

**STATE OF NEW YORK
COMMISSIONER OF EDUCATION**

[REDACTED]

Petitioner

-against-

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

Respondent

DECISION AND ORDER

Hearing Officer: [REDACTED] Esq.

Date of Hearing: [REDACTED] 2017

Location of Hearing: NYS ACCES-VR
[REDACTED] Office

[REDACTED] NY [REDACTED]

PROCEDURAL HISTORY

By letter dated [REDACTED] 2017, the Office of Adult Career and Continuing Education Services (ACCES-VR) of the New York State Education Department (“the Agency”) appointed me to act as the Impartial Hearing Officer (IHO) in a case brought by Petitioner (“[REDACTED]” under the Federal Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) (Ex. I)¹ Petitioner requested the hearing by filing a due process complaint with the agency. (Ex. III) The hearing was initially scheduled for [REDACTED] 2017. (Ex. I) That hearing was canceled on [REDACTED] 2017, due to reports of a serious snow emergency expected on the hearing date. By letter dated [REDACTED] 2017, the hearing was rescheduled for [REDACTED] 2017. (Ex. II)

The hearing was conducted at the office of ACCES-VR located at [REDACTED] [REDACTED] NY [REDACTED] I receive the transcript on [REDACTED] 2017. Petitioner had filed a closing statement via email on prior occasions to completion and distribution of the transcript. (Exs. IV, V) As had been discussed at the hearing, [REDACTED] was given the opportunity to submit a supplemental or substitute statement subsequent to [REDACTED] receipt of the transcript and thereafter, [REDACTED] filed a supplemental closing statement via email. (Exs. V, VI) The record was reopened when I was informed of Agency objections that the transcript was inaccurate with regard to certain points. (Ex. VII) Petitioner was provided with an opportunity to respond to the Agency objections and did so. (Ex. VIII) Petitioner did not state any objections to the transcript although [REDACTED] was given an opportunity to do so. (Ex. V) After review of my contemporaneous notes, I sustain the

¹ Exhibits herein are cited with Roman italics for Hearing Officer exhibits, Letter for Petitioner exhibits and Numbers for Agency exhibits. Transcripts references are indicated as T.

Agency's objections and conclude the transcript was inaccurate with regard to those points.²

The record closed on [REDACTED] 2017. (Ex. V)

Petitioner was present at the hearing and appeared pro se. The Agency was represented by [REDACTED] Director of the ACCES-VR [REDACTED] Office.

[REDACTED] Vocational Counselor, [REDACTED] Director of Counseling, [REDACTED] Office-ACCES-VR; [REDACTED] Senior Vocational Counselor; and [REDACTED] Director, [REDACTED] Office, ACCES-VR, testified in support of the Agency's claims.

Petitioner testified in support of [REDACTED] claims and presented no other witnesses.

A list of the exhibits introduced as evidence at the hearing is attached to this decision.³

ISSUE

Did ACCES-VR act appropriately and lawfully under federal and state law and its written policies when it closed Petitioner's case?

AGENCY'S POSITION

The provision of services by the Agency is not entitlement. Although eligibility has been established, an Individual Plan, for Employment ("IPE") was never created in this matter. Regardless of the reasons for Petitioner not passing the [REDACTED] exam, the relevant fact is, that [REDACTED] was not admitted to that program. Petitioner's behavior at [REDACTED] and at the Agency resulted in qualified Agency staff coming to the opinion that further assessment was required with regard to the suitability of Petitioner's employment goal and/or the articulation of another goal

² I note, however, that those corrections were not material to my decision.

³ Petitioner submitted as exhibits to his initial Closing Statement various documents concerning his prior experience and work history. (Ex. IV) I note that the Agency was aware that those documents were submitted and made no objection to my consideration of those documents. (Ex. V) Further, the documents support testimony by Petitioner during the hearing which was not contested and which I find credible and therefore the documents themselves are not material to my decision. (T.250).

notwithstanding admission to the [REDACTED] program at [REDACTED] College. Petitioner refused and the case was therefore closed. The Agency action in the above circumstances was proper and in compliance with applicable law regulations and policies. (T. 289-295).

PETITIONER'S POSITION

Petitioner makes various claims in this matter which include:

Information provided by [REDACTED] should not be considered in this proceeding because its provisions to the Agency without a "release" was a violation of Petitioner's rights. Further, the information from [REDACTED] is hearsay and unreliable and should not be considered for that reason as well. Finally, [REDACTED] had unreasonably delayed providing [REDACTED] test results to [REDACTED] although it had provided them to the Agency staff.

[REDACTED] improperly failed to reveal to the Petitioner information from [REDACTED] which it was [REDACTED] duty to reveal and relied upon information from [REDACTED] that was incomplete and/or inaccurate.

[REDACTED] did not feel threatened as [REDACTED] claimed and the evidence presented concerning Petitioner's interactions with the Agency itself, does not support a conclusion that [REDACTED] was threatening staff or a threat. Further in an email provided early in his interactions with the Agency, [REDACTED] had explained to [REDACTED] the basis for [REDACTED] "disgust toward black women." [REDACTED] failure to provide information as to [REDACTED] test results and/or disclose the reports from [REDACTED] were a deliberate effort to allow the situation to escalate in order to "exact some measure of revenge."

Petitioner's past history supports a conclusion that [REDACTED] interpersonal skills were sufficient to demonstrate job readiness and that Agency concern about that issue was not warranted and did not support further evaluations and/or closing the case.

Agency staff had agreed to provide a [REDACTED] and [REDACTED] Counselor ([REDACTED]) program and then withdrew that agreement based on incorrect and/or incomplete information.

Other training programs were urged on Petitioner but the costs of training programs discussed with Petitioner are such that the Agency requiring those programs would be wasteful and irrational since funding for the programs [REDACTED] wanted would have provided a surer benefit to [REDACTED] at much less cost.

At no point did Agency staff ever tell [REDACTED] that the reason another [REDACTED] E and/or [REDACTED] was because of the reported behavior at [REDACTED] or [REDACTED] behavior with Agency staff and Petitioner understood the reason to be unwillingness to support Petitioner's desired programs.

Petitioner also asserted claims/objections with regard to the fairness of decision-making procedure and the impartiality of the hearing officer.⁴ (Exs. IV, VI, VIII)

AGENCY'S CASE

The testimony of the Agency's witnesses and relevant documents are discussed below.

[REDACTED]

On direct and redirect examination [REDACTED] testified that:

[REDACTED] has been a Vocational Rehabilitation Counselor (VRC) at the Agency for over one year. [REDACTED] prior experience included 10 years in the field of vocational rehabilitation counseling and [REDACTED] educational background includes a Master's degree in Rehabilitation Counseling and a post-graduate diploma in Mental Health Counseling. (T.37)

⁴ I address only that which is not determined solely by review of the record and note with regard to the claim that Petitioner was denied an opportunity permitted by [REDACTED]. [REDACTED] for conversation off the record that Petitioner was informed that he could not talk with the hearing officer about the case which he had arranged to do and which [REDACTED] did not.

█ was assigned as VRC for Petitioner (█ after █ applied for Agency services and an intake interview was held on █ 2016. (T. 38) At the interview █ informed █ that █ wanted to be a Case Manager in the Human Services field. █ presented well and provided all documents required to determine eligibility and other necessary information including █ criminal record and that █ had Traumatic Brain Injury (TBI) which, among other things, could affect critical thinking. (T.38-39, Ex.1) A determination of eligibility was sent out on █ 2016. (T.38-39, Ex. 1 A) determination of eligibility was sent out on █ 2016. (T.43) Due to concerns about job readiness due to a history of interpersonal challenges with other people and █ physical condition. Petitioner was referred to █ for a █ █ █ █ █. (T.43, 175)

█ completed the DVE and at a telephone conference on █ 2016, █ and █ discussed the results. (T. 44, 175, Ex.2) █ was encouraged to explore vocational training options other than Case Manager in the Human Services field, including █ Outstanding student loan issues in a connection with prior associate degrees/education would preclude Agency funding for an additional college educational program, necessary for Case Manager employment. At that conference █ refused to consider other options. (T46-52, 174, Ex.2)

In an email exchange on █ 2016, █ was informed by █ that █ had reviewed the matter with █ supervisor and that there could be no funding for college courses unless necessary payments for the prior education was made by █ (T53-54, Ex.3)

By email on █ 2016, █ requested the return of various documents. █ also stated that █ was not surprised that Black women had derailed “this project” and that █ had tried to stay away from Black women because they tried to put obstacles in █ path, a communication which █ characterized as “racist”. (T. 56-58, Ex. 4)

█ transmitted various emails and made several phone calls on █ to █ and/or █ supervisor █) which among other things, informed that █ wanted to change focus from human services to computer technology; referenced a conversation with █ concerning a costly █ 5 month training program; alleged that staff at █ were biased and like █ wanted to prevent █ from obtaining a Bachelor's degree; alleged that █ had not appropriately informed █ of the results of his █; referenced telephone conversations with █ and requested information about █ supervisor. The emails include the statement that "...if you send me back to █ I guarantee you that I will be the last candidate you send there. FEEL ME!" "Thanks for offering me a job training program I appreciate it but I have to decline. You know what you can do with that offer and if you don't please don't hesitate to use your imagination." (T.63-66, Exs. 5,6,7) A meeting was scheduled with █, █, and █ to discuss among other things a vocational plan. (T. 66, Ex.6)

At the █ conference, █ was, among other things, reminded that the █ report had been discussed with him on █, and informed that the college sponsorship █ had requested would not be provided. █ then informed █ and █ that █ wanted to pursue █ training. █ was told that █ would need to provide a "services proposal" from █ if it was █ desire to receive training there which would then be reviewed to determine if it was a feasible goal and plan. A services proposal includes among other things, acceptance of the student for training, a description of the training, the start and end times and the price of the program. █ agreed to provide the services proposal. (T.74-77, Ex. 8) Case Notes specify █ concern about █ job readiness at that time. (Ex. 8)

Subsequent to the [REDACTED] [REDACTED] meeting [REDACTED] in a phone communication had inquired about an apprenticeship and food handling and which was the first [REDACTED] knew of that issue.

(T.81-82)

In an email exchange thereafter on [REDACTED], between [REDACTED] and RR, [REDACTED] requested and received [REDACTED]'s supervisor ([REDACTED] contact information, noted that [REDACTED] had sent in the previously discussed application to [REDACTED] and would forward the proposal when requirements there had been completed and referenced a food handler's license issues, [REDACTED] specified lack of knowledge and referred [REDACTED] to [REDACTED] for discussion. However, [REDACTED] was informed that the Agency could assist with only one vocational goal. (T.78-80, Ex.9)

On [REDACTED] 2017, [REDACTED] received a telephone call from the [REDACTED] Administrative Manager ([REDACTED] manager) and an email confirming the verbally provided information followed the same day and included a draft of a letter to [REDACTED] concerning the results. [REDACTED] was informed that [REDACTED] had not passed the language writing exam, had had an inappropriate attitude with the interviewer and would not be admitted for [REDACTED] training by [REDACTED]. The [REDACTED] manager informed [REDACTED] that [REDACTED] had been very agitated and "cursed and called names" at [REDACTED] and called back several times and was "inappropriate" with 2 other staff members and said that [REDACTED] would "come to our facility, get in, and talk to somebody because we had altered the test and [REDACTED] would have our jobs and [REDACTED] was tired of leaving messages." The [REDACTED] manager had instructed that [REDACTED] was not to be allowed entrance. [REDACTED] was informed that the section which gave the most issues was the section on Language Mechanics which included "breaking long sentences apart, putting two short sentences together, and the use of commas, semi-colons, etc." (T.90-92, Ex. 10)

On [REDACTED], [REDACTED] received an email from the [REDACTED] manager informing [REDACTED] that since being informed that [REDACTED] was not accepted, [REDACTED] had: called the [REDACTED] office repeatedly asking for

various people including the president of the organization; threatened to come to the office and “get” the [REDACTED] manager, threatened other staff verbally and had been threatening in tone and demeanor to all staff. It was reported that that day [REDACTED] had called at least 7 times and had threatened to come down and “find” staff. [REDACTED] was informed that the [REDACTED] director was going to call [REDACTED] and inform [REDACTED] that if the “harassment” of staff continued, NYPD would be contacted. (T.93-96, Ex. 11).

[REDACTED] informed [REDACTED] and [REDACTED] who replaced [REDACTED] as [REDACTED] Senior Supervisor about the emails from [REDACTED] (T.96)

During that period Agency staff had had no communication with [REDACTED] who had not submitted a services proposal or otherwise gotten in touch. A “10-days letter” asking if [REDACTED] was still interested in Agency services and providing 10 days for a response was issued on [REDACTED] [REDACTED] 2016. (T.97, Ex. E.) [REDACTED] responded via email in [REDACTED] and stated [REDACTED] was still interested in services, that [REDACTED] knew that [REDACTED] and [REDACTED] had been trying to “derail my progress from day one” and that [REDACTED] would submit a proposal concerning a program [REDACTED] was interested in. [REDACTED] added after [REDACTED] signature: “Have a great day... please don’t slip on a banana peel and break your neck or accidentally inadvertently walk in front of a steamroller on a busy [REDACTED] street.” [REDACTED] stated that [REDACTED] perceived that as “threatening and intimidating.” (T.100-101, Ex. 12)

No proposal was at that time received but Agency staff attention by then was focused on the email and the [REDACTED] submissions and staff was concerned about [REDACTED] behavior, including the way [REDACTED] was leaving messages. Staff focus at that time was more on whether [REDACTED] was job ready. (T. 102) Due to staff changes [REDACTED] ([REDACTED] had become [REDACTED] immediate supervisor and [REDACTED] had suggested a case conference in which [REDACTED] would participate. (T.105)

█ telephoned █ and told █ a meeting was necessary to meet, review the case and determine where they were going and informed █ had a new supervisor. By email on █ █ responded, in essence, that since a decision had been made by █ prior supervisor (█) the week before █ did not understand why █ had to meet with █ current supervisor unless there was some problem with the █ College program █ was proposing, that the issue was becoming time critical and that “I really don’t have time to wait for some supervisor to get off their fat ass to make a decision when the program meets the criteria.” (T.103-105, D.13) █ stated █ understood this response to be a refusal to meet. (T. 105-106)

Later on █, █ received an email from the █ manager informing █ that █ had called that day and left an “aggressive, inappropriate expletive-enhanced message” on █ phone, that the police had been called as █ had been previously warned they would be and that a criminal complaint of harassment was being filed and an Order of Protection being requested since “the message threatened me directly.” The █ manager urged █ to “stay safe and exercise caution when dealing with █.” (T. 107-108, Ex.14) █ testified that at that point █ was also very concerned about █ safety because █ messages were “getting more intimidating and aggressive. (T.108)

█ was subsequently informed that █ had contacted █ and told █ █ would be attending a █ s █ training program, that █ had told █ that there would have to be a case conference to discuss the matter and that █ had told █ that there would have to be a case conference to discuss the matter and that █ objected stating that █ had approved █ for training. █ had also informed that █ had then called █ and explained that █ need to attend the requested case conference because █ had not been able to pass the █ entrance exam at █ and █ response had been to dispute any failure and state that staff at █ felt ““

look I don't want this [REDACTED] here' so they had to come up with a reason." [REDACTED] believed that that there should be additional evaluations prior to any future services and that [REDACTED] had stated that [REDACTED] would not participate in another evaluation. (T.115)

On cross examination [REDACTED] testified that:

[REDACTED] had informed [REDACTED] in [REDACTED] initial interview that [REDACTED] had been incarcerated and that Black women were going along with a claim that [REDACTED] was hanging out with transsexuals and homosexuals but [REDACTED] believed that regardless of [REDACTED] experiences there was no basis for making racist comments to [REDACTED] merely because they were both "colored women". (T. 120-121, 123)

[REDACTED] felt threatened by the "banana peel" email which was intimidating and [REDACTED] concern was increased by the [REDACTED] reports which [REDACTED] believed indicated aggressive behavior there, by the [REDACTED] warning, by [REDACTED] phone messages to [REDACTED] which [REDACTED] believed were intimidating and by the comments about Black women. (T.125-126, 130, 158) [REDACTED] did not recuse because [REDACTED] was working with senior management on the case who were equally involved and had their support. (T.131)

The information from [REDACTED] indicated that [REDACTED] had some challenges with interpersonal skills which might be a vocational concern with a goal of [REDACTED] (T.168) [REDACTED] was informed in the telephone call from [REDACTED] that [REDACTED] had challenged the test results and wanted to talk with someone about that. (T.170-171)

[REDACTED] had been informed when [REDACTED] reviewed the case with [REDACTED] that if someone has an outstanding loan to New York State, educational degrees could not be sponsored by the Agency. (T.136-139, Ex.1) [REDACTED] had no information concerning the amount of money due for the information provided by [REDACTED]. (T142)

█'s understanding of the reason that █ wanted a college degree and Agency support for that was that █ wanted to become a Case Manager. (T.145) Because the Agency could not provide that support and based upon the █ results █ had encouraged exploration of careers in the Human Services including, specifically █ which when initially discussed █ flatly refused to consider. (T.148)

█ had no knowledge of █ offering █ a training program at █ the company which conducted the █ and which has training programs. (T. 149-150)

█ recommended █ for a █ initially because after the eligibility determination █ had reported cognitive challenges due to █ and past interpersonal challenges. (T.150)

█ received the █ report on █ 2016 and discussed it with █ on █ by telephone. (T. 154-156, Ex.2) A subsequent case conference is standard practice after a █. (T.152)

█ had no information about █ conduct in connection with █ other than what was provided in the emails from it. (T.157-157) however, █ opined that █ response to █ and when things are not going █ way indicates poor frustration tolerance, aggression, and inability to manage stress, and is not appropriate because it makes other people uncomfortable. (T. 179-181)

The only information █ had about █ test results was the material sent by █ which indicated weakness in the language part and █ noted that that was consistent with the █ results. (T.165)

█ did not close the case immediately upon receiving the information about alleged conduct at █ because the Agency still wanted to help and move forward but would require additional assessments to determine job readiness. (T.161-162) The issue of █ behavior

would have been discussed at the requested conference. (T. 163) [REDACTED] never informed [REDACTED] about her communications with [REDACTED] and had no knowledge with regard to anyone else so informing him. (T. 163-164)

[REDACTED] provides, in addition to DVEs, training programs with a range of programs, services and prices. (T.172)

[REDACTED] testified in direct examination that:

[REDACTED] has a Master's degree in Vocational Rehabilitation Counseling is a Certified Rehabilitation Counselor in which [REDACTED] is licensed as a Mental Health Counselor. (T.186) [REDACTED] has been an ACCES-VR counselor for approximately 12 years and is currently Director of Counseling. (T.186) Until about [REDACTED] r 2016 [REDACTED] was [REDACTED] supervisor but [REDACTED] continued to have some involvement with the case and had conversations with [REDACTED] (T.189-190)

In [REDACTED] 2016, [REDACTED] indicated to [REDACTED] that [REDACTED] no longer felt comfortable working with [REDACTED] (T.190, Exs. 16, 17) [REDACTED] received two voice messages from [REDACTED] (T. 190, Exs. 16, 17) The messages to [REDACTED] were both made on [REDACTED] [REDACTED]. The first in summary, informed [REDACTED] that [REDACTED] was about to call Albany to make a complaint about what staff were doing in [REDACTED] case and asked for another counselor because [REDACTED] had jerked [REDACTED] around. (T.192, Ex. 16) The second, in summary, referenced calls [REDACTED] made requesting another case manager, informed [REDACTED] that [REDACTED] would appeal [REDACTED] decision and that [REDACTED] would demonstrate that [REDACTED] was trying to sabotage [REDACTED] career and that [REDACTED] had sent [REDACTED] a "nice juicy email" the day before and hoped [REDACTED] choked on it. The issue of another evaluation was also referenced. (Ex.16)

Other messages were left for [REDACTED] [REDACTED] Office Director. One received on [REDACTED] r [REDACTED], in summary, discussed alleged misrepresentations by [REDACTED] concerning [REDACTED] failure on the [REDACTED] test and stating that the test [REDACTED] failed was not required in another program [REDACTED]

wanted and that there was no reason to take another test at [REDACTED] and that [REDACTED] believed that [REDACTED] was deliberately trying to “screw” [REDACTED] and [REDACTED] filing a complaint. Also referenced were failures by [REDACTED] to speak with [REDACTED]. The message included profanity and made claims concerning “black people” attitudes when in charge of “white people” money. (T. 190, Ex. 16) A second, made on [REDACTED] r [REDACTED], in summary, instructed that “tramp” [REDACTED] be told never to call [REDACTED] again and that [REDACTED] did not want to hear [REDACTED] r voice or see [REDACTED] face. (T.190, Ex. 16)

[REDACTED] stated that [REDACTED] tone in the conversation played demonstrated why [REDACTED] could feel threatened and that the attitudes and behaviors in the messages to [REDACTED] demonstrated why [REDACTED] case was ultimately closed. (T. 195)

With regard to the request for another [REDACTED], [REDACTED] stated that the initial [REDACTED] had been limited to 5 days because [REDACTED] already had an Associate’s degree with previous college. However, evaluation and assessment is an ongoing process and as this matter progressed [REDACTED] discussed with [REDACTED] that perhaps [REDACTED] should have another [REDACTED] not necessarily even to look at academics but to look at relevant behaviors which [REDACTED] believed related to job readiness and that that [REDACTED] should be longer (10-15 days). That would have been discussed with [REDACTED] at a case conference but [REDACTED] refused one and so those issues were never discussed with [REDACTED] (T. 199-200)

[REDACTED] declined to cross-examine of [REDACTED]

[REDACTED] (WH)

[REDACTED] testified on direct examination that:

[REDACTED] has a Master’s degree in Rehabilitation Counseling, is a licensed Mental Health Counselor, has worked for the Agency for almost 14 years, currently as a Sr. Vocational Counselor and has substantial experience with issues relating to substance abuse and reentry from prison. (T.204)

█ only direct communication with █ was on █ when █ telephoned and informed █ that █ had been approved for █ training at Medgar Evers College by SS and RR and █ had not had a follow up for the training which was starting. Both informed █ that no approval had been given. After a review of the history of the matter including the communications from the █ manager and emails sent to Agency staff, █ believed that a more extensive █ and a comprehensive psychological assessment were warranted and proposed that should be discussed at a case conference with █. However, █ had refused to participate in a case conference. Accordingly, █ telephoned █ to inform █ that the case was closed. (T. 218-223, Ex. 17)

After █ became the SVRC in this matter █ telephoned the █ manager and asked to be informed of any follow up to the information previously provided to the Agency. (T.206)

█ was subsequently provided with: 1) copy of an email to the █ District attorney sent on █, 2016 specifying threats made to █ and other staff by █ and seeking an Order of Protection; 2) a transcript of the █ telephone call made to █ to the █ manager which included repeated profanities, obscenities, and threats; 3) a criminal complaint referencing over 20 telephone calls to the █ manager and charging █ with 2 different charges of Aggravated Harassment in the Second Degree (misdemeanors) and Harassment in the Second degree (a violation). The telephone message transcript also referenced information having not been provided to █ but provided by the Agency. █ obtained verification of the charges and the issuances of the order of protection through NY State Court records. (T.206-217, Exs. 18, 19)

█ declined cross examination of █
█

█ testified on direct examination that:

█ has a Master's degree in Rehabilitation Counseling, is a certified Rehabilitation Counselor and a licensed Mental Health Counselor, has worked in the field for some 40 years of which 25 years were with the Agency and at this time is Manager of the █ District Office. (T.225)

█ submitted copies of Agency policies and procedures which █ asserted were relevant in this matter. (T. 226, 237, Exs. 21-27)

█ asserted that in this matter a final approved vocational plan had not been developed and the case was closed in Status 30, although eligibility was determined, it was in exploratory phase and a vocational plan was not written down. (T.232-235, Exs. 21-27)

PETITIONER'S CASE

Petitioner testified on █ own behalf. █ testimony and related documents are discussed/referenced below.

Petitioner (█

█ testified that:

█ is in good standing on student loans. (T.244) When █ first came to the Agency █ wanted to attend SUNY Old Westbury. (T. 244) █ holds an Associate Degree from Westchester Community College. (T.245) At the time █ applied █ owed \$976 to a community college in Suffolk County and needed one course for a degree from that school. (T.246) █ understanding of the problem of █ debt is that █ would not be admitted to college credit programs without a transcript and █ could not obtain the transcript if money was due. (T.247)

█ problem at the Agency had not been with █ but rather with █. (T.247)

After [REDACTED] completed the [REDACTED] a recommendation of Human Services or [REDACTED] was discussed and [REDACTED] believed the determination had been made. (T. 249, 251, 257) However, thereafter [REDACTED] stressed to [REDACTED] that [REDACTED] wanted [REDACTED] to take a job-training course at [REDACTED] [REDACTED] believed that the program offered would cost the Agency some \$10,000, take 5 months and would not result in guaranteed employment but rather would result solely in a volunteer job for the purpose of building a resume. (T. 252, 277-279) [REDACTED] stated that [REDACTED] had previously provided the Agency with several recommendations including from paid work [REDACTED] had done at various community colleges and that showed job readiness. (T.253)

It had made no sense to [REDACTED] that the Agency would not fund college courses at a much lower cost which would enable [REDACTED] to get a degree. (T.253)

On [REDACTED] [REDACTED] had told [REDACTED] that [REDACTED] had to go for another [REDACTED]. (T.258) [REDACTED] refused to speak with [REDACTED] thereafter although [REDACTED] had attempted to call [REDACTED] (T.258) Thereafter [REDACTED] called [REDACTED] told [REDACTED] had spoken with [REDACTED] and that they should meet and talk about [REDACTED] (T.259)

Further [REDACTED] asserted that [REDACTED] was not frightened of [REDACTED] and that if there had been a real concern security would have provided for the hearing but was not. (T.254-255)

Rather, [REDACTED] said [REDACTED] was angry because [REDACTED] was “sarcastic” in the “banana peel” postscript and [REDACTED] was irked by that, but [REDACTED] liked [REDACTED] and never threatened [REDACTED]. (T.260) [REDACTED] stated that [REDACTED] and [REDACTED] did not get along because they were bullies, two of a kind, who would not budge. (T.280)

However, [REDACTED] believed that should not affect [REDACTED] rights. (T.281)

[REDACTED] noted that it made no sense that if the Agency staff believed [REDACTED] was threatening that [REDACTED] would have been offered an opportunity to continue in [REDACTED] effort to obtain services. (T.261-262)

With regard to [REDACTED] [REDACTED] said that [REDACTED] had not called it after the [REDACTED] [REDACTED] conversation reported to the Agency and the police. (T.263) [REDACTED] had been angry because [REDACTED] had provided information to the Agency about [REDACTED] test results that it had not provided to [REDACTED] (T.264) Although [REDACTED] asserted it had sent a letter to [REDACTED], [REDACTED] had not received one. (T.264-265).

In a telephone conversation with [REDACTED] had informed [REDACTED] that [REDACTED] failed the test which led [REDACTED] to believe [REDACTED] had failed the test in its entirety. [REDACTED] then told [REDACTED] that [REDACTED] was going to send [REDACTED] for another [REDACTED] but never told [REDACTED] anything about a psychological evaluation and [REDACTED] did not say why another evaluation was necessary or that a more comprehensive one was being requested or that it would not focus on academics. (T.271-273)

[REDACTED] ultimately learned that [REDACTED] had failed only a portion of the test but no one at the [REDACTED] would tell [REDACTED] the results when [REDACTED] first began to call them after [REDACTED] had informed [REDACTED] that [REDACTED] failed. (T. 264-265) Further, neither [REDACTED] nor anyone at the Agency had ever told [REDACTED] that [REDACTED] had been communicating with the Agency about [REDACTED] behavior or provided counseling or advice with regard to that issue or provided accurate information regarding the results although they had it. (T.264, 266-267) [REDACTED] said [REDACTED] was in effect, “baited” with regard to this matter. (T.266-268, 283) Further, [REDACTED] said [REDACTED] was aware of the problems [REDACTED] was having with [REDACTED] and never returned [REDACTED] calls although it would have been easy to straighten the whole thing out and that as a result it festered. (T. 268).

With regard to the need for a second [REDACTED] [REDACTED] believed that there had been a significant degree to a psychological assessment as part of the first one and results would be the same. (T248, 249) [REDACTED] said [REDACTED] might therefore have objected but that had not come up because [REDACTED] had not been told the reason. (T.273-276).

With regard to the issue of an “apprenticeship” and [REDACTED] food handler’s license, [REDACTED] stated that [REDACTED] had been wondering if there was some possibility in that field but that [REDACTED] had been vague about that and did not give [REDACTED] any answers so [REDACTED] dropped it. (T.263)

[REDACTED] submitted various documents for admission into evidence. (Exs. A through F)

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. ACCES-VR 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 in NYS, the Agency has promulgated various written policies and procedures. Policies and procedures relevant to this matter include:

Employment Outcome Policy (010.00):

The Employment Outcome Policy specifies that the Agency works with individuals to obtain an employment outcome in the most integrated employment setting consistent with the individual’s unique employment factors. (Ex. 22)

Employment Outcome Procedure (010.00P):

The Employment Outcome Procedure specifies, among other things, that consumers must fulfill their responsibilities as active partners including completing assessments required for eligibility determination and employment plan development (Ex. 23)

Consumer Involvement Policy (100.00):

The Consumer Involvement Policy establishes various mechanisms that allow the consumer to play a major role in developing his/her personal Individual Plan for Employment. It also notes, in pertinent part, that further medical and/or vocational assessments may be needed and that the 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 complete control over his/her program and the “VR counselors must review, consider and approve all IPE’s [and that] and they will apply their professional judgement; vocational rehabilitation expertise, applicable laws and regulations and policies; sound planning considerations; and responsible use of public funds and that services must lead directly to employment goals that are feasible, timely and attainable and with fiscal constraints of the program. (Ex. 24)

Eligibility for Services Policy (202.00)

The Eligibility for Services Policy specifies that counselor observation is a significant source of information in determining eligibility, that a determination eligibility is not a guarantee of the provision of specific services and that employment factors must be assessed, documented and considered together when determining eligibility and planning services, relying on, among other things, situational assessments. This policy also states that consumers do not unilaterally

control their programs and the final decision must reflect the VRC's application of professional judgement, applicable laws, regulations and policies, and sound planning consideration of the individual's employment factors. (Ex. 25)

Assessment Policy (204.00)

The Assessment Policy discusses the assessment requirements and procedures. It specifies that:

“...assessment is ongoing and person-centered occurring at critical decision points throughout the vocational rehabilitation process.” (Ex. 26 at 1)

Purposes of an assessment include: the determination of the significance of disability; identification of the scope of required services and supports to meet rehabilitation needs; determination of progress during the implementation of the IPE. (Ex.26 at 2).

“If additional information is needed the VR counselor, along with the individual receiving services should decide how to obtain the information and establish appropriate time frames for completion. The decision to pursue any additional assessments will also be fully discussed and explained to the individual. The VR counselor must obtain only the information that is necessary for eligibility or service planning.” However, “[w]hile the decision making process is a collaborative one, decisions must reflect the judgement of the VR counselor in accordance with VR policy.” (Ex. 26 at 4)

Non-Degree Training at Trade, Business and Other Schools Policy (410.00)

The Non-Degree Training at Trade Business, and Other Schools Policy specifies that Agency sponsored individuals must meet the same standards for enrollment and admission among other things, as outlined by the school for all students. (Ex. 27)

Also relevant in this proceeding is the decision of the New York Supreme Court Appellate Division in *Matter of Goldstein*, 199 A.D. 2d 766 (3rd Dept., 1993) (Ex.21) In accordance with *Matter of Goldstein*,

the opinions of Agency counselors may be relied upon by hearing officers when deciding cases involving rejection or consumer requests for services.

FINDINGS AND CONCLUSIONS⁵

1) I find no merit in Petitioner's claim that the [REDACTED] reports may not be considered in this proceeding. I conclude that the communications from [REDACTED] were initially unsolicited by the Agency and a result of Petitioner's informing [REDACTED] that [REDACTED] application to it was connected with [REDACTED] application to the Agency. Further, even had that been otherwise, Petitioner discussed with the Agency his plans to attend [REDACTED] at Agency expense. If Petitioner has concluded that [REDACTED] violated any of [REDACTED] rights in its provision of information to the Agency, [REDACTED] recourse is an action against [REDACTED] not the preclusion of evidence in this administrative proceeding. With regard to Petitioner's objection that the [REDACTED] information is hearsay, I note that hearsay is admissible in an administrative proceeding. I note my conclusion that Petitioner's principal objections to the information provided were that it is incomplete, not that it is inaccurate, and further, that the general reliability of the information provided by [REDACTED] with regard to the behavior of Petitioner is enhanced by the criminal charges filed and the order of protection issued based upon the same information.

2) I find, and it is undisputed, that Petitioner cooperated with the Agency with regard to the determination of eligibility and the completion of the initial [REDACTED]. Further, I note the Agency did not dispute the accuracy of the excellent recommendations submitted to it by Petitioner concerning previous employment/education.

3) Although Petitioner initially wanted to pursue training for employment as a

⁵ Record references are specified in the foregoing specifications of the cases of the parties.

Case Manager in the Human Services field, ■ acknowledged that ■ could not get a transcript necessary for admission to college degree programs as a consequence of student loans issues. I find that in those circumstances, Agency support for college tuition should be precluded. I therefore do not address issues concerning the actual status of the Petitioner's educational loans except to note that I credit the testimony that Agency policy prohibits college support when educational loans from NYS are outstanding.

4) An Agency recommendation to consider ■ training is undisputed. I note, however, that even in the circumstance of ■ having been proposed by the Agency that did not constitute final Agency agreement to provide it. An IPE incorporating ■ had not yet been created and ongoing Agency consideration of an appropriate goal and program was permitted.

5) I find credible Petitioner's testimony that during ■ discussions with ■ participation in a very different training program with a different employment goal was discussed and proposed as an option. With regard to that finding I note that Petitioner's testimony was not contested by ■ and that the issue was referenced in Petitioner's communications with the Agency as early as ■ I credit Petitioner's testimony that ■ came to believe that the Agency was unwilling to provide ■ training but rather was intent on a program which ■ believed was not appropriate for various reasons.

6) I find the Petitioner was not promptly informed by ■ or the Agency as to the precise results of ■ test and was frustrated and distrustful when he was told by Agency staff that ■ had failed it. I note that although a draft of the ■ letter specifying the reasons for the failure had been sent to the agency, there is no evidence that that document was actually mailed by ■ to Petitioner and that in any event, ■ has credibly denied receipt. Further, the reports

of [REDACTED] interactions with [REDACTED] indicates that at least during some of them [REDACTED] was seeking to obtain those results and therefore support [REDACTED] testimony with regard to that.

7) I find credible the evidence presented by the Agency concerning communications with [REDACTED] and conclusions thereafter. I find Petitioner's behavior in his interactions with the Agency even absent consideration of the [REDACTED] information was sufficient to provide a reasonable basis for professional staff determination that further evaluations/assessments with regard to interpersonal skills and job readiness were appropriate. The evidence indicates that when frustrated, angered, or in disagreement with perceived or actual bureaucratic delays, failures, inefficiencies, unresponsiveness, and/or decisions, Petitioner may respond with sarcasm, profanity, veiled or actual threats and/or intemperate and repetitive communications. Staff case notes in early [REDACTED], before any [REDACTED] communications, specify concerning job readiness in view of Petitioner's various interactions with the Agency and in subsequent interactions with Agency staff [REDACTED] displayed similar concerning behaviors. Further, notwithstanding my finding that Petitioner did not receive complete and timely information from it, the interactions with [REDACTED] even in those circumstances demonstrate a lack of control and sense of appropriate limits which also provides a reasonable basis for professional staff determination that additional assessments/evaluations should be required. Although Petitioner suggests that similar issues would not arise in the kind of employment [REDACTED] is seeking, I note that virtually all employment requires interaction with others who may not meet [REDACTED] expectations in some way and/or require compliance with procedures or restrictions [REDACTED] may not agree with.

8) I find no merit in Petitioner's claim that [REDACTED] was deliberately "baited" into improper behaviors by an Agency failure to provide appropriate [REDACTED] and counseling and note that in my conclusion that the evidence does not support that.

9) I need not make a finding with regard to the degree of [REDACTED]'s personal apprehension with regard to continued work with Petitioner because I find that in the circumstances here a reasonable person could be concerned and that that is an issue related to job readiness.

10) I note, however, that the Agency asserts that the reason for closing the case was not the Petitioner's conduct but [REDACTED] refusal to come in for a conference at which the need for further evaluations would be discussed. I find credible Petitioner's testimony that believed when [REDACTED] refused the proposed meeting that [REDACTED] training was being rejected and that the purpose of the conference was connected with evaluations for a training program and goal which [REDACTED] believed were not appropriate and that [REDACTED] had no knowledge of Agency communications with [REDACTED] or the relation of the evaluations to that or his behavior generally. I note with regard to that finding the acknowledgement by [REDACTED] and [REDACTED] that they did not discuss with the Petitioner [REDACTED] behavior at the Agency and/or [REDACTED]. Although evaluations were mentioned by [REDACTED] in a prior conversation with Petitioner, I am persuaded that Petitioner understood that that was unconnected with what [REDACTED] believed was unreasonable staff preference for another program. I note my finding that Petitioner's communications to the Agency support that conclusion. Accordingly, I find that Petitioner did not have an appropriate opportunity to make an informed refusal in this matter and therefore [REDACTED] will be given an opportunity to consider whether [REDACTED] is willing to comply with an Agency request for an additional [REDACTED] and/or psychological evaluation. However, in view of the personal differences and the history here staff changes/restrictions will be required.

11) I find that ACCES-VR staff had a reasonable and lawful basis, under the laws, regulations, and policies specified above and in an exercise of their professional judgement, to require further evaluation as a condition for funding.

ORDER

- 1) The case discussed herein shall be reopened.
- 2) If within 30 days of the reopening of the case Petitioner does not consent in writing to such [REDACTED] and/or [REDACTED] assessments as are required by the Agency, the case may be closed for that reason.
- 3) The Agency is not precluded from closing the case at some subsequent date based in whole or in part on events occurring after the issuance of this Order so long as that determination in accordance with applicable laws, regulations, and policies.
- 4) The Agency may request Petitioner’s participation in another case conference to discuss Agency concerns.
- 5) The Agency shall replace [REDACTED] with another VCR assigned to this matter.
- 6) [REDACTED] shall not directly communicate with Petitioner or participate in Agency meetings or case conferences at which Petitioner is present.

Dated: [REDACTED], 2017

[REDACTED] Esq.
Impartial Hearing Officer

PLEASE TAKE [REDACTED]

This decision will become final and ACCES-VR will begin to implement the decision within twenty (20) days. If the Consumer disagrees with the decision, he may seek judicial review of this decision through an action in a court of competent jurisdiction.

IHO EXHIBITS

- I Appointment Letter/Hearing Notice, [REDACTED]/17
- II Appointment Letter/Hearing Notice, Rescheduled Hearing, [REDACTED]/17
- III Consumer Request for Hearing
- IV Petitioner's Closing Statement with Exhibits and transmission information
- V Emails between Petitioner, [REDACTED], Sternbach, and Hearing Officer
- VI Petitioner's Supplemental Closing Statement after Transcript Receipt
- VII Emails from [REDACTED] concerning proposed Transcript corrections
- VIII Petitioner's Response [REDACTED]/2017 after receipt of requested corrections

PETITIONER'S EXHIBITS

- P-A Emails between [REDACTED] and [REDACTED] n [REDACTED]-[REDACTED]/16
- P-B Email [REDACTED] to [REDACTED] [REDACTED]/16
- P-C Email [REDACTED] to [REDACTED] [REDACTED]/16
- P-D Email [REDACTED] to [REDACTED] [REDACTED]/16
- P-E Letter [REDACTED] to [REDACTED] [REDACTED]/16
- P-F Letter [REDACTED] to [REDACTED] [REDACTED]/16

ACCES-VR'S EXHIBITS

- D-1 Background Case Note, [REDACTED]/16
- D-2 Case Note [REDACTED]/16
- D-3 Emails [REDACTED] 16
- D-4 Email [REDACTED]/16

- D-5 Email [REDACTED]/16
- D-6 Case Note [REDACTED]/16
- D-7 Email [REDACTED] 17
- D-8 Case Note [REDACTED]/16
- D-9 Emails between [REDACTED] and [REDACTED]/16
- D-10 Emails between [REDACTED] and [REDACTED] [REDACTED]/16
- D-11 Emails between [REDACTED] and [REDACTED] [REDACTED]/16
- D-12 Email [REDACTED] to [REDACTED] [REDACTED]/16
- D-13 Email [REDACTED]/16
- D-14 Email [REDACTED] to [REDACTED] [REDACTED]/17
- D-15 Case Note [REDACTED]/16
- D-16 Transcription Telephone messages-[REDACTED] to Agency Staff, various dates
- D-17 Case Note [REDACTED]/16
- D-18 Email from [REDACTED] with Police Report and phone transcript
- D-19 NY State Unified Court System printout
- D-20 Case Note [REDACTED]/16
- D-21 *Matter of Goldstein, 12/16/93*
- D-22 Policy 010.00
- D-23 Procedure 010.00P
- D-24 Policy 100.00
- D-25 Policy 202.00
- D-26 Policy 204.00
- D-27 Policy 410.00