

In the Matter of

██████████ ██████████

Petitioner,

v.

██████████ DISTRICT OFFICE, ACCES-VR

Respondent

Appearances:

██████████ ██████████

petitioner

██████████ ██████████

petitioner's parent and advocate

██████████ (██████████ ██████████

District Office Manager o/b/o respondent

██████████ ██████████

Senior Vocational Rehabilitation Counselor o/b/o respondent

██████████ ██████████

Vocational Rehabilitation Counselor o/b/o respondent

██████████ ██████████

Director of Counseling, o/b/o respondent

Before:

██

Hearing Officer

INTRODUCTION:

At ██████ ██████ request by petition dated ██████ 2017, Hearing Officer ██████ ██████ Esq. conducted an impartial hearing at the ██████ office of the Adult Career and Continuing Education Services- Vocational Rehabilitation (“ACCES-VR”, “the Agency”) located at ██████ ██████ ██████ New York.

Issue: Whether the Agency improperly denied ██████ ██████ request for Agency funding for tuition and rent assistance (maintenance) for the Fall 2016 Semester of graduate studies at Niagara University.

PRELIMINARY STATEMENT:

Parties’ positions:

██████ ██████ The Agency failed to provide timely notice that it required notice by the junior year of undergraduate studies of a request for assistance in earning a graduate degree. The Agency failed to take timely action once it received the request for assistance in pursuing a graduate degree. The Agency improperly denied the request for assistance for the Fall 2016 Semester. Therefore, ██████ ██████ requests a decision ordering the Agency to reimburse him for tuition and rent assistance for the Fall Semester 2016.

Agency: The Agency’s policies govern its actions. The Agency rarely supports graduate studies. Even if ██████ ██████ request for assistance toward graduate studies had been timely (i.e. junior year of undergraduate school), the Agency would have denied the request because the Agency’s mission is to assist eligible participants in achieving entry level positions, and ██████ ██████ Individual Plan for Employment (“IPE”) and the Agency’s support of that plan fulfilled its mission. However, in Spring 2017 when the Agency received adequate verification of a change in ██████ ██████ physical fitness that rendered his IPE goal unsuitable, the Agency

promptly provided tuition assistance for the Spring Semester 2017. The Agency had the ability to do so after the start of the semester because tuition is not paid until the end of the semester. The Agency had the discretion to pay, and did pay, for maintenance for the Spring Semester though it did not grant [REDACTED] waiver request until shortly after the semester began. However, the Agency did not have discretion to pay for tuition or maintenance for the Fall 2016 Semester because a waiver had not been granted. Therefore, the Agency requests a decision affirming its decision concerning [REDACTED] request for tuition and rent assistance for graduate studies for the Fall Semester 2016.

Exhibits:

From petitioner: **Exhibit (Pet. Ex.1)** “Training at a College or University for the 2014/2015 Academic Year” (Fact Sheet; VR-844(04/20/2014); signed and returned [REDACTED] 2014: 2 pages
Exhibit 2 (Pet Ex.2) “Accountant” (Department of Justice, Bureau of Prisons Federal Prison System; Job announcements, open & closing dates 2017-01-10 to 2017-01-25; 7 pages
Exhibit 3 (Pet. Ex. 3) Administrative Review decision (undated); [REDACTED] Sr. Vocational Rehabilitation Counselor, 4 pages

From respondent: **Exhibit 1 (Resp. Ex. 1)** Chronological case history [REDACTED]/2015; 1 page
Exhibit 2 (Resp. Ex. 2) ACCES-VR Policy 405.00 College and University Training, April 2007 (Amended April 2009); 21 pages
Exhibit 3 (Resp. Ex.3) Chronological case history [REDACTED]/2016; 1 page
Attachments: Handwritten cover letter dated [REDACTED]-2016 from [REDACTED] to [REDACTED] regarding letter dated [REDACTED] 2016 from Lt. [REDACTED] Rome Police Department, to [REDACTED] 2 pages
Website results from usajobs.gov printed [REDACTED]/2016; 2 pages
Website result from dea.gov printed [REDACTED]/2016; 1 page
Exhibit 4 (Resp. Ex. 4) Chronological case history [REDACTED] 2016; 2 pages
Exhibit 5 (Resp. Ex. 5) Chronological case history [REDACTED] 2016; 1 page

- Exhibit 6 (Resp. Ex. 6)** Chronological case history [REDACTED] 2016; 1 page
Attachments: Form VR-7111 (Due Process Request); blank; 1 page
- Exhibit 7 (Resp. Ex. 7)** Chronological case history [REDACTED] 2016; 1 page
- Exhibit 8 (Resp. Ex. 8)** Chronological case history [REDACTED] 2016; 2 pages
- Exhibit 9 (Resp. Ex. 9)** Chronological case history [REDACTED] 2016; 1 page
- Exhibit 10 (Resp. Ex. 10)** Chronological case history [REDACTED] 2016; 1 page
- Exhibit 11 (Resp. Ex. 11)** Chronological case history [REDACTED] 2016; 2 pages
- Exhibit 12 (Resp. Ex. 12)** Letter dated [REDACTED], 2016 from SSA [REDACTED]
[REDACTED] ATF Buffalo Field Office, to [REDACTED] email dated
[REDACTED], 2016 at 10:50 a.m. from [REDACTED] to [REDACTED] 2 pages
- Exhibit 13 (Resp. Ex. 13)** Chronological case history [REDACTED] 2016; 1 page
- Exhibit 14 (Resp. Ex. 14)** Doctor form received by ACCES-VR [REDACTED]
2017; 2 pages
- Exhibit 15 (Resp. Ex. 15)** Chronological case history [REDACTED] 2017; 2 pages
- Exhibit 16 (Resp. Ex. 16)** Chronological case history [REDACTED] 2017; 2 pages
- Exhibit 17 (Resp. Ex. 17)** Federal Bureau of Investigation, Physical Fitness
Protocol; 10 pages
- Exhibit 18 (Resp. Ex. 18)** Chronological case history [REDACTED] 2017; 2 pages
- Exhibit 19 (Resp. Ex. 19)** Chronological case history [REDACTED] 2017; 5 pages
- Exhibit 20 (Resp. Ex. 20)** ACCES-VR Policy 206.00
Individualized Plan for Employment Policy and Procedure
Revised [REDACTED] 16 pages
- Exhibit 21 (Resp. Ex. 21)** Chronological case history [REDACTED] 2017; 1 page
Attachments: Form VR-711 (Due Process Request); 1 page
- Exhibit 22 (Resp. Ex. 22)** Chronological case history [REDACTED] 2017; 3 pages
- Exhibit 23 (Resp. Ex. 23)** Chronological case history [REDACTED] 2017; 1 page
- Exhibit 24 (Resp. Ex. 24)** ACCES-VR Policy 100.00 Participant Involvement
Policy; 4 pages
- Exhibit (HO. Ex.) 1** Notice of hearing [REDACTED] 2017; 2 pages
- Exhibit (HO. Ex.) 2** Due process Request [REDACTED]/2017; 2 pages

FINDINGS OF FACT:

I find the following facts are undisputed:

1. Because neither party raised the issue of whether [REDACTED] [REDACTED] is eligible to receive from the Agency services as a person with a disability, [REDACTED] [REDACTED] is an eligible participant.
2. [REDACTED] [REDACTED] filed a request for a due process hearing on or about [REDACTED] 2017, the date [REDACTED] signed the hearing request. **HO. Ex. 2.**
3. A notice of hearing was mailed to [REDACTED] [REDACTED] on or about [REDACTED] 2017 setting the hearing date as [REDACTED], 2017. **H.O. Ex. 1.**
4. The hearing was held before me on that date. Neither party elected to be represented by counsel. *Tr. p.9.*
5. [REDACTED] [REDACTED] attended Niagara University as an undergraduate student in criminal justice with the Agency's support, and graduated in May 2016. **Resp. Ex. 1.** E.g. *Tr. pp. 40, 102.*
6. [REDACTED] [REDACTED] informed the Agency of [REDACTED] desire for its support in pursuing a Masters in Business Administration (MBA) at Niagara University in or around [REDACTED] 2015, which was during [REDACTED] senior year of undergraduate studies. **Resp. Ex. 1;** *Tr. p. 132.*
7. [REDACTED] [REDACTED] was not informed by the Agency that it required a request for support and services by the junior year of undergraduate school. *Tr. pp. 93, 94, 135.*
8. In response to [REDACTED] [REDACTED] request for support for a graduate program, the Agency provided form VR-844, "Training at a College or a University for the 2014/2015 Academic Year." **Pet. Ex. 1;** *Tr. p. 35, 36.*
9. In and around August 2016, the Agency requested and [REDACTED] [REDACTED] provided documentation regarding an MBA program. **Resp. Ex. 4.**
10. Without having obtained the Agency's agreement to support [REDACTED] graduate studies,

█ █ began an MBA program at Niagara University in █ 2016.

Pet. Ex. 3; Resp. Ex. 4.

11. The Agency notified █ █ that it denied █ request for support of a graduate program on or about █, 2016. **Resp. Ex. 5.**
12. The Agency testified that it did not usually provide information concerning graduate studies to participants completing undergraduate degrees. *Tr. pp. 141, 142.*
13. █ █ contacted the Agency concerning its denial of a waiver and asked to speak with a senior vocational rehabilitation counselor. (SRVC). **Resp. Ex. 6.**
14. █ █ arranged for an advocate through the Client assistance program. (CAP). █ advocate's name was █ **Resp. Exs. 7,8.**
15. █ █ requested an administrative review and received an undated decision from █ Sr. Vocational Counselor upholding the Agency's decision, which upheld the Agency's determination. **Pet. Ex. 3.**
16. █ █ requested a due process hearing for the full payment of room and board for Spring Semester 2017, but subsequently revoked █ request because the Agency was able to grant it. **Res. Ex. 22; Tr. pp. 81-84.**
17. The Agency asked █ █ to provide information regarding graduate studies in █ 2015. **Resp. Ex.1.**
18. In March 2016, █ █ provided the agency with information confirming that certain positions in law enforcement either required an MBA or recommended graduate degree. **Pet. Exs. 2, 3.**
19. In █ 2016, █ █ provided the agency with additional information regarding graduate studies and a law enforcement career. **Rep. Ex. 12.**

20. In [REDACTED] 2016, [REDACTED] [REDACTED] provided the Agency with documentation that [REDACTED] sustained a physical injury that imposed limitations on [REDACTED] ability to work in law enforcement career. **Resp. Ex. 14; see also Resp. Ex. 13; Tr. p. 119, 122, 195, 200.**
21. In or around [REDACTED], 2017, the Agency informed [REDACTED] [REDACTED] that [REDACTED] waiver request was resubmitted based on new medical information. **Resp. Ex. 15.**
22. On [REDACTED] 2017, [REDACTED] [REDACTED] District Office Manager for the Agency, approved a waiver request for [REDACTED] [REDACTED] to include housing costs (maintenance) from [REDACTED] through [REDACTED] 2017 and tuition and school fees for the Spring Semester of the 2016-2017 academic year. **Resp. Ex. 19.** The waiver was granted based upon the change in [REDACTED] [REDACTED] physical condition that rendered [REDACTED] employment goal, criminal justice, inappropriate.
23. [REDACTED] [REDACTED] requested a fair hearing and as a result the Agency agreed to pay the remaining fees for maintenance. **Resp. Ex. 22.**
24. [REDACTED] [REDACTED] amended [REDACTED] fair hearing request to incorporate tuition and maintenance for Fall Semester 2016. **H.O. Ex. 2; Resp. Ex. 22; see also Resp. Ex. 23.**

ANALYSIS AND CONCLUSIONS OF LAW:

Pursuant to the State Administrative Procedures Act (SAPA), the party who initiates a hearing has the burden of proof; that is, must present substantial evidence supporting his or her contention that he or she is entitled to the relief requested. SAPA § 306(1). The substantial evidence standard has been described as “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is more than a mere surmise, conjecture, or speculation, but less than a preponderance of the evidence.” *Siano v. Dolce*, 256 A.D. 2d 582, (N.Y.A.D. 2 1998) [REDACTED] [REDACTED] as the petitioner in this matter has the burden of proving that the Agency improperly denied [REDACTED] request for tuition and maintenance for the Fall Semester 2016.

The Agency must develop an individual plan for employment (IPE) for each eligible person with a disability. 34 CFR §361.45; 8 NYCRR §247.11.

New York Education Law §1002(5)(a) defines vocational rehabilitation services as “[a]ny goods and services necessary to render a handicapped person fit to engage in a gainful occupation...” New York Education Law §1002(4) defines gainful occupation as “include[ing] any employment for which a compensation is paid either in goods and/or in services; practice of a profession; self-employment; homemaking, farm or family work (including work for which payment is in kind rather than in cash); sheltered employment; and home industries or other gainful homebound work.” Pursuant to 8 NYCRR §247.13, the Agency must “maintain written policies covering the scope and nature” of each available vocational rehabilitation service, including other goods and services, and the criteria for providing the same. Pursuant to 8 NYCRR § 247.13, the Agency must “maintain written policies covering the scope and nature” of each available vocational rehabilitation service, including other goods and services, and the criteria for providing the same. Pursuant to 8 NYCRR § 247.8, the agency “shall grant a waiver

to an eligible individual if any maximum allowance or other cost and/or duration limit established in this Part, upon a finding by the agency that such a cost and/or duration limit, if made applicable to such individual, would effectively deny his or her access to services necessary to achieve an employment outcome. A request for a waiver shall be submitted in a form prescribed by the commissioner.”

As required, the Agency established a set of policies. Those that are relevant to this matter are: Policy 100.00 Participant Involvement Policy (**Resp. Ex. 24**), Policy 206.00 Individualized Plan for Employment Policy and Procedure (**Resp. Ex. 20**), and Policy 405.00 College and University training policy. (**Resp. Ex. 2**)

Policy 100.00:

This policy explains that the participant is a partner with [REDACTED] vocational rehabilitation counselor in determining his employment goal. **Res. Ex. 24, pg. 2.** The policy mentions a waiver process “to accommodate the rehabilitation needs of an individual when necessary to achieve an employment outcome.” **Id. at 3.** A counselor may request a waiver when “comparable benefits and/or other supports” have been thoroughly explored. **Id.**

Policy 206.00

This policy is a lengthy document that communicates the details for developing an individualized plan for employment, its contents and timeliness, the role of the counselor, the evaluation and review process, how to amend the IPE, and record filing requirements. **Resp. Ex. 20.** The IPE identifies employment outcomes (also known as employment goal), the services that will be provided along with timeframes, evaluative criteria, specifics service provider(s), explains the extent of family contribution if any and which comparable benefits and services are available, specifies any anticipated post-employment services, gives notice of the individual’s

rights and the applicable procedures, details the individual's and the Agency's responsibilities, and gives information about the Client Assistance Program (CAP) **Resp. Ex. 20, pp. 2, 3.**

Policy 405.00:

“College training is academic training leading to a degree given on a postsecondary level ...,” and is available as ACCES-VR support “when required for eligible and individuals to achieve *quality employment outcomes* consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests and informed choice (employment factors). **Resp. Ex. 2, pg. 2 (emphasis added).** This training is available only when it is required as determined by the IPE. **Id.**

According to federal regulation, the purpose of the State Vocational Rehabilitation Services Program is to “assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable vocational rehabilitation programs, each of which is (a) [a]n integral part of a statewide workforce development system, and (b) [d] designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choices so that they may prepare for and engage in competitive integrated employment and achieve economic self-sufficiency.” 34 C.F.R. §361.1 (emphasis added) Federal statute identifies the purpose of the vocational rehabilitation act as “gainful employment.” 29 USCA §720(a) (2) [West].

A hearing officer must be careful to properly construe the Agency's policies. *Battaglia v. Cort*, 49 A.D. 3d 1179 (N.Y.A.D. 4 Dept. 2008) (hearing officer misconstrued agency's policy; determination annulled, remitted for new determination). Agency policies interpret statutes or regulations; policies are due deference unless the result would be absurd. See, e.g. *U.S. v.*

Memorial Sloan-Kettering Cancer Center, 563 F.3d 19, 25 (2d Cir. 2009) (resort to rules of statutory construction only if there is ambiguity) (quote and citation omitted); *Matter of 427 W. 51st St. Owners Corp. v. Division of Hous. & Community Renewal*; 3 N.Y. 3d 337, 342 (Ct. Appeals 2004); *East Acupuncture, P.C. v. Allstate Ins. Co.*, 61 A.D.3d 202, 208 (N.Y. A.D. 2d Dept. 2009) (“[T]he interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable; see also, *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F. 3d. 49 (2nd Cir. 2004) (*Chevron* deference applies so long as the agency interpretation is not “arbitrary, capricious, or manifestly contrary to the statute”), *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (even when *Chevron* deference does not apply, courts have deferred to an agency’s interpretation when it is thorough, valid, and has the power to persuade).

The question is whether the policy – in this case the policy regarding graduate studies – creates an absurd result. In the context of the totality of laws and policies addressed above, I find that it does not.

DECISION:

For the reasons that follow I find that [REDACTED] [REDACTED] did not meet [REDACTED] burden of proof, and I am constrained to rule against [REDACTED] and in favor of the Agency.

Timeliness of request for waiver:

[REDACTED] [REDACTED] contended at hearing that [REDACTED] was unaware of the Agency’s requirement that [REDACTED] notify it of [REDACTED] desire to pursue a graduate degree with its support. To the contrary, [REDACTED] [REDACTED] submitted as evidence without objection from the Agency, and referred to “Training at a College or University for the 2015/2015 Academic Year (“Training at a College Fact Sheet”)” as the only document provided to [REDACTED] from the Agency regarding this issue. **Pet. Ex. 1; Tr.p. 35,**

36. [REDACTED] currently pointed out that this document did not inform [REDACTED] that the Agency required notice in the junior year of undergraduate studies that the participant will request a waiver. *Tr. p.*

39. Moreover, the Agency did not recall providing [REDACTED] with a copy of the relevant policy or directing [REDACTED] to where [REDACTED] could find it, or in any other way told [REDACTED] in [REDACTED] junior year at Niagara University that [REDACTED] was required to give notice to the Agency. Therefore, I find that the Agency failed to adequately inform [REDACTED] [REDACTED] that [REDACTED] was required to give it notice of [REDACTED] request for a waiver to pursue graduate studies by [REDACTED] junior year of undergraduate work.

Another timeliness aspect for this case revolves around the Agency's response to [REDACTED] [REDACTED] request for support of an MBA program. The Agency knew about [REDACTED] [REDACTED] change in employment goal and request for graduate level support in [REDACTED] 2015 and informed [REDACTED] that [REDACTED] needed to provide job leads in which an MBA was a requirement for the position. **Resp. Ex. 1.** In August 2016, the Agency informed [REDACTED] [REDACTED] that it needed further information, and let [REDACTED] know that a determination would follow. **Resp. Ex. 4.** The parties continued to communicate to clarify the employment goal and to request and provide additional information. **Resp. Ex. 9-12, 16, 18.** [REDACTED] [REDACTED] did not raise as an issue, nor did I detect, an effort on the Agency's part to purposely delay a decision in order to prevent [REDACTED] from receiving support for fall semester 2016. Rather, the Agency's unchallenged testimony credibly explained that requests for waivers involve a lengthy process that could last months. *Tr. 186-188.* If the Agency had been diligent in apprising [REDACTED] [REDACTED] concerning [REDACTED] obligation to provide notice in [REDACTED] junior year, perhaps the Agency would have had sufficient time to reach its determination favorable to [REDACTED] [REDACTED]

Graduate studies and gainful employment:

My decision against the Agency on the issue of timeliness does not resolve entirely the issue presented for this fair hearing. “ACCES-VR will contribute to graduate level training only when *such training is required for the individual’s agreed upon Employment Goal* as described in the Individualized Plan for Employment (IPE). **Pet. Ex. 1, pg. 2 (emphasis)**. Thus, in order to resolve the issue presented, I must decide whether [REDACTED] employment goal (i.e. criminal justice) required a graduate degree as of Fall Semester 2016. I am constrained to find that graduate studies were not required at that time.

The uncontested evidence is that [REDACTED] was interested in pursuing “ [REDACTED] MBA to assist [REDACTED] with job promotion and to provide [REDACTED] a background for working with white collar crimes.” **Resp. Ex. 1**. The Agency requested “job leads for positions [REDACTED] is interested in indicating a [*sic*] MBA is needed to obtain the position. An envelope [was] provided.” **Id.** On or about [REDACTED] 2016, [REDACTED] provided a letter from Lieutenant, [REDACTED], Rome Police Department/Training Division. Lt. [REDACTED] letter did not state unequivocally that a graduate degree was a requirement for employment. Rather, Lt. [REDACTED] stated that such a degree could be helpful in the initial hearing process as such positions are highly competitive. **Id. at 3**. “In my opinion, the pursuit of continuing education not only shows an individual’s dedication and work ethic, but also their desire to improve themselves, making these candidates the ones a department seeks out and recruits.” **Id.** Lt. [REDACTED] opinion, though highly suggestive of the benefit of an advanced degree, fell short of stating that it was a requirement.

[REDACTED] provided the Agency with additional documentation of openings in the criminal justice field and letters that purported to show that an advanced degree was required in order to be considered for positions. According to SSA [REDACTED] ATF Buffalo Field

Office, “[t]here is always a critical need in the agency for a strong accounting and finance background to work and manage the administrative and investigative needs of all these services both nationally and internationally. ██████ would be an excellent candidate not only for ATF, but for any federal law enforcement agency having a need for employees having a strong accounting and finance background.” **Rep. Ex. 12. pg. 1.** Although SSA ██████ ██████ 4, 2016 letter came closer to stating that an MBA or other graduate degree was a requirement for hiring, ██████ was not explicit. Moreover, this letter arrived toward the end of the Fall 2016 semester.

█████ ██████ and the Agency’s efforts and communication during the Spring Semester 2017 regarding a waiver for graduate study support have limited relevance as the issue for hearing pertained to the Fall Semester only. However, for the sake of completeness these are summarized.

In or around ██████ 2017, ██████ ██████ provided the Agency with a website link to FBI.gov purporting to show that an MBA was required for a position as a Financial Operations Specialist, and as support for narrowing his employment goal from criminal justice to specify jobs within the criminal justice field. **Resp. Ex. 18.** In response, the Agency revised the waiver request. **Id. at 2.**

It is unclear when ██████ ██████ provided the Agency with a job summary from the USA jobs website regarding a position as an accountant. The pages were printed on August 25, 2017. **Pet. Ex. 2.** The open and closing dates spanned January 10, 2010 through January 25, 2017. *Id.* The job posting closed before the exhibit was printed, and without documentary or oral evidence as to when the Agency received this exhibit I am unable to determine whether the Agency received it before the Fall Semester 2016 ended. *Compare Tr. p. 41, 42* (█████ testimony);

document should be in records) with *Tr. p. 44* (██████ testimony; shown after the Fall Semester).

On its own, the Agency researched job qualifications. **Resp. 17**; *Tr. p. 122, 123*. As the Agency explained, it has the authority to pay tuition after a semester begins because funds are not due until then. *Tr. 166, 196*. This ‘grace period’ does not extend to maintenance. *Tr. 128, 182, 197*.

Gainful employment:

“The purpose of this subchapter is to assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation, each of which is—

- (A) an integral part of statewide workforce development system; and
- (B) designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, informed choice, and economic self-sufficiency, so that such individuals *may prepare for and engage in gainful employment.*”

29 USCA § 720 (a) (2) [West] (emphasis added).

The crux of the instant dispute is the meaning of “gainful employment”. The Agency contended at the hearing that even if ██████████ had complied with policy 405.00 and requested a waiver during ██████ junior year of undergraduate studies, ██████ IPE goal of pursuing a career in criminal justice was amply served by earning a bachelor’s degree. *Tr. pp. 94, 95, 199*. ██████████ counter-argument was that was that ██████ revised goal of pursuing a career in white collar crime, a related criminal justice pursuit, required an advanced degree. *Tr. p. 102*. Based on the

documentary and testimonial evidence presented and the Agency's policies, I find that [REDACTED] argument is unavailing.

As referenced above, a gainful occupation includes the practice of a profession. NY Educ. L. § 1002(4). The majority of case law decisions side with the Agency. *In Chirico v. Off. of Vocational and Educ. Services for Individuals with Disabilities (VESID)*, 211 AD2d 258 (N.Y.D. 3d Dept. 1995), the petitioner who was quadriplegic and a school guidance counselor, requested speech to text software from the Agency so that [REDACTED] could accomplish his responsibilities at home after school. The Agency denied [REDACTED] request, which was upheld after a fair hearing. The court reversed the Agency's determination citing Congressional policy that "... all programs, projects, and activities receiving assistance under this chapter [29 U.S.C.A § 701 et seq.] shall be carried out in a manner consistent with the principles of—

- (1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;
- (2) respect for the privacy, rights, and equal access (including the use of accessible formats)
- (3) inclusion, integration, and full participation of the individuals;
- (4) support for the involvement of an individual's representative if an individual with a disability requests, desires, or needs such support; and
- (5) support for the individual and systematic advocacy and community involvement

Chirico at 260 (citing 29 USCA § 701 [West]).

The court further found that [REDACTED] *Chirico* was entitled to have the opportunity to reach [REDACTED] highest level of potential. *Id.* at 261 (quoting *Matter of Polkabila v. Commission for the Blind & Visually Handicapped of N/Y/ State Dept. of Social Servs.* 183 A.D. 2nd 575, 576, quoting S. Rep. No.

388, 99th Cong., 2d Sess. 5 [1986]. However, one judge’s decision in favor of a participant does not end the present inquiry.

Three court decisions serve as examples of courts’ thinking on the issue of graduate studies for ACCES-VR participants. In *Romano v. VESID*, 223 A.D. 2d 829 [N.Y.A.D. 3d Dept 1996], the participant sought support from the Agency for graduate school. The participant’s employment goal was social work. “In providing the empowerment necessary for petitioner to ultimately achieve maximum employment as generally provided for by the stated purposes of the Rehabilitation Act, there is no requirement that VESID sponsor every possible credential desired by the petitioner.” *Id.* at 830. The court stated further that “[w]hile such an added credential would certainly commence her career at a higher level, the record fails to show that [REDACTED] achievement of the IWRP goals has not adequately empowered [REDACTED] to ultimately reach those higher levels.” *Id.*

In *Murphy v. VESID*, 243 A.D. 2d 962 (N.Y. A.D) 3d Dept. 1997), the plaintiff, Murphy, requested support for a graduate program for a career in law from the Agency before graduating with her undergraduate degree. The court stated, “It is clear to this Court that the realistic and laudable legislative goal is to empower eligible individuals with the opportunity to access their maximum employment, not to provide individuals with idealized personal references for actual optimal employment.” *Id.* at 481. In denying Ms. Murphy relief, the court reflected that, “As we previously held in *Matter of Romano v. Office of Vocational & Educ. Servs. for Individuals with Disabilities* (223 AD3d 829),’ [i]n providing the empowerment necessary for petitioner to ultimately achieve maximum employment as generally provided for by the stated purposes of the Rehabilitation Act, there is no requirement that VESID sponsor every possible credential desired by petitioner.” *Id.* at 487.

In *Campbell v. VESID*, 256 A.D. 2d 1006 (N.Y. A.D. 3d Dept. 1998), the plaintiff, Campbell, earned a bachelor's degree as a public relations representative and then a master's degree in speech communication with Agency support. Subsequently, ██████ requested support from the Agency to pursue a doctoral degree. Quoting *Murphy*, the court denied ██████ relief. *Id.* at 1007 ("Although to pursue a doctorate would enhance petitioner's employment options, VESID is not compelled to 'sponsor every possible credential desired by petitioner') (internal citations omitted).

The evidence presented at this fair hearing failed to establish that ██████ ██████ employment goal required a graduate degree, or that the Agency failed to place ██████ in a position to advance in ██████ chosen career and achieve ██████ highest maximum employment for the Fall Semester of 2016.

THEREFORE, it is my decision that:

1. ██████ ██████ request for tuition and maintenance for ██████ attendance and participation at Niagara University for the Fall Semester 2016 is denied.
2. The Agency must review its procedures for fully informing participants of their obligations with respect to postsecondary studies, and provide its staff with relevant training and supervision.

APPEAL NOTICE:

This is a final decision. If you disagree with the decision you have the right to seek judicial review through an action in a court of competent jurisdiction.

THIS DECISION RENDERED:

██████████ 2017

██████████