

Palm Beach County School District
No. 04-3484
Initiated by: Parent
Hearing Officer: Robert E. Meale
Date of Final Order: November 18, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 04-3484E
)
PALM BEACH COUNTY SCHOOL)
BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in West Palm Beach, Florida, on November 12, 2004.

APPEARANCES

For Petitioner: ██████████
Parents of ██████████
(Addresses of record)

For Respondent: Laura E. Pincus
Palm Beach County School Board
3318 Forest Hill Boulevard, Suite C-302
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STATEMENT OF THE ISSUE

The issue is whether Respondent has failed to provide Petitioner with a free appropriate public education by failing to implement Petitioner's individual education plan.

PRELIMINARY STATEMENT

By letter dated September 13, 2004, Petitioner alleged that Respondent failed to implement [REDACTED] individual education plan. Petitioner alleged that Respondent failed to allow [REDACTED] additional time during two auditions for admission to a local public school of the arts.

At the hearing, Petitioner called three witnesses and offered into evidence one exhibit: Petitioner Exhibit 1. Respondent called four witnesses and offered into evidence two exhibits: Respondent Exhibits 1-2. The Administrative Law Judge introduced four exhibits: Administrative Law Judge Exhibits 1-4. All exhibits were admitted.

The parties did not order a transcript and did not file proposed final orders.

FINDINGS OF FACT

1. Petitioner was born on [REDACTED]. [REDACTED] is [REDACTED] mother, and [REDACTED] is [REDACTED] father. At all material times, Petitioner lived with [REDACTED] mother, who lives separately from [REDACTED] father.

2. Since attending fifth grade, Petitioner has received exceptional student education (ESE) services based on [REDACTED] classification as a student with a specific learning disability

(SLD). The record is silent as to the specific processing deficits from which Petitioner suffers.

3. However, Petitioner's individual education plans have always provided an accommodation under which [REDACTED] receives additional time to perform certain tasks. Petitioner's present individual education plan, which is dated September 29, 2003 (IEP), provides for specific accommodations at specified frequencies by designated staff. Entitled, "Accommodations/Program Modifications/Supplemental Aids and Services," this part of the IEP states:

Pull-out/Consultation--Monthly--ESE Teacher
Extended Time/Flexible--As Needed--All Staff
Setting for Tests/Assignments Preferential Seating--As Needed--All Staff
Teachers prompt to begin and stay on task--As Needed--All Staff

4. Petitioner is presently attending the [REDACTED] grade at [REDACTED] High School, which is the public high school in . . . for which [REDACTED] is zoned. During [REDACTED] school and [REDACTED] grade, Petitioner attended the [REDACTED], where [REDACTED] studied visual arts.

5. Admission to the [REDACTED] is by audition only. The audition for admission into the visual arts department is divided into four parts. Each student has a stated amount of time within which to complete each part of the audition. Past

problems linking individual students with the works contained in their portfolios have reduced the admission process to each student's performance in the audition.

6. As a [REDACTED] schooler and again as a [REDACTED] grader.

Petitioner successfully auditioned for admission to the [REDACTED]. For reasons unrelated to this case, Petitioner discontinued [REDACTED] attendance at the [REDACTED] early in [REDACTED] [REDACTED]-grade year. [REDACTED] transferred to [REDACTED] home school, where [REDACTED] successfully completed [REDACTED] grade, and then reapplied to the [REDACTED] for [REDACTED] grade.

7. The [REDACTED] processed Petitioner's application and determined that [REDACTED] was eligible to audition for admission to the visual arts department of the [REDACTED]-grade class, starting in the fall of 2004. This case involves Respondent's presentation of accommodations to Petitioner, Petitioner's failure to request any accommodations, and Petitioner's performance in these auditions without any accommodations. These issues apply to the auditions of January 29, 2004, and May 18, 2004.

8. Consistent with Petitioner's two past experiences with auditions at the [REDACTED], the school earlier provided interested persons with notice of upcoming auditions in January 2004. After approving a student's application to audition, the school informs the student that he or she is eligible to

audition. As in the past, Petitioner reached this stage of the process for the January 2004 audition.

9. Consistent with Petitioner's two past experiences with auditions at the [REDACTED], the school presents speakers at a meeting a couple of weeks prior to the audition date. At these presentations, the speakers describe the audition process, which is also described on the school website. One of these speakers is the ESE coordinator, who describes the process for ESE students.

10. As is her custom, the ESE coordinator distributed [REDACTED], Visual Arts, Audition Accommodations (Accommodation Forms) to all visual-arts ESE students and their parents at the meeting a couple of weeks prior to the January 2004 auditions. Divided into the four audition areas, the Accommodation Forms state:

1. Drawing class
 - a. A [REDACTED] Visual Arts staff member will stand near the applicant to demonstrate instructions.
 - b. The applicant will be seated near the instructor.
2. Still-life drawing
 - a. A [REDACTED] Visual Arts staff member will stand near the applicant to answer questions and prompt to stay on task.
 - b. The applicant will be permitted up to 90 minutes.

3. Two or three dimensional design problem
 - a. A [REDACTED] Visual Arts staff member will stand near the applicant to answer questions and prompt to stay on task.
 - b. The applicant will be permitted up to 90 minutes.
4. Essay
 - a. The applicant will be permitted to use a computer to produce the essay OR dictate the essay to an ESE scribe.
 - b. A [REDACTED] Visual Arts student will stand near the applicant to prompt to stay on task.

These are the established ESE/504 accommodations for this art area. If you feel, based on your student's current IEP/504 plan, that other accommodations should be considered, please contact Ms. Marshall, Magnet Coordinator, in writing at the [REDACTED] by January 15, 2004.

11. At the bottom of the Accommodations Form are signature lines for the student and parent to sign and print their names. There are signature lines for the test adjudicators, but these appear to be irrelevant and are not completed on the forms involved in this case. The only other writing on the Accommodations Forms for January and May, 2004, is an asterisk between item 4.b and the flush language quoted above. Beside the asterisk, the ESE coordinator hand wrote, "no accommodations needed."

12. Petitioner and [REDACTED] mother attended the presentation and the January 2004 audition. At the presentation before the January 2004 audition, the witnesses differ as to what the ESE

coordinator said and whether the asterisked note was present prior to Petitioner and [REDACTED] mother's signing a completed Accommodations Form that was otherwise unmarked.

13. Petitioner's mother testified that the ESE coordinator mentioned accommodations as to the essay and asked if anyone needed help or a computer. The ESE coordinator testified that she covered all of the accommodations. Not surprisingly, the ESE coordinator frankly admitted that her testimony was based on her typical practice. Not surprisingly, Petitioner's mother testified with great feeling that she recalled the presentation, and the ESE coordinator mentioned only the accommodation noted above in this paragraph. Petitioner's mother testified candidly that she and [REDACTED] agreed that [REDACTED] did not require a computer or a scribe for the essay part of the audition.

14. A reasonable reading of the Accommodations Form suggests that ESE students will get the eight detailed accommodations, although the presence of the computer or scribe would require advance notice. The other seven accommodations appear to be automatic. Four of these accommodations are that a staff member or student will stand near the applicant to demonstrate instructions or prompt the student to stay on task. One accommodation states that the student will be seated near the instructor. And the remaining two accommodations state that the applicant will be permitted up to 90 minutes.

15. This reading of the Accommodations Form is reinforced by the flush language, which imposes on the ESE student and [REDACTED] or [REDACTED] parents the responsibility of contacting the school, by a certain date, to discuss other accommodations, if required by the student's IEP. The negative implication is that the ESE student and his or her parents bear no such responsibility as to the cited eight accommodations, although some advance work is obviously necessary to obtain a computer or scribe.

16. Another area of disagreement between the ESE coordinator and Petitioner's mother concerns when the ESE coordinator added the asterisked note to the form. The ESE coordinator described a fairly intense scene in which presumably nervous parents of ESE students a couple of weeks from auditions to a prestigious art school were gathered around a table, at which the ESE coordinator was seated. The ESE coordinator would hand out the forms to the parents, who either signed them immediately and returned them to [REDACTED], or retained them, prompting the ESE coordinator to note who they were so that she could call them later.

17. To credit the ESE coordinator's testimony, she distributed the forms to all ESE parents so they could read them, noted the parents who did not return them immediately so she could call them later, confirmed with the other parents that

their children required no accommodations, retrieved the unsigned forms from these parents, added the asterisked notes, returned the still-unsigned forms to these parents for their signatures, and again retrieved the now-signed forms from these parents.

18. To credit ██████'s testimony and the portion of the ESE coordinator's testimony not in conflict with ██████'s testimony, the ESE coordinator distributed the forms to all ESE parents so they could read them, noted the parents who did not return them immediately so she could call them later, confirmed with the other parents that their children required no accommodations, retrieved the signed forms from these parents, and added the asterisked notes. To the extent of any conflict ██████ testimony, as described in this paragraph, is credited.

19. The IEP does not detail the process by which Respondent is to accommodate Petitioner's SLD, although the process may be inferred from the few IEP provisions addressing the issue and the practice of Petitioner, ██████ parents, and Respondent in this case. The following paragraphs describe this process.

20. Although he or she may do so in a timely fashion, neither Petitioner nor ██████ parent is required by the IEP to request an accommodation each time one is required to provide Petitioner with a free appropriate public education. One of

Respondent's ESE witnesses testified to the contrary, claiming that the student was responsible for activating the accommodations contained in the IEP. The flaw in her interpretation of the IEP accommodations reveals itself when one considers the likelihood of the student suggesting to the teacher that she prompt ██████ to begin a test and stay on task.

21. On the other hand, although he or she may do so at anytime, none of Respondent's representatives, such as the school teacher or ESE coordinator, is required by the IEP to read the minds of Petitioner and ██████ parents as to when an accommodation may be needed. In more routine matters, though, the classroom teacher, already familiar with Petitioner, provides Petitioner with the necessary accommodations described in the IEP to provide ██████ with a free appropriate public education, and she does so without notice to Petitioner's parents.

22. In nonroutine matters, such as an audition for admission to an arts school, Respondent's representatives must make an effort to describe the nature of the activity to Petitioner and give ██████ and ██████ parents an opportunity to determine if Petitioner requires an accommodation and, if so, to request, in a timely fashion, that Respondent implement the accommodation.

23. Respondent fully discharged its obligation to describe the audition to Petitioner and [REDACTED] parents. Petitioner had already undergone a less rigorous audition to enter [REDACTED] grade, and the presentation and website described the audition process in detail. The four parts of the audition held no surprises for Petitioner.

24. Due to the ambiguity of the Accommodations Form, Respondent only partially discharged its obligation to determine whether Petitioner required an accommodation in the audition. However, as to one point, the Accommodations Form is not ambiguous, and, on this point, Respondent discharged its duty, under the IEP, of informing Petitioner and [REDACTED] parents of the right to an accommodation.

25. Providing at least seven of the eight cited accommodations automatically to any ESE student auditioning for admission to the visual arts department, the Accommodations Form does not provide for an automatic extension of time for the essay, as it does the still-life drawing and two- or three-dimensional design problems. Signing the Accommodation Form for the January 2004 audition, even without the asterisked note, Petitioner and [REDACTED] mother could not have expected that Petitioner would receive additional time on the essay, unless they timely asked for it, and neither [REDACTED] nor [REDACTED] mother asked for additional time to complete the essay until well after

the completion of the audition. In this respect, the Accommodations Form is clear and unambiguous, and the testimony of Petitioner and [REDACTED] that they did not have a chance to read the form or failed to read it, if given the chance, is discredited.

26. Petitioner attended the January 2004 audition, as scheduled. [REDACTED] performed the four parts of the audition without any accommodations whatsoever and within the time allotted to all students. Petitioner testified that [REDACTED] SLD required that [REDACTED] receive additional time to complete the still-life drawing and essay parts of the audition. According to Petitioner, [REDACTED] SLD and the timed nature of the auditions were irrelevant to [REDACTED] performance on the drawing class and the two- or three-dimensional design problem.

27. To pass the audition and gain admission as an [REDACTED]-grader into the [REDACTED], a visual-arts student must earn a minimum score of 95 points on the audition. Each part is worth 25 points. Each part is graded by three adjudicators, whose scores are combined. Thus, a student could pass the visual-arts audition by earning 24s on three parts and a 23 on the fourth part, but two 24s and two 23s would not be sufficient. The scoring is obviously demanding.

28. In the January 2004 audition, Petitioner scored only a 73. [REDACTED] earned 12 points for the drawing class, 18 points for

the still-life drawing, 23 points for the two- or three-dimensional design, and 20 points for the essay. Petitioner's claim that [REDACTED] was denied reasonable accommodation for the still-life drawing and essay accounts for 12 points, if [REDACTED] had earned perfect scores in these two areas. Even with perfect scores in these two areas, [REDACTED] would have earned only 85 points--still 10 points too few to pass the visual-arts audition.

29. However, Petitioner and [REDACTED] parents claimed that one of the adjudicators of the still-life drawing part of the audition was biased against [REDACTED], based on her dealings with Petitioner when [REDACTED] had attended the [REDACTED] during [REDACTED] grade. The school therefore allowed Petitioner to retake the still-life drawing and drawing class on May 18, 2004.

30. The school's decision is confusing for two reasons. At this point, Petitioner and [REDACTED] parents had not claimed that [REDACTED] needed an accommodation on the auditions, so the sole issue was scorer bias. However, Petitioner and [REDACTED] parents made no claim as to bias in the scoring of the drawing class, and, even if Petitioner had scored perfect 25s in the May 2004 audition on each of these two parts, [REDACTED] total score would only have been 93--two points short of passing the audition.

31. Because the May 2004 audition involved fewer students, the school did not sponsor another presentation prior to the

auditions. When Petitioner appeared at the school for the audition on May 18, 2004, accompanied this time by [REDACTED] father, the ESE coordinator was surprised to see [REDACTED], as she had not previously known [REDACTED] was taking a reaudition.

32. Trying to deal with Petitioner and another ESE student, who had requested an accommodation, the ESE coordinator made no effort to discuss the Accommodations Form with Petitioner or [REDACTED] father. As before, she gave them a blank form with the same now-passed January 15 deadline for requesting other accommodations. The ESE coordinator asked them to sign it, and, after they did so, she added the same asterisked note that she had added to the January 2004 Accommodations Form.

33. Petitioner retook the drawing class and still-life drawing parts of the audition, again receiving no accommodations and, again, not having asked for any accommodations. [REDACTED] raised [REDACTED] drawing class score by ten points, to 22, but lowered [REDACTED] still-life drawing score by one point, to 17. Now, [REDACTED] total score was 82 (or 83, if [REDACTED] could take [REDACTED] higher still-life drawing score from the January 2004 audition).

34. A few days after the May 2004 audition, [REDACTED] obtained from the school a copy of the signed Accommodation Forms, which the school did not routinely copy and supply to the ESE parents. It was at that point that Petitioner and [REDACTED] parents first claimed the need for an accommodation as to the time allotted

Petitioner during parts of the audition. It is unclear whether, initially, the parents made this claim as to only the still-life drawing part of the audition. By the time of the hearing, however, Petitioner claimed that [REDACTED] SLD and the time constraints handicapped [REDACTED] performance of the still-life drawing and the essay.

35. Petitioner faces two insurmountable problems in this case. First, as discussed above, [REDACTED] IEP and the Accommodation Form required that [REDACTED] or [REDACTED] parents timely request additional time to complete the essay part of the audition, and they did not do so. Second, Petitioner has failed to prove that, even if timely requested, [REDACTED] was entitled to an accommodation on the essay, as [REDACTED] has failed to show why [REDACTED] needed additional time for the essay in order to compete fairly with [REDACTED] nonhandicapped peers. Absent proof that Respondent unreasonably failed to accommodate Petitioner as to the essay part of the audition, any such failure as to the still-life drawing part of the audition would be meaningless because, even with a perfect score in still-life drawing, Petitioner would be short of 95 points.

36. Not claiming any SLD-related problems on the drawing class and two- or three-dimensional design parts of the audition, Petitioner effectively concedes the loss of five total points from these two, unchallenged parts. Thus, it was still

mathematically possible for ██████ to score a 95, assuming that ██████ would have scored 25s on the challenged parts of the audition, if Respondent had accommodated ██████ SLD.

37. Nothing in the record supports Petitioner's claim that ██████ SLD demanded the accommodation of more time to write the essay. By contrast, the evidence, including the testimony of the dean of the visual arts department, establishes at least that Petitioner did not perform up to ██████ capacity on the still-life drawing part of the audition. As to this part of the audition, Petitioner testified that ██████ could not fill the 18-inch by 24-inch paper in the January 2004 audition, and that was why ██████ score was so low. Petitioner explained how ██████ would fixate on one feature of the drawing assignment and lose valuable time. Petitioner had the same problems with the still-life drawing in the May 2004 audition. Although Petitioner never linked ██████ processing deficit to this subpar performance, any possible failure of Respondent to accommodate Petitioner on this part of the audition is meaningless, given the result below as to the essay part of the audition.

38. For the essay part of the audition, Petitioner has failed even to offer an explanation of what went wrong. The essay focused on a student's ability to analyze an expressive work of art in terms of its medium, composition, and theme. The emphasis in scoring was on the content of the student's answers

to four questions asked of ██████ or ██████ about the work, not on the writing ability evidenced by the student. Suggesting that ██████ experienced no difficulty with this part of the audition, Petitioner testified that ██████ was able to answer all four questions. Petitioner's only complaint is that "a few" of ██████ peers laid their pencils down before the end of the test. Assuming that these proficient writers scored well on the essay part of the audition, Petitioner has failed to show how ██████ underperformed, relative to ██████ talent and aptitude. And, as was true with respect to the still-life drawing part of the audition, Petitioner has not attempted to link ██████ performance on the essay part of the audition with ██████ SLD, which seems to require nothing more than a few minutes a month of prodding to organize ██████ and avoid procrastination.

39. It is clear from the record that Petitioner and ██████ mother had the duty of asking for more time on the essay, as an accommodation to Petitioner's SLD; that they did not do so because Petitioner's SLD did not affect ██████ ability to write the essay and, thus, did not affect ██████ essay score; and that, assuming some link between Petitioner's SLD and ██████ poor performances on the still-life drawing part of the audition, Respondent's failure to accommodate Petitioner for this part of the audition is immaterial because, with a perfect score on this

part, Petitioner would have scored only 90 points and still would not have passed [REDACTED] audition.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.57(1) and 1003.57(5), Fla Stat. (2004).

41. Section 1003.57, Florida Statutes, requires school districts to provide each ESE student with a free appropriate public education. Florida Administrative Code Rule 6A-6.03311(11)(a) provides a due process hearing upon a complaint that a student is not receiving a free appropriate public education.

42. Pursuant to Florida Administrative Code Rule 6A-6.03028(7)(c), a free appropriate public education requires, among other things, the preparation of an IEP containing:

A statement of the specially designed instruction and related services and supplementary aids and services to be provided to the student, or on behalf of the student, and a statement of the classroom accommodations, modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals; to be involved and progress in the general curriculum in accordance with paragraph (7)(a) of this rule; to participate in extracurricular and other nonacademic activities; and to be educated and participate with other students with disabilities and nondisabled students in the activities described in this paragraph[.]

43. The "accommodations" and "modifications" set forth in Florida Administrative Code Rule 6A-6.03028(7)(c) are defined in Florida Administrative Code Rule 6A-6.03028(2)(e) and (f), which, respectively, defines "accommodations" as "changes that are made in how the student accesses information and demonstrates performance" and "modifications" as "changes in what a student is expected to learn and may include changes to content, requirements, and expected level of mastery."

44. Pursuant to Florida Administrative Code 6A-6.03028(11)(a)-(c), a free appropriate public education also requires the implementation of the IEP:

IEP implementation and accountability. The school district, or other state agency that provides special education and related services either directly, by contract, or through other arrangements, is responsible for providing the specially designed instruction and related services to students with disabilities in accordance with the students' IEPs. However, it is not required that the school district, teacher, or other person be held accountable if a student does not achieve the growth projected in the annual goals and benchmarks or objectives. An IEP must be in effect before specially designed instruction and related services are provided to an eligible student and is implemented as soon as possible following the IEP meeting.

(a) The student's IEP shall be accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation.

(b) Each teacher and provider described in paragraph (11)(a) of this rule shall be informed of their specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP.

(c) The school board must make a good faith effort to assist the student to achieve the goals and objectives or benchmarks listed on the IEP.

45. Petitioner has the burden of proof. Devine v. Indian River County School District, 249 F.3d 1289 (11th Cir. 2001), cert. denied, 537 U.S. 815 (2002).

46. In the context of this case, the purpose of accommodations is to enable Petitioner to compete fairly with [REDACTED] nonhandicapped peers in seeking admission to the upper division of the [REDACTED]. A free appropriate public education requires the accommodation, if it removes any advantages that Petitioner's peers may have, due to Petitioner's SLD, but does not allow the accommodation, if it gives Petitioner's advantages over [REDACTED] nonhandicapped peers. On this record, even if timely requested, an accommodation of more time for the essay part of the audition was not required to provide Petitioner with a free appropriate public education. Without the accommodation, Petitioner competed fairly with [REDACTED] peers, and [REDACTED] failure to pass the audition was not due to [REDACTED] SLD.

ORDER

It is

ORDERED that Petitioner's claim that Respondent is failing to implement [REDACTED]. individual education plan is denied.

DONE AND ORDERED this 18th day of November, 2004, in Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of November, 2004.

COPIES FURNISHED:

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(Address of record)

██████████.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.