

STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK, ADULT CAREER AND CONTINUING EDUCATION SERVICES- VOCATIONAL REHABILITATION

BEFORE: [REDACTED], HEARING OFFICER

In the Matter of [REDACTED]

APPEARANCES

FOR CONSUMER

[REDACTED]

FOR ACCES-VR

[REDACTED]

PRELIMINARY INFORMATION

By letter dated [REDACTED], the undersigned received notice of appointment from Anne Sternbach, Senior Vocational Rehabilitation Counselor, Adult Career And Continuing Education-Vocational Rehabilitation (“ACCES-VR”), as Hearing Officer pursuant to 8 N.Y.C.R.R. Part 247.4. (Hearing Officer Exhibit No. 1). A hearing was scheduled for [REDACTED]. The Consumer, [REDACTED] (“Consumer”) requested an adjournment. ACCES-VR did not oppose that request and a second Notice of Hearing was issued dated [REDACTED] again appointing me as the Hearing Officer and scheduling a hearing for [REDACTED] at the ACCES-VR [REDACTED]. (Hearing Officer Ex. 2). A hearing was then held at [REDACTED] on [REDACTED]. All parties had the opportunity to make opening and closing statements, to examine and cross examine witnesses and to present evidence. All parties were also advised of their right to appear with counsel; however, both parties chose to appear without counsel.

Since both sides were appearing *pro se*, the hearing, which lasted approximately two-hours, was conducted in an informal matter with the hearing officer asking several questions. Significantly, all parties were given the opportunity to be heard.

RECORD

A stenographic record of the hearing was made by Court Reporter [REDACTED]. The only exhibits introduced into evidence were Hearing Officer Exhibits 1 and 2 referenced above.

The record was deemed closed after the hearing on [REDACTED].

STATEMENT OF FACTS

There are no material factual disputes.

ACCES-VR began its presentation by explaining that they denied the Consumer’s request for additional training because the Consumer would not cooperate in their efforts to obtain an assessment of [REDACTED] skills and abilities.

The Consumer indicated that [REDACTED] thought such an assessment was a waste of public resources and [REDACTED] time. [REDACTED] explained that [REDACTED] needed additional training in the field of phlebotomy to be sufficiently competent to work with pediatric patients. Additionally, the Consumer indicated that [REDACTED] had difficulty communicating with [REDACTED] assigned counselor.

The Consumer is [REDACTED] and suffers from [REDACTED] which makes it difficult to find a job.

LEGAL ANALYSIS

The Federal Rehabilitation Act of 1973, 29 U.S.C. Sec. 701 is designed to assist disabled

individuals gain employment. The Act provides grants to states that choose to participate. New York has opted into this program, *See*, Education Law Sec. 1001 *et. seq.*

In New York, ACCES-VR administers vocational rehabilitation programs and has issued rules and regulations implementing same. *See*, 8 N.Y.C.R. Part 246; *Matter of Murphy v. Office of Vocational and Educational Services*, 92 N.Y. 2d 477 (1998) (discussing nature of ACCES-VR, formerly known as VESID); *Wasser v. NYS Office of Vocational and Educational Services*, 602 F.3d 476 (2d Cir. 2010) (same).

ACCES-VR regulations, 8 N.Y.C.R.R. Part 247.4(i) (2), require that this proceeding be governed by that State Administrative Procedures Act (“SAPA”). Section 306 of SAPA places the burden of proof on the party who initiated the proceeding which is the Consumer.

Section 306 of SAPA also requires that my decision be based upon consideration of the record as a whole and in accordance with substantial evidence. Both state and federal reviewing courts have given deference to decisions of Hearing Officers. *Fruci v. Mills*, 855 N.Y.S. 2d 795 (3rd Dep’t. 2008) (state court applies deferential substantial evidence standard to decision of Hearing Officer); *Wasser v. N.Y.S. Office of Vocational and Educational Services For Individuals with Disabilities*, 602 F. 3d 476 (2d Cir. 2010) (federal court applies deferential standard by affording “due weight” to decision of Hearing Officer).

The Court of Appeals in *Murphy, supra* held that ACCES-VR must make a case by case determination in order to determine whether support is appropriate. The Court described the policy goals underlying the statute as follows:

These invocations of the Act’s statutory purpose and policy statements manifest to us a determined Congressional intent to set some realistic boundaries to the scope of the Act, including specifically, empowerment of individuals by “providing them with the tools” and placing them in a position, competitive to that of nondisabled peers, so they might have the equal opportunity to achieve ‘maximum employment.’

Murphy, supra.

It has been judicially recognized that ACCES-VR needs to retain a certain amount of discretionary authority to ensure appropriate disbursement of funds, *Wasser v. N.Y.S. Office of Vocational and Educational Services*, 2008 WL 4070263 (E.D.N.Y. 2008) (n.o.r.), *affirmed*, 2010 WL 1688764 (2d Cir. April 28, 2010) (n.o.r.), and that ACCES-VR counselors are professionals who are given a measure of leeway to apply their professional judgment in appropriate circumstances. *Barbee v. Officer of Vocational and Educational Services*, 234 A.D.2d 646 (3rd Dep’t 1996).

Indeed, in *Goldstein v. Office of Vocational and Educational Services For Individuals With Disabilities*, 199 A.D.2d 766 (3d Dep’t. 1993), the court found that the opinion of a Rehabilitation Counselor which was supported by the opinion of other specialists provided substantial evidence to support the Agency’s decision to deny certain services. *Goldstein* also recognized that Consumers do not have complete control over their program.

CONCLUSION

Based upon the proceedings had herein, it is concluded that the below remedies/actions should be ordered.

REMEDIES/ACTIONS ORDERED TO IMPLEMENT CONCLUSION

1. That the Consumer shall be assigned to a different rehabilitation counselor from the [REDACTED] i.e., someone other than [REDACTED] within two weeks from ACCES-VR receipt of this decision; and
2. That the Consumer participate in a Job Placement/Work Tryout program in the Health Science profession within 20 miles of [REDACTED] home and with no requirement that [REDACTED] go over a bridge to get to work. Both sides understand that it may take some time for this placement to occur.

RIGHT TO APPEAL

This is a final decision of ACCES-VR. Any party that disagrees with this decision can appeal, as of right, by filing an Article 78 proceeding in a New York State Supreme Court or an action in United States District Court of appropriate jurisdiction under 29 U.S.C. Sec. 722(c)(5)(J)(i). *See, El v. VESID*, 2011 WL 288512 (E.D.N.Y. 2011) (n.o.r.) (discussing judicial review process).

SO ORDERED:

_____, 2017

[REDACTED]
Hearing Officer

CERTIFICATE OF SERVICE

This certifies that the Hearing Officer mailed a copy of this decision on _____, 2017 via regular U.S. mail to the following individuals:

1.

[REDACTED]

2.

[REDACTED]

[REDACTED]