STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATION,	)	
Petitioner,	)	Case No. 01-3340
vs.	)	
SANDRA LEWIS,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge Daniel Manry conducted the administrative hearing of this proceeding on September 25, 2001, in Orlando, Florida, on behalf of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Joseph L. Shields, Esquire
Department of Education
Division of Vocational
Rehabilitation Services
2002 Old St. Augustine Road
Building A, Room 343
Tallahassee, Florida 32301-4862

For Respondent: Sandra Lewis, pro se
3813 Columbia Street
Orlando, Florida 32811

STATEMENT OF THE ISSUE

The issue is whether Petitioner should terminate the existing individual plan of employment ("IPE") that was

developed pursuant to Section 413.30, Florida Statutes (2001), because the existing IPE is no longer viable. (All chapter and section references are to Florida Statutes (2001) unless otherwise stated.)

PRELIMINARY STATEMENT

By letter dated July 23, 2001, Petitioner advised Respondent that her IPE was no longer viable and that Petitioner would no longer fund the plan. Respondent timely requested an administrative hearing.

At the hearing, Petitioner presented the testimony of one witness and submitted three exhibits for admission in evidence. Respondent testified and submitted 11 exhibits for admission in evidence. The identity of the witnesses and exhibits and the rulings regarding each are set forth in the official record of the hearing. Neither party requested a transcript of the hearing.

Respondent timely filed her Proposed Recommended Order ("PRO") on October 1, 2001. Petitioner timely filed its PRO on October 26, 2001.

FINDINGS OF FACT

1. Respondent has been a client of Petitioner for many years and has received thousands of dollars in benefits from Petitioner in accordance with an existing IPE. The existing IPE provides that Respondent's employment goal is for self-

employment as an administrator of a beauty academy in the Orlando metropolitan area.

2. Sometime prior to March 30, 2000, the parties entered into mediation to resolve certain differences between them. On March 30, 2000, the parties executed a Mediation Agreement.

3. The Mediation Agreement required Respondent's business plan to include expenses described as the cost of accreditation and the cost of financial aid software. It also required the Small Business Development Center ("SBDC") at the University of Central Florida to evaluate Respondent's business plan.

4. Petitioner agreed to pay the expenses of accreditation and financial aid software if the SBDC found that the business plan is viable. In relevant part, the Mediation Agreement provided:

> If the business plan . . . is found by SBDC to be viable and the business plan includes the 2 expenses referred to . . . above, VR agrees to provide theses expenses as part of its services in the IPE.

Respondent's Exhibit A

5. On April 4, 2000, the SBDC issued a written evaluation of Respondent's business plan. The parties agree that the business plan evaluated by SBDC includes the requisite expenses.

6. At the hearing, Petitioner claimed that Respondent did not satisfy the relevant requirement in the Mediation Agreement for a finding by SBDC that the business plan is viable, in part,

because the written evaluation does not use the term "viable." Petitioner cited no statute, rule, or judicial decision that establishes a technical definition for the term "viable." In the absence of a technical definition, the term should be interpreted according to its common and ordinary meaning.

7. The American Heritage Dictionary of the English Language, at 1915, (4th Ed. Houghton Mifflin Co. New York 2000), defines the term "viable" to mean, "Capable of success or continuing effectiveness; practicable. . . . See synonyms at possible." The written evaluation issued from SBDC to Petitioner's consultant found that Respondent's business plan is viable. In relevant part, the written evaluation finds:

> . . . this business plan has been very carefully researched and written. It is a thorough description of Sandra's business concept. If implemented as described, this document should serve as tool (sic) to help insure her business success. I would like to add that this plan is more comprehensive than any that I have ever evaluated for Vocational Rehab clients.

Respondent's Exhibit A.

8. Petitioner designated the SBDC as Petitioner's agent for the evaluation of Respondent's business plan. SBDC issued the written evaluation to Petitioner's consultant and provided copies to Respondent and others. Petitioner is bound by the findings of SBDC as Petitioner's designated agent.

9. The parties did not agree in the Mediation Agreement that SBDC would, as a condition of Petitioner's obligation to pay expenses, find that Respondent's business would be viable. Rather, the parties agreed, as a condition of funding, to a finding by SBDC that the business plan is viable. Respondent satisfied that express condition of funding.

10. Petitioner knew, or should have known, that SBDC would not make a finding that the proposed business would be viable. In relevant part, the written evaluation issued to Petitioner's consultant stated:

> As I am sure you know the ability to prepare a "good" business plan does not necessarily mean that someone will or will not be successful. The SBDC, therefore, will not pass judgment on the feasibility or likelihood of success of any business. We limit our remarks to a critique of the plan itself as a written document only.

Id.

11. After SBDC issued the written evaluation, Petitioner executed the existing IPE. By letter dated May 23, 2000, Petitioner provided Respondent with a copy of the IPE.

12. In relevant part, the IPE provides that Petitioner will pay for the costs of accreditation and software that were conditioned on the written evaluation from SBDC. The IPE further provides that Petitioner will pay for specific services for counseling and guidance, physical restoration by physicians

of Respondent's choice, mental restoration by providers of Respondent's choice, miscellaneous training required for accreditation, maintenance, and transportation. In addition, the IPE provides that Petitioner will pay for other goods and services associated with the new business including auditing expenses, licensing expenses, advertising, a video camera and tripod, video tapes, work clothing, rent in the amount of $16,119, the cost of staff development, office supplies, janitorial services, utilities of $4,400, and a computer workstation.

13. After May 23, 2000, the parties amended the IPE approximately four times to include additional expenses not included in the original IPE. The additional expenses included the cost of beauty equipment and legal fees.

14. Between May 23, 2000, and June 1, 2001, Petitioner disputed some of the expenses submitted by Respondent. When Respondent requested that Petitioner pay a security deposit equal to three months rent for office space for the new business, Petitioner denied the request on the grounds that a security deposit is not rent and that the IPE obligates Petitioner to pay only rent.

15. The proposed landlord refused to register as vendor with Petitioner. A real estate broker agreed to act as the conduit-vendor for the security deposit and rent. However,

Petitioner's consultant refused to proceed with the arrangement without approval from his Tallahassee office.

16. The security deposit was rent within the meaning of the IPE. Payment of the security deposit would not have increased the total amount paid as rent but would have come from the monies already allocated to rent.

17. The delay in obtaining approval for the security deposit caused Respondent to lose her option to lease the original office space. Respondent located a second site for the new business, but the new site requires some renovation before it will be suitable for opening. Petitioner refuses to pay the renovation expense on the grounds that such expenses are not rent.

18. On June 6, 2001, Petitioner retained the services of a specialist to provide a market analysis to determine whether the proposed business, as opposed to the business plan, is viable. The specialist issued a written market analysis on June 27, 2001.

19. By letter dated July 23, 2001, Petitioner's consultant advised Respondent that her IPE was no longer viable (the "termination letter"). In relevant part, the letter stated:

> I have decided that there is no likelihood that your planned services relating to your self-employment as the administrator of a

> beauty academy will lead to your employment in that capacity. This decision is made for a number of reasons but I shall take the opportunity to list some of them below; 1)the loss of your previously anticipated referrals. . ., 2)my reluctance to provide payment(s) for the required (3 months) security deposit on your intended commercial lease, 3)the continuing unwillingness of [an organization designated as NACCAS] to certify your academy, 4)my belief that you can not qualify as a financial aid approved facility without certification. . . 5)the apparent lack of sponsoring . . . sources 6)my unwillingness to sponsor repairs for your intended place of business, 7)tuition costs higher than those at public institutions in the community and 8)current market analysis suggesting that additional cosmetology/beauty schools in the metro Orlando area would have a difficult time obtaining profitability. (emphasis supplied)

Petitioner's Exhibit 1.

20. The preponderance of evidence does not support the findings in grounds 1) and 5) in the termination letter. Respondent testified that she had commitments for referrals and sponsors and provided written statements from approximately 13 sources that supplemented and explained her testimony. The sources of referral and sponsorship include the Sanctuary of Praise Ministries, The Bridge, two radio stations, the NAACP, and the Central Florida Advocate.

21. Grounds 2) and 6) of the termination letter pertain to the security deposit and renovation expenses. A security deposit equal to three months rent is "rent" covered by the IPE.

Renovation expenses are not rent but would not increase the total rent in the IPE because the current space is less expensive than the original space.

22. Grounds 3) and 4) in the termination letter are only temporary. The certifying organization is the National Accrediting Commission of Cosmetology Arts and Sciences (the "NACCAS"). After November 15, 2001, Respondent will be eligible to apply for accreditation from the NACCAS and, once obtained, will be eligible for financial aid for her students.

23. The preponderance of evidence does not support a finding pertaining to ground 7) in the termination letter. The parties submitted conflicting evidence on this issue.

24. Ground 8) is a mixed question of fact and law. Petitioner failed to show that there is "no likelihood" that Respondent will achieve her goal of self-employment as an administrator of a beauty academy.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties and subject matter of this proceeding. Section 120.57(1). The parties were duly noticed for the administrative hearing.

26. Petitioner has the burden of proof in this proceeding. This case does not involve a denial by a state agency of an initial application. Petitioner approved the initial application by Respondent, developed the existing IPE,

and now proposes that the IPE should be terminated. The party seeking to prove the affirmative of an issue has the burden of proof. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 788 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 350 (Fla. 1st DCA 1977).

27. Petitioner must show by a preponderance of evidence that the existing IPE is no longer viable. J.W.C. Company, Inc., 396 So. 2d at 778; Balino, 348 So. 2d at 349. Petitioner failed to satisfy its burden of proof by the requisite standard.

28. The preponderance of evidence shows that Respondent satisfied relevant conditions in the Mediation Agreement by obtaining a finding from the SBDC that her business plan is viable. Petitioner then issued an IPE in accordance with the Mediation Agreement. Petitioner subsequently sought to terminate the IPE on the grounds stated in the termination letter.

29. Petitioner failed to establish all of the eight grounds stated in the termination letter by a preponderance of the evidence. The preponderance of evidence shows that Petitioner refused to pay a security deposit that the IPE required Petitioner to pay as rent. The refusal delayed Respondent's acquisition of office space for her business. Petitioner failed to prove the other grounds in the termination

letter including the market analysis that formed the basis of ground 8)in the termination letter.

30. Respondent submitted evidence to contradict several of the assumptions underlying the conclusion in the market analysis. Respondent's evidence raises issues concerning the reliability of the market analysis.

31. The market analysis is hearsay within the meaning of Section 90.801(1)(c). The specialist who prepared the market analysis did not testify at the hearing.

32. Unlike the written evaluation by SBDC that is an admission, within the meaning of Section 90.803(18)(b)-(d), the market analysis does not fall within any of the exceptions authorized in Section 90.803. In addition, Petitioner failed to satisfy the requirements of Section 90.804 that otherwise would allow the market analysis to be admitted if the declarant were unavailable.

33. The witness for Petitioner was neither tendered nor qualified as an expert. Therefore, the witness is not an expert who is authorized by Section 90.702 to rely on the market analysis as a basis for his expert opinion.

34. Section 120.57(1)(c) prohibits the ALJ from basing a finding of fact on hearsay. The market analysis is the only evidence relied on by Petitioner to determine the market feasibility of the proposed business. The market analysis does

not explain or supplement other competent and substantial evidence within the meaning of Section 120.57(1)(c).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Respondent enter a final order finding that there is some likelihood that the IPE will lead to Respondent's self-employment as an administrator of a beauty academy; and requiring Petitioner to continue the IPE toward that goal.

DONE and ENTERED this 31st day of October, 2001, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October 2001.

COPIES FURNISHED:

James A. Robinson, General Counsel
Department of Education
The Capitol, Suite 1701
Tallahassee, Florida 32399-0400

Carl F. Miller, Jr., Director
Division of Vocational Rehabilitation
Department of Education
2002 Old St. Augustine Road
Building A
Tallahassee, Florida 32301-4862

Joseph L. Shields, Esquire
Department of Education
Division of Vocational
Rehabilitation Services
2002 Old St. Augustine Road
Building A, Room 343
Tallahassee, Florida 32301-4862

Sandra Lewis
3813 Columbia Street
Orlando, Florida 32811

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.