

105.00P Due Process Procedure

April 1, 2003

See corresponding policy: 105.00 Due Process Policy

Note: Vocational Rehabilitation procedures provide internal guidance for ACCES-VR staff only and create no procedural or substantive rights for any individual or group.

Table of Contents

- Introduction
- Notice of Review
- Initial Review
- General Information
- General Timelines
- Termination of the Review Process Before Its Completion
- Levels of Review
 - Administrative Review
 - Mediation
 - Impartial Hearing
- Rights of the Individual
 - Reasonable Accommodations
 - Transportation
 - Individual's Representation during the Review Process
 - Status Quo
 - Postponement
 - Copies of the Record of Services
- Default
- Preparing for a Review

Introduction

ACCES-VR's due process system is designed to assist individuals who are dissatisfied with any determination made by ACCES-VR staff concerning the provision of services. It assists them to seek and receive a timely review of the decision and resolution of any disagreement. Throughout the due process, staff should continue to attempt to reach resolution with the consumer in the most collaborative and least confrontational manner possible. When an individual informs ACCES-VR of a disagreement, staff should immediately offer an opportunity for the individual to meet informally with supervisory staff to discuss the matter and seek a mutually agreeable resolution.

An informal meeting with supervisory staff can be the most expeditious way in which to resolve a disagreement and should always be explored as the first course of action. If that review is unsuccessful, the individual may continue through the due process steps

of Administrative Review, Mediation and Impartial Hearing. All due process must occur in an accessible place at a mutually convenient time.

Notice of Review

1. The Client Assistance Program (CAP) brochure will be displayed in each district and satellite office's reception areas. Individuals will be informed about the availability of due process at orientation. The brochure "What Can I Do If I Disagree with ACCES-VR's Decisions About My Case..." should be available at orientation, but does not have to get given out to every consumer.
2. ACCES-VR staff will provide each individual the brochure "What Can I Do If I Disagree with ACCES-VR's Decisions About My Case" and information about the right to representation and the Client Assistance Program when:
 - A. a potential impasse occurs, such as
 - i. the denial of any application or right to apply for agency services;
 - ii. any action involving a suspension, reduction or termination of service;
 - iii. disagreements about the scope of service; and
 - B. an ineligibility decision is made.
3. The individual will be informed about their right to due process, CAP and representation at the following times:
 - A. at application (documented in Contact or Background Information and Current Impressions case note under Orientation/Intake, Orientation or Intake headers.)
 - B. when an Individualized Plan for Employment (IPE) is developed (pre-printed on IPE form),
 - C. when a case is closed (in closure letter), or
 - D. when an order of selection is implemented and a priority category has been assigned (if implemented will be in eligibility letter).
4. The request for any of the due process options must be in writing and SIGNED AND DATED by the individual or representative. Written requests may be by agency form (VES 711) or any signed and dated letter. Forms that are unsigned and not dated must be sent back to the individual for signature and date. If the individual cannot write, the request can be dictated at the district office and witnessed by two ACCES-VR staff members. Signed and dated requests begin the 60-day time period for an impartial hearing.
5. When requests are received, staff must try to resolve consumer dissatisfaction in the most expeditious and simple manner possible, while adhering to Federal and State law and ACCES-VR policy. By endeavoring to resolve consumer dissatisfaction in the most simple manner possible, including discussion with the counselor's supervisor/manager, staff help assure that issues do not evolve into more confrontational matters.
6. Each office is responsible to notify ACCES-VR's Service Review Unit of all written requests for Administrative Reviews, Mediation and Impartial Hearings and their outcomes. Documents should be faxed to (518) 486-4154.

Initial review

1. The individual may request an Initial review verbally or in writing.
 - A. If the request is verbal, it should be documented in the case record.
 - B. If the request is in writing, other due process options must be discussed and documented.
2. The Senior Vocational Rehabilitation Counselor or other appropriate supervisory staff will conduct this review. All parties should be prepared to discuss the issue being appealed; provide a description of what happened; identify who was involved and what is needed to remedy the situation.
3. The reviewer should become familiar with the case and discuss it with the Vocational Rehabilitation Counselor and other appropriate staff before the meeting. During this conference, the reviewer should explore why the individual is dissatisfied; determine the facts of the situation; explain the reasons for the contested action or decision; and try to resolve the problem in a mutually satisfactory way, if possible.
4. At the end of the discussion, the reviewer must verbally inform the individual of the decision and document it in a casenote under a due process heading. If the individual does not agree with the decision, the individual must be informed that they may continue with the Administrative Review, Mediation and Impartial Hearing process and the availability of CAP. These options should be explained. The results of this conference should be documented in a case note by the ACCES-VR staff conducting the review.

General Information

All options for due process, which includes Administrative Review, Mediation and Impartial Hearing, must be offered to an individual. If an Administrative Review is held and the individual disagrees with the outcome, Mediation should be offered as an option along with an Impartial Hearing. It is possible that the individual will request that all options be scheduled. It is critical to plan each of the options so they can be scheduled within 60 days of the written request.

If the individual requests for due process options can not be completed within the 60-day time period, the individual must be informed that this may cause a delay in the date for the Impartial Hearing. If the individual is not willing to accept a delay for the Impartial Hearing, the district office should contact the Operations and Service Review Units to discuss next steps including not conducting the Administrative Review or Mediation.

General Timelines

The timelines that are indicated for all parts of the review process are expressed as calendar days. All requests for review must be within 90 days of the action or decision. The district office should decide if the individual's delay in requesting the hearing beyond the 90-day limit should be raised as an issue. This may occur when the delay will affect the district office's ability to present ACCES-VR's position on the primary issue of the review. Reasons may include:

1. A change in the individual's circumstances such as when the individual's condition has worsened and they are no longer eligible for services; or
2. ACCES-VR staff involved in the decision are not available because of retirement or otherwise leaving ACCES-VR.

If the district office decides the 90-day limit should be an issue, they must inform the Service Review Unit when they fax the review request to the central office.

Termination of the Review Process Before Its Completion

1. If resolution is reached before the completion of the review process, the individual or representative must withdraw the request in writing to the district office. The district office must send a copy of this letter to the Service Review Unit who will send a letter to the individual closing the hearing request. This does not apply when an initial review request was made verbally.
2. Except at the individual's request, an Impartial Hearing must not be delayed or canceled because of the possibility of a negotiated agreement.

Levels of Review

Administrative Review

1. General Information

The request for due process begins the timeframe for Administrative Review, Mediation and the Impartial Hearing. A copy of the request must be faxed to the Service Review Unit. The Service Review Unit will immediately start the process of scheduling the Impartial Hearing.

2. Scheduling
 - A. The review must be scheduled to occur within 15 days of receipt of the request, unless the individual agrees to a delay. The individual should place the request for a postponement in writing as it will change the established timeline.
 - B. The Notice of the Scheduled Review, Form VES-712, must be mailed certified mail with return receipt at least seven days before the review.
3. Conducting the Administrative Review
 - A. The District Office Manager or designee should conduct the review. Participants may include the Senior Vocational Rehabilitation Counselor and Vocational Rehabilitation Counselor, as well as the individual and representative. To the extent possible, the reviewer should not have been involved in the decisions or actions that resulted in the review.
 - B. The District Office Manager or designee may think the Administrative Review is not advisable. If the Manager decides not to review, the individual and authorized representative must be notified in writing of the decision and the reasons why there will not be an Administrative Review. Mediation should be made available as an option.
4. The Decision

- A. The reviewer must make a decision and notify the individual and representative within five days after completing the review using Form VES-713. The decision must be a comprehensive statement containing the following elements:
 - i. statement of the issue or issues involved;
 - ii. a clear and complete statement of facts;
 - iii. references to all laws, regulations and other legal bases for the decision;
 - iv. a concise statement of the conclusions drawn; and
 - v. a clear statement of the actions to be taken.
 - B. The individual must inform ACCES-VR if he or she accepts or rejects the Administrative Review decision within 15 days of receiving the decision.
 - C. If the decision is accepted, implement the recommendation within 20 calendar days. The Mediation/Impartial-Hearing request is withdrawn by the individual in writing or by signing the VES-713.
 - D. If the decision is not accepted, there is a statement on the VES-713 that Mediation or the Impartial Hearing will occur as scheduled unless the individual withdraws the request in writing.
5. A copy of the review decision and the individuals acceptance or denial must also be sent to the Service Review Unit and the Vocational Rehabilitation Counselor for the record of services.

Mediation

1. ACCES-VR must present Mediation as an option at all points of dispute. ACCES-VR will participate when the individual selects this option. This does not prevent staff from reviewing the issue and contacting the individual, if a more expedient means to resolve the dispute becomes apparent. Mediation is not a prerequisite to nor should it delay the Impartial Hearing process.
2. The district office will provide the individual who has expressed an interest in Mediation with the name, location and telephone number of the regional Mediation center. This will enable the individual to further explore the Mediation option directly with the Mediation center.
3. A written request for Mediation is to be treated as a formal request for a hearing. The Impartial Hearing must be scheduled within 60 days of this written request, unless the individual indicates in writing that he/she will delay the scheduling of the Impartial Hearing until the completion of Mediation. In these instances, the Impartial Hearing will be scheduled to occur within 60 days of the conclusion of Mediation efforts.
4. Once the written request has been received by ACCES-VR, the individual should be given the option to initiate the scheduling of Mediation directly with the center or ACCES-VR staff can contact the local center. The individual should also be informed that the district office will immediately send the written request to the center, to be certain that the timelines will be met.
5. The Mediation will take place within the region where the district office is located, although not at the district office unless needed for security reasons.
6. The district office will provide the name and phone number of the individual who will represent ACCES-VR at Mediation to the Mediation Center. The ACCES-VR

representative should be the Regional Coordinator, District Office Manager, Assistant Manager, or the Director of Counseling. Should ACCES-VR change the representative, the regional Mediation center must be notified in advance of the Mediation session.

7. Prior to the Mediation session, the Mediation center will conduct an intake interview with the individual to collect additional information regarding the issue. The center will ask the district office to provide a description of the issue, from the agency perspective.
8. The Mediation center will schedule the Mediation to occur at a time and place convenient to all parties, within two weeks of the intake interview.
9. The discussion that occurs during the Mediation session is confidential and will not be recorded for the record of services. The discussion that occurred cannot be described or presented as evidence at an Impartial Hearing. The mediator will ask that all participants sign a Mediation Center's confidentiality statement at the start of the session.
10. If the Mediation session concludes satisfactorily, a consent agreement or Mediation agreement will be prepared by the Mediator and presented to the individual and ACCES-VR for signature immediately at the Mediation. The consent agreement will be made part of the record of services. The ACCES-VR representative is responsible for immediately sending a copy of the agreement to the Service Review Unit who will send out letters canceling the Impartial Hearing.
11. If the Mediation session concludes without a mutually agreeable resolution, the mediator will provide a case report that will describe the efforts at Mediation without revealing the confidential nature of the discussion. The report is filed in the case record and a copy faxed to the Service Review Unit.
12. The individual may discontinue the Mediation or retract an agreement reached in Mediation even after signing the consent agreement. If the individual does retract the agreement and wishes to appeal the initial ACCES-VR decision to an Impartial Hearing Officer, a new written request descriptive of the issue is required. The written agreement, but not the Mediation discussion, can be provided as an exhibit and discussed by ACCES-VR in the presentation of its case to the Impartial Hearing Officer.
13. The individual has the right to have a representative at Mediation. The individual will notify the regional Mediation center in advance if a representative will be involved. The center will notify the ACCES-VR district office of this, also in advance of the hearing. The actual Mediation session will be with only the ACCES-VR representative and the individual, unless the individual needs assistance due to the disability or communications issues. All other attendees will participate at the direction of the mediator.
14. In the event that an individual fails to appear at a scheduled Mediation, the regional center will contact the individual to inquire as to the reason and if the individual wishes to reschedule Mediation. If the individual does wish to proceed with Mediation, the center will inform the district office. The Mediation will be rescheduled if the individual has a good reason for non-appearance and if it is within the timeline for the Impartial Hearing.

15. There may be extraordinary circumstances in which an effort at Mediation may appear to be futile to the District Office Manager. In these cases, the District Office Manager must discuss the situation with Manager of the Service Review Unit in central office and based on a joint decision, may decline to schedule Mediation. An example of such an extraordinary circumstance is when the individual has shown or threatened violent behavior.
16. If the Manager decides not to participate in Mediation, the Manager must notify the individual and authorized representative of the decision and the reasons why there will not be Mediation. The decision must be recorded, either in a case note or in a letter to the individual.
17. In the event of any other unusual circumstance, such as the lack of availability of a Mediator, or the unwillingness of the Mediation Center to involve itself with a particular case, the District Office Manager or designee should contact the Service Review Unit to resolve the situation.

Impartial Hearing

1. The Impartial Hearing is the highest level of review within ACCES-VR that may be initiated by an individual and is the final level of review within the State Education Department. No earlier review needs to be conducted. The individual can choose to have recourse through civil action if dissatisfied with the outcome of the Impartial Hearing.
2. The Service Review Unit will randomly select an Impartial Hearing Officer within 15 calendar days after receipt of a request for the review. The Service Review Unit oversees the selection of the Hearing Officer and the hearing process.
3. An individual who wishes to challenge the appointment of a Hearing Officer must submit a written objection with written evidence to support the allegation to the Service Review Unit no later than two weeks before the hearing on the following:
 - A. does not meet the qualifications;
 - B. will not be objective; or
 - C. has prior knowledge of the individual or experience in working with the program agency.
4. Once the Hearing Officer is appointed, a written notification will be sent from the Service Review Unit with return receipt at least 14 days before the hearing to all parties involved. The individual's letter will be sent by certified mail. ACCES-VR or the individual/representative may request from the Hearing Officer an extension of the time limit with justification and agreement of all parties.
5. The district office must arrange for the court stenographer and distribution of the transcript upon completion of the hearing. The district office should check to make sure the court stenographer will attend. The transcript should be immediately forwarded to the Hearing Officer, with copies to the Service Review Unit, the individual and representative.
6. The Hearing Officer's decision must be issued no later than 21 days after the receipt of the hearing transcript by the Hearing Officer. There are times when the Hearing Officer may extend the completion date so parties on both sides can submit a brief.

7. The Hearing Officer's decision is final and the district office must begin to implement the decision within 20 calendar days.

Rights of the Individual

Reasonable Accommodations

ACCES-VR will pay the costs for an interpreter fluent in the individual's dominant language or skilled in communicating with persons with special modes of communication when necessary.

Transportation

ACCES-VR will pay costs for least expensive mode of transportation necessary for an individual to attend an Initial or Administrative Review, Mediation or Impartial Hearing. Costs will be paid within New York State. The appropriate mode of transportation and class will be determined by ACCES-VR. ACCES-VR will not reimburse lodging or other incidental expenses for an individual to attend a review or hearing.

Individual's Representation during the Review Process

1. All individuals requesting Mediation or a review will be notified that they have a right to be accompanied by a representative. The individual must complete the section of Form VES-711 or they must inform ACCES-VR in writing if they will have a representative. If the individual wishes to change or withdraw an authorization of a representative in the review, the individual must inform the district office in writing.
2. Record of Appearance. In accordance with Section 166 of the Executive Law, any individual who represents an individual for a fee at an Impartial Hearing must complete a Record of Appearance Form (CO-1). The Hearing Officer must ensure the form is completed, as needed.

Status Quo

1. Any services that are being provided under an IPE must continue until the final decision by the Impartial Hearing Officer or agreement through Administrative Review, Mediation or a supervisory meeting. This includes ongoing casework, assessment, plan development and counseling provided by the rehabilitation counselor.
2. If the services were obtained through misrepresentation, fraud, collusion or criminal conduct by the individual, status quo will not apply.

Postponement

It is not in the interest of ACCES-VR or the individual to postpone a hearing without establishing a new date for a hearing. This date must be within 60 calendar days unless there is an agreement by all parties to extend the hearing date.

Copies of the Record of Services

ACCES-VR may provide one copy of a part of the record of services upon request or the case record, if needed by the individual. Each additional copy will be provided at \$.25 per page.

Default

1. Administrative Review

Failure of the individual and/or the individual's representative to appear at a scheduled review is considered a waiver of the right to that level of review. It does not impact on his/her right to an Impartial Hearing.

2. Impartial Hearing

Failure to appear at a scheduled Impartial Hearing is considered a waiver of the right to a hearing. The appropriate action for the Impartial Hearing Officer is to find the person in default of the issue of the hearing and to close the matter for further hearings.

3. Exceptions

If the individual promptly provides the Reviewer or Hearing Officer an appropriate reason for not appearing, the review or hearing will be rescheduled at the Hearing Officer's instruction.

Preparing for a Review

1. All Reviews

ACCES-VR staff should prepare for a due process proceeding by becoming familiar with the case. This involves the following steps:

- A. Identify the issue(s). Discussions should be held with the Vocational Rehabilitation Counselor, Senior Vocational Rehabilitation Counselor, and other involved staff about how decisions were reached and to determine what efforts towards resolution were undertaken, if appropriate.
- B. Review the Record of Service. Determine if the record of service supports the decision or action by ACCES-VR. The Vocational Rehabilitation Counselor and/or Senior Vocational Rehabilitation Counselor should be asked to identify relevant documentation. Decide what to use as exhibits from the case record, i.e., any review decisions, relevant IPE's, etc. If the complete record of service is relevant, it should be entered in its entirety.
- C. Review relevant laws, regulations, policies and administrative memos. SED legal counsel is available to assist in the process. It should be determined how they apply to the decision and issue. Those that are relevant should be selected to enter as exhibits. Seek advice from District Office Administration on issues related to interpretation on program and policy decisions.

2. Impartial Hearings

For the Impartial Hearing, the following additional steps should take place. The District Office Manager or designee should:

- A. Prepare a concise case outline as a reference for the hearing. The outline should include relevant dates, decisions, references to the case record, forms, policies, etc.
- B. Decide on legal representation. The ACCES-VR District Manager or designee will usually represent ACCES-VR at the hearing. However, if an attorney or CAP is representing the individual, the situation should be discussed with SED's legal counsel to jointly decide on appropriate representation. SED's legal counsel can also be consulted if the issue is based on unique, legal interpretation rather than a counseling decision.
- C. Determine who should testify. This should be a staff member who has been involved in the case. Usually, this is the Vocational Rehabilitation Counselor, if he/she can effectively present ACCES-VR's case. Depending on his/her involvement in the decision and issue, the Senior Vocational Rehabilitation Counselor can reiterate the impact of facts and amplify supervisory input/concerns. The Director of Counseling may be considered to add expertise in counseling issues and practices. The District Manager or Director of Counseling can describe policy, regulations, law as applied to the individual's case and the thinking underlying review decisions. Other experts, if needed, should be considered. It is important to establish witnesses as experts by having them testify about education and employment history.
- D. Prepare the opening statement. Briefly state the issue as ACCES-VR sees it and describe why the decision was made. Specifics should be held for the presentation.
- E. Outline the closing statement. The statement needs to be succinct and persuasive. Restate ACCES-VR's position. Refer to testimony, laws, regulations, and policies to support the counselor's decision. Indicate that the Hearing Officer's decision is to be based on the evidence at the hearing, the law and ACCES-VR's written policy. Point out that the burden of proof is on the individual and argue that they have not met it.
- F. Reconsider resolution. When preparing a thorough presentation, questions or concerns may arise regarding ACCES-VR's position on an issue or documentation to support the decision. The District Office Manager or designee should discuss the issue with involved staff to determine if another attempt at resolution should be tried with the individual and/or representative.