BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
OSAH
AUG 02 2017
Kevin Westray, Legal Assistant

[redacted], by and through [redacted] and [redacted] and [redacted]	:	
Petitioners,	:	
	:	**Docket No.**
v.	:	**OSAH-DOE-SE-1733564-33-KENNEDY**
COBB COUNTY SCHOOL DISTRICT,	:	
Respondent.	:	

FINAL DECISION
ORDER GRANTING
PETITIONERS' MOTION FOR PARTIAL SUMMARY DETERMINATION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

Petitioner [redacted] is a student in the Cobb County School District (CCSD) and is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§ 1400 *et seq*. On April 20, 2017, [redacted] and his parents, [redacted] and [redacted], filed a Due Process Hearing Request alleging issues related to evaluation and a Free Appropriate Public Education (FAPE). Petitioners sought approval to have an Independent Education Evaluation, in the form of a Functional Behavior Analysis (FBA), which would be conducted by Dr. Michael Mueller. CCSD filed a Response on May 1, 2017. Petitioner then filed a Motion for Partial Summary Judgment (Motion) on May 3, 2017. On May 5, 2017, CCSD filed a Notice of Insufficiency and, on May 8, 2017, this Court found Petitioner's Due Process Hearing Request to be insufficient only as it related to the allegation of a denial of FAPE. Accordingly, the Court dismissed without prejudice any issues regarding FAPE in Petitioner's Due Process Hearing Request.

CCSD filed a response to Petitioner's Motion for Partial Summary Judgment on May 22, 2017, and also filed a Counter-Motion for Summary Determination (Counter-Motion). On June 12, 2017, Petitioner filed a brief in opposition to CCSD's Counter-Motion and a brief in support of Petitioner's Motion (Reply Brief).

Having considered the pleadings and arguments set forth before the Court, and based on the undisputed material facts set forth below, Petitioner's Motion for Partial Summary Determination is **GRANTED**, and CCSD's Counter-Motion for Summary determination is **DENIED**.

II. FINDINGS OF UNDISPUTED MATERIAL FACT

Viewing the probative evidence in the light most favorable to the Respondent, the following facts are undisputed:

1.

[redacted] is a [redacted] grade student attending HAVEN at [redacted] in CCSD since August 1, 2016. (Pet'r's Mot., Becker Aff. ¶ 1).

2.

In February 2017, CCSD conducted a Functional Behavior Assessment (FBA) for [redacted] (Pet'r's Mot., Becker Aff. ¶ 4; Resp't's Counter-Mot., Coleman Aff. ¶ 4 and Exhibit 1).

3.

On March 14, 2017, CCSD sent Petitioner's parents, [redacted] and [redacted] a copy of the February 2017 FBA. (Pet'r's Mot. 2; Resp't's Counter-Mot., Coleman Aff. ¶ 5, and Exhibit 2).

4.

On March 15, 2017, [redacted] informed CCSD in writing that she disagreed with the February 2017 FBA conducted by the School District, and requested an IEE to be conducted by Dr. Michael Mueller, a board certified behavior analyst at the Ph.D level (BCBA-D). [redacted] selected Dr. Mueller based on her perception that [redacted] had severe behaviors that required an FBA be completed by someone with Dr. Mueller's experience and expertise with behavior evaluation and modification. (Pet'r's Mot. 4, Becker Aff. ¶ 5 and Exhibit 1; Pet'r's Mot. Mueller Aff. ¶ 3; Resp't's Counter-Mot., Coleman Aff. ¶ 6 and Exhibit 2).

5.

On March 16, 2017, CCSD provided Petitioners a Parental Request Form. The School District asked that Petitioners complete the form but noted that, by law, they were not required to do so. CCSD further informed Petitioners that if CCSD did not receive a completed form within 10 business days, CCSD would move forward to consider whether to grant Petitioners request for an IEE at public expense, whether to file a due process hearing request to demonstrate that the school district's evaluation is appropriate, or determine whether a completed IEE did not meet the criteria of the school district. That same day, March 16, 2017, [redacted] mother's returned the completed Parental Request Form to CCSD, reiterating her request for an independent FBA to be conducted by Dr. Mueller. (Pet'r's Mot. 8, Becker Aff. Exhibit 2; Resp't's Counter-Mot., Coleman Aff. ¶¶ 6, 8, and Exhibits 3 and 4).

6.

On March 27, 2017, Susan Christensen, the director of special education services for CCSD, approved [redacted]s request for an IEE. The following language was included in CCSD's March 27 response: "Independent evaluators must also abide by the following District criteria: (a) Abide

by the maximum fee schedule to be determined after review of current competitive rates provided by evaluators." Along with the letter, CCSD provided a list of three approved individuals who could conduct an independent FBA based on having met CCSD's criteria, including acceptance of the maximum allowable fee of $132.50 per hour. The letter further informed Petitioner that if she wished to use an evaluator not on the District's approved list, the evaluator would be required to comply with the District's requirements, including adhering to the maximum fee schedule. The letter suggests that the maximum fees are not a result of an average of charges of evaluators listed on the approved list of evaluators, but are designed to exclude any evaluators charging unreasonably excessive fees. Finally, the letter informs Petitioners that if they choose someone not on the list and the evaluator exceeds the maximum fees established by the District, Petitioners will be given an opportunity to demonstrate that unique circumstances may exist to warrant the selection of the particular evaluator. (Pet'r's Mot. 8, Becker Aff. Exhibit 3; Resp't's Counter-Mot., Coleman Aff. ¶ 9 and Exhibit 5).

7.

On March 27, March 30, and April 4, 2017, [redacted] responded to CCSD by thanking them for the approval of the independent FBA and by reiterating her desire for Dr. Mueller to conduct the FBA. In her responses, [redacted] explained why she was requesting Dr. Mueller. It was necessary that Petitioners explain the unique circumstances that Petitioners believed existed to warrant the selection of Dr. Mueller because he was not on CCSD's list of approved evaluators and had not agreed to accept a rate of $132.50 per hour.[1] Dr. Mueller charges $150 per hour. According to Dr. Mueller, he has not increased his fees from $150 since 2011, in part, to ensure that his rate is

[1] Although there are approximately 50 BCBAs within a 50-mile radius of [redacted]s school, there are only three that have accepted CCSD's maximum allowable fees and have been approved to be listed on CCSD's list of approved Independent Evaluators. Of the three individual approved by CCSD, only one is a BCBA-D, that being Dr. Alexander. Pet'r's Mot. Mueller Aff. ¶ 19.

reasonable and fair to school districts and families, alike. Between 2011 and 2017, Dr. Mueller conducted nine FBAs for CCSD at the rate of $150 per hour and he is unwilling to accept a lower fee that he believes is arbitrary and unreasonable. (Pet'r's Mot. 8, Becker Aff. Exhibits 3 and 4, Mueller Aff. ¶¶ 3, 15, 19, and 20; Resp't's Counter-Mot., Exhibits 5, 6).

8.

On March 30, 2017, Petitioners inquired about the status of their request for Dr. Mueller to perform the independent FBA. (Resp't's Counter-Mot., Exhibit 6)

9.

The following day, on March 31, 2017, CCSD provided [redacted]s parents a letter informing them that Dr. Mueller is not on the District's list of Independent Evaluators because he has not agreed to CCSD's fee schedule. CCSD further requested that [redacted] parents respond with the unique circumstances that would warrant the use of Dr. Mueller to conduct the FBA. (Pet'r's Mot. Becker Aff., Exhibit 4; Resp't's Counter-Mot., Exhibits 6 and 7)

10.

In response, on April 4, 2017, Petitioners informed CCSD that Dr. Mueller had performed two FBA's for CCSD at the rate of $150 an hour; that his rate has stayed the same for a long time and is fair; that Dr. Mueller has a solid track record and experience, is very good at what he does; that there is no reason to not use him; and that he is unbiased and well versed in modifying behavior. [redacted] further informed CCSD that she felt someone very experienced, like Dr. Mueller, was needed to conduct the FBA because of [redacted]s "severe case" and the fact that he had already attended HAVEN for 8 months before CCSD conducted an FBA or sought to prepare a behavior intervention plan. Dr. Mueller concurs with [redacted] assessment that it is critical that a skilled, well experienced BCBA-D conduct an independent FBA as a foundation for devising and

implementing a behavioral intervention plan for [redacted] based on [redacted] independent needs and regression. (Pet'r's Mot. 9, Becker Aff. ¶ 8 and Exhibit 4 thereto; Pet'r's Mot. Mueller Aff. ¶ 16; Resp't's Counter-Mot., Coleman Aff. ¶¶ 10, 12 and Exhibit 6 thereto.)

11.

Thereafter, on April 12, 2017, Petitioners, not having heard from CCSD after their April 4, 2017 reply setting forth the unique circumstances why they were requesting that Dr. Mueller be approved to conduct the independent FBA, informed CCSD that if they did not hear back from the district by end-of-business on April 13, 2017, they would file a due process hearing request because they were concerned that the matter had been continuously delayed. Petitioners concerns were due, in part, to the fact that the February 2017 FBA was the first FBA conducted since [redacted] began school in CCSD in August 2016. (Pet'r's Mot. Becker Aff. Exhibit 4; Resp't's Counter-Mot., Coleman Aff. ¶ 11, and Exhibit 6).

12.

On April 17, 2017, CCSD prepared a letter addressed to [redacted]s parents in which CCSD informed Petitioners that the reasons provided in Petitioner's April 4, 2017 email regarding the unique circumstances that would warrant Dr. Mueller performing the independent FBA were insufficient. CCSD further explained to Petitioners that the School District believed that the three evaluators on the approved Independent Evaluator list were qualified to perform the independent FBA evaluation for [redacted] and Petitioners would be expected to choose one of the three individuals on CCSD's approved list. (Resp't's Counter-Mot., Coleman Aff. ¶ 13 and Exhibit 8 thereto.)

13.

On April 18, 2017, Petitioners requested that the independent FBA proceed with Dr. Mueller. At that time the Petitioners offered to pay the cost to have Dr. Mueller complete the independent evaluation "for time[']s sake."[2] The Petitioners were eager to have the independent FBA completed by Dr. Mueller as soon as possible because there were only 25 days left of school and [redacted] in their opinion, was not performing well in the placement at HAVEN. [redacted] recalls being told by the principal of HAVEN that Dr. Mueller would be treated as a visitor and allowed only 1 hour a day access and, further, he would be required to obtain approval 24 hours in advance to visit for one hour. However, it is not possible to conduct a proper, appropriate, and useful FBA if data collection is limited to one hour a day. Instead, it typically takes a half-day to a full-day of observation to fully understand the context of the behavior being observed, and it is not uncommon for an FBA to include up to 20 or more hours of direct behavioral observations. Accordingly, Petitioners requested confirmation from CCSD that Dr. Mueller would have the same access as a provider paid for by the school district to complete the IEE. (Pet'r's Mot. 10, Becker Aff. ¶ 9 and Exhibit 5; Mueller Aff. ¶ 17; Resp't's Counter-Mot., Coleman Aff. ¶ 14 and Exhibit 9 thereto)

14.

On April 20, 2017, Petitioners filed the Due Process Hearing Request requesting that Dr. Mueller be approved to proceed with completing an independent FBA and to address any issues regarding denial of a Free and Appropriate Public Education (FAPE) that may exist as a result of the delay in conducting the initial FBA and/or the delay in going forward with Petitioners'

[2] The following day, Petitioners' attorney sent an email to CCSD's attorney, asking that Dr. Mueller be allowed to proceed with conducting an independent FBA and discuss or litigate if necessary who pays for it later. (Pet'r Motion Becker Aff. Exhibit 5)

request that Dr. Mueller perform an independent FBA. (ALJ Exhibit 1, Due Process Hearing Request Form)

15.

Prior to the matter at issue, in November 2016, CCSD solicited "best and final offers" from potential Independent Evaluators via the county Procurement Services Department through a Request for Proposal (RFP). The solicitation stated that "awards will be made to all responsible vendors provided they are willing to accept a universal fee rate schedule that is *based upon the average price* submitted by the responsive and responsible vendor's pricing for each category listed on the Cost Proposal Form in this RFP document or a fee for evaluation." (Pet'r's Mot. 8, Mueller Aff. ¶ 20 and applicable attachment; Pet'r's Reply Brief, Exhibit B) (emphasis added).

16.

CCSD received four responses to their request for "best and final offers" for a BCBA-D conducting behavior analyst services. These responses were $150, $150, $125, and $105. The average of the four responses is $132.50, the amount set by CCSD as the maximum fee rate the district will pay for a BCBA-D to conduct a FBA. On December 2, 2016, Dr. Mueller was informed by CCSD that $132.50 would be the maximum fee rate paid for in-house services, which he did not agree to accept and thus he did not enter into a contractual agreement with CCSD. Subsequently, in January 2017, CCSD contacted Dr. Mueller and indicated that CCSD's list of approved evaluators to conduct independent FBAs had not been updated in quite some time and that the district was soliciting information from individuals who desired to be on CCSD's list of approved evaluators to conduct independent FBA's. Dr. Mueller noted that the letter indicated he would be required to accept the CCSD maximum fee rate to remain on the approved list of providers to conduct independent FBAs. When Dr. Mueller inquired as to what

the maximum fee rate would be for conducting independent FBAs he was informed that the maximum fee would not be determined until after the School District reviews current competitive rates from all evaluators that wish to remain on CCSD's approved list on independent evaluators. Ultimately, CCSD set the maximum rate for BCBA-D's to conduct independent FBAs at $132.50, the same average rate that was determined in December 2016, based on the four best and final offers the district had received in response to its RFP. (Pet'r's Mot. 8, Mueller Aff. ¶ 20 and applicable attachment; Pet'r's Reply Brief, Exhibit B; Resp't's Counter-Mot., Exhibit 11).

17.

On May 5, 2017, CCSD filed a Notice of Insufficiency asserting Petitioners' Complaint failed to provide an adequate description of, or resolution regarding, CCSD's alleged denial of FAPE to [redacted] On May 8, 2017, the Court dismissed without prejudice any issues regarding FAPE in Petitioners' complaint. (Notice of Insufficiency Order)

III. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by Office of State Administrative Hearings (OSAH) Rule 15, which provides, in relevant part:

> A party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

GA. COMP. R. & REGS. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont

Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication).

Further, pursuant to OSAH Rule 15:

> When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

GA. COMP. R. & REGS. 616-1-2-.15(3). See Lockhart v. Dir., Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

IV. CONCLUSIONS OF LAW

Applicable Law

When a local education agency (LEA) performs an evaluation of a student, the student's parents have the right to seek an Independent Education Evaluation (IEE) as a procedural safeguard if they disagree with the evaluation. 20 U.S.C. § 1415(b)(1). In *Schaffer v. Weast*, the Supreme Court recognized the central role that access to a publicly-funded IEE may play in addressing the natural advantage in information and expertise that schools have over parents. 546 U.S. 49, 60-61 (2005) ("IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."). More recently, in *Phillip C. v. Jefferson County Bd. Of Education*, the 11th Circuit Court of Appeals reaffirmed the importance of independent assessments of students, finding "[t]he right to a publicly financed

IEE guarantees meaningful participation throughout the development of the IEP," and without an IEE some children "would not receive, as the IDEA intended, 'a free and appropriate public education' as the result of a cooperative process that protects the rights of parents." 701 F.3d 691, 698 (11th Cir. 2012).

If a parent requests an IEE at public expense, the local education agency has two alternatives, either: "(i) file a due process complaint to request a hearing to show that its evaluation was appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. § 300.502(b)(2); Parker v. West Chester Area Sch. Dist., 2017 U.S. Dist. LEXIS 104068 *39 (E.D. Pa. 2017).

However, the right to obtain an IEE at public expense is qualified. 34 C.F.R. § 300.502 states the following in pertinent part:

> (b) Parent right to evaluation at public expense.
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either –
>
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
>
> (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to require a due process hearing to defend the public evaluation.

Further, a school district may establish the criteria for funding an IEE. In terms of costs for an IEE, a school district may establish maximum allowable charges for specific tests if said maximum (i) allows a choice among qualified professionals, (ii) is not limited to the average fee customarily charged in that area, (iii) allows for exceptions for justified unique circumstances, and (iv) applies as well to the district when it initiates an evaluation. A school district may also establish reasonable cost containment criteria applicable to [both district and parent evaluators], but only with a provision for an exception when the parents show unique circumstances justifying a higher fee. See, e.g., Letter to Anonymous, 22 IDELR 637 (OSEP Feb. 2, 1995); see generally Letter to Thorne, 16 IDELR 606 (OSEP Feb. 5, 1990) ("[I]t should be noted that if the total cost for an IEE exceeds the district's cost criteria and there is no justification for the excess cost, the cost of the IEE must be publicly funded to the extent of the district's maximum allowable charge."). "The denial of an IEE based solely on financial cost would be inconsistent with 34 CFR § 300.502." See Guidance Letter from Stephanie S. Lee, Office of Special Educ. and Rehabilitative Servs., U.S. Dep't of Educ. (Oct. 9, 2002).

When enforcing reasonable cost containment criteria, a school district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If the total cost of the IEE obtained by the parents exceeds the maximum allowable cost and the school district believes that there is no justification for the excess cost, the school district cannot in its sole judgment determine that it will pay only the maximum allowable

cost and no further. Rather, the school should initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the district's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed. See Guidance Letter from Stephanie S. Lee, Office of Special Educ. and Rehabilitative Servs., U.S. Dep't of Educ. (Oct. 9, 2002) ("If the total cost of the IEE exceeds the maximum allowable costs and the school district believes that there is no justification for the excess cost, the school district ... [must] initiate a hearing ....").

Anaylsis

After [redacted]s mother communicated her request for an IEE to CCSD, CCSD had these options: (1) accept the request; (2) file its own request for a due process hearing to defend its evaluation; or (3) initiate a hearing to demonstrate that Petitioners' insistence on an evaluator whose fees exceed CCSD's maximum allowable rate did not meet the district's reasonable cost containment criteria.

CCSD notified Petitioners that their request for an IEE had been approved, but CCSD did not actually accept Petitioners request because CCSD refused to pay the rate of $150 per hour charged by the evaluator selected by Petitioners because this rate exceeded the School District's maximum fee rate of $132.50 per hour. The School District's maximum fee rate was determined based on the average fee of four individuals who submitted a best and final offer under a Request for Proposal (RFP) solicitation in November, 2016. Although school districts are allowed to establish maximum fees for IEEs that are to be paid at public expense, the Office of Special Education Programs (OSEP) has opined for almost three decades that "[i]f a district establishes maximum allowable charges for specific tests, the maximum charge cannot simply be an average

of the fees customarily charged in the area by professionals who are qualified to conduct the specific test." Letter to Kirby, 213 IDELR 233 (OSEP 1989).

As set forth in the Undisputed Facts, CCSD solicited a 'Best and Final Offer' (BAFO) price from Independent Evaluators on November 22, 2016, to perform behavior analyst testing for the district. The Independent Evaluators quoted hourly rates of $150, $150, $125, and $105 for FBAs conducted by a BCBA-D. The average of the four bids was $132.50. While it is reasonable for local educational agencies to set maximum fee rates for independent evaluations to avoid paying excessively unreasonable costs, the maximum rate cannot simply be an average of the fees customarily charged in the area, or even the average of evaluators who provided their best and final offer to be awarded contracts for providing in-house services, which likely reflects the fees customarily charged in the area. An averaging of fees could potentially prohibit parents from selecting an appropriate independent evaluator. For example, if nine behavior analysts in Georgia billed at $150 an hour and one billed at $130 an hour, the average rate would be $148 an hour. If a school district then set the $148 as the maximum allowable fee, nine of the evaluators would be eliminated from being able to provide independent evaluations, barring a showing of unique circumstances or the evaluators agreeing to a reduced fee, leaving parents with possibly only one choice to conduct the independent evaluation.

Pursuant to OSAH Rule 15, a party opposing a Motion for Summary Determination cannot simply deny the allegations. Instead, the opposing party must show that there is a genuine issue of material fact. CCSD has not specifically admitted or denied Petitioner's assertion as to how the maximum fee was set, but also CCSD has not provided any evidence to show CCSD used another method besides averaging the fees charged by local professionals to establish the maximum allowable charges for a BCBA-D to conduct an independent FBA.

Finally, CCSD was well aware that Petitioners were requesting that Dr. Mueller perform the independent FBA from the moment of their initial request. Petitioners even proposed to have Dr. Mueller conduct the independent FBA at their cost subject to future litigation regarding which party was ultimately responsible for the costs. If CCSD was unwilling to pay Dr. Mueller's rate of $150 per hour because it exceeded the district's maximum allowable fee, then it was incumbent upon CCSD to request a hearing to demonstrate that an FBA conducted by Dr. Mueller would not meet agency criteria. In this matter, CCSD did not do so.[3] Cf. A.L. v. Jackson Cty. Sch. Bd., 635 F. App'x 774 (11th Cir. 2015) (a school district is not required to file for due-process hearing where parents made unreasonable demand by insisting on evaluation being conducted by an evaluator located 200 miles away).

Moreover, even if the court determined that the 5th Circuit's reasoning in *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961 (5th Cir. 2016) is correct that the language of 34 C.F.R. § 300.502(b)(2)(ii) does not require an agency to initiate a hearing, or that the plain language of the regulation only applies to situations in which the parents have *actually obtained* an evaluation that the school district maintains does not meet agency criteria, 34 C.F.R. § 300.502(b)(4) specifically provides that a school district "may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to defend the public evaluation. In this matter, the School District's actions unreasonably limited the choice of evaluator for the parents because the School District chose to set its maximum allowable fee based on the average price of the best and final offers received from four individuals under a Request for Proposal (RFP).

[3] Although not a finding of fact or conclusion of law, the Court notes that Petitioner's proposal to pay Dr. Mueller's $150 per hour fee, or the difference between CCSD's maximum allowable fee of $132.50 per hour and Dr. Mueller's fee, while awaiting the outcome of pending litigation to determine which party was ultimately responsible

Based on the foregoing, the court concludes that once CCSD approved the request for an IEE it was incumbent upon the School District to ensure that the evaluation took place without unnecessary delay. One means by which this could have been accomplished was to pay Dr. Mueller the maximum rate of $132.50 per hour and allow Petitioners to cover the overage, at which point Petitioners could have filed a Due Process Hearing Request if they wanted to litigate the fee issue. However, instead, CCSD informed Petitioner that it would not approve their request to have Dr. Mueller conduct the independent FBA because his $150 hourly rate exceeded the School District's maximum rate of $132.50 per hour. Since CCSD's method of calculating this maximum rate is unacceptable, as set forth above, the maximum rate is not reasonable. Dr. Mueller's rate of $150 per hour is reasonable, and CCSD should pay such fee. Alternatively, CCSD could have requested a hearing to show that Dr. Mueller's evaluation would not meet the district's criteria. However, it is undisputed that Dr. Mueller is qualified to conduct such evaluations, and the only issue would be his fee, which has been determined to be reasonable. The final option available to CCSD would have been to request a hearing to defend its FBA. Since CCSD did not do this, it has waived its right to defend its FBA.

V. ORDER

For the foregoing reasons, Petitioner's Motion for Partial Summary Determination is **GRANTED** and CCSD'S Counter-Motion for Summary Determination is hereby **DENIED** Respondent is directed to provide [redacted] an independent Functional Behavior Analysis (FBA), at public expense, to be conducted by Dr. Michael Mueller at the cost of $150 per hour, as soon as reasonably possible. Respondent is directed to permit Dr. Mueller to complete the FBA within the customary standards known within the field (i.e., to allow an appropriate duration and

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for the cost was reasonable and likely would have served the best interests of both parties, and especially the child at issue.

quantity of observations). Once the FBA is completed and provided to the parties, the parties are directed to prepare and implement an appropriate behavioral plan with training and adjustments as may be needed.

Given that the Court granted Respondent's Notice of Insufficiency regarding allegations of a denial of a Free and Appropriate Public Education because they could not be fleshed out until after the independent FBA is completed, and inasmuch as this Order resolves all remaining issues in this pending matter, this decision concludes this matter and a hearing shall not be scheduled.

SO ORDERED, this 2nd day of August, 2017.

Ana Kennedy
Administrative Law Judge