

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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W.C.,

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT ON DISABILITY
SERVICES, REHABILITATION
SERVICES ADMINISTRATION
Respondent.

Case No.: 2011-DDS-000XX

FINAL ORDER

I. Summary of this Final Order

This Final Order grants Petitioner's request to compel Respondent, the Rehabilitation Services Administration of the District of Columbia Department on Disability Services ("Respondent" or "DDS/RSA" or "RSA"), to continue to pay his full tuition to ITT Tech.

II. Procedural Background

On May 26, 2011 Petitioner W.C., through counsel, requested a hearing to challenge RSA's notice reducing the amount of tuition it pays on his behalf to ITT Technical Institute ("ITT Tech"), which notice was dated March 7, 2011, and which he received on May 2, 2011.

Consequently, on May 27, 2011, this administrative court issued a Case Management Order¹, scheduling a hearing on June 8, 2011.

On June 8, 2011, the hearing proceeded as scheduled. Joseph Cooney, Esq., Client Assistance Program, appeared on behalf of and with Mr. W.C. Shakira Pleasant, Esq., Assistant Attorney General, appeared on behalf of DDS. At the conclusion of the evidentiary hearing, I ordered the parties to file, by June 17, 2011, citations to the authorities they cited during the hearing and any other authorities upon which they rely to support their positions. Additionally, I allowed the parties until June 17, 2011 to file written closing arguments.

On June 17, 2011, Petitioner filed Petitioner's List of Legal Sources and Respondent filed Agency's Submission of Authority and Closing Argument.

Upon consideration of the testimony of the witnesses, my assessment of their credibility, the exhibits admitted into evidence, the parties' post-hearing listings of authorities upon which they rely, Respondent's written closing argument, and the entire record in this matter, I hereby make the following Findings of Fact and Conclusions of Law:

III. Findings of Fact

The facts of this case are undisputed and as follows:

Mr. W.C. has a disability and, based on that disability, received Social Security Administration Supplemental Security Income benefits at all times relevant to this case.

¹ The Case Management Order incorrectly stated that Petitioner filed a hearing request pursuant to D.C. Official Code § 4-210.1 and 1 DCMR 2805. Section § 4-210.1 and 1 DCMR 2805 are not applicable to this case, but relate to certain public benefits. Petitioner's hearing request was made pursuant to 29 DCMR 135. The Case Management Order is amended to reflect this correction.

Mr. W.C. applied for vocational rehabilitation services through RSA in March 2010. On March 29, 2010, RSA issued a Certification of Eligibility to Mr. W.C., informing him that RSA had determined him eligible for vocational rehabilitation services based on its preliminary assessment. Petitioner's Exhibit ("PX") 102. RSA placed Mr. W.C. in Category I, based on its determination that he was most significantly disabled, which placement allowed him to receive priority for paid-for services. PX 103.

In March 2010, Mr. W.C. enrolled for and began attending classes at ITT Tech, a private post-secondary school in the Washington Metropolitan Area (the "Area"). Because his application was not processed by RSA before the March 2010 quarter began, Mr. W.C. paid the tuition for his first quarter at ITT Tech.

On May 18, 2010, RSA and Mr. W.C. jointly agreed upon and executed an Individualized Plan for Employment (the "IPE"). The IPE states that Mr. W.C.'s employment goal is to be a "computer support specialist", with a vocational objective "to obtain a degree in the computer sciences by 5/18/2012" at ITT Tech. PX 100. The RSA counselor who counseled Mr. W.C. and developed the IPE with him informed Mr. W.C. that RSA would pay his full tuition at ITT Tech. The RSA counselor admittedly did not know nor did she inform Mr. W.C. then that RSA's payment of tuition must be limited by a "comparable benefits" calculation and that Mr. W.C. was required to apply for financial aid. Under the IPE, RSA agreed to pay, and in fact has paid, Mr. W.C.'s full tuition at ITT Tech through May 2011. PX 100. Additionally, RSA has provided a stipend to Mr. W.C. to cover transportation expenses. PX 101.

The IPE stated, among other things, that Mr. W.C. could request a hearing at the Office of Administrative Hearings if he were dissatisfied with the furnishing or denial of vocational

rehabilitation services and also provided information on the Client Assistance Program (“CAP”), where he could obtain information and advice on benefits under the Rehabilitation Act. PX 100.

Mr. W.C. has attended ITT Tech each quarter since March 2010. As of June 8, 2011, Mr. W.C. had two quarters remaining for completion of the 2-year associate degree program at ITT Tech.

However, on May 2, 2011, Mr. W.C. received a letter dated March 7, 2011² from RSA, informing him that it should not have paid the full amount of tuition at ITT Tech. The letter informed Mr. W.C. that ITT Tech is a private institution and that he should have selected one of the area’s public institutions. The letter went on to inform Mr. W.C. that RSA paid ITT Tech’s full tuition in error and that beginning June 2011 it would pay his tuition at ITT Tech at the published rate for the University of the District of Columbia. PX 104.

The Government has since clarified its position with respect to the tuition payments it will make to ITT Tech on Mr. W.C.’s behalf: Pursuant to 29 DCMR 122.4, RSA will pay Mr. W.C.’s tuition at ITT Tech at the tuition rate for the least expensive non-public post-secondary institution in the Washington, DC area. *See* Agency Status Report, filed June 3, 2011. At the June 8, 2011 hearing, RSA, through its counsel, represented that the least expensive non-public post-secondary institution in the Washington, DC area and that whose tuition rate it will pay is Strayer University. ITT Tech’s tuition is \$493 per credit unit, for a total of \$5,916 per quarter. Strayer University’s tuition is \$370 per credit unit, for a total of \$4,400 per quarter.

² RSA sent the letter to Mr. W.C. by certified mail on March 7, 2011. Respondent’s Exhibit (“RX”) 200. The certified mail was returned by the United States Postal Service (“USPS”) to RSA unclaimed. RX 201. Based on Mr. W.C.’s unrefuted testimony, he did not receive notice from USPS informing him of USPS’s attempted delivery of the certified mail and had no knowledge of the letter until he received it in person on May 2, 2011. RSA does not dispute the timeliness of Petitioner’s request for a hearing.

Other than a conversation between the parties on February 18, 2011 and RSA's letter of March 7, 2011, RSA did not seek Petitioner's cooperation in amending the IPE to reflect reduced tuition under a "comparable benefits" re-calculation.

IV. Mr. W.C. ' challenge to RSA's adverse action

On May 26, 2011, Mr. W.C. filed a Verified Petition and Request for Immediate Hearing to contest RSA's adverse action. As grounds for his challenge to the adverse action, Mr. W.C. asserts that the adverse action should be reversed because RSA's notice was defective and RSA is estopped based on the IPE it executed with him on May 18, 2010.

V. Conclusions of Law

A. Overview of the Rehabilitation Act application process

The Rehabilitation Act of 1973, as amended (the "Rehabilitation Act" or the "Act"), 29 U.S.C. 701 *et seq.*, provides for federal grants to states to provide vocational rehabilitation to individuals with disabilities. *Buchanan v. Ives*, 793 F. Supp. 361, 363 (D. Me. 1991). State participation is voluntary, but states that choose to participate must comply with federal regulations. *Id.* In the District of Columbia, RSA is the agency charged with implementing the Rehabilitation Act. *See* 34 CFR § 361.57(b)(2); D.C. Official Code § 32-331; Mayor's Order 2002-173; and 29 DCMR 100 - 199. The parties agree that Petitioner has a disability and meets the criteria for participation in the RSA program. *See* 29 U.S.C. § 722(a)(1).

Under the Rehabilitation Act, RSA conducts an assessment to determine eligibility for vocational rehabilitation services. The determination is to be made "in the most integrated setting possible, consistent with the individual's needs and informed choice." 29 DCMR 103.1.

A qualified vocational rehabilitation counselor employed by RSA is required to determine whether an application requires vocational rehabilitation services to prepare for and secure employment on considering, among other things, the applicant's strengths, resources, and informed choice. 29 DCMR 103.2(c).

Once an individual is determined to be eligible for vocational rehabilitation services, RSA must develop a written Individualized Plan for Employment ("IPE"). The formulation of the IPE is a collaborative effort between the individual client and the RSA counselor. 34 CFR § 361.45(d)(3), 29 DCMR 110.5(c). The individual and the counselor equally participate in the formation of the IPE. *Buchanan*, 793 F. Supp. at 366; *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 153 N.C. App. 652, 657 (N.C. Ct. App. 2002). This collaborative effort "gives eligible individuals the opportunity to exercise informed choice in selecting", among other things, the entity that will provide the vocational rehabilitation services. 29 DCMR 110.5(b)(3). In order to ensure joint participation, the IPE, upon its completion, must be agreed to and signed by both the eligible individual or his representative and the qualified vocational rehabilitation counselor. 34 CFR § 361.45(d)(3), 29 DCMR 110.5(c).

Similarly, to amend the IPE, the individual client and the RSA counselor must work cooperatively "if there are substantive changes in the employment outcome, the vocational rehabilitation services to be provided, or the providers of the vocational rehabilitation services." 34 CFR § 361.45(d)(6), 29 DCMR 110.5(f). Like the initial IPE, amendments must be agreed to and signed by both the individual client and the RSA counselor. 34 CFR § 361.45(d)(7), 29 DCMR 110.5(g); *Murphy v. Office of Voc. & Educ. Servs. For Individuals with Disabilities*, 92 N.Y.2d 477, 488 (N.Y. 1998) (holding that the rehabilitation services agency should have the same final authority in amending IPEs that it has in forming IPEs); *In re Appeal of Wenger*, 504

N.W.2d 794, 798 (Minn. Ct. App. 1993) (holding that any amendment must be jointly decided); *Carrigan v. N.Y. State Educ. Dep't*, 2007 U.S. Dist. LEXIS 42981 at 23 (N.D.N.Y. June 12, 2007) (citing *Murphy* to demonstrate that the rehabilitation services agency should have the same final authority in amending IPEs that it has in forming them).

B. The process here

Section 114.2 requires RSA to “determine whether comparable services and benefits....exist under any other program” *prior to providing any vocational rehabilitation services. (Emphasis added)*. RSA admittedly, but inexplicitly, did not determine whether comparable services and benefits were available before it provided vocational rehabilitation services to Mr. W.C. Without determining whether comparable services and benefits were available, RSA developed and executed Mr. W.C.’s IPE, which allowed for full tuition payment to ITT. The comparable services rule that RSA now invokes existed at the time Mr. W.C. applied to RSA and executed the IPE. RSA invokes the “comparable services” provision belatedly, only after Mr. W.C. is more than half-way through the vocational rehabilitation program at ITT.

Petitioner is correct that the governing federal and state regulations do not permit unilateral amendment to an IPE. To amend the IPE, the individual client and the RSA counselor must work cooperatively. 34 CFR § 361.45(d)(6), 29 DCMR 110.5(f). This cooperation and informed collaboration seemingly did not occur again.

C. The notice of adverse action

RSA is required to provide written notice to a program participant when reducing their services. 29 DCMR 136.2. The notice must include, among other things, information on how to

seek review of the determination and on the Client Assistance Program. 29 DCMR 136.1. RSA's March 7, 2011 notice to Mr. W.C. admittedly did not meet these requirements. The notice failed to provide any information on how Mr. W.C. could seek review or a referral to the Client Assistance Program.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The purpose of notice is to apprise the affected individual of, and permit adequate preparation for, an impending hearing. *Ford v. Turner*, 531 A.2d 233, 236 (D.C. 1987), relying on *Memphis Light, Gas & Water Division v. Waters*, 436 U.S. 1, 13 (1978), quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Adequate notice is integral to the due process right to a fair hearing, for the "right to be heard has little reality or worth unless one is informed." *Mullane, supra*, at 314.

In administrative proceedings, defective notice can be cured. "[T]he requirements of procedural due process are met if upon review the court is satisfied that a complainant was given adequate opportunity to prepare and present its position ... and that no prejudice resulted from the originally deficient notice." *Watergate Improvement Associates v. Public Service Commission of the District of Columbia*, 326 A.2d 778, 785 (1974). "[T]he question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure. . . ." *Watergate, supra*, at 786, quoting 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 8.04 at 525 (1958) (internal quotations omitted).

RSA argues that information on rights it provided to Mr. W.C. earlier in the IPE cured the deficiencies in its notice. RSA is correct that the IPE informed Mr. W.C. how to seek review and otherwise informed him of those rights omitted in the notice. PX 100. However, its argument is not persuasive. RSA's own regulations require, among other things, that it inform each client of their right to request a hearing and the method by which a hearing may be obtained at the time of the initial application *and at the time of any action affecting the client's claim for services*. 29 DCMR 146.1. Accordingly, provisions on client rights contained in the IPE did not cure the deficiencies in the notice.

But for other reasons, I have determined that the defective notice was cured. In this case, despite not having been sufficiently informed of his right to a hearing, Mr. W.C. timely requested a hearing. Further, with the assistance of his able counsel from the Client Assistance Program, Mr. W.C. zealously advanced arguments responsive to RSA's adverse action. Mr. W.C. has been afforded notice and opportunity to be heard in a meaningful and timely manner and thus has not been prejudiced as a result of the error. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Armstrong v. Manzo* 380 U.S. 545, 552 (1965); *see also Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944, 947 (D.C. 1999) (a defect in a notice of hearing rights is harmless error, if no prejudice is shown as a result of the error). Therefore, RSA's action will not be reversed based on the insufficient notice RSA issued to Mr. W.C.

D. The adverse action

However, RSA's action must be reversed based on its failure to prove that Mr. W.C.'s tuition benefit should be reduced.

RSA's reduction of tuition payment is based on the "Comparable Services and Benefits" provisions of 29 DCMR 114. RSA argues that the plain and clear interpretation of the regulations require that it pay tuition at the tuition rate for the least expensive non-public post-secondary institution in the Washington, DC area pursuant to 29 DCMR 122.4.

Contrary to RSA's argument, a plain and clear interpretation of the regulations does not require it to pay Mr. W.C.'s tuition rate at the tuition rate for the least expensive non-public post-secondary institution in the Area. RSA relies on 29 DCMR 122.4, which provides as follows:

If a public post-secondary institution ("public institution") located in the Washington, D.C. Metropolitan Area ("Area") offers an academic program necessary to achieve the consumer's vocational goal and the consumer chooses to attend that institution, the Rehabilitation Services Administration shall pay the published tuition rate of that particular public institution.

RSA did not establish that this regulation is applicable. RSA did not establish whether any public institution in the Area offers an academic program necessary to achieve Mr. W.C.'s vocational goal. Nor did RSA establish whether Strayer University is a public or private post-secondary institution with a comparable program. There was no evidence whatsoever that establishes these points or that this regulation applies to Mr. W.C.'s situation. Nor did RSA's evidence prove that application of this regulation results in a reduction to tuition payments for Mr. W.C.

Further, other RSA regulations may not allow RSA to reduce its payment of Mr. W.C.'s full tuition at ITT Tech. The provisions pertaining to tuition in 29 DCMR 122.4 appear not to cover Mr. W.C.'s situation. Section 122.4 covers only attendance at post-secondary public institutions. Section 122.5 addresses tuition rates when a private institution is chosen, but a public institution offers a comparable program. Section 122.6 speaks to a situation in which a student chooses a school outside of the Area. None of these regulations addresses tuition rates when more than one private school in the Area has comparable programs, as may be the situation in this case.

Accordingly, RSA having failed to establish that its action to reduce Mr. W.C.'s tuition is proper, Mr. W.C.'s request is granted and RSA's adverse action reversed.

VI. Conclusion

For the reasons discussed above, this Final Order grants Petitioner's request to compel Respondent to continue to pay his full tuition to ITT Tech.

VII. Order

WHEREFORE, it is, this 4th day of August 2011:

ORDERED, that RSA's adverse action is hereby **REVERSED**; and it is further

ORDERED, that Respondent shall take action consistent with this Final Order; and it is further

ORDERED, that any party may exercise the appeal rights stated below.

/s/
Elizabeth Figueroa
Administrative Law Judge