

THE STATE EDUCATION DEPARTMENT
COMMISSIONER OF EDUCATION

[REDACTED]

Petitioner

Against

OFFICE OF ADULT DEVELOPMENT AND CONTINUING EDUCATION
SERVICES (ACCES-VR)

Respondent

FINAL DISPOSITION AND ORDER

Hearing Officer:

[REDACTED]

Date of Hearing:

[REDACTED]

Location of Hearing:

[REDACTED]

For Petitioner:

[REDACTED] *se* [REDACTED] 6K

For Respondent:

[REDACTED]

By letter dated [REDACTED] the Office of Adult Career and Continuing Education Services (ACCES) of the New York State Department of Education (“the Agency”) appointed me to act as the Impartial Hearing Officer (IHO) in a case brought by Petitioner under the federal Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) (Ex. I.) Petitioner requested the hearing by filing a due process complaint with the Agency by letter dated [REDACTED] (Ex. II.) The hearing was conducted on [REDACTED] at [REDACTED] [REDACTED]. I received the transcript on [REDACTED].

Petitioner was present at the hearing and appeared *pro se*. The Agency was represented by [REDACTED] [REDACTED] a Vocational Rehabilitation Counselor at the Agency’s [REDACTED] testified for the Agency. (Ex.3). Petitioner testified in support of [REDACTED] claims.

A list of exhibits introduced as evidence at the hearing is attached to this decision.¹

ISSUE

Whether or not the Agency provided a timely evaluation and whether any failure to provide or amend the IPE for the period from 2011 is justified as a consequence of a failure to receive appropriate information.

POSITIONS OF THE PARTIES

The Agency claims it acted appropriately and developed an IPE and that any delays in amending it were a consequence of Petitioner’s failure to provide necessary information and/or cooperate with Agency efforts to obtain that information. The Agency claimed that the case was closed in [REDACTED] after the filing of the Impartial Hearing request, because the Agency was

¹ References to the transcript are specified as (T. --). References to Exhibits are specified as (Ex.--).

unable to obtain the necessary information. (T. 27-29) It is willing to reopen this matter if certain information it believes is required is provided. (T. 29, 63).

Petitioner claims [REDACTED] cooperated fully with regard to Agency requests and that substantial delay was caused by Agency staff action or inaction and not attributable to [REDACTED]

RELEVANT LAWS, REGULATIONS AND POLICIES

ACCES-VR is the New York State Agency authorized to administer federal funds under the Rehabilitation Act of 1973 (the Act), which is codified at 29 U.S.C. 701 et seq. The Agency administers a federal program under Title 1 of the Act to assist eligible individuals in achieving their employment goals. The purpose of the Act is to develop comprehensive programs that will maximize the employment of disabled individuals and their integration into society. (2 (b)) of the Act). However, despite its broad reach, the Act specifically provides that it is not intended to confer any entitlement to vocational rehabilitation services. (102(a) (3)(B) of the Act).

To implement the Act at the state level, the Agency has promulgated various written policies. Of particular relevance to this case are the Consumer Involvement Policy. (Ex. B). Also relevant in this matter is the decision of the New York Supreme Court Appellate Division in *Matter of Goldstein*, 199 A.D. 2d 766 (3rd Dept., 1993). (Ex.C).

The Consumer Involvement Policy establishes various mechanisms that allow the consumer to play a major role in developing █ personal Individual Plan for Employment (IPE). It also notes, in pertinent part, that further medical and/or vocational assessments may be needed and that individuals will be assisted so that they may make informed choices about that need. However, this policy specifically provides that the consumer does not have the complete control over █ program and that “VR counselors must review, consider, and approve all IPE’s [and that] they will apply their professional judgement; vocational rehabilitation expertise, applicable laws and regulations and policies; sound planning, considerations; and responsible use of public funds.” (Ex. B at p.2).

In accordance with *Matter of Goldstein*, the opinion of VESID counselors may be relied upon by hearing officers when deciding cases involving rejection of consumer requests for services. (Ex. C.)

FINDINGS AND CONCLUSIONS

The persuasive evidence in this matter shows the following:

From at least 2011, Petitioner had been receiving services through the Agency's [REDACTED] office. An IPE had been developed pursuant to which the student had commenced requested training in massage therapy for which the Agency funds had been expended. Disagreements concerning certain aspects of the program had resulted in at least one Impartial Hearing. (T. 93-96, 102-104).

However, the Agency was continuing to work with Petitioner with regard to an amendment of the IPE. At the request of Petitioner, [REDACTED] case was transferred to the Agency's [REDACTED] office. [REDACTED] was [REDACTED] vocational rehabilitation counselor in the [REDACTED] facility. (T.95, 104-105). [REDACTED] reviewed [REDACTED] file and thereafter met with [REDACTED] for the first time on [REDACTED]. At the meeting, Petitioner's educational background was discussed as well as the need to schedule a psychological assessment pursuant to the prior recommendation of the [REDACTED]. Petitioner agreed to the evaluation but told [REDACTED] would prefer to do it later because of housing and various legal issues which required [REDACTED] attention. Petitioner called [REDACTED] in [REDACTED] to discuss scheduling as [REDACTED] agreed to do, and told [REDACTED] [REDACTED] would be available in [REDACTED] for a comprehensive psychological evaluation. (T. 110-111) It is undisputed that Petitioner had authorized the release of information for the evaluation. (T.48-51)

In [REDACTED] called Petitioner with regard to the evaluation. Although Petitioner did not return [REDACTED] call [REDACTED] was informed shortly thereafter that [REDACTED] had retained the Client Assistance Program operated by Disability Rights New York (CAP) to represent [REDACTED] (T.49-50). A referral to [REDACTED] for a Comprehensive Psychological Evaluation (the evaluation) was made and an appointment was to be scheduled. (T.50). There is a dispute concerning how quickly the referral occurred after the Agency attempts commenced efforts to locate one. (T. 50, 109-110). I find credible [REDACTED] testimony that the referral was made shortly after the notification of the CAP representation and not that it does not appear that Petitioner was directly interacting with the Agency at that time. (T.50: See also T. 122 which indicates Agency difficulties in the identification of an evaluator, alleged by Petitioner, occurred while Petitioner was engaged in other matters and unavailable.) It is noteworthy, however, that delay in obtaining the evaluation has not been asserted by the Agency as a basis for its finally closing this matter and there is nothing in evidence indicating that Petitioner was responsible for any delay after April [REDACTED]

[REDACTED] evaluation was conducted on [REDACTED] and the report received by the Agency on [REDACTED] (T. 50,55). [REDACTED] noted that Petitioner wanted to pursue a career as a [REDACTED] but [REDACTED] concluded that that was not feasible for various reasons. [REDACTED] also noted that absence of certain recent medical/psychological records. [REDACTED] recommended supportive psychotherapy be continued and a frank discussion of the report's findings and discussion of a broader range of [REDACTED] vocational options, after, perhaps, a Diagnostic Vocational Evaluation ("DVE"). (T.51, Ex.7).

[REDACTED] was contacted by a CAP representative in September who was provided with a copy of the evaluation and who went over Petitioner's folder independently and with [REDACTED].

(T.55-56) CAP staff had been “been actively working” with Petitioner since [REDACTED] when [REDACTED] contacted it and claimed that [REDACTED] was experiencing difficulty in communicating with [REDACTED] counselor and had not received any services towards [REDACTED] vocational goal. (Ex.5) After the evaluation was concluded Petitioner also made independent efforts to review the report with [REDACTED] (T.113).

By letter to Petitioner dated [REDACTED] CAP noted that Petitioner had told it on [REDACTED] that [REDACTED] was no longer interested in receiving services from it and that therefore [REDACTED] case was closed effective [REDACTED] Petitioner was advised that a new file could be opened if was seeking CAP assistance in the future. (Ex. 5). Petitioner testified with regard to [REDACTED] termination of CAP services that [REDACTED] had informed CAP [REDACTED] wanted to file an Impartial Hearing Request and it disagreed. (T. 118, 136).

By letter to Petitioner also dated [REDACTED] [REDACTED] enclosed a copy of the evaluation, informed [REDACTED] that the Agency would send a copy to [REDACTED] doctor at the option of Petitioner and upon receipt of a release (form enclosed) and that, as [REDACTED] requested, a meeting had been arranged to discuss the report and [REDACTED] vocational options. The meeting was scheduled for [REDACTED] (T. 56-57, Ex. 3). The Agency had been informed by CAP that it was no longer representing Petitioner. (T.58). [REDACTED] testified that Petitioner neither appeared nor called to cancel the appointment and that no other appointment had been made. (T. 58, 88-89) Petitioner testified that the appointment was canceled by [REDACTED] via voicemail and, initially asserted that others had been cancelled by [REDACTED] previously. (T. 118) However, I find that testimony unreliable and note that Petitioner subsequently acknowledged that was the first appointment after the evaluation that had actually been made although other dates had been

discussed. (T. 113, 116). I conclude that Petitioner is misremembering the circumstances of [REDACTED] failure to participate in [REDACTED] meeting.

Shortly thereafter, the Agency became aware of Petitioner's Impartial Hearing request [REDACTED] and decided to wait until a determination was made with regard to that before taking any further action. (T.59, 61) At some point thereafter (discussed below) the Agency Quality Assurance Unit staff rejected entitlement to hearing having concluded that it raised the same issues that were the subject of a prior hearing. (T. 60-61) Although the precise date is not in the record, that appears to have occurred by [REDACTED]

In [REDACTED] again wrote to Petitioner concerning the need for a meeting and additional information, noting that [REDACTED] had not responded in November or thereafter and stating that if [REDACTED] did not contact the Agency within 10 days, it would be assumed [REDACTED] was no longer interested in its services and the case would be closed. (T. 59-60) No response was received by [REDACTED] and the case was closed. (T59-60) Although Petitioner initially denied having received anything stating that the Agency had closed the case and initially denied having received anything stating that the Agency had closed the case and denied knowledge of that until the following summer, [REDACTED] later stated that CAP had told [REDACTED] it was going to handle the matter and [REDACTED] was not to communicate with the Agency. (T. 119, 121)

As specified above, the request for a hearing had been initially denied by the Agency's Quality Assurance Unit. In [REDACTED] however, Petitioner contacted CAP and requested assistance with regard to that denial. CAP thereafter successfully advocated to have the denial rescinded by [REDACTED] the Agency was in the process of scheduling a hearing.² However,

² There is nothing in the record; specifying the precise date the decision was rescinded or the reason for the delay until the end of September in scheduling the instant hearing.

by phone on [REDACTED] and in emails thereafter Petitioner communicated to CAP that [REDACTED] no longer wished to obtain CAP services. CAP therefore informed [REDACTED] that it would not be representing [REDACTED] in the instant hearing and that [REDACTED] CAP case has been closed. (Ex. 4)

With regard to the information needed to proceed with an amended IPE, [REDACTED] acknowledged that Petitioner had signed all releases requested and had voluntarily provided certain medical records in their [REDACTED] meeting. (T. 65,67, 74-76) However, [REDACTED] testified that had it appeared that there was insufficient current psychiatric and other medical information, and, further, that the Agency believed, after consideration of the evaluation, that a DRE was required. (T. 63-69) The Agency requires information from within the past year. (T.68-69) Pursuant to Agency procedure, Consumers are requested to sign releases and then to instruct their physicians to send the requested information and inform them that if a release was required by the physicians they should contact the Agency which would provide a copy of the previously signed release. (T.67, 77-79) No requests for a release were made to the Agency and information from only one Petitioner's psychiatrists and that only through [REDACTED] was thereafter received. (T.77) All material received was thereafter provided to [REDACTED] prior to the evaluation. (T. 80) [REDACTED] acknowledged that there was no communication with Petitioner concerning the need for additional medical information. (T. 81-83) That would have been done at the proposed [REDACTED] meeting. (T.83-84). Thereafter, there was no communication concerning this with Petitioner until the case was closed. Further, there was no request made for a DVE. (T.136)

Petitioner testified that [REDACTED] informed [REDACTED] that the releases had to be sent to the physicians to obtain information. (T122) [REDACTED] also testified in this proceeding that one of [REDACTED] physicians was unwilling to send information regardless of any release issued because [REDACTED]

believed [REDACTED] had a conflict of interest arising from [REDACTED] relationship with the Agency in other matters. (T123-125) Petitioner also claimed that the information actually received by the Agency was the most updated information then available for various reasons. (T. 125-128) The above claims/information was not provided to the Agency prior to this proceeding. (T. 115-116)

I conclude from the foregoing that the time of the initial filing of the hearing request in [REDACTED] the Agency was actively attempting to obtain information that in the professional judgement of Petitioner's counselor was necessary for the development of an appropriate IPE and that the determination was within [REDACTED] authority and based on [REDACTED] expertise. Further, the evidence presented in this hearing does not show that the Agency was dilatory with regard to those efforts or in this matter and I conclude from the testimony herein that it was not.

The Agency closed the case in [REDACTED] after the Petitioner failed to respond to another request for a meeting with regard to additional information that was needed. Petitioner has acknowledged that [REDACTED] was aware of the request and did not respond but claims that was on the advice of CAP counsel in view of the ongoing issue of denial of the requested hearing. There has been no evidence supporting the claim that [REDACTED] was instructed not to cooperate with the Agency. In any event, Petitioner's reliance on that advice does not support a conclusion that the closure at that time was improper or should be rescinded.

In this proceeding, the Agency stated that it is willing to reopen this matter at the request of Petitioner but will require the provision of certain information if it is available and may also require other evaluative material in connection with the development of an IPE. Should reopening be requested Petitioner and the Agency will have an opportunity to clarify and verify the reasons for any deficiencies the Agency at that believes are in medical records provided.

This matter is DISMISSED.

Dated:

[REDACTED]

[REDACTED]

Impartial Hearing Officer

EXHIBITS

ARBITRATOR EXHIBIT NO.

- I* Letter of Appointment dated [REDACTED]
- II* Consumer's Request dated [REDACTED]

PETITIONER EXHIBIT NO.

1. Letter dated [REDACTED] (DUPLICATE Pet. Ex. 5)
2. Authorization and Release for Psychological Report by [REDACTED]
3. Letter from ACCES-VR to Petitioner dated [REDACTED] enclosing Comprehensive Psychological Evaluation and scheduling a [REDACTED] appointment
4. Letter from [REDACTED] Esq. of Disability Rights New York CAP dated [REDACTED] re reopening of Impartial Hearing, Petitioner's refusal of CAP assistance and the closing of the CAP case.
5. Letter dated [REDACTED] from [REDACTED] DR NY CAP re CAP Assistance Determination and Case Closing, concerning Petitioner's [REDACTED] refusal of CAP assistance.
6. Letter dated [REDACTED], with enclosure envelope, from [REDACTED]
7. Copy of Comprehensive Psychological Evaluation of [REDACTED] conducted on [REDACTED] dated [REDACTED]

AGENCY EXHIBIT NO.

- A* ADMISSION DENIED (E-mail dated [REDACTED])
- B* Consumer Involvement Policy (100.00)
- C* *Matter of Arthur Goldstein*, 199 AD2d 766 (December 16, 1993)