

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT**  
**PROCEEDING BEFORE THE DUE PROCESS HEARING OFFICER**

In the Matter of

[REDACTED] Parents,  
on Behalf of N.L., Student,

Petitioners

v.

ALBUQUERQUE PUBLIC SCHOOLS,

Respondent

DPH #1415-20

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**DECISION**

**September 12, 2015**

**Attorney for Petitioners (Parents)**

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**DECISION**

This matter coming before the due process hearing officer (DPHO) at a hearing held on June 22-25, June 27, June 29-30, 2015, Petitioners (hereinafter "Parents") represented by Gail Stewart, Attorney at Law; Respondent (District) represented by Samantha M. Adams and Alana De Young, Attorneys at Law, and the hearing officer, having heard the testimony of witnesses, reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law, and Order.

**STATEMENT OF PROCEDURE**

Parents filed the Request for due Process Hearing on April 21, 2015. Parents in their complaint alleged District failed to properly identify Student as ASD and perform necessary testing to properly implement his IEP and to deliver necessary related and assistive services, and did not provide appropriate transition services, in general, denying Student FAPE. *[DPHO Exhibits 1]* A Pre-Hearing telephone conference was held on April 30, 2015 and the Pre-Hearing Order entered on May 4, 2015. *[DPHO Exhibit 2]* The Response to the Petition was entered on May 15, 2015. *[DPHO Exhibit 3]*

A stipulated Statement of Issues was filed on June 9, 2015 *[DPHO Exhibit 4]*; Respondent's Witness and Exhibit Lists and the draft Joint Exhibit List were submitted June 15, 2015. *[DPHO Exhibits 5,6,7]* Respondent's Amended Witness List was submitted on June 18, 2015 *[DPHO Exhibit 8]* Petitioners' Witness List and Exhibit List was timely filed on June 17, 2015 *[DPHO Exhibits 9, 10]*

The DPHO left the record open to address two post-hearing Motions filed by District: Respondent's Motion to Permit Medical and Mental Health Rebuttal Testimony<sup>1</sup> and Motion to Submit into Evidence the File of Petitioners' Expert, Dr. Michael Neessen, Ph/D. and Unredacted Copies of Medical Records Pertaining to Psychological Information and DSM Diagnosis *[DPHO Exhibits 11, 12]* Parents' Responses to these Motions were timely filed on July 6, 2012 *[DPHO Exhibit 13]*. District's Reply Brief was submitted July 7, 2015. *[DPHO Exhibit 14]* The Motions were denied by DPHO Order entered July 11, 2015, except that largely unredacted copies of the evaluations were ordered, redacted only as to third parties.<sup>1</sup> I, 260-266 Other material in Dr. Neessen's file is privileged. <sup>1</sup> *[DPHO Exhibit 15]* The record was closed June 30, 2015 with the exception of a Decision on the above referenced Motions.*[DPHO Exhibit 16]*

The transcript in this case was delivered July 29, 2015. Argument and requested findings of fact and conclusions of law were timely filed on August 27, 2015. *[DPHO Exhibits 17, 18, 19]* The parties made a joint request for extension of time to file the Decision herein until September 14, 2015. This decision was entered on September 12, 2015. *[DPHO Exhibit 20]*

In an effort to expedite the hearing, the DPHO, on behalf of District, entered a continuing objection as to "form" and "foundation" to mitigate the excessive number of objections made during the first three days of the hearing. District submitted a Motion to Strike post-hearing statements made by Parents' attorney which were immaterial to the issues presented in this case and

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<sup>1</sup> One unredacted report does reference a nonbiological maternal great uncle, but that is harmless. The redacted, privileged material applies to Student's biological parents. Biological mother was adopted and parental rights terminated as a result of grandparents' adoption (Parents herein).

which was not entered into the record proper. *[DPHO Exhibits 21, 22]*

### **ISSUES PRESENTED**

**Petitioners and District have identified the following issues for determination by the hearing officer:**

1. Whether District's failure and refusal to identify Student's autism eligibility denied and continues to deny him FAPE?
2. Whether District's failure to provide instruction and supports which are evidence-based for students with autism, including the specific eleven considerations enumerated in NMPED regulations, denied and continues to deny Student FAPE?
3. Whether District's 2014 reevaluation denied FAPE by failing to conduct all necessary evaluation, including applying professional judgment to known history and facts, in not considering whether Student met eligibility criteria as a student with autism?
4. District failed to implement Student's IEP in fall, 2014 and whether that failure to implement denied Student FAPE?
5. Whether District's failure to consider whether Student needs related services and supplemental aids and supports has denied and continues to deny Student FAPE?
6. Whether District failed to supply Student with education which is "free," thereby denying him FAPE?
7. Whether District failed to provide Student with necessary assistive technology equipment and services and whether, as a result, Student was denied FAPE?
8. Whether District failed to write and implement an IEP for Student which acknowledged and addressed skill deficits arising from core deficits of autism, i.e., social

communication, as well as executive function skills and whether, as a result, Student was denied FAPE?

9. Whether District has failed and refused to support Student's access to general education electives and whether, as a result, Student was denied FAPE?

10. Whether District has limited Student's access to activities (including extracurricular activities and sports) with nondisabled peers by failing to provide all necessary supports and by requiring that his access to necessary supplemental instruction occur at lunch?

11. Whether District has failed to conduct necessary transition planning and transition services targeted to the unique needs of Student arising out of autism and whether District's lack of transition services for students with autism continues, meaning that Student has been denied FAPE and continues to be denied FAPE as a result?

12. What equitable remedy is needed as a result of the denial of FAPE?

**District concurs in the above Statement of Issues with the following caveats:**

1. District takes exception to any issue that suggests a systemic failure by the District.

2. District takes exception to any issue that presupposes District "failed" to do something; and

3. District takes exception to the presupposition that an equitable remedy is needed rather than determination first whether there has been a deprivation of FAPE, and second, even if there is a deprivation of FAPE, whether an equitable remedy is appropriate.

## FINDINGS OF FACT<sup>2</sup>

1. All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent these contentions are consistent with the findings and conclusions herein, they have been accepted. To the extent that they are inconsistent, deemed irrelevant, or not necessary to a proper determination of the issues presented, they have been rejected.<sup>3</sup>

2. All applicable time limits have been met, waived by the parties, or extended for good cause shown.

3. Student is now seventeen years old (DOB 9/4/1988) in his junior year of high school in the LEA. He is currently eligible for special education services as OHI (ADHDi) and SLD.

4. *By way of historical background:* Parents, in particular Father (hereinafter Parent) have suspected autism for some time. They have had Student independently evaluated as early as 2005 in an effort to rule out an autism diagnosis. Student's middle school special education chair noted in 2010 in an email to M.P., an educational diagnostician at the LEA.: "This kiddo is having difficulties socially..." and to Parent, "I am concerned that [Student's] social difficulties might require additional SpEd resources...." Student was retained in 4<sup>th</sup> grade. Student's biological mother was adopted. No biological relative has ASD to anyone's knowledge, except perhaps his biological father. *Exhs 45, pp.4-5, 7, 13-15, FF; V, 1443*

In the fall of 2011 the LEA addressed the issue of autism eligibility in its three-year

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<sup>2</sup> To the extent that the foregoing findings of fact contain conclusions of law, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Bd.*, 835 F. Supp. 340 (1993).

<sup>3</sup>Parents' Exhibits are numerical, Respondent's Exhibits are by letter, Joint Exhibits are double letters, DPHO Exhibits are identified as such.

re-evaluation. District conducted the ADOS-Module 3 (Autism Diagnostic Observation Schedule) inhouse, with four LEA staff observing, interpreting, and co-scoring the results along with the then lead diagnostician D.N. Student fell below the cutoff score and did not meet LEA ADOS criteria for eligibility. No one could testify to what that score was. There are no original reports or protocols for this testing. D.N., the lead educational diagnostician for this purpose retired and could not be located; he was not a witness. *Exhs 5; I, 18, 42, 47, 167, 246*

The January, 2012 PER (Private Evaluation Review) Committee took the position that autism characteristics are pervasive and can't be turned on and off. According to M.P., a member of District's ADOS team and now lead diagnostician on this case, was the compiler of the MET (Multidisciplinary Evaluation Report). District's reason why Student didn't meet the school's criteria for autism eligibility was that his behaviors (noise-making, boundary issues, inappropriate touching) were addressed by related service providers in the spring semester of 6<sup>th</sup> grade and, according to his instructors back then, Student was able to self-regulate his sensory/behavior issues and interact successfully in the fall , 2011. He continued to have socialization problems. Student had relatively good reports re: present levels of performance in the 7<sup>th</sup> grade. His eligibility at that time was SLD for dysgraphia and processing only. Student did not, at that time, have a medical diagnosis of ADHD or ASD. *Exh LL; I, 251-252*

## **STATUTORY PERIOD**

### **Parents' Experts**

5. Parent had an IEE performed early in 2014 by Dr. Deborah Bower, a neuropsychologist (since deceased). The PER, REED (Review of Existing Evaluation Data) , and MET (Multidisciplinary Evaluation Team) processes were used to assess the private evaluation. Dr.

Bower diagnosed ADHDi and recommended a 6-month medication trial. If that was ineffective, she recommended an ASD evaluation. *Exhs 10, OO, PP, p. 7; I, 18, 196-198, 307-310*

6. After receiving Dr. Bower's report, M.P. offered to perform additional assessments for autism. Parents rejected this offer on May 27, 2014. wanting to proceed with OHI/ADHDi testing by the LEA on an expedited basis This testing was performed for less than ten minutes by M.P., after he had drafted an OHI eligibility determination. The formal report was issued May 2, 2014. The eligibility determination for Student was OHI and SLD as of June 15, 2014. The MET report was delivered to the IEP committee meeting on October 29, 2014 and an OHI/ADHDi eligibility added. *Exhs AA, MM, pp.2-3, NN, OO, PP; I, 96, 200-202; V, 1261*

7. Believing the medication trial failed, Parents had another IEE performed by Dr. Michael Neessen on April 2, 2015 -- shortly before the complaint was filed on April 21, 2015 This witness presented as "reliable," i.e., qualified expert in performing ADOS-Module 2 (Autistic Diagnostic Observations Scale), and other testing. Although both Parents were vague about Student's medications, except to state that Concerta had bad side effects and Student was switched to Adderal, Parent believed he was taking Adderal at the time he was evaluated and that the evaluator was so informed. Dr. Neessen also believed he was informed but that fact did not appear in his report. Dr. Neessen is also an expert in diagnosing ADHDi (inattentive) and advises parents to continue any medications on the day of an evaluation. Whether Student was or was not on ADHD medication "would not have changed his presentation or the results of [the] evaluation." *Exh QQ; II, 489-490; 556; V, 1474; Dr. Neessen's webpage.*

8. According to Parent, Dr. Neessen provided a probable autism diagnosis orally to Parents at the conclusion of Student's ADOS testing on April 2, 2015 . He had yet to examine



teacher questionnaires and evaluate testing results to complete his diagnosis. These questionnaires were first provided to teachers on February 4, 2014, and then again on April 8, 2015, and completed questionnaires returned to this evaluator on April 14, 2015. *Exh Z; III, 901*

9. Dr. Neessen did not do classroom observation, instead relying on teacher questionnaires. Dr. Neessen relied on Parents' representations in obtaining a developmental history of Student's behavioral and emotional patterns since birth. He also reviewed previous IEEs, IEPs and other school records made available to him by District. *Exhs QQ, Z; II, 489-491, 590*

10. Dr. Neessen had his written report distributed to the LEA through the parties' respective attorneys on May 5, 2015, in which he formally diagnosed Level 1, high-functioning autism. *Exh QQ; II, 624*

11. He noted in his report there were inconsistencies in the teacher questionnaires e.g., "He can relate to peers well," while other teachers thought not so much. They universally reported he had friends, made eye contact, and was struggling, in particular with processing and focusing. *Exh Z; II, 590*

12. Following six hours of testing (not all of it ADOS testing), Neessen concluded that Student was socially and emotionally immature for his age. His social skills and social communication skills were quite a bit lower than "what would be expected for a boy his age," in particular, language skills. Student showed weakness in his ability to use eye contact and nonverbal behaviors. He had limited insight into social relationships. *II, 494-497*

13. He identified, generally, three primary domains in an ASD diagnosis: social interaction, communication (e.g., nonverbal language, eye contact), and repetitive motor mannerisms or stereotyped language. Dr. Neessen did not observe the repetitive motor mannerism

but accepted Parent's reports re: stereotyped language in the form of repetitive questions. *II, 497-498*

14. Dr. Neessen's recommendations included, among others: 1) year-round instruction in social thinking curriculum, 2) measurable goals and daily data collection, 3) one to two hours per week of social skills group training with someone with a master's degree in psychology or the equivalent of a BCBA (Board Certified Behavior Analyst) or similar. *II, 498-515*

15. His opinion was that Student's current school program, as developed in his IEPs of May 14, 2014 and October 29, 2014, supported Student in meeting his academic and cognitive difficulties, but was not specific to his autism. Dr. Neessen viewed his recommendations as a supplement to Student's current IEP. *II, 620; VII, 2148*

16. This expert did not rule out Student's ADHD diagnosis. Autism and ADHD are comorbid conditions and are not mutually exclusive. *II, 619, 624*

17. District conceded that the ADOS itself was properly administered by Dr. Neessen and was not at issue. *I, 247-249*

18. Dr. Neessen presented as a credible expert witness in his field of neuropsychology, particularly with respect to pediatric evaluations and interventions, specializing in the diagnosis of older children. *Exh RR*

19. Dr. Neessen focused on socialization and social skills; he did not address academic assessment believing that Student's current curriculum was appropriate except that it should be more autistic-specific. *Exh QQ; II, 610; VII 2074*

### **District's Expert**

20. District's expert, Dr. Courtney Burdette, the director of University of New Mexico Center for Developmental Disabilities (NM CDD), is a clinical psychologist with extensive autism evaluation experience. *Exh X*

21. Her role in this case was to review Dr. Neessen's report, the bases for his evaluation, and conclusions. Dr. Burdette noted that Student presented as flat to Dr. Neessen. Notably, his behavioral observations of Student were different from what the classroom teachers were reporting in the questionnaires. Dr. Burnette never met Student or Parents. *VII, 2055-2056*

22. Autism is a neurodevelopmental disorder. She agreed there may be comorbid conditions such as ADHD. *VII, 2014-2015*

23. This expert, a credible witness and "reliable" ADOS evaluator, noted that the "social pieces" in teachers' questionnaires were discrepant among themselves and there were discrepancies in all the reports.. Social concerns are less of a concern to teachers than focus and attention. *VII, 2054-2055, 2104*

24. She testified the bases for ADOS evaluations performed at UNM CDD are consistent with Dr. Neessen's bases. Classroom observation is utilized only as a backup to teacher questionnaires, as needed. She noted Dr. Neessen did not use direct observation across settings, relying on historical information from Parents, IEPs, previous evaluations dating as far back as 2005, other school reports as provided by District, and the teacher questionnaires describing the school setting. *VII, 2101-2104, 2127*

25. Dr. Burnette clarified the difference in autism definitions and changes in DSM IV and DSM V. *VII, 2017-2019*

26. Neither expert, both of whom are psychologists, conduct the ADOS with observers, although at UNM CDD a SLP may watch in the room or through glass. Neither of these experts did group scoring of results. *Exh 5; II, 599; VII, 2102-2103*

27. Dr. Burnette was of the opinion that more assessment was needed because of inconsistencies in the teachers' reports and Dr. Neessen's analysis. She reviewed all relevant reports but did not have any direct experience with Student. She could not conclude whether Student was in the ASD category or not.<sup>4</sup> *VII, 2122, 2134-2136*

### **Teachers' and Staff Observations**

28. At the IEP meeting on October 29, 2014, teachers first viewed M.P.'s, the lead diagnostician's report, the MET report, Student's IEPs, and the PAG (Program at a Glance -- a list of the accommodations developed by the IEP team for teachers in Student's inclusion classes). *Exhs AA, p.5, LL, PP, p.10; II, 376, 653, 655*

29. Student's teachers T.A., S.S. and M.C.M., testified that Student often zoned out and "shut down." He needed supports to understand materials, understand and complete assignments, follow directions, organize material, and to stay on track. He was more interested in socializing and in what his peers were doing. M.C.M. could not say whether he had friends or not; he was uncomfortable around his peers. T.A. thought the reason his grades dropped from first semester to second semester could be because he lacked motivation. *Exhs 27, Z; II, 387-392, 395-396, 442-443; III, 821-822, 853, 858- 859*

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<sup>4</sup> Dr. Burnette noted that the Social Responsiveness Scale information (SRS - a screening test for autism) was not included in the 2005 (when Student was 7 years old) redacted report she reviewed. A later submission of an unredacted report was inserted in the record proper. A comparison between the two versions were the same with respect to the SRS -- neither included information about the SRS.

30. M.C.M. the World History I teacher, made efforts to accommodate Student's needs without the benefit of PAG, his IEPs, or the presence of a special education inclusion teacher. Without additional guidance, she gave Student preferential seating, assistance with inclass assignments, extra time and other accommodations she felt were necessary based on her individual knowledge of Student and the usual accommodations regular education teachers received with respect to special education students, in general. *Exh BB, p.7; II, 376, 442-448, 464*

31. Student received an F in World History I for the first six weeks of the semester. Changes in the delivery of instruction and supports were made in November, 2014, following the IEP meeting of October 29, 2014. *Exh 27; II, 403-404; III, 696*

32. T.A. was a new special education teacher under a ILicense I (intern). She had no previous teaching experience. Prior to her assignment as Student's math teacher and sponsor teacher, she was employed by the LEA as a EA (educational assistant).

33. S.S.'s first day was September 15, 2014. This special education inclusion teacher, who had experience teaching autistic students, did not observe any of the usual ASD characteristics in Student. Student presented as social, made eye contact, was not obsessive, no perseveration, no repetitive behaviors. She did note he sometimes made inappropriate, out of context remarks. *Exh Z; III, 649, 658, 718-720*

34. S.S.'s perception was that, as shown by their numerous email exchanges, Parent was very concerned and showed a willingness to help in the beginning, later becoming more frustrated and hostile. T.A. could tell from Parent's excessive number of emails that he was getting frustrated. *Exh 16, pp. 29-30; III, 679, 800; V, 1510*

35. S.J., Student's special ed biology teacher (in an inclusion class of 35 students

in the spring semester 2015), found Student to have success in her classroom because it was hands-on. She was also the lab monitor for Student's eCADEMY online class to make up credits in World History I. Student did not perform well in eCADEMY for a variety of reasons, and has not made up the lost credit to date. *IV, 1186, 1195-1196*

36. N.S., Student's small group English teacher, observed Student's cheerfulness, friendliness, eye contact, smiles, friendships, also his daydreaming and lack of focus. She did not have any concerns about Student's social, behavioral or emotional functioning. He was very polite and respectful. His peers wanted him to be in their study groups. He volunteered to teach class on one occasion. He acted like a leader. It was her opinion that it was typical for students to do worse in the second semester of 10<sup>th</sup> grade. *Exh A-1; VI, 1553, 1558, 1565-1566, 1559, 1621-1622*

37. N.S. completed her questionnaire on February 5, 2015 and believed she faxed it to Dr. Neessen at that time, but was not at all certain. All the teacher questionnaires were sent to Dr. Neessen on April 14, 2015; seven days prior to the filing of the complaint herein. *Exhs Z, A1, B-1, ; VI, 1651, 1660, 1662-1663*

38. According to T.B., Student's case manager in the 9<sup>th</sup> grade and small group biology teacher in his sophomore year, was the person Parent communicated with most. Parent presented to her as a very concerned parent. She thought Student was struggling. She offered tutoring during her lunch hour and Student responded better 1:1, although he didn't often avail himself of this opportunity. She admitted that was not a good practice. Student needed more support and accommodations, in her opinion.. The only characteristic she observed in her experience with autistic students that could indicate ASD in Student was his communication with adults. She presented as a credible witness. *VI, 1573,-1574, 1597-1598, 1605-1606, 1670, 1779-1780*

39. When T.B. went through Student's backpack, it was completely disorganized until she put everything in folders. Many completed assignments were found that were never turned in. Student could use daily help in organizing his backpack and retrieving assignments. *VI, 1761-1763*

40. According to T.B., when offered help by a teacher, Student would deny he needed assistance when he was obviously stuck. Everything was always "OK." *VI, 1602-1603*

41. Teachers and staff testified it was very difficult to meet Parent's expectations of District. It was not typical for educators to have to respond to a parent's emails on a daily basis. *VI, 1694-1697*

42. District asserts it did not know that Student was doing a medication trial for ADHD during the 2013-2014 school year, even though that trial was recommended in Dr. Bower's report and reviewed by the PER, REED, MET, and IEP team. *VI, 1751-1752*

43. In retrospect, Student's sponsor teacher supported an Assistive Technology evaluation given Student's serious difficulties with written expression and written product. *Exhs QQ, p. 6, FF, p. 2; VI, 1748-1755, 1800-1803*

#### **Parents' Testimony**

44. Parents presented as very concerned and fearful for Student's future. Parent also presented as overbearing with respect to managing Student's education. *Testimony of Mother, IV, 1101-1184; Testimony of Father, V, 1228-1535*

45. According to Mother, Student does well with hands-on courses. He always demonstrates flat affect, is very withdrawn, does not understand social cues, does not volunteer information about himself. He has no school friends that he interacts with after school, leading to

Parents' conclusion that he does not have friends at school. The testimony of teachers unequivocally contradicts this impression. *Exh CC; , II, 443, 494, 660, 666, 724; IV, 1102-1104, 1109-1111; V, 1300-1303, 1480; VI, 1649, 1651, 1658 ; see also S.J.'s testimony, IV, 1184-1220*

46. Mother wants the high school to be consistent in implementing the accommodations in Student's IEP and to implement Dr. Neeson's recommendations. *IV, 1114, 1120-1123, 1161*

47. Mother testified that one ADHD medication had an opposite effect and did not work the way it was expected to – Student lost weight, was sleepy, dazed, “like a zombie.” *IV, 1182-1184*

48. Parent states he is not fixated on the label of autism– only on getting help for Student whatever his disability is. However, since elementary school he has consistently advocated that autism be ruled out. *V, 1304*

49. According to Parent, Dr. Neessen advised Parent of Student's potential ASD after completing Student's testing on April 2, 2015. Parent immediately informed the LEA of the “new” diagnosis. *V, 1417-1419*

50. Parent has been concerned about Student's disorganization, lack of attention, inability to take notes and social interaction for a number of years , as well as his failing grades. *V, 1455, 1477, 1480-1484*

51. Upon cross-examination, Parent gave examples of repetitive, stereotypical language that did not appear in his earlier questionnaire. *V, 1496-1499*

52. Parent has made himself responsible for completion of Student's assignments in class and for his homework on a daily basis, starting within a half hour after Student returns home



from school. *V, 1514, 1518-1519, 1524*

53. Parent emailed N.S. about the absence of a sponsor and the fact that IEP accommodations were not being implemented. Parent was in frequent contact with teachers and case managers (sponsors) as evidenced by the volume of emails in the record proper, in addition to numerous telephone consultations. *Exh 12, pp. 17-18; VI, 1667-1668, 1694*

54. Parent exhibited serious distrust in having the LEA further assess Student's eligibility. Further assessments for educational eligibility were offered and rejected by Parent in the case of both Dr. Bower's and Dr. Neessen's evaluations. Parent and District both agreed that Student was struggling. *VI, 1696*

#### **Student**

55. In the statutory period under consideration (April, 2013-April, 2015) , Student was enrolled in several high school core classes (World History II, Geometry, Science) in special education small group settings (usually comprised of 12-15 students, a special education teacher, a regular education teacher and an aide). Several classes (World History I, Biology, English) were in a regular ed inclusion class, with about 35 students. *Exh 22*

56. When he was doing homework and completing assignments with Parent, he demonstrated difficulty in understanding and doing the assignments. His grades seriously declined in the second semester in the 2014-2015 school year. *Exhs 22, 27, 29; II, 626-628*

57. Student's testimony was monosyllabic, expressionless and noncommittal. Answers for the most part were "I don't know." He presented with a very flat affect. He did not make eye contact with anyone in the hearing room. He was exceedingly uncomfortable. His testimony was limited by the hearing officer when cross-examination got into how he thought he

performed at his evaluation. *Testimony of Student, IV, 1077, 1097-1100*

58. Student repeats the same questions to Parents each day, even though he has received the same answer and has been asked to stop. In the school setting, he never asks questions.

*Exh QQ; III, 724; V, 1497-1501*

59. Student's attitude about many of the class offerings and subjects he has already taken is negative. He does not acknowledge his academic difficulties. He likes music (piano) and hand-on instruction. He does not believe he has a problem in class or out of the classroom in understanding and completing assignments. He really just wants to be treated like a normal sixteen year old teenager. *IV, 1108, 1187; V, 1284-1287, 1297-1298, 1353-1360*

60. Student did worse in his sophomore year than in his freshman year in terms of grades. There is a large difference in terms of expectations of teachers in the second year of high school as compared to the first year. *VI, 1601-1602*

61. Student had three IEP meetings in the 2014-2015 school year. The purpose of the October 29, 2014 meeting was to add a new eligibility based upon Dr. Bower's evaluation – OHI (ADHDi)– in addition to SLD. The purpose of the two previous meetings on January 8, 2014 and May 14, 2014 was to change his World History second semester class to a small group setting and to change his small engine elective. *Exhs AA, BB, CC, TT; V, 1262-1263; VI 1593*

62. Student behaved differently with adults (shy, demure, quieter) than he did with his student clique (jovial, joking, interacting with peers). *VI, 1605-1608, 1609-1612*

63. Student shut down even more in student-led meetings involving both his teacher and Parent. His knee-jerk response, "I don't know." Parent took the lead in all meetings concerning Student's education and often criticized Student in the teacher's presence. *VI, 1670, 1673-1677,*

1679-1680

64. Student was adamant that he did not want to be placed in small group special education settings, even though he did better in those classrooms. He became upset at IEP meetings when that option (which District supported) was discussed. There were very few classes that Student enjoyed: piano, biology, both hands-on classes. *VI, 1678, 1682-1683, 1686, 1687, 1704-1705*

65. Student performed below average in several areas. *VI, 1767*

66. Student is smart but has poor executive function. *VII, 1920, 1934*

67. Student never received an AT evaluation but was offered a portable keyboard (Alphasmart), which he did not use because it would embarrass him in front of peers. *VI, 1803*

68. Student did have friends he could pal around with in the school setting. It is not known why they did not have after school contact or were not invited to his home. There is a huge discrepancy in the way Student is perceived by teachers and the way he is perceived by his Parents with respect to the subject of school friends. *Exh. 12; V, 1300-1303, 1310-1311, 1313, 1318-1319, 1323, 1325*

### **Transition Planning**

69. C.G. is the high school's transition specialist assigned to Student's case. She has a caseload of some 400 students on IEPs; she has rehabilitation experience but no special education experience. The LEA does not use the model transition forms generated by NMPED; they create their own forms. Transition planning for Student in his freshman and sophomore years was *de minimus*. At the time of the hearing Student did not have a transition plan that would adequately inform him and Parents of post-secondary school options. The transition specialist was not adequately informed about those options. Student was made responsible for coordinated activities

necessary to transition. *Exhs AA, 34; IV, 936-938, 965-967, 986; Testimony of C.G. IV, 935-987*

70. Transition planning in Student's IEPs is so general as to be meaningless. All Student's teachers were to be responsible for seeing that Student was working towards the goals. Goals were outdated. *Exh AA, pp.3,6, BB, p.8; III, 908, 917-919, 926-928*

#### **Autism Resource Team**

71. C. P., the instructional manager for autistic students in the LEA and a credible witness, supervises its Autistic Resource Team (ART). The LEA provides autistic-specific programs throughout district schools for students who are placed through the IEP process. The NMPED's eleven considerations for autism eligibility (TEAM) are requirements under state law, according to this witness. *IV, 992-993*

72. The LEA's Autism Resource (ART) provides consultation services with respect to placement recommendations and the development of goals and strategies for students on the autism spectrum. C.P., the director of ART testified that if there is a medical diagnosis of autism it is appropriate for the LEA to consider IDEA eligibility for autism services, His team could work with Dr. Neessen's recommendations to design a program that would fit Student's individual educational needs. He did not, however, recommend using scripts for Student as not age appropriate. ART could do additional assessments as well. *Exh X; VII, 1880-1886, 1875-1877, 1921, 1942, 2012*

73. The ART response to a request for its assistance takes approximately one week.  
*Exhs 35, 36*

74. According to C.P., even if a student has already taken a Study Skills class, he could benefit from this instruction again if he hasn't met his goals. *Exh CC, p. 33 [PWN #4]; IV,*

1016, 1055

75. ART will support the individual student's needs even if that student has the medical diagnosis of autism and not the educational eligibility. *IV, 1052*

#### **District's Policies**

76. District requirements for IEEs is that the evaluation report go to a PER (Private Education Review committee), then through the REED (Review of Existing Evaluation Data) which determines whether more evaluation is needed and what, then to the MET (Multidisciplinary Education Team, formerly EDT), and finally the IEP team. This process can take as long as six months. This process for review of IEEs varied in 2015 from previous years.

77. District's policy was to have diagnostician files destroyed after one year. Thereafter, this policy was amended to "after the MET." Social work services (which Student received for six months) and occupational logs are nonexistent, according to District. Student's LEA diagnostic files were destroyed in January, 2015. *Exh A; I, 9-13, 20, 45-46, 112, 119-121, 196, 275-276*

78. The NMPED manual, TEAM (Technical Evaluation and Assessment Manual), lists the criteria and components necessary for an LEA to determine educational eligibility for autism and attendant services. District does not use the TEAM "highly recommended" information guidelines. District's position is that even if there is a neuropsychological (medical) diagnosis of ASD, the LEA is still required to determine ASD eligibility for educational purposes through its screening processes. *Exh 31, pp 40-49; I, 159, 291-292*

79. M.P. appeared telephonically at an expedited May 5, 2015 PER meeting to discuss the Neessen report. As this witness recalled, the ADOS administrator B.H-R said it "looked

*acceptable—or that [the committee] could consider it.”* Student had a qualifying ADOS score. The PER committee indicated there were missing, necessary components that had to be filled in for the LEA to proceed with a formal autism evaluation (REED). District’s position was that there is more involved in diagnosing ASD than just the ADOS. *Exh SS, p.5; I, 234-236, 244-245, 247-248*

80. District responded to Parent’s numerous complaints about Student’s curriculum, and made attempts to change courses and schedules to satisfy Parent and Student, even if difficult to do and against the school’s policies. *VI, 1447-1449,-1693-1695, 1701*

## **DISCUSSION**

### **Independent Educational Evaluation (IEE)**

It is undisputed that parents have the right to obtain an IEE at their own expense. *34 CFR §300.502(a)(1); 34 CFR § 300.502(b)(3)* Parents in this case desired to pursue Dr. Bower’s recommendation for autism testing following a failed trial of ADHD medication. They directed Dr. Michael Neessen to perform an IEE and, specifically, “to rule out autism.” Student already had special education eligibility in the categories of SLD and ADHDi.

Under IDEA the LEA must consider the IEE results and recommendations when making IEP FAPE decisions, providing the IEE meets the LEA’s criteria. *34 CFR § 300.502(c)(1)*

The LEA does not have an obligation, however, to adopt the evaluator’s recommendations or conclusions. “Consider” is not defined by IDEA or its regulations. Summaries of the IEE are permitted under case law. *Evans v. District No. 17, 841 F.2d 824 (8<sup>th</sup> Cir. 1988); T.S. v. Bd. of Educ. of the Town of Ridgefield, 20 IDELR 889 (2d Cir 1993); G.D. v. Westmoreland Sch. Dist., 17 IDELR 751 (1<sup>st</sup> Cir. 1991); Garvey Sch. Dist., 110 LRP 44204 (SEA CA 07/19/10); In re: Student with a Disability, 114 LRP 43641 (8/4/10)*

District has a cumbersome IEE review process (PER, REED, MET, IEP) before an IEE can be approved or disapproved, sometimes taking as long as an entire school semester. In this case, the expedited PER apparently passed on the IEE. The next hurdle is the REED which determines autism eligibility for educational purposes.

### **Autism Eligibility**

IDEA mandates the definition and criteria for autism eligibility: “Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance.” Often associated other characteristics are “engagement in repetitive activities and stereotyped movements, resistance to environment change or change in daily routines, and unusual responses to sensory experiences.” *Exh 36, p.4; 34 CFR § 300.8(c)(1)(I)*

District’s position seems to be that the LEA’s 2011 administration of the ADOS and its conclusion of noneligibility was the only, sole determinant allowing District to deny Student an autism eligibility for the past three years, even though no record of this testing actually exists. This earlier LEA evaluation occurred well outside of the 2-year statute of limitations, no information is currently available except that Student did not meet the cutoff point. It is given limited weight. *Exhs 5, p. 1, LL, p. 25; I, 240-246; Respondent’s Argument, DPHO Exhibit 19*

With respect to the very recent IEE dated May 5, 2015, District offered to do further assessment and review, however, this offer was definitively rejected by Parents who choose to pursue the due process hearing route instead of LEA assessments. Further consideration of an IEE by the LEA is, however, required by IDEA and the case law interpreting 34 CFR § 300.502(c), the “must be considered” clause. The DPHO does not have jurisdiction to bypass the LEA’s IEE process,

except to expedite it in order to provide FAPE. All hinges on “educational performance.” That term is not defined in IDEA. 34 CFR 300.8(c)(1)(1)

The NMPED’s TEAM manual requires that ASD eligibility be determined by a team, including parents, “When making an eligibility determination decision, the team must follow the regulations in IDEA (2004) and professional judgment should be used within the context of evaluation findings.” *Exh 31, pp. 6, 11-12* Under state regulations the eleven considerations that IEP teams should use to determine autism eligibility are:

a) extended educational programming; (b) daily schedules reflecting minimal unstructured time and active engagement; (c) training for acquisition of social skills, and strategies that facilitate generalization of skills between environments; (e) future planning that considers what skills are needed to function in post-secondary or work environment; (f) parent or family training and support by qualified personnel with experience in ASD; (g) suitable staff to student ratio to achieve social progress and individual independence across settings; (i) social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including, for example, trained peer facilitators, video modeling, social stories, and role playing; (j) professional educator and staff support including training on “correct implementation of techniques and strategies described in the IEP;” (k) teaching strategies based on peer-reviewed, research-based practices for students with ASD, including...those associated with...visual supports, applied behavior analysis, structured learning...social skills training.

6.31.2.11(B)(5)(a-k) NMAC

State regulations mandate that eleven considerations be applied to the facts of this case. IDEA requires that ultimately the IEP team determines eligibility. This LEA has complicated this process by inserting three review hurdles that an IEE has to go through before the IEP team has even the chance to consider the IEE, i.e., the PER, the REED, the MET, and finally the IEP meeting. The IEP team never sees the actual evaluation report and recommendations, only summaries in the MET report, which is permissible under case law. This cumbersome review process for IEEs was not envisioned by IDEA and its regulations, especially when it takes 6 months to complete.



Under IDEA a student with a medical diagnosis of autism must show that the disability has an adverse effect on his educational performance. 34 CFR § 300.8(c)(1) Without defining “adversely affects,” except to state that it is more than trivial, courts have held that if a Student’s educational performance is adversely affected by the autism disability, eligibility for services must result. *Mr. I. V. Maine Sch. Admin. Dist. No. 55*, 47 IDELR 121 (1<sup>st</sup> Cir. 2007) [nothing in the IDEA, the Part B regulations...set a specific degree of impact on a child’s educational performance as a threshold for IDEA eligibility]; *Ashli and Gordon C. V. Hawaii, Dep’t. Of Educ.*, 47 IDELR 65(D. Hawaii 2007)

Case law also supports the LEA determination of noneligibility if a student’s education has not been adversely affected by the disability. *La Mesa-Spring Valley Sch. Dist.*, 109 LRP 54643 (SEA CA 08/20/09); *Clear Creek Indep. Sch. Dist.*, 6 ECLPR 46 (SEA TX 2008); *D.A. and J.A. ex rel. M.A. v. Meridian Joint Sch. Dist. No. 2*, (U.S. Ct. App. 9<sup>th</sup> Cir., July 6, 2015) 65 IDELR 286; *Vista Unified School District*, 113 LRP 8884 (SEA CA 02/26/13); *Pickerington Local Sch. Dist.*, 10 ECLPR 72 (SEA OH 2012).

In this case, however, where it is obvious even to a noneducator, that Student’s cognitive processing does not meet his academic challenges seriously affecting his grades, and there is a medical diagnosis of autism, there should be a determination of ASD eligibility, if only to see if Student can receive educational benefit from an autistic-specific program. He certainly is hardly receiving educational benefit at this point if he attends school all day and within a half hour of returning home from school he is required by Parent to do school work until bedtime. Even then, it is not enough.

There is no dispute between Parents and the LEA that Student is struggling. There

is no dispute that Student's academic grades are failing or near failing, whether he has friends at school or not. The one consistent factor in all his evaluations, assessments, questionnaires, and LEA IEPs is that Student does not focus, does not stay on task, and has severe difficulties in cognitive processing .

### **Denial of FAPE**

In the 2014-2015 school year, Student did not receive special education services and accommodations/ modifications pursuant to his January 14, 2013 IEP, as follows: The LEA could not identify a sponsor teacher until T.A. was identified of October 31, 2014, approximately two and one half months into the semester. T.A., the sponsor who was finally identified, was also Student's small group geometry teacher. She had an intern license (I License) as of October 31, 2014; this was her first teaching experience. Student received instruction from substitutes in math until T.A. was assigned. *Exhs AA, p. 32, 16, pp. 25, 29, 82; II, 369; III, 749, 785, 777-778, 788*

M.C.M., Student's World History I inclusion teacher in the fall of 2014, did not have a special education teacher in the classroom at the time school started on or about August 13, 2014 until S.S. was assigned on September 15, 2015. There were substitute teachers for Student's inclusion class. Although she knew Student was in special education, this teacher did not receive the Program at a Glance (PAG) or see his IEP until the IEP meeting on October 29, 2014. The same held true for Student's other teachers.

Transition planning for Student does not meet IDEA requirements pursuant to 34 CFR § 300.1; 34 CFR § 300.320(b). *Dracut School Committee v. Bureau of Special Education Appeals, 55 IDELR 66 (D. Mass. 2010)* All other issues raised by Parent are resolved in the Findings of Fact and Conclusions of Law herein.

## CONCLUSIONS OF LAW

1. The DPHO has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA 2004). *20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2004).*

2. All procedural safeguards required by IDEA and implementing regulations, and the New Mexico Special Education Regulations have been complied with.

3. Extensions of time limits have been granted at the request of one or both of the parties.

4. Parent bears the burden of proof that Student was denied FAPE. *Schaefer v. Weast, 126 S. Ct. 528 (2005), 44 IDELR 150; Johnson v. Independent School Dist. No. 4 of Bixby, 921 F. 2d 1022 (10<sup>th</sup> Cir. 1990)*

5. The applicable time limit under the Statute of Limitations for IDEA actions is two years from date of filing the request for due process, in this case from April 21, 2013. Any findings made with respect to information prior to that date is for historical purposes only.

6. Eligibility of Student to receive special education and related services under IDEA as Other Health Impaired (OHI-ADHDi) and Specific Learning Disability (SLD), and not under the ASD (Autism Spectrum Disorder), is at issue. *34 CFR § 300.8(a); 34 CFR § 300.8 (b)(9) and (10)*

7. Discovery requests on both sides were not honored. Petitioner: Parent redacted reports initially submitted to District and represented that only redacted reports existed; District's original diagnostic files are destroyed after only one year, service provider files were nonexistent.

8. From the beginning of the 2014-2015 school year until October 31, 2014, Student

was denied FAPE to the extent that his IEP special education instruction and accommodations and modifications specified in his IEP were not uniformly applied.

9. Dr. Burdette's testimony and any other testimony with respect to DSM definitions do not put Student's medical history or condition at issue in this case, entitling District to discovery of Dr. Neessen's internal file.

10. IDEA eligibility as determined by the LEA is at issue, not medical condition.

11. The LEA's administration of the ADOS in this case appears unconventional compared to methods used by other "reliable" evaluators.

12. The LEA does not uniformly follow IDEA and state special education regulations which specify that IEP teams must consider the enumerated eleven considerations to determine autism eligibility for educational purposes. *6.31.2.11(B)(5)(a-k) NMAC*

13. District used the SLD form instead of the form specifically intended for ASD eligibility determinations. The LEA does not use the NMPED form which enumerates criteria for autism eligibility. *Cf. Exhs 5 and 31*

14. There were no evaluations performed by District during the statutory period; there was a LEA assessment, following consideration of Dr. Bower's report, that Student qualified for the additional eligibility of ADHDi.

15. Student's IEPs and PWNs do not reflect a consideration of Student's impaired communication and processing abilities, limited oral expression, inability to organize and complete assignments, or his transition through meaningful goals and instructional strategies supported by research consistent with Student's individual needs. *Exhs AA, BB, CC, DD, EE*

16. Apart from District's ADOS testing determining in 2011 that Student did not

meet the cutoff, there was no autism diagnosis by a neuropsychologist that concluded Student was autistic until the May 5, 2015 IEE.

17. The LEA did not deny Student FAPE because it did not find Student autistic.

18. Aware that Student was “struggling,” IEP teams did not consider supplemental aids and supports, an AT evaluation, and related services, denying Student FAPE.

19. Student and Parent choose electives and sports participation. The fact that they turned out not to meet Student’s expectations is not a failure on the part of District.

20. The \$25.00 fee Parents paid for eCADEMY does not mean Student was not provided a free education. This was their choice among several options.

21. Student evidences severe processing and organizational deficits as a result of his disability which have not been addressed.

22. Parents expectations for Student’s academic performance are not consistent with Student’s ability to perform successfully in high school.

23. Both Parent and Student tied the LEA’s hands in their efforts to develop an appropriate IEP for Student.

24. Student’s personal interactions are different across settings, *cf.* home, church and school.

25. Student has Level 1, high functioning autism, as determined by Dr. Michael Neessen, a medical diagnosis of autism.

26. Very specific interventions are necessary to support students with autism. *VII*,  
2141-2142

27. Student requires an autistic-specific program to be determined by the LEA’s IEP

Team and the Autistic Resource Team. *VII, 2140-2144*

28. Student's transition planning does not follow IDEA requirements denying Student FAPE. *20 U.S.C. § 1414(d)(1)(A)(i)(VIII); §6.31.2 NMAC.*

29. District failed to implement Student's IEP in early fall, 2014 denying Student FAPE.

### **ORDER**

1. Assuming the evaluation has completed the PER but for the official report, the REED committee shall determine whether Student requires additional assessments for an eligibility of educational autism, based on the adverse effect his disability has on his failing educational performance.

2. Following the REED consideration of the IEE, and the MET results (all to be completed on an expedited basis), this case shall also be considered by Autistic Resource Team (ART) and Student's IEP team, even if it is determined there is no educational eligibility. [ART also consults in cases where there is a medical diagnosis of autism but not an educational eligibility. (*See V, 1052, testimony of C.P., ART director*)]

3. The IEP team and ART shall consider and identify Student's unique cognitive processing and organizational deficits to best address his unique learning processes, so that Student can access academic subjects himself with minimal parental assistance.

4. The goal of the IEP team is also to consider the recommendations of Dr. Neessen with respect to Student's social needs (as deemed age- appropriate by ART), with the ultimate goal of devising an autistic -specific program to assist Student in achieving academic and social skills goals.

5. Student shall have an Assistive Technology evaluation.

6. The LEA shall conduct a facilitated IEP meeting to be held within three weeks of entry of this decision. Parents will provide three names as candidates for facilitator. The parties will agree to one of the three.

7. For placement in an autistic-specific program, ART will review Student's progress as necessary (preferably on a monthly basis), and provide additional supports as ART deems needed.

**THIS DECISION IS ENTERED THIS THE 12<sup>TH</sup> DAY OF SEPTEMBER, 2015**



Muriel McClelland  
Due Process Hearing Officer

#### **RIGHT TO APPEAL**

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 U.S.C. § 1415(I)(2004), 34 CFR § 300.516 and 6.31.2.13(I)(25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

## CERTIFICATE OF SERVICE

I hereby certify that I mailed  
by US mail a copy of the foregoing Decision  
on September 12, 2015 to the following persons:

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Muriel McClelland