2015 - #13

STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK, ADULT CAREER AND CONTINUING EDUCATION SERVICES-VOCATIONAL REHABILITATION
BEFORE: [redacted] HEARING OFFICER

In the Matter of [redacted]

APPEARANCES

FOR CONSUMER

1. [redacted]
   Consumer Representative
   [redacted]

2. [redacted]

RECEIVED
OCT 01 2015
BY:

FOR ACCES-VR

1. [redacted]
   Director of Counseling
   ACCES-VR [redacted]
   [redacted]

PRELIMINARY INFORMATION

By letter dated August 25, 2015, the undersigned received notice of appointment from Patricia Mazzariello, Rehabilitation Provider Specialist 2, Adult Career And Continuing Education-Vocational Rehabilitation ("ACCES-VR"), as Hearing Officer pursuant to 8 N.Y.C.R.R. Part 247.4. (Hearing Officer Exhibit No. 1). A hearing was held at ACCES-VR [redacted] District Office on September 25, 2015. All parties had the opportunity to make opening and closing statements, to examine and cross examine witnesses and to present evidence. All parties were also advised of their right to appear with counsel; however, both parties chose to appear without counsel.

Since both sides were appearing *pro se*, the hearing, which lasted approximately two hours, was conducted in an informal matter with the hearing officer asking several questions. Significantly, all parties were given able opportunity to be heard and to present their evidence in the manner they each saw fit. All witnesses were sworn in.

RECORD

A stenographic record of the hearing was made by Court Reporter [redacted] from [redacted] Court Reporting. Additionally, because the Consumer, his representative and the ACCES-VR counselor were all deaf, two sign language interpreters from [redacted] Interpreting Service, [redacted] and [redacted] provided interpretation services. ACCES-VR introduced one exhibit into evidence, ACCES-VR Policy 405 (College and University Training Policy) and the Consumer introduced one exhibit into evidence (Undergraduate Unofficial Transcript and Gallaudet University Student Financial Services document). I did not exclude any exhibits which were offered. I carefully reviewed this entire record and this decision is based only on that record.

Both sides were well represented and the quality of advocacy was excellent. The record was deemed closed at the conclusion of the hearing on September 25, 2015.

STATEMENT OF FACTS

The facts of this case are simple and straight forward. There are no material factual disputes.

The Consumer, [redacted] is an articulate young man who is deaf. His Mother, who along with [redacted] corresponded with ACCES-VR, is also deaf.

In the Fall of 2014, the Consumer enrolled as a resident student at Gallaudet University in Washington, D.C. ACCES-VR conceded that the Consumer was eligible for tuition, fees, room and board coverage, but the agency did pay these expenses because:

1. Registration information was not provided which describes the courses that were taken;
2. Bursar information which gives a cost breakdown were not provided.

Significantly, ACCES-VR indicated that it was still willing to pay these expenses if the correct documentation was provided.

At the hearing the Consumer provided a copy of an unofficial undergraduate transcript and a copy of a student financial services statement which shows an unpaid balance of $7,758,76 (Consumer Exhibits 1A & 1B). Both parties agree that is the amount at issue even though the typewritten portion of the form shows an outstanding balance of $11,162.76. Presumably, the difference involved the health insurance fee. In any event, the differing amounts are not at issue in this case.

Additionally, at the hearing, the representative of ACCES-VR was given the opportunity to question the Consumer about these exhibits and his education expenses. [redacted] indicated that he was now satisfied that the Consumer provided all of the necessary information, that the Consumer now complied with Policy 405 and that ACCES-VR will pay the full amount requested, $7,758.76.

[redacted] did indicate that for accounting purposes, the $7,758,76 may be broken down into different parts, but, in any event, the full amount will be paid.

LEGAL ANALYSIS

The Federal Rehabilitation Act of 1973, 29 U.S.C. Sec. 701 is designed to assist disabled individuals gain employment. The Act provides grants to states that choose to participate. New York has opted into this program, *See,* Education Law Sec. 1001 *et. seq.*

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

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

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

with Disabilities, 602 F. 3d 476 (2d Cir. 2010) (federal court applies deferential standard by affording "due weight" to decision of Hearing Officer).

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

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

Murphy, supra.

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

Indeed, in *Goldstein v. Office of Vocational and Educational Services For Individuals With Disabilities,* 199 A.D.2d 766 (3d Dep't. 1993), the court found that the opinion of a Rehabilitation Counselor which was supported by the opinion of other specialists provided substantial evidence to support the Agency's decision to deny certain services.[1] *Goldstein* also recognized that Consumers do not have complete control over their program.

Both the Consumer and his Mother are deaf. Although the record is somewhat vague on this issue, it appears that there was some miscommunication and that is why the appropriate documentation was not timely provided. I make no findings in this regard, however, because ACCES-VR conceded that the documentation provided at the hearing together with the

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[1] ACCES-VR " is permitted to consider cost when determining the vocational rehabilitation services it will provide to disabled individuals so long as it does not" 'place absolute dollar limits on specific service categories' and it 'permits exceptions [to any fee schedules] so that individual needs can be addressed,' *Wasser v. N.Y.S. Office of Vocational and Educational Services,* 2008 WL 1688764 (2d Cir. April 28, 2010) (n.o.r.), *quoting,* 34 C.F.R. Sec. 361.50(C)(ii); *citing Murphy, supra.*

Cost does not appear to be an issue here because services were not denied on that basis

Consumer's testimony provided the required information and that the Consumer was entitled to have his tuition, room and board and fees paid in the amount of $7,758.76.

CONCLUSION

It is concluded that the Consumer is entitled to have his tuition, room and board and fees in the amount of $7,758.76 paid.

As both parties conceded that the only issue before me concerned payment of the $7,758.76 amount for the Fall 2014 semester, I make no findings with respect the Consumer's future eligibility for college or other services.

Finally, at the end of the hearing, the Consumer suggested that he be assigned to a different counselor. That issue is beyond my jurisdiction and therefore, I do not have the authority to make any binding ruling. However, in order to avoid any miscommunication in the future, I recommend, but do not require, that ACCES-VR assign another counselor to the Consumer.

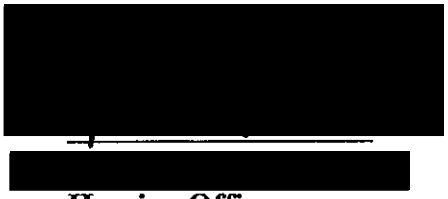
REMEDY/ACTIONS ORDERED TO IMPLEMENT CONCLUSION

It is ordered that within thirty days of ACCES-VR receipt of this decision, it shall pay $7,758.76 on behalf of the Consumer.

RIGHT TO APPEAL

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

SO ORDERED:



September 28, 2015

Hearing Officer

CERTIFICATE OF SERVICE

This certifies that the Hearing Officer mailed a copy of this decision on September 28, 2015 via regular U.S. mail to the following individuals:

1. [redacted]
   Director of Counseling
   ACCES-VR [redacted]

2. [redacted]
   Consumer Representative
   [redacted]

3. [redacted]

4. Patricia Mazzariello
   Rehabilitation Provider Specialist 2
   The State Education Department
   Adult Career And Continuing Education Services-Vocational Rehabilitation
   89 Washington Avenue, Room 560
   Albany, NY 12234

[redacted]

[redacted]
Hearing Officer