

**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND
REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
WASHINGTON, DC 20202**

TECHNICAL ASSISTANCE CIRCULAR
RSA-TAC-02-01
DATE: February 11, 2002

TO : STATE VOCATIONAL REHABILITATION AGENCIES
(GENERAL)
STATE VOCATIONAL REHABILITATION AGENCIES
(BLIND)
STATE REHABILITATION COUNCILS
CLIENT ASSISTANCE PROGRAMS
REGIONAL REHABILITATION CONTINUING EDUCATION
PROGRAMS
AMERICAN INDIAN VOCATIONAL REHABILITATION
SERVICES PROJECTS
RSA SENIOR MANAGEMENT TEAM

SUBJECT : ASSESSMENTS OF INDIVIDUALS WITH SIGNIFICANT
DISABILITIES UNDER THE STATE VOCATIONAL
REHABILITATION SERVICES PROGRAM

BACKGROUND: This Technical Assistance Circular (TAC) clarifies the process that must be followed in assessing whether individuals with disabilities, particularly those with significant or the most significant disabilities, are eligible under the State Vocational Rehabilitation Services Program (VR program) which is authorized by Title I of the Rehabilitation Act of 1973, as amended (Act). This TAC follows the recent revision to the scope of available employment outcomes under the VR program to include only outcomes in integrated settings.

On January 22, 2001, amendments to the definition of the term “employment outcome” in regulations for the VR program were published in the Federal Register (66 FR 7249). These final regulations amended the definition of “employment outcome” in 34 CFR 361.5(b)(16) to read:

“(16) Employment outcome means, with respect to an individual, entering or retaining full-time or, if appropriate, part-time competitive employment, as defined in Sec. 361.5(b)(11), in the integrated labor market, supported employment, or any other type of employment in an integrated setting, including self-employment, telecommuting, or business ownership, that is consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. (Emphasis added).

The term “integrated setting” -- defined in 34 CFR §361.5(33)(ii) as a "setting typically found in the community in which individuals with disabilities interact with non-disabled individuals to the same extent that non-disabled individuals in comparable positions interact with other persons -- was unchanged by the regulatory amendments.

The revised regulations included in the January 22, 2001 Notice became effective for all designated State VR agencies on October 1, 2001 (as explained in a subsequent Federal Register Notice, 66 FR 8870). The primary purpose of the change to the definition of “employment outcome,” and the conforming changes to other regulatory provisions in 34 CFR 361, was to ensure that persons with disabilities participating in the VR program, particularly those with significant disabilities, are assisted by State Vocational Rehabilitation (VR) agencies in pursuing employment in integrated settings in the community. In that regard, the Rehabilitation Services Administration (RSA) determined that, consistent with the Act, narrowing the scope of available employment outcomes under the VR program to competitive employment, supported employment and other forms of integrated employment was necessary to both provide individuals with significant disabilities employment opportunities in settings comparable to non-disabled individuals and to ensure that individuals with significant disabilities are not routinely placed in extended employment (i.e., sheltered work settings) based on the view that they are only capable of sheltered work as opposed to integrated employment in the community.

This TAC is intended to address a key issue related to the promulgation of the revised regulations. Specifically, we wish to emphasize the process that State VR agencies must follow in assessing whether an individual with a disability, including an

individual with a significant disability (defined in section 7(21)(A) of the Act and 34 CFR 361.5(b)(31)) and an individual with a most significant disability (defined in section 7(21)(E) of the Act and 34 CFR 361.5(b)(30)), is eligible under the VR program. This Circular is particularly necessary since all participants in the VR program are now required to pursue employment in an integrated setting in order to receive services under the VR program.

We note that the January 22, 2001 Federal Register Notice also includes a number of other changes to the VR program regulations that are related to the revised definition of the term “employment outcome,” and also includes extensive guidance material concerning the justification and consequences of the revised definition. In particular, the revised regulations require VR agencies to refer to local extended employment providers (e.g., community rehabilitation programs) individuals with disabilities who make an informed choice to pursue extended employment after the State unit has informed the individual of the nature of the VR program, the individual’s integrated employment options, and other important information specified in the regulations (see 34 CFR 361.37(b) of the revised regulations). The guidance in the Appendix also makes clear that extended employment remains a viable, interim option for purposes of preparing participants in the VR program for employment in integrated settings and a long-term employment option through sources other than the VR program for those individuals who prefer to work in extended employment facilities. Please refer to pages 7252 - 7253 of the January 22, 2001 Federal Register Notice for additional regulatory changes and to the Questions and Answers on Pages 7254 and the Analysis of Comments and Changes on Pages 7254 - 7258 of the notice for additional guidance material.

Below, however, is a description of the process that State VR agencies must follow in assessing whether individuals with disabilities, including individuals with significant and the most significant disabilities, are eligible under the VR program. By clarifying the eligibility process, we intend to ensure that eligibility assessments for persons with significant and the most significant disabilities are properly conducted and are not prematurely discontinued or otherwise conducted in a manner that is inconsistent with VR program requirements.

DISCUSSION:

The eligibility criteria for the VR program are specified in section 102(a) of the Act and 34 CFR 361.42 of the program regulations. According to these requirements, an individual is eligible to receive VR services if he or she is “an individual with a disability,” meaning that the individual has a physical or mental impairment that results in an impediment to employment and can benefit in terms of an employment outcome from VR services. The individual also must require VR services in order to prepare for, secure, retain, or regain employment. (See Sections 7(20)(A) and 102(a)(1) of the Act and 34 CFR 361.5(b)(28) and 361.42(a)(1)).

In applying the eligibility criteria to individuals with disabilities seeking VR services, particularly individuals with significant and the most significant disabilities, it is critical to note that both the Act and regulations specify that any individual seeking VR services is “presumed” able to benefit in terms of an employment outcome from VR services unless the State VR agency can demonstrate by clear and convincing evidence that the individual is incapable of benefiting in terms of an employment outcome under the VR program due to the severity of the individual's disability. (See section 102(a)(2)(A) of the Act and 34 CFR 361.42(a)(2)). For guidance purposes, “clear and convincing evidence” is described in a Note following 34 CFR 361.42 as, in part, the highest standard in our civil system of law whereby State agencies must have a high degree of certainty before concluding that an individual is incapable of benefiting from services in terms of an employment outcome. The term “clear,” as stated in the Note, means unequivocal.

Given that, as of October 1, 2001, employment outcomes under the VR program are limited to employment in integrated settings, the presumption that all individuals are able to benefit in terms of an “employment outcome” from VR services means that all individuals, including those with significant or the most significant disabilities, are presumed capable of working in an integrated setting provided that they are furnished necessary VR services. The expectation established by both the Act and regulations through, for example, the priority the Act affords individuals with significant disabilities under the order of selection requirements (see 101(a)(5) of the Act and 34 CFR 361.36) and through the presumption of benefit described above -- is that individuals with

significant disabilities are capable of working in integrated settings in the community and that VR agencies should assist those individuals in that pursuit. Although some individuals seeking VR services may, in light of the severity of their disability, be considered by State VR agencies unable to perform work in an integrated setting, the agency must establish clear and convincing evidence to that effect before determining that the individual is ineligible for VR services.

The Act and regulations also specify steps that must be taken by State VR agencies before it can establish "clear and convincing evidence" demonstrating that an individual is incapable of working in an integrated setting. Section 102(a)(1)(B) of the Act states that in order to demonstrate by clear and convincing evidence that an individual cannot benefit in terms of an employment outcome from VR services due to the severity of the individual's disability, the State VR agency shall:

“(B) [E]xplore the individual’s abilities, capabilities, and capacity to perform in realistic work situations, through the use of trial work experiences, with appropriate supports. . . .”

Based on this authority, the regulations at 34 CFR§361.42(e) require the agency to develop a written plan for assessing the individual's progress during trial work experiences and specify that:

- The individual's abilities, capabilities, and capacity to perform in realistic work situations must be periodically assessed;
- Trial work experiences must be conducted in realistic work settings;
- Necessary and appropriate supports, including assistive technology devices and services and personal assistance services, must be provided to accommodate the rehabilitation needs of the individual during the trial work experiences; and
- Trial work experiences must be of sufficient variety and over a sufficient period of time to result in sufficient evidence to conclude either that: (1) the individual can benefit in terms of an employment outcome from VR services (i.e., is capable of working in an integrated setting) in which case the individual is

eligible for VR services, or (2) there is “clear and convincing evidence” to the contrary (i.e., clear and convincing evidence that the individual cannot work in an integrated setting due to the severity of the individual’s disability) in which case the individual is ineligible for VR services (and must be referred to a local extended employment provider in accordance with 34 CFR 361.37 as revised by the regulations published in the January 22, 2001 Federal Register Notice; the procedures for making ineligibility determinations in 34 CFR 361.43 must also be followed). (See Sections 7(2)(D) and 102(a)(2)(B) of the Act and 34 CFR§361.42(e)).

Notably, the regulations also describe the State VR agency’s obligations in instances in which an individual cannot take advantage of trial work experiences or if options for trial work experiences have been exhausted without the agency being able to determine whether the individual is eligible for VR services.

Please refer to the provisions of 34 CFR §361.42(f) for information concerning the required use of extended evaluation under such circumstances.

We’ve described this step-by-step approach to the eligibility process in order to highlight the steps that must be followed in determining whether an individual with disability, particularly an individual with a significant disability and an individual with a most significant disability, is capable of integrated employment and, correspondingly, eligible under the VR program. We caution State VR agencies that they must ensure that the full scope of the eligibility requirements discussed above are satisfied rather than determining an individual ineligible for VR services based on a belief or limited information indicating that the individual is too severely disabled to perform work in an integrated setting. If a State VR agency conducts only a limited assessment, meaning that it has insufficient information to demonstrate conclusively that the individual does not have the ability or capacity to work in an integrated setting, then an individualized assessment must continue until such time that clear and convincing evidence is established, or the individual is found to be capable of working in an integrated setting. Because an individualized assessment, including the trial work experiences component, must be carried out until either of these results is reached, agencies also must not impose arbitrary time limits on eligibility assessments. As we stated in the

Appendix to the January 22, 2001 Federal Register Notice, in the absence of clear and convincing evidence following a trial work assessment of the individual's abilities (or, as appropriate, an extended evaluation under 34 CFR 361.42(f)), VR agencies must consider each individual, including those with the most significant disabilities, capable of achieving integrated employment.

CONCLUSION: The Act and regulations prohibit determining any person with a disability, including any individual with a significant or a most significant disability, ineligible under the VR program based on an assumption, belief, or limited information that the individual is incapable of working in an integrated setting. When there is doubt regarding an individual's ability to benefit from VR services in terms of employment in an integrated job setting due to the severity of the individual's disability, the Act and the regulations require the State VR agency to conduct an individualized assessment that includes the provision of trial work experiences in realistic work settings until such time that the individual is found capable of working in an integrated setting (when provided appropriate VR services) or there is clear and convincing evidence that the individual cannot perform such work.

**CITATIONS
IN LAW :** Sections 7(2), 7(20)(A), and 102(a) of the Rehabilitation Act of 1973, as amended.

**CITATIONS
IN
REGULATIONS:** 34 CFR §§361.5(b)(16), 361.5(b)(28), 361.5(b)(33), 361.36, 361.37, and 361.42.

**EFFECTIVE
DATE :** Issue Date

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EXPIRATION

DATE : Until Retired

INQUIRIES : RSA Regional Commissioners

Joanne M. Wilson
Commissioner

cc: CSAVR
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