria, and that whether the position is under a contract with a direct labor-hour ratio requirement is just one factor VR agencies should consider when determining if an employment location is “typically found in the community.”

The Department appreciates the support from many commenters for its long-standing interpretation of the term “typically found in the community.” We decline to make changes recommended by those commenters who asked that we specify that jobs under the JWOD Act and similar State law are “typically found in the community.” Such a change is inconsistent with the Department’s long-standing interpretation that has existed since at least 1997 and benefits individuals with disabilities by expanding access to employment opportunities in the competitive labor market. As explained in the Overview to the FAQs, the Department’s interpretation fully supports the mission of the VR program and the provision of VR services leading to high-quality employment outcomes for individuals with disabilities. In addition, we disagree that the other recommended changes are necessary because these updated FAQs make clear that VR agencies are not to make “blanket determinations” when conducting case-by-case analyses of the integrated nature of the employment location for the individual’s job position, including those in community rehabilitation programs (CRPs). Instead, they may consider multiple factors, in addition to whether the job complies with a direct labor-hour ratio requirement, when determining if a job position at a CRP is in an integrated location.

Many commenters expressed appreciation for the jobs listed in the response to proposed Q10 (current Q8) that could be found by a VR agency, when conducting its case-by-case analysis, to be typically found in the community and in integrated locations, although some of these commenters also recommended clarification. For example, they asked that we clarify that centers for independent living (CILs), protection and advocacy (P&A) programs, and other entities serving individuals with disabilities that affirmatively hire and promote individuals with disabilities are “typically found in the community” and, thus, integrated locations. Similarly, some commenters asked that we make the same clarification for disability-owned businesses that affirmatively hire and promote individuals with disabilities, as well as Federal agencies that exercise affirmative hiring authorities for their positions.

We clarify in the response to current Q8 (formerly proposed Q10) that jobs in CILs, P&A programs, minority-owned businesses, and other employers that affirmatively hire and promote individuals with disabilities, but which are not CRPs, are “typically found in the community” and in “integrated locations” because, unlike CRPs, they are formed to meet the unique needs of individuals with disabilities, not for the specific purpose of employing them.

A few commenters recommended that the Department develop and adopt additional factors that could be used to determine if employment locations are typically found in the community, such as those used by the U.S. Court of Appeals for the Fourth Circuit in *Baltimore Goodwill Industries v. N.L.R.B.*, 134 F.3d 227 (4th Cir., 1998), to distinguish employment settings that are primarily rehabilitative from those in private industry. The factors used by the Court include discipline, competitive placement, productivity standards, counseling, and the terms and conditions of employment.

To acknowledge these other factors and address this comment, we have added Footnote 4 to current Q6 to explain the Court’s holding in this case is consistent with the Department’s long-standing interpretation of what is meant by “typically found in the community” for purposes of competitive integrated employment under the VR program. However, the Department does not adopt these additional factors through the FAQs.

Finally, we have renumbered proposed Q8 through Q10 as Q6 through Q8.

**Standard for Interaction in the Work Unit and Worksite**

Many commenters supported the emphasis in this section of the FAQs on the need for parity in the level and type of interaction among employees with disabilities and employees without disabilities across the work unit and the worksite. Some commenters stated that group employment settings seldom, if ever, satisfy all criteria for competitive integrated employment and asked that we add language in the updated FAQs clarifying the circumstances under which such settings would not be considered to satisfy the standard for interaction and to be “integrated locations.”

Some commenters opposed the Department’s interpretation of the standard for interaction that must be met for an employment location to be integrated and stated that the interaction criteria generally are too prescriptive, or that the level of parity cannot be ascertained. Some commenters asked that we revise the FAQs so that all interactions during the workday, including social interactions and not just interactions for the purpose of performing the job, are considered. Some commenters also asked that the term “work unit” be removed from the regulations and FAQs because it treats employment for individuals with disabilities differently from any other employment and that interaction only be assessed across the entire worksite. Other commenters asked that we update the FAQs by expanding interactions to include those with colleagues, vendors, customers, or any other individual that the employee may come in contact with during a workday. Some commenters stated the FAQs should make clear that there is no presumption against a janitorial or landscaping job being in an integrated setting simply because the job arises under a State or Federal contract intended to increase employment for individuals with disabilities.

Finally, a few parties commented that a numerical standard would be difficult to apply across employment sectors, agreeing with the Department’s position in the proposed FAQs that the quality of each interaction more adequately portrays integration than statistical analysis. However, one commenter stated that it is possible to identify a numerical standard of individuals with disabilities versus those without disabilities when ascertaining if a location is integrated. Still other commenters stated that the response to proposed Q16 (current Q14) was in conflict with the response to proposed Q9 (current Q7) because it stated clearly that no ratio would, in and of itself, qualify or disqualify a job position from being considered competitive integrated employment, whereas the response to proposed Q9 (current Q7) stated that direct labor-hour ratio requirements likely indicate that an employment position is in a non-integrated location.

We agree that group employment settings and enclaves often do not satisfy the interaction standard and are generally not “integrated locations.” Therefore, we have added the following language to the response to current Q13 (formerly proposed Q15) in the updated FAQs: “To the extent that an organization divides its crews or enclaves on the basis of disability status so that crews are comprised primarily of persons with disabilities or entirely of non-disabled persons, such that persons with disabilities would not have regular interactions, while performing their job duties, with non-disabled persons at either the worksite or work unit levels, such crews or enclaves would not be considered “competitive integrated employment,” as defined at 34 C.F.R. § 361.5(c)(9). Interaction with program staff and/or staff supervisors does not constitute “regular interactions” with non-disabled persons for purposes of the definition of ‘competitive integrated employment.’” We also direct readers to the response to Q16 for a more detailed discussion about the case-by-case analysis VR agencies must conduct to determine whether a job position satisfies the definition of “competitive integrated employment.”

We disagree that the standard for interaction is too prescriptive and decline to substantively change the guidance contained in this section of the FAQs regarding when interaction between individuals with disabilities and others without disabilities is to be considered for purposes of an “integrated location.” We also disagree with the recommendation to remove “work unit” from the regulatory definition of “competitive integrated employment” and from these FAQs. Such an action would require a regulatory change. We continue to maintain it is the interaction that occurs between employees with disabilities and those without disabilities within the “work unit” that provides the clearest indication of parity. However, we understand that readers may have been confused by the references to ratios in the responses to proposed Q9 (current Q7) and Q16 (current Q14). We have revised the response to Q14 in the updated FAQs to clarify the distinction between the two answers. Specifically, we make clear that the inability to identify a numerical standard that would signify a position is in an integrated employment location, as discussed in the response to Q14, is distinct from the reference in the response to Q7 to businesses that are required by Federal law (*i.e.*, the JWOD Act) to meet a direct labor-hour ratio requirement.

Although not in response to comments, we have moved the discussion of telework, formerly found in the Standard for “Typically Found in the Community” section of the proposed FAQs to this section of the updated FAQs. This form of employment is more appropriately discussed in the context of the interaction it affords individuals with disabilities, as we have done since first promulgating the definition of an “integrated setting” in 1997, and not with respect to the standard for “typically found in the community.”

We have renumbered proposed Q11 through 16 as Q9 through Q14.

**Case-by-Case Analysis**

Many commenters were supportive of the FAQs’ emphasis on the importance of VR agencies and counselors performing a case-by-case analysis of job positions to determine if they meet the definition of “competitive integrated employment.” Commenters viewed such analyses as essential and considered the focus on a case-by-case analysis as a positive step. However, other commenters expressed concern that VR agencies inconsistently applied case-by-case analyses, so that jobs in some States were determined not to meet standards for competitive integrated employment while in other States similar jobs were found to satisfy the definition’s criteria. Similarly, comparable employment settings in the same State were deemed to meet the standards for competitive integrated employment in some nonprofit agencies and not in others. Finally, some commenters referenced a “blanket approach” taken by VR agencies in which no jobs in nonprofit agencies under the JWOD Act and similar State law were considered to be competitive integrated employment. Some of these commenters suggested that all jobs in these nonprofit agencies should be considered competitive integrated employment, and others alternatively recommended that we provide training and technical assistance to ensure State VR agencies conduct proper case-by-case analyses.

We disagree with those commenters requesting that the Department determine all employment opportunities provided by nonprofit agencies, including CRPs, under the JWOD Act and similar State law are competitive integrated employment, and we maintain the case-by-case analysis as the basis for determining whether a position meets the definition’s criteria. In clarifying the factors for consideration in a case-by-case analysis, the updated FAQs will help to minimize the inconsistent application of those factors by VR agencies. In the response to current Q16, we also include additional information on factors that a VR agency should consider when conducting a case-by-case analysis to determine whether a job position, particularly in a CRP, is “competitive integrated employment” for purposes of the VR program. The Department will provide follow-up technical assistance through various resources such as the RSA-funded technical assistance centers to ensure an understanding of the case-by-case analysis.

We have renumbered proposed Q17 and Q18 as current Q15 and Q16.

**Informed Choice**

Several commenters expressed support for the information in this section of the proposed FAQs, although they requested modifications. They suggested that the proposed FAQs did not go far enough in describing how VR agencies should inform individuals with disabilities of their employment options, and recommended that we expand this discussion, for example, by adding the impact of competitive integrated employment on public benefits to the list of information individuals with disabilities may need when making an informed choice about their employment options. Others commented that the discussion in the FAQs should be consistent with the purpose of the Rehabilitation Act to support competitive integrated employment and less emphasis should be placed on segregated, non-competitive employment as a choice of employment.

We have restructured the questions in this section of the updated FAQs, removed redundancies, and made clarifications in response to comments. We expand in the updated FAQs the discussion of how the VR program ensures that individuals with disabilities exercise informed choice in making decisions about services and employment, referencing the Department’s long-standing policy, as stated in RSA-Policy Directive (PD)-01-03 (Jan. 17, 2001), that informed choice is a decision-making process that occurs throughout the individual’s experience in the VR program. We also address in the updated FAQs how a VR agency can help an individual with a disability to exercise informed choice when considering employment, adding specific references to benefits counseling and the benefits of competitive integrated employment to the list of discussion topics that VR counselors should address with individuals with disabilities to assist them in making an informed choice about employment options. Furthermore, we include a discussion of the DOJ Statement that explains the affirmative duty of a public agency under Title II of the Americans with Disabilities Act (ADA) to guard against segregation by ensuring opportunities for individuals with disabilities to make informed choices. Finally, we confirm that an individual who wishes to receive services and supports through the VR program must choose to pursue an “employment outcome,” clarifying that only competitive integrated employment and supported employment are allowable employment outcomes for purposes of the VR

program.

We have renumbered proposed Q3, Q19 and Q20 in this section of the updated FAQs as Q17 through Q19.

**Referral and Training**

Several commenters expressed their appreciation that the FAQs clarify that, when exercising informed choice, it is permissible under the VR program for individuals with disabilities to participate in both integrated and non-integrated training and work experiences while pursuing an employment outcome under the VR program.

In response to comments, we have revised the responses to proposed Q21 and Q22, which have been renumbered as Q20 and Q21. We clarify in the response to current Q21 that, while the DOJ Statement makes clear that public entities must provide services in the most integrated settings appropriate to the needs of qualified individuals with disabilities, the Rehabilitation Act is silent in most instances on this point and VR program regulations specifically require VR agencies to inform individuals with disabilities who choose to pursue non-integrated employment that training is available in these settings for the purpose of preparing for competitive integrated employment.

Some commenters recommended that we include a discussion of the benefits of providing services and training in integrated settings versus non-integrated settings. They commented that the use of segregated employment settings such as sheltered workshops as a training placement or as a setting to prepare for competitive integrated employment is inconsistent with the ADA, employment research, and professional literature. We decline to include a discussion of the merits of various training settings allowed under the VR program in response to current Q21 because the purpose and scope of the updated FAQs is to explain the requirements and what is permissible under the Rehabilitation Act and its implementing regulations. A number of commenters expressed concern that VR agencies are not making referrals to CRPs for employment, suggesting that VR agencies should be required to inform all VR program applicants of employment opportunities in these settings. We disagree that all VR applicants should be informed about non-competitive integrated employment opportunities in CRPs operating under the JWOD Act or similar State law. VR program applicants with disabilities who specifically express a goal of working in non-integrated employment settings, as well as eligible individuals who decide during the VR process that competitive integrated employment does not meet their individual employment goals, are ineligible for VR services. In accordance with 34 C.F.R. § 361.37(b), VR agencies must refer these individuals to appropriate programs and service providers best suited to address the specific rehabilitation, independent living, and employment needs of individuals who make an informed choice not to pursue an “employment outcome” under the VR program, as defined in 34 C.F.R. § 361.5(c)(15). We clarify in the response to current Q20 the requirements that must be met before making a referral of an individual who has made an informed choice to pursue another opportunity outside of competitive integrated employment.

For further information about the Department’s guidance processes, please visit <https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html>.