

## **105.00 Due Process Policy**

(April 1, 2003)

See corresponding procedure: 105.00P Due Process Procedure

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### **Description**

An applicant or eligible individual for ACCES-VR services who is dissatisfied with any determination made by ACCES-VR concerning the provision of services may seek to resolve that dissatisfaction through Administrative Review, Mediation and/or Impartial Hearing. The objective is to reach a mutually agreeable solution, as quickly as possible, preferably before a formal Impartial Hearing.

ACCES-VR will assist individuals to be active participants in their program and advise them of their rights, the steps of the Administrative Review, Mediation and Impartial Hearing processes and the availability of assistance from the Client Assistance Program (CAP) when:

1. an application is made,
2. an ineligibility decision is made,
3. an individualized plan for employment (IPE) is developed,
4. a potential impasse is reached or services are reduced, suspended or terminated,
5. a case is closed, or
6. the designation of the individual's priority category if order of selection is in effect.

### **Initial Review**

An Initial Review is a means to resolve problems quickly through a meeting with the senior counselor or other supervisory staff before resorting to a more formal due

process procedure. A person may request an Initial Review verbally or in writing and describe what he or she is appealing, what happened, when it happened, the people involved and what the individual wants ACCES-VR to do to remedy the situation. The senior counselor or other supervisory staff should explore why the individual is dissatisfied, explain the reasons for the contested action or decision, and resolve the problem in a mutually satisfactory way, if possible. The individual should be encouraged to participate and be completely involved in these discussions.

After the discussion is completed, the senior counselor or other supervisory staff must immediately inform the individual of the decision and, if the individual does not agree with the decision, should describe again the Administrative Review, Mediation and Impartial Hearing process and the availability of CAP.

### **Requesting Due Process**

The individual must request a due process review within 90 calendar days after being informed of the action or decision to be reviewed, unless he or she can show good cause why the review request was made after 90 days. Individuals must be informed about their due process rights at the time of the dispute as well as completion of any part of due process.

### **Time Limitations**

Time periods for all parts of the review process are computed as calendar days from the first day following the day on which the action takes place. Time periods can be extended for good cause with the agreement of all parties. All requests for extensions must be made in writing to the Impartial Hearing Officer.

### **Due Process Options**

The request for due process must be made in writing, signed and dated by the individual or representative.

### **Administrative Review**

The Administrative Review must be scheduled at a time and place which is accessible and allows the individual to participate fully in the review. The person conducting the Administrative Review should not have been involved in the decisions or actions that resulted in the Administrative Review. The review must be conducted within 15 days of receipt of the written request. The District Office manager may decline to schedule an Administrative Review and go directly to Mediation or an Impartial Hearing if the issue will not be resolved at the District Office level.

The review must include the individual and/or representative, the counselor and other appropriate staff. Within five days of completing the review, the reviewer will issue a comprehensive, written decision that clearly states:

1. all relevant facts presented at the review,

2. references to appropriate law and policy,
3. conclusions and the basis on which they are made,
4. actions ACCES-VR will take to implement the decision, and
5. the individuals right to Mediation or an Impartial Hearing.

The individual must inform ACCES-VR if he or she accepts the Administrative Review decision within 15 days of receiving the decision. If the individual agrees with the decision and withdraws the request for due process in writing, the decision is final and ACCES-VR will begin to implement the Administrative Review decision within 20 days. If there is no agreement by the individual, then Mediation can be requested or an Impartial Hearing will continue as scheduled.

## **Mediation**

Mediation is an effective, voluntary, alternate means to resolve disputes by reaching a mutually agreeable solution between an individual and ACCES-VR through the assistance of a trained mediator. The Mediation process can be less formal and adversarial than an Impartial Hearing. Mediation is not a prerequisite to nor can it delay the Impartial Hearing. If Mediation does not resolve the issue, the individual must be informed about an Impartial Hearing.

1. Mediation request - The Mediation session will be scheduled as quickly as possible to occur at a site and time accessible to the parties. ACCES-VR will pay the cost of the Mediation session.
2. Mediator criteria - The Mediation will be conducted by a trained and impartial mediator, knowledgeable in the laws, regulations and policies relating to the provision of vocational rehabilitation services. The mediator is neutral; not an employee of ACCES-VR, not currently employed by a vocational program doing business with ACCES-VR, with no personal or financial interest that would conflict with his or her objectivity.
3. Identifying a mediator - ACCES-VR will maintain a list of qualified mediators and may use the services of appropriate agencies providing general Mediation services to the community. The district office manager or a designated staff member will represent ACCES-VR. The representative from ACCES-VR may not agree to a resolution which is contrary to State or Federal law, regulation or ACCES-VR policy.
4. Mediation Participants - Individuals may bring representatives or family members to Mediation. The Mediation session will focus only on direct participation from the ACCES-VR representative and the individual receiving ACCES-VR services. All other parties will participate at the direction of the Mediator unless the individual is unable to participate because of the disability or communication issues.
5. Mediation Session - Parties may present whatever evidence they wish in support of their position. However, Mediation does not involve findings of facts or the strict weighing of evidence as an Impartial Hearing. It relies, instead, upon the good faith efforts of the participants communicating together to reach their own agreement as to how the dispute should be resolved

Although Mediation does not lead to fact finding, Mediation participants should be prepared to describe the factual background behind the dispute and to discuss their

desired outcome. ACCES-VR participants must also be prepared to describe the legal and policy context around which the dispute arose, as well as the factual details of the situation.

The ACCES-VR representative and the individual should be prepared to discuss and consider each other's viewpoints and be willing to cooperate in seeking a resolution acceptable to both. The mediator will facilitate the discussion. The focus is on a resolution, not which party is right or wrong.

6. Agreement - When reaching an agreement, all parties must have a clear understanding of what each will do in carrying out the agreement. The mediator will compose the agreement and ask the parties to sign a written Mediation agreement before leaving the Mediation. The agreement will be implemented within 20 days.
7. Confidentiality - All discussions during the Mediation process are confidential and may not be used as evidence in an Impartial Hearing or a civil proceeding. The mediator will ask the parties to sign a confidentiality pledge prior to the beginning of the Mediation session.

## **Impartial Hearing**

An Impartial Hearing is a formal review, and is the highest level of review within ACCES-VR and the State Education Department. An earlier review is not required before proceeding to an Impartial Hearing.

### **Selection of the Impartial Hearing Officer**

An Impartial Hearing is conducted by a hearing officer who has been trained and approved by ACCES-VR and who:

1. is not an employee of ACCES-VR or any other public agency (other than as an administrative law judge, hearing examiner, or employee of an institution of higher education);
2. is currently not employed by a vocational program doing business with ACCES-VR; is not a member of ACCES-VR's State Rehabilitation Council;
3. has not been involved in previous decisions about the vocational rehabilitation of the individual;
4. has knowledge of the delivery of vocational rehabilitation services, the State Plan and Federal and State laws, regulations and policies about providing services;
5. has received appropriate training about the duties of a hearing officer; has no personal or financial interest that would conflict with his or her objectivity;
6. was not employed by either ACCES-VR or the Client Assistance Program within the last six years; and
7. has agreed to follow ACCES-VR policies and procedures for Impartial Hearings.

Impartial Hearing officers are assigned by the Deputy Commissioner or his/her designee to hearings on a random basis within the geographic area they serve. The pool of qualified persons is jointly identified by ACCES-VR and members of the State Rehabilitation Council. The individual may challenge the assignment of a particular person as the hearing officer in the review if he or she believes that the hearing officer:

1. not meet the qualifications;
2. will not be objective; or
3. has prior knowledge of or experience in working with the individual or program agency.

An individual who wishes to challenge the appointment of a hearing officer on these grounds should submit the objection in writing, with evidence to support the allegation, to the Deputy Commissioner no later than 2 weeks prior to the hearing.

### **Conduct of the Hearing**

An Impartial Hearing is a quasi-judicial proceeding conducted under the State Administrative Procedures Act where the proceedings are recorded by a court stenographer at a neutral location wherever possible. The Impartial Hearing must be scheduled to occur within 60 days of receipt of the written request. The individual must be notified of the hearing at least 14 days before the hearing.

The duties and powers of the Impartial Hearing officer include:

1. defining the issue, receiving and considering all relevant and reliable evidence,
2. ensuring an orderly presentation of the evidence and issues,
3. overseeing the preparation of the record, and reaching a fair, independent and impartial decision based solely on the issues and evidence presented at the hearing, consistent with relevant laws, regulation and policy.

The hearing officer's decision must be issued no later than 21 days after the completion of the hearing, which is defined as the receipt of the hearing transcript by the hearing officer. The hearing officer will send copies of the decision to the Deputy Commissioner, the individual who requested the hearing and any representative who appeared at the hearing on the individual's behalf, as well as to the District Office manager. The decision will be a comprehensive written statement, which fully describes:

1. the issues raised at the hearing, the hearing officer's findings and the evidence presented at the hearing which supports these findings (all pertinent laws, regulations and policies),
2. the conclusions of the hearing officer and the bases upon which they are drawn, and
3. specific actions to be taken to implement the hearing officer's decision.

The hearing officer's decision is final and the District Office must begin to implement it within 20 days if the decision requires any action by ACCES-VR. This is the highest level of review within ACCES-VR's due process system.

If an individual is dissatisfied with this decision, they should be advised that further recourse would be available to them through civil action, which will be referenced in the hearing officer's decision.

## **Assistance to Individuals During Due Process**

An interpreter fluent in the individual's dominant language or skilled in communicating with persons who use special modes of communication will be provided when necessary during any step of the review or Mediation processes. ACCES-VR will also pay the reasonable costs for:

1. transportation by the least expensive carrier necessary for an individual to attend a review, Mediation or Impartial Hearing usually only within New York State; ACCES-VR will not reimburse lodging or other incidental expenses for an individual to attend Mediation, review or hearing, nor any expenses of the individual's representative;
2. the cost of the Mediation session;
3. the cost of the court stenographer for an Impartial Hearing and hearing officer.

## **Representation During Due Process**

1. All individuals requesting Mediation, a review or hearing will be notified in writing that they have the right to be accompanied and represented by an authorized representative, such as legal counsel, lay advocate, relative or other spokesperson. The reviewer, mediator or Impartial Hearing officer can exclude any person whose presence is disruptive to the process. They will also be informed in writing about the availability of the Client Assistance Program. All expenses of such representation, including legal fees, are the responsibility of the individual.
2. If an individual elects to be represented by another person at any time during a Mediation, review or hearing, the individual must inform the District Office in writing. The individual may withdraw authorization for that representative at any time by informing ACCES-VR staff in writing.

## **Termination of the Review Process Before Its Completion**

The parties to any part of due process may resolve their disagreement at any time prior to the completion of the review, either with or without the Mediation process. In order to withdraw a request for a review, the individual or representative must notify the District Office or hearing officer in writing. The District Office should respond with a letter describing the resolution of the case. Except at an individual's agreement, a review must not be delayed or canceled because of the possibility of a negotiated agreement.

## **Default**

Failure of the individual or the representative to appear at a scheduled hearing is considered a waiver of the right to that hearing, unless the individual promptly provides a good reason for not appearing. The hearing officer will decide if the reason offered is good cause for missing the review or hearing.

## **Status Quo**

Pending the final determination of any part of due process, ACCES-VR will not suspend, reduce or terminate services being provided, including evaluation and assessment services and plan development, unless the individual agrees or unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual, or the individual's representative.

**Reference:**

Rehabilitation Act:

- Section 102(c)(2)

State Law:

- State Administrative Procedures Act

ACCES-VR Policies:

- 100.00 Consumer Involvement Policy
- 102.00 Confidentiality Policy

Forms:

- Preferred form - ACCES-VR Administrative Review/Mediation/Impartial Hearing Request (VR-711)