

STATE OF NEW YORK  
ADULT CAREER AND CONTINUING EDUCATION SERVICES  
VOCATIONAL REHABILITATION SERVICES

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In the matter of:

██████████

Petitioner,

vs

NYSED's Adult Career and Continuing Education Services  
Vocational Rehabilitation (ACCES-VR)

Respondent

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FINDINGS AND DECISION

Before: ████ ██████████ Impartial Hearing Officer

For Petitioner: ████ ██████████ Petitioner *Pro Se*

For Respondent: ████ ██████████ District Office Manager for ACCES-VR's  
██████ office

██████████ Director of Counseling, ACCES-VR's ██████████  
Office

██████████ Senior Vocational Rehabilitation Counselor,  
ACCES-VR's ██████████ Office

██████████ Vocational Rehabilitation Counselor, ACCES-  
VR's ██████████ Office

Place of Hearing: NYSED/ACCES-VR Office located at ██████████  
██████ NY ██████████

Also Present: ████ ██████████ Petitioner's ██████████  
██████████ Service Coordinator, Catholic Charities,  
██████ NY

Date: of Hearing: ██████████ 2016

On [REDACTED] 2016, the Petitioner was sent a letter by [REDACTED] Vocational Rehabilitation Counselor for the NY State Education Department's Office of Adult Career and Continuing Education Services- Vocational Rehabilitation ([REDACTED] "ACCES-VR" or the "the Agency") letting the Petitioner know that [REDACTED] Individualized Plan for Employment ([REDACTED] "IPE") has ended and [REDACTED] case closed.

On [REDACTED] 2016 the Petitioner [REDACTED] filed a "Due Process Request" form requesting Administrative Review of the above-referenced letter of discharge dated [REDACTED] 2016. On [REDACTED] 2016, an Administrative Review of the [REDACTED] 2016 decision was made, in the form of "ACCES-VR Administrative Review Decision." The Petitioner did not agree with that Decision, and [REDACTED] requested an impartial hearing.

Pursuant to that request, on [REDACTED] 2016 a hearing was conducted in [REDACTED] NY with myself, Attorney [REDACTED] conducting the hearing as an Impartial Hearing Officer ([REDACTED] "IHO").

On [REDACTED] 2016, I received a complete and accurate Transcript of the hearing.

**SOLE QUESTION BEFORE THIS IHO:**

[REDACTED] ACCES-VR's prior decisions of [REDACTED] 2016 and Administrative Review of [REDACTED] 2016 were appropriate.

Petitioner/Consumer's position:

[REDACTED] [REDACTED] argues that [REDACTED] case with the Agency should not have been closed and [REDACTED] Individualized Plan for Employment ([REDACTED] "IPE") should not have ended.

ACCES-VR's position:

The Agency argues that since [REDACTED] [REDACTED] [REDACTED] ([REDACTED] [REDACTED]) needed to close out the Petitioner's case due to the Petitioner's verbally aggressive behaviors, the Agency properly closed Petitioner's case and properly ended [REDACTED] IPE.

**LIST OF EXHIBITS (header of the first page noted)**

Agency (VR)'s Exhibits:

- Ex. 0 NYSED's "Due Process Request" date stamped [REDACTED] 2016 with handwritten letter by Petitioner attached (2 pages) [REDACTED] with "Notice of Hearing" dated [REDACTED] 2016 (2 pages);
- Ex. 1. "100.00 Consumer Involvement Policy" (4 pages)
- Ex. 2. "206.00 Individualized Plan for Employment Policy and Procedure" - 17 pages
- Ex. 3. "State Search Results" print date [REDACTED]/2016 - 2 pages
- Ex. 4. "Eligibility/Significance of Disability Case Note" dated [REDACTED]/2015 - 4pages
- Ex. 5. "Supported Employment Referral Form" dated [REDACTED] 2015 - 6 pages
- Ex. 6. "Supported Employment Referral Case Note" dated [REDACTED]/2015 - 6 pages
- Ex. 7. "Center for Disability Services-Employment Options -Summary Account-meeting with [REDACTED] [REDACTED]/2015" with attachments - 5 pages
- Ex. 8. "Chronological Case History/Important Events Case Note" dated [REDACTED]/2015 - 1 page
- Ex. 9. "The State Education Department/The University..." letter from [REDACTED] [REDACTED] dated [REDACTED] 2015- 1 page
- Ex. 10. "Supported Employment Referral Case Note" dated [REDACTED]/2015- 6 pages

- Ex. 11. "The State Education Department...Referral Form- Date of Referral  
█/2015
- Ex. 12. "Situational Assessment Report" dated █/2015 - 2 pages
- Ex. 13. "Chronological Case History/Important Events Case Note" dated █/2016  
by █ - 1 page
- Ex. 14. "Chronological Case History/Important Events Case Note" dated █/2016  
by █ - 3 pages
- Ex. 15. "The State Education Department..." decision letter addressed to Petitioner  
dated █ 2016 from █ - 2 pages
- Ex. 16. "28 Closure Summary Case Note" dated █/2016 - 2 pages
- Ex. 17. "Chronological Case History/Important Events Case Note" dated █/2016  
by █ - 1 page
- Ex. 18. "ACCES-VR Administrative Review Decision," review dated █/2016,  
Decision dated 6/14/2016 by █ █ - 3 pages
- Ex. 19. "Individualized Plan for Employment (IPE)... IPE Change Date:  
█/2015" - 4 pages
- Ex. 20. "Individualized Plan for Employment (IPE)... IPE Change Date:  
█/2015" - 3 pages
- Ex. 21. "Individualized Plan for Employment (IPE)... IPE Change Date:  
█/2015" - 2 pages
- Ex. 22. "Individualized Plan for Employment (IPE)... IPE Change Date:  
█/2015" - 2 pages

## **SUMMARY OF HEARING**

██████████ testified first for the Agency, giving a short chronology of the several times in recent memory that various providers had reported that the Petitioner was verbally abusive. ██████████ testified that after the ██████████ for ██████████y ██████████ reported difficulties with the Petitioner, the Petitioner was referred to ██████████ ██████████ ██████████ (██████████), who reported to the Agency that the Petitioner was argumentative and verbally abusive. (Transcript, page 4)

██████████ testified ██████████ belief that the Petitioner has an interest and a desire to work. ██████████ further testified that the Agency feels that the Petitioner needs mental health counseling, and without such counseling, the Petitioner's "...pattern of verbal aggression and inability to sustain employment... will continue to be displayed, making it highly unlikely that another provider will accept [the Agency's] referral and agree to my additional services." (Transcript, page 25)

██████████ testimony concluded with the following statement: "...it is our professional judgement that ██████████ ██████████ seek intensive counseling supports prior to my additional efforts to secure employment and to work with our agency." (Transcript, page 26)

Following the testimony of ██████████ ██████████ the Petitioner was allowed an opportunity for an opening statement and rebuttal and to cross-examine ██████████ ██████████ The Petitioner mentioned that ██████████ has been receiving psychotherapy for the last 12 years and that ██████████ does have a psychiatrist, a Dr. ██████████ (phonetic) and indicated that the Agency's ██████████ had refused to "...reach out..." to ██████████ said Psychiatrist. The Petitioner then informed the IHO as to the nature of ██████████ brain

injury and [REDACTED] seizures. (Transcript, pages 28, 29) The Petitioner testified that ... “additional help was asked for and needed...” (Transcript, page 29) During cross examination of [REDACTED] [REDACTED] the petitioner’s father asked about a neuropsychological [report] that was missing from the record (Transcript, page 35), stating, by way of an opening statement, that the Petitioner are not just “...emotional problems but also... cognitive problems.” (Transcript, page 36) The Petitioner’s father went on to testify that the Petitioner suffered from a brain injury and problems due to carbon monoxide poisoning. (Transcript, page 37)

[REDACTED] [REDACTED] then testified on behalf of the Agency, stating that the job coaches that [REDACTED] assigned to the Petitioner repeatedly came back to [REDACTED] and complained of the verbal abuse from the Petitioner and that the job coaches told [REDACTED] [REDACTED] that “...they shouldn’t need to deal with that...” (Transcript, page 38) [REDACTED] [REDACTED] went on to testify, stating: “... if there any problems like [the] verbal abuse, I’m going to have to close your case out. I’m not left with many options.” (Transcript, page 39) The Petitioner and her father had an opportunity to cross-examine [REDACTED] Burt. [REDACTED] the Petitioner’s father first testified that he had previously worked as both a “... neuropsychologist and a therapist...” (Transcript, page 44) The Petitioner’s father then went on to remark that his [REDACTED] has “...never been physically aggressive...” (Transcript, page 44)

[REDACTED] [REDACTED] testified, stating for the Agency that “...we cannot place somebody who tends to be verbally aggressive out in the community.” (Transcript, page 46) The Petitioner and [REDACTED] were then provided the opportunity to question [REDACTED] [REDACTED]

██████████ then asked the Agency members for them to provide information as to the criteria set by the agency for determining whether a consumer was "...too aggressive to work in employment..." (Transcript, page 49) ██████████ Director of Counseling from the Agency provided the answer, stating the Petitioner's job coaches in the instant matter had reported many incidents of "yelling" and "raising voices" and that the job providers had told ██████████ that they cannot work or will not work with ██████████" (Transcript, page 50) ██████████ agreed that the Petitioner was in need of "...cognitive remediation, and neurological and psychological therapy..." (Transcript, page 56) ██████████ then interjected that the Petitioner had previously been referred to "██████████ ██████████ ██████████ ..." (Transcript, page 56) ██████████ continued, stating that there was "...an expectation of behavior [in the workplace] regardless of disability..." (Transcript, page 58) The Petitioner and ██████████ father were then provided the opportunity to cross-examine ██████████

██████████ then interjected that the Petitioner had previously been referred to ██████████, "...an agency that serves individuals with traumatic brain injury..." (Transcript, page 59), but, afterwards that the agency stated it was not willing to work again with the Petitioner.

The Petitioner was then provided the opportunity to make a statement, which ██████████ did. The Petitioner's father, ██████████ then observed that the Petitioner's Agency case could have simply been placed in "...hiatus until [██████████ mental health] issues had been taken care of..." (Transcript, page 61) ██████████ also noted that an Agency report stating that "██████████ ██████████ mental health issues

contributed more to ■■■ difficulties than any limitations arising from ■■■ traumatic brain injury...” was “ludicrous”, testifying that “Mental issues do arise from brain injury.” (Transcript, page 60).

### **DECISIONS OF THE IHO**

The instant matter is controlled by Federal Statute and regulations (29 USC §§ 701 et seq., 34 CFR §361) as well as NY State statute and regulations (NYS Education Law Article 21, §1001-1009, 8 NYCRR Part 247).

The petitioner has the burden of proof in the instant matter (See NY State Administrative Procedures Act §306). In order to prevail, the Petitioner must demonstrate that ■■■ position is supported by “substantial evidence.” *See Matter of Goldstein v. VESID*, 199 AD 2d 766 (Third Dept. 1993). “Substantial Evidence” is defined as less than a “preponderance of the evidence”, yet is more than a “scintilla of evidence.” Due deference will be accorded to the Agency regarding its policies and prior Administrative Decisions (such as “Administrative Review Decision”- Exhibit 18) pertaining thereto.

Under 8 NYCRR §247, and IHO may “receive and consider all relevant and reliable evidence.”

The burden of proof in the instant matter lies with the Petitioner to demonstrate “by Substantial evidence” that ■■■ should prevail, and to prevail, the Petitioner would have needed to demonstrate “by substantial evidence” that ■■■ case with the Agency should not have been closed and ■■■ Individualized Plan for Employment (hereinafter “IPE”) should not have ended. In order to prevail, the Petitioner would have needed to demonstrate, by substantial evidence, that the

agency was compelled to continue the consumer's case with [REDACTED], or by demonstrating that the Agency lacked the discretion to close out [REDACTED] case, or abused its discretion by doing so.

Unfortunately, this IHO is unable to find any law, statute, regulation, case law, or policy that is directly on point that would directly address the scenario whereby a consumer's actions, in the setting of a service provider, is or was verbally aggressive, overly argumentative, verbally threatening, swearing, cursing or the like. Therefore, this IHO is compelled to address this matter strictly from a standpoint of Agency discretion and/or lack thereof or the abuse thereof.

It is uncontroverted that the Petitioner suffers from disabilities and the documentation supports this. The Petitioner suffers from Mood Disorder due to toxic Encephalopathy due to Carbon Monoxide poisoning (see Exhibit 3) and therefore [REDACTED] suffers exactly from the types of disabilities that the Federal and NY State stature and regulations were designed to address (See also Exhibit 9)

However, ACCES-VR Policy 100.00 "Consumer Involvement Policy" states the following:

They [ACCES-VR Counselors] will apply their *professional judgement*; vocational rehabilitation expertise, applicable laws, regulations, and policies, sound planning considerations; and responsible use of public funds. Services must lead directly to employment goals that are feasible, timely and attainable within the fiscal constraints of the program. This means that ACCES-VR will only support the most cost-effective option that leads to the individual's employment goal and that is required to meet the individual's employment objective. Cost effectiveness is determined by comparing cost, level of integration, duration, quality, timeliness, proximity, and appropriateness of service options required to meet the individual's needs.

Matter of Goldstein v. VESID, 199 AD 2d 766 (Third Dept.1993)

has consistently stood for the premise that a consumer will have a say, but does not have complete control over their own vocational rehabilitation program. Combined with the above quoted language from ACCES-VR Policy 100.00, it is clear to this IHO that the Agency has reserved unto itself a great deal degree of discretion in most, if not all, of its actions. It is the opinion of this IHO that “Professional Judgment” would clearly grant an Agency Officer or Director the degree of discretion to decide, based upon ascertainable facts and substantial evidence, whether to terminate or close out a consumer’s IPE case when the providers of said rehabilitation services feels it can no longer work with a consumer.

In the instant case, many service providers have submitted to the Agency information that they had difficulty working with the consumer. In regards to [REDACTED] referral to the [REDACTED] [REDACTED], for example, the Petitioner demonstrated “...confrontational behavior and ... resorting to expletives.” (Exhibit 7) Due deference is given to the Agency’s own Case Notes stating the Petitioner “... is very aggressive verbally and reacts too quickly...” (Exhibit 8) An Agency Case Note from [REDACTED] 2015 stated that the Petitioner “...acted inappropriately becoming verbally aggressive... [REDACTED] continued to act out during the meeting in a verbally aggressive manner. This was a pattern for this individual as [REDACTED] can be impulsive...” (Exhibit 10) *See also* Exhibit 14, Case Note from [REDACTED], [REDACTED]/ [REDACTED] Specialist. It is clear to this IHO that there is sufficient documentary evidence to demonstrate, by substantial evidence, that there was a pattern and practice of significant verbal aggression by the Petitioner.

The Agency's ██████ 2016 closure letter was subsequently reviewed after the Petitioner requested Due Process measures be instigated, and on ██████ 2016 the Agency issued its "Administrative Review Decision" (Exhibit 18) While this IHO would note that the crux of the Petitioner's complaint rests with the fact that ██████ feels ██████ did not receive a sufficient level of assistance from ██████ job coach at ██████ the sole question again for this IHO to consider is whether there was an abuse of Agency discretion, and in light of the evidentiary record, it is the opinion of this IHO that the Agency did not abuse its discretion in making its decision.

While this IHO agrees that the Agency did, indeed have the discretion to close out the Petitioner's case and did not abuse its discretion, it is still troubled by the fact that the Petitioner's mental health issues were not dealt with as well as they could have been, and believes that the Petitioner could have benefitted by a better "match-up" with job coaches who were more diligent, more sympathetic, and willing to go "that extra mile" for the Petitioner.

In the Petitioner's referral to ██████ (Exhibit 11), the Agency believed the Petitioner ... "would be better served with an agency that would be able to effectively deal with ██████ mental health issues..." From this correspondence, it appears that the Agency had faith and confidence that ██████ and the job coaches there would be able to handle the Petitioner's disabilities. It is fortunate that the ██████ and the job coaches there were unable to handle the Petitioner's verbal aggression, but unfortunately this IHO would not and cannot compel service providers to continue providing services to consumers who are verbally aggressive or abusive. That would be outside the powers of this IHO.

The Agency's own officer [REDACTED] [REDACTED] stated and acknowledged the following:  
... "it is our *professional judgement* that [REDACTED] [REDACTED] seek intensive counseling supports prior to any additional efforts to secure employment and to work with our agency..."  
(Transcript, page 26) The Petitioner's father also agreed with this diagnosis of the situation, observing that the Petitioner's Agency case could have simply been placed in "...hiatus until[ here mental health] issues had been taken care of. .." (Transcript, page 61)

This IHO agrees with the Administrative Review Decision (Exhibit 18) and specifically agrees with the following language of that decision: "It is the professional opinion of this reviewer that [REDACTED] case remain closed. If [REDACTED] were to reapply in the future for ACCES-VR services it is recommended that [REDACTED] do so after having participated in counseling services to help [REDACTED] manage [REDACTED] emotions and outbursts." (Exhibit 18).

This IHO therefore issues the following Order:

ORDER: it is hereby ordered that the Agency's prior decisions be re-affirmed.

Dated: [REDACTED] 2016

[REDACTED] Impartial Hearing Officer

Appeal Notice: Please take note that this is a final decision. If you disagree with this decision, you may seek judicial review through an action commenced in a NY State or Federal court of competent jurisdiction.