

**Received**

APR 17 2006

Dispute Resolution &  
Administrative Services

**VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES  
OFFICE OF DUE PROCESS AND COMPLAINTS**

**CASE CLOSURE SUMMARY REPORT**

<u>Public Schools</u>	<u>Mr. &amp; Mrs.</u>
<b>School Division ("LEA")</b>	<b>Name of Parent</b>
 	<u>April 7, 2006</u>
<b>Name of Child</b>	<b>Date of Decision or Dismissal</b>
<u>Carol McCoskrie, Esq.</u>	<u>Howard Deiner, Esq.</u>
<b>Counsel Representing LEA Parent/Child</b>	<b>Counsel Representing</b>
<u>Parents</u>	<u>LEA</u>
<b>Party Initiating Hearing</b>	<b>Prevailing Party</b>

**Hearing Officer's Determination of the Issues(s):**

Whether Respondent ( Public Schools "            ") failed to properly respond to an October 31, 2005 request from Petitioners concerning a document identified as an "Independent Educational Evaluation" performed by Dr.    ?

**Hearing Officer's Order and Outcome of Hearing:**

   is not required to fund the evaluation performed by Dr.   . Accordingly, it is hereby **ORDERED** that this matter is **DISMISSED** and    is the Prevailing party in this matter.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached, the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer and the SEA within 45 calendar days.

  
\_\_\_\_\_  
Signature, Hearing Officer  
David R. Smith

4-7-06  
\_\_\_\_\_  
Date

**APR 17 2006**

Dispute Resolution &  
Administrative Services

**VIRGINIA:**

**VIRGINIA DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION APPEAL  
DUE PROCESS HEARING**

	)	
	)	
<b>Petitioners,</b>	)	
	)	
<b>v.</b>	)	<b>In Re:</b>
	)	
<b>PUBLIC SCHOOLS</b>	)	
	)	
	)	
<b>Respondent.</b>	)	

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**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECISION**

**I. INTRODUCTION:**

**A. Procedural History**

1. The undersigned was appointed as the hearing officer to preside over a Due Process Hearing concerning (Hereinafter “the student”).

2. A “Request for Due Process Hearing” (“Request”) was filed by Mr. and Mrs. (“Petitioners”)<sup>2</sup> dated January 23, 2006 contending that the Public Schools (“Respondent”) had failed to reimburse the Petitioners for an Independent Educational Evaluation (“IEE”)?

<sup>1</sup> Referred to herein as the “student.”

<sup>2</sup> Petitioners may also be referred to herein as “father,” “mother,” or collectively as “parents.”

3. Following the appointment, the undersigned contacted the representatives of the parties to schedule a pre-hearing telephone conference call to set a date, time and place for the Hearing.

4. A pre-hearing telephone conference was held on February 21, 2006 in which the parties discussed the status of the case. The undersigned was informed that the parties met in a resolution session meeting, but there was no resolution to the issue because the Petitioners provided the Respondent with a document at the meeting that required further review. Shortly after the resolution meeting, Respondent sent the parents a settlement offer, which the parents were in the process of responding to as of the date of the pre-hearing conference telephone call. The terms of the settlement were not agreed to and the parties agreed to waive any additional resolution session.

5. It was agreed to schedule a Due Process Hearing, which went forward on March 9, 2006 at 9:30 a.m. The Hearing was convened at the \_\_\_\_\_ Public Schools Education Center at \_\_\_\_\_, VA

6. At the end of the testimony, the parties discussed whether to conduct oral closing arguments or to submit post-hearing briefs. It was agreed that the parties would submit simultaneous briefs on Friday, March 24, 2006. However, at the request of Petitioner and upon agreement this was extended to March 27, 2006.

7. Respondent's Brief was received by the Hearing Officer on March 27, 2006. However, due to a family emergency, Petitioner's counsel requested another extension to March 28, 2006. Respondent did not oppose to this additional extension, but Respondent stated that there would be an objection to any further extension. Therefore, the extension was granted to March 28, 2006, on which date Petitioners' Brief was received by the Hearing Officer. The record closing on said date.



**B. The Record:**

The Record in this matter consists of the following:

1. Transcript of the Hearing on March 9, 2006;
2. Exhibits admitted into evidence submitted by Petitioners dated March 3, 2006.<sup>3</sup>
3. Exhibits admitted into evidence submitted by Respondent dated March 3, 2006.<sup>4</sup>
4. Respondent's Closing Memorandum of Respondent Public Schools, submitted on March 27, 2006.
5. Parents' Post-Hearing Brief submitted on March 28, 2006.

**D. ISSUE(S)**

Whether Respondent failed to properly respond to an October 31, 2005 request from Petitioners concerning a document identified as an "Independent Educational Evaluation" performed by Dr.

?

**FINDINGS OF FACT**

Based on the evidence presented in this matter, I find that:

1. The student is 18 years old and will turn 19 on her birthday on July 14, 2006. During the 2004-2005 school year, the student attended the High School (" ") on a "Stay-Put" Individualized Education Program ("IEP")<sup>5</sup> as a result of ongoing litigation between the parties that was initiated by the Petitioners due to Respondent expelling the student in 2004.<sup>6</sup>

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<sup>3</sup> Attached is a listing of all exhibits submitted by Petitioner with "Y" indicating that the exhibit was admitted into evidence and a "N" indicating that the exhibit was not admitted into evidence.

<sup>4</sup> Attached is a listing of all exhibits submitted by Respondent with "Y" indicating that the exhibit was admitted into evidence and a "N" indicating that the exhibit was not admitted into evidence.

<sup>5</sup> Testimony of the father, Tr. P. 29, 43

<sup>6</sup> Testimony of , Tr. P. 81; R-5

2. The last agreed upon and implemented IEP for the student is dated March 19, 2004, which IEP was implemented for her at \_\_\_\_\_ during the 2004-2005 school year, which was her senior year.<sup>7</sup>

3. The student graduated from \_\_\_\_\_ on June 23, 2005 with a standard diploma.<sup>8</sup> The student is no longer attending school under the jurisdiction of Respondent and in fact, at the time of the Due Process Hearing, was attending classes at the \_\_\_\_\_ Community College (“\_\_\_\_\_”).<sup>9</sup>

4. Pursuant to an agreement between the parties as reflected in an “Early Resolution Agreement” dated October 26, 2004, Respondent agreed to conduct a psychological evaluation of the student.<sup>10</sup> The evaluation was conducted on November 11, 2004; the report of that evaluation is dated November 19, 2004.<sup>11</sup> Following Respondent’s completion of the psychological evaluation, Respondent held an eligibility meeting on December 7, 2004, the result of which the student was determined eligible for special education as “Other Health Impaired,” having been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”).<sup>12</sup>

5. The school psychologist who performed the psychological evaluation for Respondent dissented with the determination that the student was eligible for special education.<sup>13</sup> Petitioners disagreed with the Respondent’s school psychologist report. The father testified:<sup>14</sup>

“This eligibility report, one of the concerns that we had, and one of the reasons why we were requesting it initially, was we had issues with how the school system had dealt with (the student’s) behavior issues, and prior evaluations, and IEPs. And had made a request. This report came back in essence indicating that there were no behavior issues with (the student).”

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<sup>7</sup> Testimony of the father, Tr. P. 43  
<sup>8</sup> R-5  
<sup>9</sup> Testimony of the father, Tr. 53  
<sup>10</sup> R-1  
<sup>11</sup> P-5; Testimony of the father, Tr. 29-32  
<sup>12</sup> R-5;  
<sup>13</sup> P-7  
<sup>14</sup> Testimony of Petitioner, the father; Tr. 29

6. On April 6, 2005, the student's father wrote a letter to Respondent's representative, Ms.

,<sup>15</sup> subject: "Request for an Independent Education Evaluation for (the student)." Ms.

is the Director of Special Education for Respondent. In his April 6, 2005 letter to Ms.

, the father expressed his disagreement with the Respondent's school psychologist's

conclusion and stated, among other things with regard to the student:

"She needs a thorough evaluation by competent professionals to develop behavior intervention strategies before a new appropriate Individual Education Program (IEP) can be finalized."

"We previously requested that PS conduct behavior assessments and design a behavior intervention plan(s), but they have not been provided, and PS has had ample time."

"I request:

- Social skills and functional behavior assessments
- Behavior intervention strategies, services, and modifications assessments."

"We would appreciate it if you would contact us at your earliest convenience to let us know whether the IEE at public expense will be provided. Please send us copies of PS guidelines for this and the names of PS approved, qualified independent evaluators, if available."

7. On April 22, 2006, Ms. sent a letter to Petitioner, acknowledging receipt of his April 6, 2005 letter.<sup>16</sup> Ms. referred to the request of Petitioner for a "social skills and functional behavior assessment; behavior intervention strategy, services, and modifications assessment."

In her letter of April 22, 2005, Ms. also stated:

"Having noted that an FBA is not an evaluation, and therefore not subject to entitlement to pursue an IEE, an evaluation which is subject to entitlement to pursue an IEE is defined by the regulations as a procedure to determine whether a child has a disability, and if so, the extent and nature of special education and related services required.

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<sup>15</sup> R-2; Exhibits will be referred to as "P" for Petitioner and "R" for "Respondent" respectively, followed by the number assigned to the Exhibit by Petitioner and Respondent in their respective Five-Day Disclosures.

<sup>16</sup> R-3



Nowhere in the federal or state special education regulations is an FBA equated to an evaluation. In fact, the regulations expressly define evaluations and FBAs as separate and distinct concepts.”

8. Ms. \_\_\_\_\_’s letter went on to state:

“Although in a legal sense, the \_\_\_\_\_ Public Schools ( \_\_\_\_\_ ) are under no obligation to grant an IEE at our expense, in the interest of good will, we are willing to honor your request. Our current list of approved independent evaluators does not include any professional known to have expertise in these areas, as they are not evaluations, Please submit the name, qualifications, and contact information of the professional you have in mind to conduct the two assessments your have requested.”

9. On April 27, 2005, Petitioners filed a Complaint with the Office of Dispute Resolution and Administrative Services of the Virginia Department of Education<sup>17</sup> contending that Respondent had failed to provide an IEE at public expense or request a due process hearing. However, Respondent was found to have complied with applicable regulations with regard to this issue.

10. On May 23, 2005, Petitioners wrote a letter to Ms. \_\_\_\_\_ subject “Pans for an IEE for (the student)”<sup>18</sup> In this letter, Petitioner stated:

“Thank you again for your positive response to our request for an IEE for (the student).” We have located a clinical psychologist who has performed IEEs and is available. His name is Dr. \_\_\_\_\_. I have attached his resume for your review.” He has a vacancy for the initial test on Friday, May 27. It will be a four-hour session followed by a second four-hour session about a week later. We will provide him \_\_\_\_\_’s most recent psychological evaluation to avoid duplicating any unnecessary test. He will consult with Dr. \_\_\_\_\_, (the student’s) psychologist. We will cover her costs to help.”

“His preliminary estimate is the IEE will cost about \$2500. He will submit his final report to you in his request for payment. He suggested you may want to talk to him and workout details between you and answer questions.”

11. Ms. \_\_\_\_\_ testified that she contacted Dr. \_\_\_\_\_ to discuss the testing to be done and asked him about the Functional behavior Assessment, to which he responded that wasn’t what he had been requested to do by the family. Ms. \_\_\_\_\_ asked Dr. \_\_\_\_\_ if he could perform

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<sup>17</sup> R-5

<sup>18</sup> R-4

an FBA and he responded that he could.<sup>19</sup> Ms. informed the Petitioners about her conversation with Dr. regarding the IEE/FBA issue and she was told by Petitioners that the evaluation would go forward.<sup>20</sup>

12. Ms. also testified about a conversation with Petitioners' counsel regarding the assessment of Dr. and his invoice for the services he was to render for the Petitioners.

She testified she told counsel:

“That as soon as received an invoice, an itemized invoice and assessment report, that a check could be cut.”<sup>21</sup>

13. Ms. was told that this would be communicated to the “family”<sup>22</sup> and the father testified that the request of Respondent had been communicated to the family by their counsel.<sup>23</sup> In any event, Ms. did not receive a response from the family.<sup>24</sup>

14. On October 31, 2005, Petitioners wrote a letter to Ms. subject: “Reimbursement Request for an Independent Education Evaluation for (the student).”<sup>25</sup> In this letter, Petitioners again expressed their disagreement with Respondent’s November 1, 2004 psychological report<sup>26</sup> and stated:

“Pursuant to Section 300.502(b) of the IDEA’s implementing regulations, I am requesting reimbursement at public expense for an independent education evaluation (“IEE”) we had conducted for my daughter, (the student). The psychological and psycho-educational evaluation was conducted by Dr. in May-June 2005. We are requesting reimbursement of \$2500.”

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<sup>19</sup> Testimony of , Tr. at 86-87  
<sup>20</sup> Testimony of Ms. , Tr. 88  
<sup>21</sup> Testimony of Ms. , Tr. 90  
<sup>22</sup> Id.  
<sup>23</sup> Testimony of the father, Tr. 55  
<sup>24</sup> Testimony of Ms. , Tr. 90  
<sup>25</sup> P-2  
<sup>26</sup> Testimony of the father; Tr. 27



15. Ms. \_\_\_\_\_ concluded that the evaluations referred to in the October 31, 2005 letter were the same as those referred to in the Petitioners' May 23, 2005 letter<sup>27</sup> and that the reference to "IEE" and "FBA" were being used interchangeably by Petitioners.<sup>28</sup> Ms. \_\_\_\_\_ also did not interpret the requests in the letter as a new request because of the reference to Dr. \_\_\_\_\_ and the evaluations mentioned.<sup>29</sup>

16. On January 10, 2006, Mr. Deiner, counsel for the Petitioners, faxed to Respondent, a copy of an Invoice from Dr. \_\_\_\_\_ in the amount of \$2500.00. Under the heading "Services Rendered" the Invoice had checked "Psychological Test."<sup>30</sup>

17. On January 11, 2006, Respondent's representative Ms. \_\_\_\_\_ sent a FAX Transmittal Form to Dr. \_\_\_\_\_ stating that the statement that Respondent had received from him "does not provide the breakdown of charges needed to establish the amount to be funded by \_\_\_\_\_ for the FBA. Further, \_\_\_\_\_ requires a written copy of the report to be forwarded prior to payment being made by the Finance Dept."

18. The report of Dr. \_\_\_\_\_ was not provided to Respondent until on or about March 3, 2006, along with the Five-Day Disclosure documents for this Due Process Hearing.<sup>31</sup> In fact, Dr. \_\_\_\_\_ was directed by the Petitioners not to respond to Respondent for a copy of the report.<sup>32</sup> Dr. \_\_\_\_\_'s report confirms that he evaluated the student on May 30, 2005 and May 31, 2005. The report states as the reason for referral that the

"parents are concerned about (the student) academic performance, as well as her social and emotional functioning. Thus, this evaluation was requested to gather more information about what may be causing (the student) difficulties and to provide recommendations to inform educational planning."<sup>33</sup>

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<sup>27</sup> Testimony of Ms. \_\_\_\_\_, Tr. 59  
<sup>28</sup> Testimony of Ms. \_\_\_\_\_, Tr. 85  
<sup>29</sup> Testimony of Ms. \_\_\_\_\_, Tr. 95-97

<sup>30</sup> R-10; P-11  
<sup>31</sup> Testimony of \_\_\_\_\_, Tr. 53; \_\_\_\_\_, Tr. 95, 98  
<sup>32</sup> Testimony of \_\_\_\_\_, Tr. 53  
<sup>33</sup> P-10

19. Ms. testified that the report was never available to Respondent for determining the student's eligibility for special education services and was never available for determining the student's educational placement because the student graduated before Respondent received the report.<sup>34</sup> Furthermore, Ms. testified that she did not view the report of Dr.

as appropriate as an IEE because of the references made to college and that the report seemed to have been generated for postsecondary education purposes.<sup>35</sup> Respondent's witness Ms.

, Pupil Services Specialist and 504 Coordinator, also testified that the report seemed "to be documenting some diagnoses with the goal of seeking college accommodations."<sup>36</sup>

### CONCLUSION OF LAW

1. Based on the record here, the student attended during her senior year, the 2004-2005 school year, on a "Stay-Put" IEP dated March 19, 2004. The "Stay-Put" was the result of a prior disciplinary action and subsequent litigation between the parties. The student graduated from on June 23, 2005 with a standard diploma. She is currently attending classes at ..

2. On April 6, 2005, approximately 2 ½ months prior to the student's graduation from , Petitioners requested that Respondent conduct an IEE. Petitioners maintained throughout the Hearing their contention that the request was for an IEE and not an FBA as concluded by Respondent, based on the description of what the Petitioners' sought in their letter dated April 6, 2006.

3. The pertinent regulations concerning an IEE state at 34 C.F. R. §300.502 which reads as follows:

**(a) General.**

(1) The parents of a child with a disability have the right under this part to

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<sup>34</sup> Testimony of , Tr. 94  
<sup>35</sup> Testimony of Tr. 98  
<sup>36</sup> Testimony of Tr. 108



Obtain an independent educational evaluation of the child, subject to Paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this part-

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with Sec. 300.301.

(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.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either –

(i) Initiate a hearing under Sec. 300.507 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 under Sec. 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates 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 explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation-

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.<sup>37</sup>

4. The Virginia Regulations Governing Special Education Programs for Children with Disabilities in Virginia ("Virginia Regulations") implements the above regulations and provides that the parents of a child with a disability have a right to obtain an IEE of the child and that the local education

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<sup>37</sup> Although IDEA 2004 became effective July 1, 2005, final regulations implementing the act have not been promulgated. The Regulations cited herein are to those in existence prior to the IDEA 2004.



agency is to inform the parent or parents upon request, information about where such may be obtained.<sup>38</sup>

Furthermore, the Virginia Regulations state in pertinent part:

“If the parent or parents request an independent educational evaluation at public expense, the local educational agency must, without unnecessary delay, either:

1. Initiate a due process hearing to show that its evaluation is appropriate; or
2. Ensure that an independent educational evaluation is provided at public expense, unless the local educational agency demonstrates in a hearing that the evaluation obtained by the parent or parents does not meet local educational agency criteria.”<sup>39</sup>

5. Here, although the Petitioners requested an IEE in their letter of April 6, 2005, the areas that they wanted to be addressed and the specific requests that were made clearly reflected their concern for the student’s behavioral issues:

“She needs a thorough evaluation by competent professionals to develop behavior Intervention strategies before a new appropriate Individual Education Program (IEP) can be finalized.”

“We previously requested that PS conduct behavior assessments and design a behavior intervention plan(s), but they have not been provided, and PS has had ample time.”

“I request:

- Social skills and functional behavior assessments
- Behavior intervention strategies, services, and modifications assessments.”

6. Ms. testified that notwithstanding the mention of an “IEE,” she interpreted the father’s request as one for a Functional Behavior Assessment; I find Ms. testimony credible.

7. Ms. provided Petitioners with her interpretation in her letter to Petitioners dated April 22, 2005 and also, that Respondent does not typically pay for such, but in view of the ongoing litigation between the parties, as a sign of good will, she agreed to pay for the FBA. Ms.

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<sup>38</sup> 8 VAC 20-80-70 B.1

<sup>39</sup> 8 VAC 20-80-70 B.2

stated that since Respondent does not pay for FBAs they do not maintain a database of providers of such, but agreed to pay for one; however, she requested that she be furnished with a copy of the individual's resume. In any event, following the April 6, 2005 request, on April 27, 2006, five days after Ms. [redacted]'s letter agreeing to pay for an FBA, the Petitioners filed a Complaint with the VDOE and among the issues dealt with was whether or not Respondent had acted on the parent's April 6, 2006 request. The Complaint reviewer concluded that it had.

8. Following the filing of the Complaint with VDOE, but prior to the rendering of a decision regarding the Complaint, the Petitioners provided to Respondent with a letter dated May 23, 2005 that stated "Thank you again for your positive response to our request for an IEE for Petitioners" and went on to provide Dr. [redacted] name and the estimate of what he would charge, \$2500. This information was requested by Ms. [redacted] in her letter of April 22, 2005.

9. By letter dated October 31, 2005, the Petitioners again requested an IEE, which letter formed the basis for initiating this Due Process Hearing.

10. Although not as detailed as the April 6, 2006 letter, the October 31, 2006 letter specifically mentions Dr. [redacted] the \$2500 reimbursement request and the time frame involved; May-June 2005. As noted above, the actual dates that Dr. [redacted] attended to the student was May 30 and 31, 2005. The report however was not completed by Dr. [redacted] until June 2005.<sup>40</sup>

11. It is also noted that the Petitioners stated in the May 23, 2005 letter their intention for the Dr. [redacted] to submit his final report and request for payment invoice to Respondent and provided his telephone number and indicated a willingness for Ms. [redacted] to talk with him by stating: "He suggested you may want to talk to him and workout details between you and answer questions."

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<sup>40</sup>

Testimony of the father, Tr. 37



12. Yet, as Ms. testified that after she had received the October 31, 2005 letter, she did attempt to communicate with Dr. about the report, and payment, because had not received it. Ms. also testified that after she received the October 31, 2005 letter she attempted to contact Petitioners through counsel about the status of Dr.'s report and his invoice, but she was not successful in obtaining it.<sup>41</sup> Ms. testified that she did not consider the October 31, 2006 letter to be a different or new request, but rather another letter requesting payment for the same evaluation that was requested in the April 6, 2005 letter from Petitioners and further addressed by Petitioner in the May 23, 2005 letter.<sup>42</sup> The hearing officer considers Ms.'s testimony here credible and consistent with the documentary record.

13. Ms. was not successful in communicating with Dr. because, based on Petitioners' testimony, Dr. was told not to comply with the requests of Respondent and therefore, no report was provided to Respondent until receipt of the Five-Day Disclosures for the Hearing.

14. Under these circumstances, it was reasonable for Ms. to conclude that the request for an IEE in the October 31, 2005 letter was just another letter requesting the same as was requested by the Petitioners' in the April 6, 2005 letter. Ms.'s testimony is deemed credible and consistent with the documentary record. Therefore, there is no factual basis to conclude that Respondent failed to act on the Petitioner's request for reimbursement for an IEE as mentioned in the October 31, 2005 letter. In fact, Respondent had agreed as of April 22, 2005 to reimburse the Petitioners for an FBA.

15. Based on the record, it is clear that there was a difference of opinion as to what the Petitioners felt they had requested in the April 6, 2005 letter and what Respondent believed the request

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<sup>41</sup> Testimony of , Tr. 90, 96  
<sup>42</sup> Testimony of Tr. 95-96



to include. Petitioners contend that they were requesting an IEE; however, Respondent contends that notwithstanding the title of the evaluation sought, the April 6, 2005 letter was requesting that a FBA be performed. Ms. [redacted] provided credible testimony that indicating that the language used in the correspondence between the parties clearly concerned an FBA. The hearing officer agrees, the record reflects ongoing concerns by the Petitioners regarding the student's behavior.

16. Furthermore, in view of the fact that the student was set to graduate, the most logical interpretation of the statement by Dr. [redacted] that the basis for the referral was due to the parents concerns about the student's behavior and for "educational planning" is that the evaluation conducted by Dr. [redacted] was for the student's education beyond [redacted]. In the report, Dr. [redacted] states that the student was planning on attending college and that the Petitioners encourage that decision and he states further with regard to the interest of the Petitioners:

"They would like to be assured that (the student) will receive special education services and supports if warranted."<sup>43</sup>

17. Respondent's interpretation of the basis for Dr. [redacted]'s report, is consistent with the record in this case, particularly in view of the date the request for the IEE was made, the time frame in which it was to be conducted and that the student was on a graduation track and did in fact graduate. In this regard, Respondent challenges the assertion that the evaluation conducted by Dr. [redacted] is actually an evaluation consistent with the Virginia Regulations, which defines an "evaluation" as:

"procedures used in accordance with this chapter to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs as described in 8 VAC 20-80-54."

18. As previously stated, the student had been determined eligible for special education and received services pursuant to a "Stay-Put" IEP for the 2004-2005 school year, her senior year at [redacted]. An IEE was requested by Petitioners approximately 2 ½ months prior to the student's

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<sup>43</sup> P-10, p. 3

graduation. Although the Petitioners dispute whether the student actually graduated, there is no dispute that the student and the Petitioners participated in graduation ceremonies, the student received a standard diploma and began attending college at . Accordingly, it is difficult to see what use the report of Dr. would have regarding special education services at since the evaluation of the student was not even conducted until the end of May 2005, approximately 3 weeks before the student was to receive her diploma from .

19. Furthermore, Ms. a Pupil Services Specialist and 504 Coordinator for the Respondent testified that the types of diagnoses presented in the report was not appropriate for special education purposes.<sup>44</sup> Ms. testified that the report appeared to her to be done to assure that the student would receive special education services she needed in college.<sup>45</sup> Although Ms. testified that she had only briefly reviewed Dr. 's report prior to the Hearing, her testimony is deemed credible in that it is consistent with Dr. 's report when he states:

“(The parents) encourage (the student’s) decision to attend college and pursue her academic and career interests. They would like to be assured that (the student) will receive special education services and supports if warranted.<sup>46</sup>”

20. Additionally, even if the report was intended to support the student while she was still at , the fact that the Petitioners would not allow the report from being provided to Respondent until the Due Process Hearing, clouds the intentions of Petitioners as to what was their real motivation in having Dr. prepare the kind of report he prepared. Accordingly, it can be concluded that Dr. 's report was not written for the purpose of assisting the student while at .

21. Although the Petitioners appear to dispute that the student graduated, there is no dispute that the student received a standard diploma from on June 23, 2005, which is a good indication that she did in fact graduate.<sup>47</sup>

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<sup>44</sup> Testimony of , Tr. 113  
<sup>45</sup> Testimony of Tr. 101,103, 106, 112  
<sup>46</sup> P-10, page 3



22. Based on the record, the essence of Petitioners' April 6, 2005 request for an IEE, followed by a May 23, 2005 letter and the letter the October 1, 2005 letter, the subject of this Due Process Hearing, Petitioners described an FBA as what they wanted, but called it an IEE; however, based on the testimony of Ms. [redacted] and Ms. [redacted], the report that was prepared by Dr.

[redacted] was not an FBA, which Respondent had agreed to pay for. The record reflects that even though Dr. [redacted] had completed the report in June 2005, even after repeated requests, the invoice for payment was not provided to Respondent until January 10, 2006 and the report was not provided to [redacted] until the 5 days prior to the Due Process Hearing.

23. Petitioners argue that Dr. [redacted] was told not to provide his report to [redacted] because [redacted] indicated that it would only pay for an FBA and it was Petitioners' assertion that what he requested was an IEE. Perhaps Petitioners intended to request an IEE, but that is not what was described in the April 6, 2005 letter. Furthermore, there is nothing in the record that Petitioners attempted to clarify any misunderstanding on the part of [redacted] about what it was that Petitioners wanted. The obvious time to have done this was upon receipt of Ms. [redacted]'s April 22, 2005 letter that clearly described what Respondent had agreed it would pay for. Yet, Petitioners go on to say in a subsequent letter to Respondent dated May 23, 2005 "Thank you again for your positive response to our request for an IEE for (the student)." This letter presented another opportunity to have corrected any misunderstanding.

24. Petitioners testified that the submission of the October 31, 2005 letter was to clear up any misunderstanding regarding an IEE or FBA; however, there is no question here as to how Ms.

[redacted] interpreted the request of the Petitioners because she stated her understanding clearly, in the



April 22, 2005 letter.<sup>48</sup> Based on the record here, Respondent is not liable to reimburse the Petitioners for the report prepared by Dr. [redacted].

**DECISION AND ORDER**

It is hereby ORDERED that this matter is DISMISSED, with Respondent, Public School being the prevailing party.

**APPEAL INFORMATION**

This decision is final and binding unless either party appeals in a Federal District Court within 90 calendar days of the date of this decision, or in a state circuit court within one year of the date of the decision.

4-7-06

Date



David R. Smith, Esq.  
Hearing Officer

<sup>48</sup>

Petitioner, Tr. 159