

Rights and Responsibilities

Applicants and participants are afforded certain basic rights with respect to nondiscrimination, confidentiality and the opportunity to appeal decisions made by NYSCB staff.

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This chapter includes the following sections that address rights and responsibilities that apply to the VR program.

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### Introduction

All personally identifiable information (PII) furnished to or by NYSCB will be maintained in a confidential manner and released only in accordance with applicable laws, regulations and guidelines, including all of the following:

1. Federal regulations (34 CFR 361.38) regarding confidential information
2. Education Law §1007
3. Personal Privacy and Protection Law (Public Officers Law), §91 et. seq.

Information will only be released or obtained when necessary for VR program purposes. VR counselors should carefully evaluate whether obtaining or releasing the information is relevant and necessary for service provision or to enable the individual to meet their goal before they share or request information. A *Release of Confidential Information* form is required except in special circumstances as described below (see “Special Circumstances Allowing for Release of Confidential Information Without an Individual’s Consent” below).

Individuals also have a right to information in their case record for reasons unrelated to the VR program and can request that NYSCB release information in a written request.

NYSCB will also release information when necessary to protect the safety of the participant or others in accordance with the guidelines in this section or when otherwise authorized by a court order in accordance with applicable laws and regulations and in response to investigations in connection with law enforcement, fraud or abuse.

Information will be released by the assigned VR counselor or their supervisory staff. The VR counselor should seek supervisory guidance anytime they have questions about obtaining or releasing information. When releasing substance use, mental health and/or HIV/AIDS related information, the VR counselor should consult with their supervisor before releasing any information to confirm that all necessary guidelines are followed.

### What is to be Held Confidential

All information available to employees or representatives of NYSCB during the administration of the VR program is the property of NYSCB and will be maintained in a confidential manner and released only consistent with applicable federal and state laws and regulations. This includes but is not limited to

1. lists of names and addresses,

2. reports from service providers,
3. reports of medical/psychological examinations and treatment,
4. financial information,
5. services and related payments, and
6. any additional information in the case record.

### Informing Individuals about Release of Confidential Information

Individuals must be informed about the guidelines for the release of confidential information during the intake interview. The NYSCB Handbook for Vocational Rehabilitation Services contains information regarding confidentiality of information that should be reviewed at the initial intake interview. Individuals must be informed about the exceptions allowing for release of confidential information without their consent. This includes, but is not limited to, the requirement that VR counselors report knowledge of an individual driving.

### Special Circumstances Allowing for Release of Confidential Information Without an Individual's Consent

The VR counselor, after consultation with supervisory staff, may release personal information without the written consent of the individual to protect the individual or others when the individual poses a threat to their safety or to the safety of others. The VR counselor must document in the case record, the reason for the release of information, the entities to which the information was released, and the nature of the information released [34 CFR Section 361.38 (e)].

In addition to the mandated notification to the Department of Motor Vehicles described below, where appropriate, the VR counselor should discuss with all individuals, the impact their vision loss has on their ability to drive safely and the potential danger of their driving. The VR counselor may find it helpful to include the individual's family in this discussion.

NYSCB will continue to assist the individual through the VR process after the report has been made. Orientation and Mobility training and/or reimbursement for travel costs to travel safely to participate in services is available in accordance with NYSCB policy. The availability of these services should be discussed with all individuals who participate in services outside of their home. See Section 9.07, Transportation for more information.

NYSCB will release identifying information under certain circumstances in accordance with the following guidelines:

1. NYSCB staff who have documentation that an individual is legally blind and credible knowledge that the individual is driving a motor vehicle (For example, the individual has told the NYSCB staff that they are driving or the NYSCB staff observes the individual driving), must immediately report this information to their district manager. Upon receipt of this information, the district manager must notify the associate commissioner in writing and provide the following information:
  - Individual's name
  - Individual's address
  - Individual's date of birth
  - The basis for the NYSCB staff member's knowledge that the individual is driving

A copy of this notification must be provided to the VR counselor (in the event the notification did not originate from the VR counselor) and must be entered in the individual's case record. The individual's name and address will be forwarded to the New York State Department of Motor Vehicles Driver Improvement Program for appropriate action by that agency. Copies of the letter to the Department of Motor Vehicles will be sent to the VR counselor and to the individual.

2. If the VR counselor learns about an individual driving a motor vehicle through a service provider, they should meet with the individual to verify the accuracy of the information. The VR counselor must document the content and the outcome of the meeting in a letter to the individual. If the individual confirms that they do drive, the letter should specifically indicate whether they have agreed to stop driving. A copy of the letter must be provided to the district manager who will forward the letter to the associate commissioner to determine the appropriate follow-up actions, which could include reporting the information to the Department of Motor Vehicles.

Reporting this information is required regardless of the individual's status in the VR program. It applies to all individuals when NYSCB has documentation of legal blindness, including individuals applying for services, individuals who withdraw their application for services, eligible individuals and individuals receiving services.

### Consent for Release

Information shall not be disclosed directly or indirectly, other than in the administration of the VR program, or as otherwise required by law or regulation without a signed Release of Confidential Information form, unless the individual is driving or thought to be driving or otherwise poses a threat to their safety or to the safety of others.

If the individual is a minor, the parent or legal guardian must sign the consent form, except when releasing HIV related information. When a request to obtain or release HIV related information for a minor is needed, the VR counselor must consult with OCFS counsel before requesting or releasing any HIV related information.

### Conditions for Release

Any release of information to any member of the public, agency, or organization other than a referral to the NYS Department of Motor Vehicles for individuals who are driving or thought to be driving or when the individual poses a threat to their safety or to the safety of others shall be conditioned upon the following:

1. A signed release from the individual
2. A satisfactory assurance by such member of the public, agency, or organization that the information will be used only for the purpose for which it is provided, and will not be released to any other individual, agency or organization without written authorization from the individual

A release of information is not needed when referring an individual to a service provider who has a contract with NYSCB. Confidentiality assurances are covered in the contract language.

### Release for Protected Individuals

Certain individuals in protected categories are afforded additional protection beyond the basic conditions for release cited above. Federal and state laws require that special conditions be met when releasing or obtaining confidential information regarding substance use, mental health and HIV and/or AIDS. For each of these protected categories, there are common and specific conditions that must be met for all releases of information.

### Special Conditions

To release or obtain information regarding substance use, mental health, HIV or AIDS, the following special conditions for release of information are required:

1. A designated staff person must be responsible for approving the release of confidential information. The VR counselor or their supervisor is designated by NYSCB to obtain and release information in accordance with the special conditions related to confidentiality. The VR counselor should consult with supervisory staff prior to releasing the information.

2. The name, title and address of the person to whom the information is being released or from whom it is being obtained must be clearly noted on the Release of Confidential Information form.
3. The signature of the individual and the date the release was signed must be entered on the release form.

If the individual wants to rescind his/her permission, an oral request is valid, but should be followed up in writing. When an oral rescission is made, the VR counselor should note it in the individual's file and send a confirming letter to the individual.

#### Specific Conditions for Releasing Substance Use, Mental Health or HIV/AIDS Information

The NYS Department of Health Release Form (DOH 5032) must be used when disclosing information or records regarding substance use, mental health or HIV/AIDS.

#### Release of Information to the Individual

Individuals have access to their own records pursuant to and subject to any limitations set forth in the applicable federal and state law and regulations.

Upon written request, information shall be released to the individual, or as appropriate, a parent, guardian or other representative subject to the special provisions noted below.

#### Information Received from Other Sources

If personal information has been obtained from another agency or organization, it may be released only by, or under the conditions established by, the other agency or organization. For example, a licensed psychologist may prohibit releasing psychological evaluation reports unless the request is made directly to the psychologist.

#### Release of Medical, Psychological or Other Information to the Individual

Information may be released to individuals in accordance with these special provisions:

If in the opinion of the VR counselor, release of such information would clearly not be harmful to the individual, then such information may be released directly to the individual. If in the opinion of the VR counselor, release of such information may be

harmful to the individual, then such information must be released through a third party chosen by the individual, which may include, among others, an advocate, a family member or a qualified medical or mental health professional, unless a representative has been appointed by a court to represent the individual, in which case the information must be released to the court-appointed representative.

### Amendments to the Case Record

If the individual believes that the information in their case record is inaccurate or misleading, they can request that NYSCB amend the information. If the information is not amended, the request for the amendment must be documented in the case record.

### Release of Information to Organizations Involved in Research

Requests for the release of information for research purposes must be transmitted to NYSCB Senior Management for consultation with the OCFS Bureau of Research. No information can be shared for research purposes unless approved by Senior Management.

### Security of Confidential Records

NYSCB staff is responsible for safeguarding records so that the confidentiality of those records is maintained.

### Judicial Order for Participant Records

If a judicial order requiring the release of individual records or the provision of testimony is served to a NYSCB employee, no information should be released, or testimony given until the document is reviewed by the Office of Children and Family Services (OCFS) Division of Legal Affairs. If you receive a subpoena

1. you must **IMMEDIATELY** notify the district manager in your office (or other individual representing the district manager in their absence).
2. the district manager (or their representative) will **IMMEDIATELY** transmit the subpoena to the NYSCB home office and call to alert that office of the transmittal.
3. The NYSCB home office will transmit the judicial order to the OCFS Division of Legal Affairs c/o Counsel's Office located at OCFS's home office

4. The Division of Legal Affairs will advise the NYSCB home office of the proper action to be taken following its review of the subpoena. Such action may include copying records and the delivery of such records to the court issuing the subpoena. The NYSCB home office will notify the district manager of the result of the review by the Division of Legal Affairs.

#### Service of Complaint or Other Legal Proceeding Upon NYSCB Employees

If a complaint or other legal document is served upon a NYSCB employee for the purpose of commencing a legal action or proceeding against the employee related to their employment with OCFS, the employee must immediately notify their supervisory staff. Notification must immediately be transmitted to Senior Management staff who will notify the OCFS Division of Legal Affairs in accordance with the Public Officer's Law. The OCFS Division of Legal Affairs must submit the original document to the New York State Office of the Attorney General with a request for representation within five days of being served. In the event of service, the NYSCB employees may contact the OCFS Division of Legal Affairs with any questions or concerns.

### Introduction

It is the expectation of NYSCB that NYSCB and contract agency staff communicate with individuals in their preferred format.

Although it is important to communicate effectively with individuals at all points in the rehabilitation process, it is especially important at the time of case opening and closure. Individuals are provided information regarding their rights and the availability of the Client Assistance Program (CAP) at these times. It is best practice that VR counselors have a face-to-face meeting with any individual prior to opening or closing their case. In addition, a letter must be sent in the individual's preferred format when their case is being closed.

### Using Interpreters to Facilitate Communication

For deaf-blind or Limited English Proficiency (LEP) individuals, it is mandatory that a certified interpreter or other acceptable communication format, preferable to the individual (e.g., deaf-blind communication device, CART, etc.) be present during both the initial meeting and the closure meeting. This procedure should be followed regardless of the VR counselor's interpreting skills. Exceptions may be made by the district manager when the VR counselor holds the title Vocational Rehabilitation Counselor (Manual Communications) or Vocational Rehabilitation Counselor (Spanish or other Language).

The VR counselor must verify that the individual and the VR counselor understand each other. During meetings where certified interpretation is being used, the VR counselor should stop frequently to check for the individual's understanding and confirm that understanding through the interpreter.

At other times during the rehabilitation process, VR counselors should evaluate the purpose of the meeting and the individuals participating in the meeting to determine if certified interpreter services are required. For example, a meeting to develop and review the IPE would require an interpreter, a meeting to discuss transportation or requesting a service may not require interpretation if another form of communication is available and acceptable to the individual.

See Section 9.08, Interpreter Services for Individuals who are Deaf-Blind, for additional information regarding the use of sign-language interpreters.

### Communication With Deaf-Blind Individuals

Special arrangements may also be needed for individuals who are deaf-blind and do not rely on sign language for communication. For example:

1. Presence of an oral interpreter or certified tactile interpreter to convey the VR counselor's speech if the individual is unable to understand the VR counselor's speech or read lips
2. Use of a deaf-blind communicator or other speech to text, type to text/braille formats for individuals relying on braille for communication

When an interpreter or other modality is used, the VR counselor should stop frequently to check for the individual's understanding and confirm that understanding through the interpreter or alternate modality.

### Communications with Individuals who are Limited English Proficient (LEP)

For VR counselors to communicate effectively with individuals who do not speak English, it is necessary to secure the services of a foreign language interpreter during the initial interview and during other contacts with the individual. Telephone interpretation may be used for phone communication and in-person meetings and during the provision of training at no cost to the individual.

The Office of Children and Family Services (OCFS), follows a Language Access Plan pursuant to NYS Executive Order No. 26, Statewide Language Access Policy, to provide LEP individuals meaningful access to agency services, programs and activities. LEP individuals are to be served in a manner compliant with this policy.

For LEP individuals served by NYSCB, oral interpretation by an approved foreign language interpreter should be provided for pre-planned in-person meetings. Phone calls to and from individuals should utilize telephone interpretation. Exceptions may be made if the VR counselor holds the title Vocational Rehabilitation Counselor (Spanish or other Language). Interpreters should also be provided for training sessions that NYSCB has authorized as well as phone conversations with the providers of the training and/or services. When an interpreter is used, the VR counselor and/or trainer should stop frequently to check for the individual's understanding and confirm that understanding through the interpreter.

For individuals who decline free, OCFS-interpretation assistance during an in-person meeting, the New York State Waiver of Right to Free Interpretation form must be completed. The completed copy must be kept in the individual's case record.

See Section 9.09, Interpreter Services for Non-English-Speaking Individuals, for additional information on the use of foreign language interpreters.

#### Providing Written Communications in the Individuals Preferred Format

To communicate effectively in writing with individuals, it is important that the individual receive written materials in a format that is accessible to them. At first contact VR counselors are required to ask the individual to identify their preferred format for receipt of written communications and complete and sign the Preferred Format form. This information should also be documented in the "Preferred Written Communication Medium" field on the Demographic Form. Since the preferred format may change during the time an individual is involved with NYSCB, the VR counselor should periodically check with the individual to confirm that the preferred format is current. If the preferred format changes, the case record should be updated. Once updated, the VR counselor must provide all forms of communication to the individual in the identified format(s).

### Policy

It is the policy of NYSCB to provide individuals with the opportunity to resolve disagreements with decisions made by their VR counselor.

### Introduction to the Appeals Process

NYSCB's objective in the appeals process is to provide individuals an opportunity to re-examine the decisions reached by NYSCB staff to determine if they are in accordance with NYSCB policy and procedures. The goal is to reach a mutually agreeable solution in a timely manner at the least formal level possible. Administrative Reviews, Mediation and Administrative Hearings are available options in the appeals process. An informal administrative review gives individuals and NYSCB staff the opportunity to resolve differences more quickly than during the formal administrative hearing process.

Individuals can choose to bypass the administrative review and proceed to mediation or bypass both the administrative review and mediation and proceed directly to an administrative hearing. When an administrative review or mediation is requested, an administrative hearing will also be scheduled. This is required to enable NYSCB to meet the established time frames for a hearing in the event one is needed.

### Informal Resolution at the District Office Level

Prior to beginning the appeals process, if the VR counselor and the individual cannot resolve an issue regarding their VR services, the concern should be brought to the attention of the senior counselor for an initial review in an attempt to come to an informal resolution. Often, the senior counselor can help to resolve the issue and provide a timely resolution. The senior counselor can involve the district manager if that would help to facilitate an informal resolution. The individual should be given information about the Client Assistance Program (CAP).

### Business Enterprise Program Appeals Process

Individuals in the Randolph-Sheppard Business Enterprise Program (BEP) can appeal any NYSCB decision or action pertaining to the BEP program.

Policy and procedures governing the BEP appeals process are in the Handbook for Vending Facility Operators.

### Children's Services Appeals Process

The policy and procedures governing the Children's Program appeals process are contained in the NYSCB Children's Services Handbook.

### Definitions

As used here, unless the context requires otherwise, these terms will have the meanings indicated below:

1. **Administrative Hearing** - a formal hearing conducted by one or more employees of the Office of Children and Family Services (OCFS) who are members of the OCFS State Fair Hearing Board in accordance with the guidelines established in this policy.
2. **Administrative Law Judge** - the member of the OCFS State Fair Hearing Board assigned to conduct an administrative hearing.
3. **Administrative Review** - a review conducted by NYSCB administrative staff in accordance with the guidelines established in this policy.
4. **Agency** means NYSCB.
5. **Individual** - a person who is receiving services from NYSCB or a person who has applied or attempted to apply for services from the agency (applicant or eligible individual).
6. **Mediation** - a voluntary process between the individual and the appropriate NYSCB staff with the goal of resolving a dispute with NYSCB. Mediation is conducted by a qualified and impartial mediator who is trained in mediation techniques. While mediation can be requested at any time, both parties must agree to participate in mediation.
7. **Reviewer** means the agency staff member who conducts the administrative review.
8. **State Fair Hearing Board** - a group of persons established by OCFS and authorized under state law to review administrative hearing decisions that affect the provision of NYSCB's services and carries out the responsibilities of the impartial hearing officers in accordance with federal regulations.

### Individuals' Rights

All individuals have the right to appeal any VR counselor action or decision or any other disagreement with their VR counselor including

1. the denial of an application or the right to apply for services provided by NYSCB;
2. the suspension, reduction or termination of services; and
3. disagreements pertaining to the scope or quality of services provided.

### Time Frame for Requesting a Review

An individual must request a review no later than 60 days after being informed of the action or decision to be reviewed, unless they can show good cause as to why the review request could not be made within the 60-day time frame. The reason for granting a waiver should be documented in the case record.

### Notification of Policy

This appeals policy and the names and addresses of staff with whom to file an appeal will be communicated to all individuals, in their preferred format, through at least the following means:

1. The Handbook for VR Services provided during the intake process to all individuals who apply for VR services. The Handbook includes: information regarding rights and responsibilities, information about the Client Assistance Program (CAP) and instructions for initiating an appeal.
2. A statement of the appeal rights included with
  - a. the Individualized Plan for Employment (IPE), including amended IPEs, and
  - b. letters sent to the individual at case closure.
3. At the time of reduction, suspension or termination of VR services, individuals will be counseled about their rights and the actions necessary to begin the appeal process. This will be documented in the case record.

### Continuity of Service

Pending a resolution of an issue being appealed, services currently being provided will not be suspended, reduced or terminated except

1. where services have been obtained through misrepresentation, fraud, collusion, or criminal conduct by the individual or their representative, or
2. where continuation of services would result in a violation of federal and/or state law or regulations.

If an individual appeals a case closure decision, the individual's case status should be returned to the status just prior to case closure, pending the outcome of the appeal.

### Right to Representation

Any individual who requests an administrative review, mediation or administrative hearing will be notified in writing that they have the right to be accompanied and represented by an authorized representative such as legal counsel, a Client Assistance Program representative, lay advocate, relative or other representative, at their expense.

If the individual chooses to be represented during an appeal, they will inform the agency, in writing. Authorization for representation can be withdrawn at any time by giving written notification to the agency of the withdrawal.

The individual may be accompanied at an administrative review, mediation or hearing without prior written notification, if the person accompanying the individual does not act as a representative. The reviewer, mediator or impartial hearing officer will have the right to exclude any individual whose presence is disruptive to the review, mediation or hearing.

### Access to the Individual's Case Record and Other Information

At the individual's (or their representative's) request, NYSCB will provide copies of the case record or pertinent laws, regulations, policies or procedures in their preferred format (to the extent possible). These requests must be signed by the individual or authorized representative and should be submitted in writing to the District Office.

### Time Limitations

1. **Date of filing** - All written communications to and from the agency will be considered filed on the date they are received or in the case of verbal requests, the date they are received by NYSCB.

2. **Computation of time** - Computation of any period of time will begin on the first day following the day on which the act which initiates the action occurs. The term days will mean calendar days unless otherwise noted.
3. **Extension of time** - The time limits set forth in this policy can be extended by the reviewer, mediator or impartial hearing officer when good cause is shown by one party or at the request of both parties. All requests for extensions will be made in writing to the reviewer, mediator or impartial hearing officer, before the expiration of the period originally prescribed or as previously extended.

### Use of an Interpreter

For deaf-blind individuals or individuals who are limited English proficient a certified interpreter or other acceptable communication format will be provided at agency expense at the administrative review, mediation and administrative hearing when requested and necessary.

### Other Expenses

Round trip transportation for the individual to attend an administrative review, mediation or administrative hearing will be provided at agency expense only within New York State. Waivers to obtain out-of-state travel may be provided by the district manager if such waiver would expedite the appeals process. See Section 9.07, Transportation, for additional information.

Lodging and other incidental expenses related to attendance at an administrative review, mediation or hearing are the responsibility of the individual and will not be provided by NYSCB.

If a waiver is not granted and the individual does not wish to postpone the administrative review, mediation or hearing they may travel at their own expense; or appoint another individual to represent them.

### Requesting a Review

A request for a review must include the following information and won't be considered complete until all information is provided:

1. Individual's name and address (including mailing address), phone number and preferred method of communication (braille, large print, tape, regular print)

2. If a representative has been identified, the name, address and phone number of the representative (this information can be provided at a later date if no representative has been identified at the time the request is made)
3. A description of the decision or action being appealed
4. The type of appeal requested (administrative review, mediation or administrative hearing)

Individuals can request an appeal by completing the *Request for an Appeal* form or by providing the required information to enable NYSCB staff to complete the form. The district manager will forward the *Request for an Appeal* form to the home office appeals coordinator to start the process of scheduling the appeal.

### Scheduling the Review – General Information

If an administrative review is requested, the appeals coordinator will forward the request to the associate commissioner or their designee. If mediation is requested, the coordinator will initiate the procedure for scheduling mediation.

In addition, to meet the required time frame for holding an administrative hearing, the coordinator will send a copy of the Request for Appeal form (regardless of the type of review requested) to the Bureau of Special Hearings to schedule an administrative hearing. The Bureau of Special Hearings will provide a copy of the scheduling notice to the individual, the NYSCB representatives and the appeals coordinator. This process should be clearly explained to the individual when they request an appeal.

If the disputed issue is resolved at or before an administrative review or through mediation, the administrative hearing will be cancelled. NYSCB staff will ask the individual to sign a *Cancellation of an Appeal* form indicating that the dispute has been resolved and that the request for an administrative hearing is being withdrawn. The appeals coordinator will forward the form to the Bureau of Special Hearings with a copy to the NYSCB representatives. For information regarding withdrawal from an administrative review or mediation see separate guidelines in each section of this policy.

### Administrative Review - Introduction

The administrative review is considered an informal appeal that can be requested prior to mediation or an administrative hearing but is not a required step in the appeals process. The following specific guidelines apply only to the administrative review process.

### Scheduling an Administrative Review

Upon receiving a request for an administrative review, the associate commissioner, or their designee will assign a reviewer who will initiate scheduling the review. The designated reviewer must not have been involved in decisions or actions that resulted in the individual's request for an administrative review. The reviewer will schedule a meeting by phone or in person with the individual and their representative, if one has been designated. A separate meeting will be scheduled with the NYSCB staff involved in the decision being appealed. The dates set for these two meetings should be within 10 days of the receipt of the request for an administrative review.

Follow-up meetings or phone calls may take place after the reviewer meets with both parties, if needed.

### Notice of Scheduling

The reviewer will send a confirming letter to the individual (and representative if applicable) in their preferred medium. The confirming letter will include the date, time and place (if applicable) of the review, the name of the reviewer, an explanation of the review procedure and information about right to representation.

### Request for Rescheduling

If the individual is unable to participate in the administrative review meeting as scheduled, they can request that the date and/or time be changed. The request to change the date should be made prior to the day of the review.

### Participation in the Review

If the individual designates a representative for the administrative review and chooses not to participate in the administrative review, the information presented by the representative will be considered representative of the individual's views and the administrative review decision will be made using the information presented by the representative.

Failure to attend the scheduled administrative review meeting will be deemed a waiver to the right to a review, unless the individual contacts the reviewer promptly to explain the reason for the default and requests to reschedule.

### Conducting the Review

The reviewer will meet with the individual (and their representative, if applicable) and then meet with the NYSCB staff involved in the disagreement. The reviewer will analyze relevant NYSCB policy associated with the disagreement. The reviewer may contact the individual and/or NYSCB for further clarification. The reviewer will submit a written draft decision to the associate commissioner of NYSCB within seven days of completion of the meeting with NYSCB staff. The draft decision will include a description of the issues, a summary of the information presented by both parties, a summary of the relevant NYSCB policies and a recommended outcome.

### Issuing an Administrative Review Decision

The associate commissioner will issue the final administrative review decision within five days of receipt of the draft decision from the reviewer.

1. The final decision will be sent to the individual (and representative if applicable) in their preferred format and to the VR counselor, who will enter the decision in the individual's case record.
2. If the decision is favorable to the individual, NYSCB staff will proceed with implementing the decision. If the decision is not favorable, the individual will be informed that they can proceed with the administrative hearing that has been scheduled or they can request mediation.

### Description of the Mediation Process

Mediation provides an opportunity for NYSCB and individuals to work together to resolve a disagreement with the assistance of a trained mediator. By asking questions during the mediation session, the mediator works to open a dialogue between both parties. The goal of mediation is to reach an agreement that conforms to the Rehabilitation Act, federal regulations, state law and NYSCB policy.

Mediation is a voluntary option for both NYSCB and the individual. Both parties must agree to participate in mediation. Participation in mediation will not delay or deny the opportunity for an administrative hearing, although the parties may agree to postpone the administrative hearing pending completion of the mediation process. All parties can present information to support their position during mediation.

### Scheduling Mediation

When the individual requests mediation, the district manager will send the *Request for Appeal* form to the appeals coordinator in the home office. The coordinator will obtain a signed *Release of Confidential Information* form from the individual to share their contact information, contact information for their representative and a brief statement of the issue to be mediated, with the dispute resolution center or other entity that will be scheduling the mediation. The appeals coordinator will contact the dispute resolution center or other entity in the appropriate county and request that mediation be scheduled.

Staff at the dispute resolution center or other entity will schedule the mediation session and will notify all parties to the mediation. The mediation session will be scheduled in a timely manner and will be held in a location that is convenient to both parties in the dispute, taking into consideration the need to identify an appropriate site and any need for accessible accommodations. Notification of scheduling will be made in writing to all parties. Notification to the individual will be made in their preferred format.

### Withdrawal from Mediation

If the disagreement with NYSCB is resolved prior to the mediation the individual will complete a *Cancellation of an Appeal* form. Mediation will not be delayed or canceled because of the possibility of a resolution, unless the individual requests a delay or cancellation.

### Confidentiality

The mediation proceeding is confidential. Discussions occurring during mediation are not admissible in any subsequent hearing or civil proceeding. The parties to the mediation process will be required to sign an *Agreement to Mediate* form, which includes information about the confidentiality of the mediation, prior to the beginning of the mediation process.

### Representation and Presentation of Evidence

Individuals can select a person to accompany them to and represent them during the mediation session. However, it is critical to the success of mediation that the individual participate as fully as possible in the mediation.

NYSCB will be represented by staff knowledgeable about the disagreement. NYSCB

representatives will be designated by the deputy director in consultation with the regional coordinator and/or the district manager.

### Costs

NYSCB will cover the cost of the mediation process, including round trip transportation for the individual to attend the mediation, within New York State.

Waivers to obtain out-of-state travel may be provided by the district manager if such waiver would expedite the appeals process. The appropriate transportation carrier and class will be determined by the NYSCB. Lodging and other incidental expenses related to attendance at mediation will not be provided by NYSCB.

As noted above, NYSCB will not pay for costs associated with representation at mediation.

### Selection of Mediators

Mediation will be conducted by a qualified and impartial mediator who is trained in mediation techniques. Mediators will be selected from a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of vocational rehabilitation services. This list will be maintained by NYSCB.

### Mediation Agreement

If an agreement is reached, the terms will be described in a written mediation agreement signed by the individual and NYSCB staff. NYSCB representatives may not agree to any resolution that conflicts with federal or state law or regulations or NYSCB policy. Implementation of the agreement will begin as soon as possible but no later than 30 days from the signing of the agreement. The mediator will provide copies of the agreement to NYSCB and to the individual in their preferred format and to their representative, if applicable. A copy of the mediation agreement will be placed in the individual's case record.

### Administrative Hearing - Introduction

An administrative hearing is the final level of appeal available through NYSCB. An individual can choose to have an administrative hearing and bypass all other options in

the appeals process. The following specific guidelines apply only to the Administrative Hearing process.

### Scheduling an Administrative Hearing

The appeals coordinator will forward all requests for an appeal to the Bureau of Special Hearings. An administrative hearing will be scheduled each time an appeal is requested (regardless of the type of appeal requested, to meet federal timeframes for holding an administrative hearing). Within 15 days after the receipt of a request for a review, the hearing will be scheduled at a location convenient for all parties. The hearing will be held within 60 days of the receipt of the request for a review unless a specific extension of time is agreed upon by the parties.

### Notice of the Hearing

Notice of the scheduled hearing will be provided to all parties by the Bureau of Special Hearings in advance of the hearing. The notice will include the time, date and place of the hearing. The individual's notification will be provided in their preferred format.

### Request for Rescheduling

Prior to the day on which an administrative hearing is scheduled, the administrative law judge assigned to conduct the administrative hearing may change the date, time or place of the hearing upon written notice to the parties involved when

1. good cause is shown by one party, or
2. at the request of both parties, or
3. the administrative law judge has a conflict requiring a rescheduling.

### Default

The individual's failure to appear at a scheduled hearing will be deemed a waiver of the right to a hearing unless they apply promptly to the administrative law judge for relief from their default. Such application will include documentation of the reasons for the failure to appear. The administrative law judge will determine whether the individual has established good cause for such failure and if so, vacate the default and reschedule the hearing.

### Withdrawal from an Administrative Hearing

An administrative hearing will not be delayed or canceled because of the possibility of a resolution, unless the individual requests a delay or cancellation.

If the disagreement with NYSCB is resolved prior to the administrative hearing the individual must contact the administrative law judge to cancel the hearing.

### Subpoenas

At the request of any party to the administrative hearing, the administrative law judge may issue subpoenas requiring the attendance and testimony of witnesses, and/or production of documents and other evidence.

### Rights of the Individual

The individual has the right to

1. present and establish all relevant facts by oral testimony and documentary evidence;
2. advance any pertinent arguments without undue interference;
3. question or refute any evidence or testimony, including an opportunity to confront and cross-examine adverse witnesses;
4. examine and introduce relevant evidence from the case record;
5. examine and introduce any other agency documents as determined by the administrative law judge; and
6. be represented by counsel (counsel is not provided by or paid for by OCFS or NYSCB).

### Duties and Powers of the State Fair Hearing Board

The administrative law judge presiding at the administrative hearing will have the powers provided by the State Administrative Procedures Act, Section 304 including

1. defining the issues,
2. receiving and considering all relevant and reliable evidence,
3. ensuring an orderly presentation of the evidence and issues, and
4. overseeing the preparation of the record of the proceedings.

The final hearing decision will be made either collectively or by a majority vote of the State Fair Hearing Board and will be

1. a fair, independent and impartial decision;
2. based solely upon the issues and evidence presented at the hearing; and
3. made in accordance with the relevant provisions of statutes, regulations, the approved VR State Plan and the NYSCB VR Services Manual.

### Evidence

The introduction of evidence will be governed by the provisions of the State Administrative Procedure Act, Section 306. All documents and other evidence offered or taken for the record will be open to examination by the parties.

A record of the administrative hearing will be prepared in accordance with the provisions of the State Administrative Procedure Act, Section 302, and will contain the following elements:

1. A statement of the issue or issues involved in the hearing
2. A clear and complete statement of facts as supported by evidence presented at the hearing
3. Reference to all laws, regulations and other legal bases for the decision
4. A concise statement of the conclusions drawn, and the basis for the decision
5. a clear statement of the actions to be taken to implement the decision

### Administrative Hearing Decision

The State Fair Hearing Board will issue a full written report of the findings and the grounds for the decision within 30 days of the completion of the hearing. Copies of the decision will be sent to the

1. NYSCB associate commissioner,
2. the individual, in their preferred format as documented in their case record, and
3. the individual's representative, if applicable.

If the decision is favorable to the individual, NYSCB will take steps to promptly implement the decision. If the decision is averse to the individual, the letter transmitting the hearing decision will inform the individual that if they disagree with the decision, they can file an Article 78 lawsuit in New York State Supreme Court. The counselor will file a copy of the decision in the individual's case record.

### Judicial Review

When an individual seeking or being provided vocational rehabilitation, services is dissatisfied with the final decision resulting from an administrative hearing, they may file a petition for judicial review by the courts pursuant to Article 78 of the C.P.L.R. or in federal district court.

### NYSCB Staff Rights

With respect to the appeals process and procedures outlined in this chapter, NYSCB employees will be afforded all the rights guaranteed by their collective bargaining agreement, OCFS policies and applicable law.

### Client Assistance Program (CAP)

The CAP is a federal program operated by Disability Rights New York (DRNY) to assist New Yorkers with disabilities with questions or issues encountered while receiving or applying for NYSCB services.

### When an Individual Should Contact CAP

Client Assistance Programs can assist individuals at any point in their VR process. For example, CAP can assist when

1. an individual is applying for services or has questions about the services they can receive;
2. an individual disagrees with decisions made by their VR counselor regarding their employment goal and VR services;
3. an individual has problems or delays in obtaining services, equipment and training
4. an individual disagrees with their case being closed.

### How CAP Can Assist

CAP staff will typically learn about an individual's goals, interests and abilities and then discuss their rights in the VR program. If an individual is experiencing a conflict with NYSCB, CAP staff may contact NYSCB to negotiate a resolution. CAP typically attempts to mediate and negotiate a resolution before pursuing a more formal appeal. When a negotiated settlement is not possible, CAP staff may represent an individual at an administrative review, mediation or an administrative hearing and can represent an individual in court if the issue is not satisfactorily resolved through the appeal options available through NYSCB.

### Determination of Services to be Provided

CAP has the discretion to determine when it is appropriate to provide their services to an individual. CAP is not obligated to assist an individual when CAP has determined that their dispute lacks merit.

**Notifying Individuals About CAP - VR Counselor's Role**

VR counselors are required to notify individuals about CAP at several times during the rehabilitation process. Notification should be provided in the individual's preferred format. Documentation of the notification should be entered into the case record (this includes a case note and a copy of a letter sent to the individual). Specifically, notification must be made when

1. an individual applies for services. The CAP brochure is shared with applicants at the intake interview. Information about CAP is also included in the NYSCB Handbook which is part of the Intake Packet;
2. an Individualized Plan for Employment (IPE) is developed;
3. an individual's case is closed;
4. there is a disagreement or dispute between the VR counselor and the individual;  
and
5. an individual requests an administrative review, mediation or an administrative hearing.

### Introduction

Informed choice is a decision-making process that provides an individual the opportunity to be an active and knowledgeable participant in their vocational rehabilitation (VR) planning. This includes making decisions in ways that reflect the individual's strengths, resources, priorities, concerns, abilities, capabilities and interests, including identifying a vocational goal, the services needed to achieve the goal and the providers of services to achieve the goal. Through informed choice individuals will also be made aware of the degree to which services are provided in an integrated setting.

### Facilitating Informed Choice

In developing the IPE, the VR counselor will provide or assist the individual in obtaining information about the range of options for services to meet their employment goal and information about services providers; including information about the types of services, the cost and duration of services, accessibility, when available, participant satisfaction, provider qualifications and the degree to which the service is provided in an integrated setting.

### Opportunities for Informed Choice

Informed choice occurs at various points in the VR process. Examples of informed choice:

1. Understanding VR eligibility criteria and determining whether VR is appropriate
2. Identifying assessments required to determine eligibility and services
3. Selecting an employment goal and the services required to achieve the employment goal; selecting service providers; understanding comparable benefits; understanding economic need and services that require the individual to meet economic need
4. Selecting the employment setting, type of employment and any additional services needed to facilitate competitive integrated employment
5. Agreement that the individual's case is ready to be closed and what that means to the individual.

### VR Counselor's Role in Informed Choice

Individuals are encouraged to actively participate and make meaningful choices with the support and guidance of their VR counselor. Individuals do not have complete control over their service provision as VR counselors apply their professional judgement,

applicable federal and state laws, agency policies and consideration of each individual's circumstances in the decision-making process.

Some examples of the VR Counselor's role:

1. Supporting the individual's choice making process
2. Identifying the range of services offered in the VR process
3. Providing information to individuals on resources, services and vendors
4. Encouraging individual participation in identifying a vocational goal and selecting the services and service providers required to meet the agreed upon vocational goal
5. Supporting individuals in making reasonable requests and decisions in the selection of services and providers
6. Informing individuals of any potential consequences regarding their choices

#### Individuals Role in Informed Choice

Individuals are responsible for the choices they make while pursuing their vocational goal and for actively participating in the rehabilitation process. Individuals are expected to make choices that will enable them to achieve their employment goal and can use the following strategies to assist in the informed choice decision process:

1. Gather information to understand available services and service providers.
2. Explore resources for obtaining employment and developing vocational skills (this may include accessing a Career Center).
3. Take an active role in developing their IPE.
4. Communicate with their VR counselor frequently and participate in agreed upon services.

#### Limitations on Individual Choice

There are some situations where the VR counselor cannot support the individual's choice, including any of the following situations where:

1. relevant labor market information or substantial evidence indicates that the individual's selected employment goal or the services to reach that goal would not lead to successful employment. In these circumstances other options leading to successful employment will be discussed.
2. the participant requests that the VR program pay for a service that is not required to achieve their employment outcome;
3. the participant's choice conflicts with federal or state law or NYSCB policy;

4. the participant's choice of service or a device can be provided by a contracted service or obtained at a lower cost without reducing the quality, quantity or benefits of that service or device.