

The University of the State of New York
The State Education Department
Office of Adult Career and Continuing Education Services
Vocational Rehabilitation (ACCES-VR)

In the Matter of an Impartial Fair Hearing between:

██████████ ██████████

DECISION

Consumer,

and

ADULT CAREER AND CONTINUING
EDUCATION SERVICES – VOCATIONAL REHABILITATION (ACCES-VR)

Respondent,

BEFORE:

██████████ ██████████ ESQ. HEARING OFFICER
██████████ ██████████
██████████ NY ██████████

APPEARANCES:

██████████ ██████████ Consumer
██████████ ██████████
██████████ NY ██████████

ADULT CAREER AND CONTINUING EDUCATION SERVICES -VOCATIONAL
REHABILITATION (ACCES-VR) NEW YORK STATE EDUCATION DEPARTMENT

██████████ ██████████
██████████ NY ██████████

BY: ██████████ ██████████ District Office Manager
██████████ ██████████ Senior VRC
██████████ ██████████ VRC
██████████ ██████████ Director of Counseling

Date: ██████████ 2016 and ██████████ 2016
Held: ██████████ ██████████ NY ██████████

PRELIMINARY STATEMENT

Consumer [REDACTED] also referred to herein, as appellant, commenced this appeal by way of due process request dated [REDACTED] 2016. I am an impartial Hearing Officer, approved by the State Education Department. I was appointed to conduct this hearing on this appeal by Kevin G. Smith, Deputy Commissioner of ACCES-VR. This appointment was set forth in a Notice of Hearing letter dated [REDACTED] 2016, which letter was signed by Anne Sternbach, Senior Vocational Rehabilitation Counselor.

HEARING DATES, APPEARANCES AND EVIDENCE

The consumer challenges a determination made by ACCES-VR on [REDACTED] 2016, wherein the consumer's case with ACCES-VR was closed. A hearing was held on this appeal at the New York State Education Department location at [REDACTED] [REDACTED] [REDACTED] in [REDACTED] New York. It commenced on [REDACTED] 2016, and concluded on [REDACTED] 2016. In attendance at the hearing on both dates were the following individuals on behalf of ACCES-VR: [REDACTED] Vocational Rehabilitation Counselor, [REDACTED] [REDACTED] District Office Manager, and [REDACTED] Director of Counseling. Also in attendance for ACCES-VR on the hearing date of [REDACTED] 2016 was [REDACTED] Senior Vocational Rehabilitation Counselor. In attendance for the consumer was [REDACTED]. Interpreter services were provided to the consumer by [REDACTED] and [REDACTED] of [REDACTED].

During the course of the hearing, testimony was presented by [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] on behalf of ACCES-VR and by [REDACTED] the consumer, on [REDACTED] behalf. The following documents were received in evidence:

Hearing Officer Exhibit 1-Due Process Request; Hearing Officer Exhibit 2-Notice of Hearing dated [REDACTED] 2016; Hearing Officer Exhibit 3 -Notice of Hearing Dated [REDACTED] 2016.

ACCES-VR Exhibit 1 Consumer Involvement Policy; ACCES-VR Exhibit 2 – Individualized Plan for Employment Policy and Procedure; ACCES-VR Exhibit 3 Chronological Case History/Important Events Case Note (Chronological Summary for [REDACTED] [REDACTED] ACCES-VR Exhibit 4- E-mail Communication between [REDACTED] [REDACTED] and [REDACTED] [REDACTED] and Notice of Intent to File Suit Signed by [REDACTED] [REDACTED] ACCES-VR Exhibit 5 Document marked for identification but not received in evidence; ACCES-VR Exhibit 6 – ACCES-VR letter dated [REDACTED] 2016, authored by [REDACTED] Closure Summary Case Note Dated [REDACTED] 2016 and [REDACTED] 2016, E-mail from [REDACTED], [REDACTED], directed to [REDACTED] ACCES-VR Exhibit 7- [REDACTED] 2016, Letter of [REDACTED] D.O., and two page medical assessment form signed by [REDACTED] D.O.; ACCES-VR Exhibit 8- ACCES-VR Monthly Progress for Supported Employment Forms.

Consumer Exhibit A- [REDACTED] 2016, E-mail communication between [REDACTED] and [REDACTED] [REDACTED] Consumer Exhibit B- [REDACTED] 2016 E-mail communication between [REDACTED] and [REDACTED] [REDACTED] Consumer Exhibit C- [REDACTED] 2016, E-mail communication between [REDACTED] and [REDACTED] [REDACTED] Consumer Exhibit D- [REDACTED] 2016; Consumer Exhibit E- [REDACTED] 2016, E-mail communication between [REDACTED] and [REDACTED] [REDACTED] Consumer Exhibit F- ACCES-VR Discharge Note with discharge date of [REDACTED] 16 and a signature of [REDACTED] on [REDACTED] 2016; Consumer Exhibit G- [REDACTED] 2016, E-mail communication between [REDACTED] [REDACTED] to [REDACTED] [REDACTED] Consumer Exhibit H- [REDACTED] 2016, e-mail communication between [REDACTED] [REDACTED] and [REDACTED]

██████████; Consumer Exhibit I- ██████████ 2016, Facsimile Transmittal Letter from ██████████
██████████ to ██████████ with an unofficial transcript from Walden University, a ██████████
2016, notice from Walden University and Certificates of Completion from Forensic Training
Institute, Psycho Educational Resources and Global Institute of Forensic Research; Consumer
Exhibit J- ██████████ 2016, letter authored by ██████████ ██████████

POSITION OF ACCES-VR

The consumer was determined to be eligible for services through ACCES-VR based on an impairment of deafness, and ██████████ thereafter received vocational services from ACCES-VR. ACCES-VR, Exhibit 3, page 1) ACCES-VR closed appellant's case and discontinued the provision of services to the appellant. The determination letter dated ██████████ 2016 (ACCES-VR Exhibit 6) states that the case was closed because appellant failed to make reasonable efforts to cooperate in carrying out ██████████ vocational plan. An ACCES-VR discharge note dated ██████████ 2016 elaborates upon this determination. (Consumer Exhibit F). It sets forth that the case was being closed because of several missed appointments by the consumer as well as failure to meet the expectations of ██████████ vocational rehabilitation counselor, ██████████. The document lists a failure to provide phone numbers for references, an unwillingness to secure a volunteer position and a lack of response from the consumer with respect to scheduling meetings, as examples of the consumer's failure to meet expectations. Although not listed in this discharge note, testimony was adduced at the hearing that the consumer failed to provide documentation regarding educational qualifications and medical documentation regarding a surgical procedure, was crude and disrespectful in communications with personnel and in an episode that occurred at the Hudson Valley Community College bookstore, was critical and threatened litigation and improperly secured the services of an interpreter for a court appearance. A chronological

summary of case notes also set forth specific instances of interaction between ACCES-VR and the consumer and was cited by ACCES-VR at the hearing in support of its contention that the consumer did not provide the level of cooperation for [REDACTED] case to remain open.

POSITION OF CONSUMER

The consumer challenged the allegations made by ACCES-VR. [REDACTED] maintained that [REDACTED] was not disrespectful in [REDACTED] interactions with personnel, but was merely exercising [REDACTED] free speech rights in expressing dissatisfaction with certain aspects of services provided by ACCES-VR. [REDACTED] challenged the characterization of events at the Hudson Valley Community College bookstore. [REDACTED] produced communications that demonstrated colloquy outlining [REDACTED] positions regarding volunteer services and phone numbers for references. Specifically, [REDACTED] challenged the necessity for volunteer services, particularly given [REDACTED] schedule, and [REDACTED] maintained that it would be deleterious to provide phone numbers, as references might resent being contacted excessively. [REDACTED] provided documentation showing that educational material was provided by way of facsimile transmittal dated [REDACTED] 2016. (Consumer exhibit 1). [REDACTED] also gave testimony that [REDACTED] was successful in securing employment with the U.S. Postal Service, but [REDACTED] disavowed that ACCES-VR assisted [REDACTED] in securing such employment.

APPLICABLE LAW

The policies of ACCES-VR provide general guidance on the interaction between the consumer and the agency in establishing a vocational rehabilitation program and involving the consumer in such process. Policies 100.00 and 206.00 describes this process of involving the consumer and creating an individualized Plan for Employment Policy and Procedure. (ACCES-VR Exhibits 1 and 2). While Policy 100.00 sets forth that the consumer does not have complete control over the program, the specific matters raised on this appeal must be decided by a careful

review of the evidence regarding the nature and timing of events and a commonsense application of the general principles set forth in the policies. There is no statute, regulation or policy that mandates a resolution of the issue in this case, i.e. whether the decision of ACCES-VR to terminate services to the consumer due to a lack of cooperation is supported by substantial evidence and is based on a rational weighing and evaluation of the relevant facts. This appeal will be decided by applying constitutional principles to the speech employed by appellant and then evaluating the conduct alleged and the process by which the determination was reached.

FINDINGS

The consumer received services from ACCES-VR from [REDACTED] 2014, when an Individual Plan for Employment (IPE) was written for the consumer through [REDACTED] 2016. (ACCES-VR Exhibit 3). ACCES-VR's service provider, [REDACTED] made a decision on [REDACTED] 2016 to stop providing services to the consumer. (ACCES-VR Exhibit 3, pages 28-29). ACCES-VR rendered a decision by letter dated [REDACTED] 2016, closing the consumer's case with ACCES-VR. The letter set forth that the consumer had not made reasonable efforts to cooperate in carrying out [REDACTED] vocational plan. (ACCES-VR Exhibit 6). The consumer appealed this determination by submitting a due process request dated [REDACTED] 2016. (Hearing Officer Exhibit 1).¹

Initially, I determine that the consumer does have free speech rights that includes the ability to criticize governmental entities and the nature or quality of services provided by any governmental organization. ACCES-VR is a state agency and is therefore subject to the restrictions upon the government exacting a penalty against citizens for the exercise of free

¹ The due process request alleges discrimination based on the consumer's gender. I lack authority to make a ruling on this claim and make no finding that discrimination occurred. Nothing in the decision should be taken as an opinion on this allegation or the merits of any claim that might be brought wherein such allegation is raised.

speech rights under the First Amendment to the U.S. Constitution. (*See Consolidated Edison Co. of New York v. Public Service Commission* 447 US 530 [1980], where the U.S. Supreme Court applied First Amendment free speech protections against the Public Service Commission of New York; *See also Gorman-Bakos v. Cornell Co-Op Extension of Schenectady County* 252 F.3d 545 [2d Cir., 2001], where the U.S. Court of Appeals for the Second Circuit opined that it appeared Cornell Co-Op Extension was a subordinate agency and therefore subject to First Amendment strictures, although it was necessary for the court to reach this issue since the applicability of the amendment to the organization’s conduct was not disputed; *See also Anemone v. Metropolitan Transportation Authority* 410 F. Supp. 2d 255 [USDCND, 2006], where the court evaluated First Amendment claims against a public benefit corporation.)

The dissatisfaction expressed by the appellant, some of which was crude and intemperate, appears to address a matter of public concern, i.e., the government’s delivery of rehabilitation services to those suffering from deafness. An expression of opinion on matters of public concern is constitutionally protected from governmental restraint, even if the character of the speech is “inappropriate or controversial”.(*Snyder v. Phelps* 562 US 443, 453 [2011], quoting from *Rankin v. McPherson* 483 US 378, 387 [1987]). Constitutional protection of speech involving “matters of purely private significance” is “often less rigorous”. (*Snyder at 452*, quoting from *Hustler Magazine v. Falwell* 485 US 46, 56 [1988]). Yet, by characterizing the protection as “less rigorous”, the U.S. Supreme Court has apparently concluded that even purely private speech has some level of protection. (*See also Connick v. Myers* 461 US 138, 147 [1983], where the U.S. Supreme Court was careful to clarify that it was not declaring that speech on a private matter is totally beyond First Amendment protection). In any event, ACCES-VR acknowledges that it has

no rule penalizing consumers for expressing dissatisfaction. (Transcript of hearing held on [REDACTED] 2016, pages 183-185).

In short, I determine that appellant has the right to be dissatisfied and express such dissatisfaction, regardless whether others agree with [REDACTED] opinion or conclude that such dissatisfaction is warranted. Therefore, I do not find that any determination to close the consumer's case can be based upon [REDACTED] expression of dissatisfaction or threats to bring a claim or generate negative publicity.

Having made this finding, I recognize that there are reasonable limitations upon the time, place, and manner of the exercise of free speech. (*Consolidated Edison Co. of New York v. Public Service Commission, supra; see also Lewis v. Cowen 165 F. 3d 154 [2d Cir. 1999]*) The exercise of such speech cannot shield words or conduct that are personally abusive or otherwise result in a serious or sustained lack of cooperation with ACCES-VR personnel providing services to the consumer. I will now address whether the consumer engaged in words or actions that rose to a level of conduct that supports the closing of [REDACTED] case.

I do not find that the words expressed by the consumer in [REDACTED] interactions with ACCES-VR personnel reached a level of abuse or hostility that demonstrated the consumer did not desire further services from ACCES-VR or would not reasonably cooperate in securing and receiving such services. This is not to say that I condone the phraseology utilized by the consumer in all [REDACTED] communications or agree that [REDACTED] methodology of interacting with personnel was ideal. Indeed, at least one of the comments made by the consumer evinced a high level of hostility and comes close to being abusive under any reasonable evaluation. (See ACCES-VR Exhibit 3, e-mail dated [REDACTED] 2016 authored by consumer). However, although it uses some profanity and intemperate language, it does not appear to make a personal threat other than to pursue [REDACTED] legal

rights. Therefore, it does not reach a level that would support closing ■■■ case. I am also mindful of the fact that the consumer's deafness presents issues regarding expression and may have impacted the choice and use of words at that particular e-mail. Furthermore, the e-mail was undoubtedly drafted at a time when the consumer was frustrated, as ■■■ had just been notified that ■■■ case was being closed. Since the e-mail was authored after ■■■ received this notification, I cannot consider that it provides a basis for establishing a lack of cooperation by the consumer during the period of time that ■■■ case was actively open.

I also do not find that the incident or events that occurred at the Hudson Valley Community College bookstore can serve as a basis for closing the consumer's case. The consumer has steadfastly denied the characterization of events presented in the documentation provided by ACCES-VR. No one with personal knowledge of the event gave testimony to contradict the testimony of the consumer. Furthermore, the limitations upon the consumers' ability to communicate may have contributed to confusion or a difference of interpretation with respect to the consumer's conduct. Finally, this event in the bookstore cannot serve as a basis for closing the consumer's case, as it occurred outside of the consumer's interaction with ACCES-VR personnel, and I did not receive proof that the consumer was convicted of any charge arising from activity in the bookstore.

I will next address the allegations that the consumer did not timely provide medical documentation regarding a surgical procedure and did not provide proof of educational qualifications. Since these allegations are not specifically set forth in the ACCES-VR discharge note (Consumer Exhibit F), they cannot provide much, if any, support to the determination to close the consumer's case. It is reasonable to conclude that if they were significant factors leading to this determination, they would have been specifically set forth in the discharge note.

The allegation regarding the failure to timely provide documentation regarding the nature of medical treatment appears to have arisen as a result of a misunderstanding on the consumer's part. It appears [REDACTED] believed that the request required [REDACTED] physician to provide sensitive medical information which [REDACTED] found to be highly personal (ACCES-VR Exhibit 3, pages 6). In reality, the request was not seeking that level of information and, therefore, was not duly intrusive (ACCES-VR Exhibit 3, page 7). In any event, the requested medical documentation was ultimately provided.(ACCES-VR Exhibit 3, page 15).

The allegation regarding the failure to provide educational documentation appears to be correct insofar as the documentation was not provided until after the consumer's case was closed. (See Consumer Exhibit 1, which contains a facsimile letter dated [REDACTED] 2016). However, the consumer stated at the hearing that [REDACTED] a provider of services to ACCES-VR with respect to [REDACTED] [REDACTED] had the records. (Transcript of hearing on held on [REDACTED] 2016, page 227). It is not clear from the record whether [REDACTED] [REDACTED] had the records, but the consumer's belief in this regard may have affected [REDACTED] understanding on the need or importance of also providing this information to ACCES-VR. There does not appear to have been a deadline established for [REDACTED] to provide the information or a communication to the consumer that the failure to provide the information would warrant a closing of [REDACTED] case. The relative lack of importance ascribed to providing this information within a specific timeframe is corroborated by the fact that is not specifically referenced in the ACCES-VR discharge note. I am not finding fault with the manner in which ACCES-VR personnel made its request for this information. I am simply determining that, given all the factors I have outlined related to this request, the failure of the consumer to provide the information prior to [REDACTED] 2016 cannot support the determination to close [REDACTED] case.

ACCES-VR has also maintained that its decision is supported by the fact that the consumer failed to provide contact information for references. The documentation submitted contains a [REDACTED] 2016, e-mail from the consumer wherein [REDACTED] expressed [REDACTED] belief that providing such information would prove harmful to [REDACTED] as the referral source might resent being contacted by people [REDACTED] did not know. (ACCES-VR Exhibit 3, page 23). While the consumer certainly has every right to express [REDACTED] concerns and to attempt to convince ACCES-VR personnel to change its position with respect [REDACTED] concerns and to attempt to convince ACCES-VR personnel to change its position with respect to the information requested, I do not hold that [REDACTED] has the right to determine that [REDACTED] will not comply with the request. By seeking services from ACCES-VR, [REDACTED] obligates [REDACTED] to comply with the requirements the agency is allowed to establish to secure information it believes necessary to properly serve the consumer. Certainly, it would appear that the consumer's concerns might have been addressed by the consumer making clear to the parties providing references that certain information is needed to be provided to ACCES-VR. This could have been done before contact was made by ACCES-VR rather than the consumer forwarding the e-mails of ACCES-VR to the referral source, as [REDACTED] indicated in [REDACTED] e-mail of [REDACTED] 2016. However, in the absence of a rule, regulation, or Individual Plan for Employment (IPE), which was not offered as evidence, establishing responsibilities of the consumer and consequences for the failure to timely provide requested contact information, I find that the consumer should have been forewarned that the failure to provide the information would result in [REDACTED] case being closed and services no longer provided. Notwithstanding my determination that ACCES-VR had a right to request the contact information, I find that the consumer's failure to provide the information as requested does not support the decision to close the consumer's case, as the consumer was not given a deadline to provide the information or

advised the failure to provide the information would result in [REDACTED] case being closed. I determine the consumer lacked notice that failure to provide the information within a specified time frame would result in closure of [REDACTED] case and loss of [REDACTED] right to receive further vocational rehabilitation services.

My analysis is similar with respect to the contention of ACCES-VR that the consumer failed to secure volunteer experience as requested. While ACCES-VR may have the right to mandate such an element as a condition for continued participation and receipt of services, I find that the failure of the consumer to secure such experience cannot support a decision to close [REDACTED] case with ACCES-VR, unless the consumer is given a reasonable deadline to secure volunteer experience and advised, in advance of closure, that the failure to meet this requirement will cause [REDACTED] case to be closed.

ACCES-VR also bases its determination on the fact that the consumer missed one or more appointments and inappropriately secured the services of an interpreter to assist [REDACTED] in a court case. The consumer has testified that [REDACTED] was confused on the time of a missed appointment, and that, irrespective of this fact, missing one or several dates should not result in [REDACTED] case being closed. The consumer has failed to address the contention that [REDACTED] inappropriately utilized the services of an interpreter provided by ACCES-VR in a court case. With respect to the missed appointments, I find that the proof does not establish that the consumer was not confused regarding the dates. Indeed, [REDACTED] e-mail of [REDACTED] 2016 evinces a misunderstanding of the time of the appointment on that date (Consumer Exhibit B). Also, I agree with the consumer that [REDACTED] failure to make one or two appointments over an extended period during which services were provided to [REDACTED] is not sufficient to support the determination to close [REDACTED] case, in absence of forewarning as to the significance of such missed appointments.

No one with personal knowledge testified regarding the allegation that the consumer used an interpreter for a court case. The record is therefore unclear as to what led to the utilization of interpreter services in the situation, what the consumer was advised, if anything, regarding the utilization of such services for such a purpose or what the consumer's understanding was in this regard. Further, the discharge note does not make reference to this incident. (See Consumer exhibit F). In these circumstances, I hold that this alleged incident cannot support a closure of the consumer's case.

With respect to all the allegations raised by ACCES-VR, it is apparent that its service provider, [REDACTED] intended, raise some or all of them at a meeting scheduled for [REDACTED] 2016, at which the consumer was to be provided an opportunity to continue the program if [REDACTED] exhibited cooperation. When the consumer missed the meeting, a decision was made to close [REDACTED] case, without a finding that [REDACTED] protestation of confusion on the time of the meeting was apocryphal or unjustified. (See ACCES-VR Exhibit 3, pages 27-29; Consumer Exhibit D). It is apparent that a determination was made that the consumer should be provided a final opportunity to meet and continue with [REDACTED] case if [REDACTED] addressed concerns to be raised at the meeting. Despite that fact that the consumer sent an email on the day of meeting asking for clarification of the time, the service provider never provided [REDACTED] an opportunity to explain the reason for [REDACTED] confusion on the time of the meeting or another opportunity to meet. In these circumstances, the decision to close [REDACTED] case must be considered arbitrary and capricious.

Nothing in this decision should be construed by either party as my approbation of the consumer's conduct in [REDACTED] dealings with personnel employed by ACCES-VR. I do not decide or opine that the consumer should have carte blanche authority to disregard requests of ACCES-VR

or have the right to make personal aspersions or unlimited vitriolic statements in ■■■ dealings with personnel providing rehabilitation services. If the consumer is given reasonable deadlines and advance notice of the consequences of a failure to meet the deadlines without legitimate explanation, ■■■ might be deprived of an opportunity to receive services from ACCES-VR in the future. However, the record before me does not establish that the conduct that has occurred is sufficient to warrant a closure of ■■■ case at this time.

It appears from testimony adduced at the conclusion of the second hearing date that the consumer has secured gainful employment with the U.S. Postal Service. This may mean that ■■■ entitlement to future services through ACCES-VR is limited in scope or duration or non-existent. This is an administrative determination that will be made by ACCES-VR and is not for me to decide. If the consumer is entitled to additional services once ■■■ case is reopened, it is possible that ■■■ may come to a greater appreciation of the services provided by that agency. If this occurs, a more harmonious and cooperative relationship should result. The agency can be very helpful to a person in the consumer's position, particularly if a spirit of cooperation imbues the relationship. In this regard, despite the consumer's contention that ACCES-VR did not assist ■■■ in securing ■■■ current employment position, it appears that the agency arranged for an interpreter to provide services to the consumer in ■■■ interview with the U.S. Postal Service, ■■■ present employer. (See ACCES-VR Exhibit 4).

DECISION

ACCES-VR rendered a decision by way of letter dated [REDACTED] 2016. For the reasons set forth above, this determination closing the consumer's case is reversed and annulled as arbitrary, capricious, and unsupported by substantial evidence. ACCES-VR is directed to reopen the consumer's case.

APPEAL NOTICE

PLEASE TAKE NOTICE THAT THIS IS A FINAL DECISION. IF YOU DISAGREE WITH THIS DECISION, YOU MAY SEEK JUDICIAL REVIEW IN A COURT OF COMPETENT JURISDICTION. THE TIME TO SEEK SUCH REVIEW IN NEW YORK STATE SUPREME COURT OR THE UNITED STATES DISTRICT COURT IS LIMITED BY LAW, AND YOU MUST ACT TO TIMELY REVIEW.

Dated: [REDACTED] 2016

[REDACTED] Impartial Hearing Officer