

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER

In the Matter of  
as Parent and  
as Grandparent,  
on behalf of NM, a minor,

Petitioners

v.

DPH # 1112-05

LOS LUNAS PUBLIC SCHOOLS,

Respondent

DUE PROCESS HEARING DECISION

Muriel McClelland  
Due Process Hearing Officer

November 6, 2011

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DUE PROCESS HEARING  
DPH 1112-05

## **DECISION**

This matter coming before the due process hearing officer (DPHO) at a hearing held on October 3-5, 2011; Petitioners (Parent and Grandparent; hereinafter "Parent") represented by Gail Stewart and Tara Ford, Attorneys at Law; Respondent (District) represented by Jacquelyn Archuleta Staehlin and Elizabeth Church, Attorneys at Law, and the hearing officer, having heard the testimony of witnesses, having reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law and Order.

## **STATEMENT OF PROCEDURE**

Parent filed a request for due process with the New Mexico Public Education Department (NMPED) on August 16, 2011, alleging District failed to evaluate Student in all suspected areas of disability and failed to qualify Student as eligible for special education under the category Specific Learning Disability (SLD), disregarded its Child Find responsibility, applied improper discipline measures, and denied Student FAPE. [DPHO Exhibit 1] District in its response to the complaint denies all allegations, challenges the jurisdiction of the DPHO to hear SAT issues, and affirmatively states that Student is not eligible for services under IDEA. [DPHO Exhibit 3] This hearing officer was appointed on August 16, 2011.

At the pre-hearing telephone conference held on August 31, 2011, District requested an extension of time limits for good cause shown, which was granted over the

objection of Petitioner. The DPHO dismissed the NMPED at this hearing. [DPHO Exhibit 4] Statements of issues were submitted on September 12, 2011. [DPHO Exhibits 6, 7] Exhibits and witness lists were exchanged on September 26, 2011. [DPHO Exhibits 8, 9, 10, 11] The hearing took place on October 3-5, 2011. District's oral motion to dismiss following presentment of Petitioner's case-in-chief was denied. Briefs and requested findings of fact and conclusions of law were timely filed. [DPHO Exhibits 12, 13, 14] This decision was entered on November 6, 2011. [DPHO Exhibit 16]

### **ISSUES PRESENTED**

**Petitioner has identified the following issues for determination by the hearing officer:**

1. Whether the LEA failed and refused to evaluate Student for IDEA eligibility prior to the spring of 2011.
2. Whether, when the LEA did evaluate in the late spring of 2011, it failed to evaluate Student in all areas of suspected disability.
3. Whether during the statutory period the LEA denied Student FAPE because of its failure to evaluate and determine all appropriate areas of disability and its failure to provide special education and services with an IEP written and implemented to meet the Student's unique needs.
4. Whether during the statutory period the LEA denied Student FAPE by substituting punishment for provision of special education, including positive behavioral supports (a FBA and BIP) and related services.
5. Whether the LEA improperly delayed evaluations and provision of special education

by reliance on the RTI/SAT process.

6. Whether the LEA improperly relied on services provided by a third party (BMS through Namaste) obtained by Parent, and on Parent, in lieu of identification for and provision of special education services.

7. Whether the LEA failed to protect Student from bullying based on disability by provision of appropriate instruction, related services, and placement.

8. Whether the LEA failed to provide Parent with proper PWN when it refused to evaluate in all areas of suspected disability and whether that procedural violation created a deprivation of FAPE to the Student and interfered with Parent's IDEA rights.

9. Whether the LEA denied Student access to the general curriculum by failure to provide accommodations, including auditory books and supports sufficient for Student to participate in social/extracurricular activities at the elementary school.

10. Whether the LEA failed to provide FAPE when it disenrolled Student from its elementary school in 2011.

11. Whether District denied Student FAPE from August 16, 2009 to the present (the statutory period).

**Respondent submits the following Statement of Issues:**

1. Whether Parent voluntarily chose to remove Student from one district elementary school and transfer her to another district elementary school and whether this issue is one over which the DPHO has jurisdiction under IDEA.

2. Whether Student qualifies for the receipt of special education and related services,

specifically, whether a) Student has a recognized, qualifying disability under IDEA and its implementing regulations, and whether b) by virtue of the disability, Student requires special education services.

3. Whether if Student is in need of any services or interventions, Student's least restrictive alternative is the LEA's SAT process.

4. Whether Student has instigated the majority of bullying incidents that have occurred; whether the DPHO has authority to review such allegations by Parent.

5. Whether Parent mentioned possible suicidal ideation in a SAT meeting and whether District properly followed District policy in terms of requiring a mental health status evaluation/assessment before allowing Student to return to school; whether the DPHO has jurisdiction under IDEA to review District's policy and implementation thereof.

6. Whether, if there was any loss of FAPE, such loss was caused in whole or in part by Parent's own acts.

#### **FINDINGS OF FACT<sup>1</sup>**

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

2. At the time of the hearing Student was eight years old and attended 3rd grade

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<sup>1</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). 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.

in District's elementary school.

3. During the 2010-2011 school year Student attended another elementary school in the LEA, transferring at Parent's request to her present school.

4. Student was referred to the Student Assistance Team (SAT) in each of the school years (kindergarten, first, second grade) prior to the 2011-2012 school year. *TR I, 225*

5. Parent made a request for evaluation in April, 2011, signing the consent to evaluate on May 10, 2011. Although the form allowed evaluation, generally, in a number of different areas, District's diagnostician, Dr. K, and Parent specified an educational evaluation only at this time; Parent agreed to the limited testing. *Exhs 3, 4; TR. II, 11, 16, 20-27, 121-121, TR III, 122-123*

6. Whether Parent understood that the EDT would be considering SLD only and not behavior, and so consented to the limited assessment, is disputed by Parent. *Exhs 3, 4; TR I, 204-208, TR II, 120-122; TR III, 86*

7. District's educational diagnostician, Dr. K, is qualified as an expert based upon her education and credentials as a nationally certified school psychologist and educational diagnostician. It was the diagnostician's position that learning had to be addressed before behavior could be assessed. *TR II, 4-5, 118, 121*

8. Dr. K, in the presence of another diagnostician who took notes, reviewed the results of her evaluation with parents at length on June 10, 2011. *Exh AA; TR I, 220, TR II, 22, TR III, 124-125, 133-136*

9. Student had no difficulty with encoding or decoding, or with phonetic

awareness; she scored above grade level in several areas. Student was on task and had no difficulty focusing while being tested. Dr. K concluded that Student's evaluation (which included classroom observation, as well as reviewing background information including family history, and SAT materials) ruled out dyslexia, specifically, as well as a broad SLD disability, in general. Student's behavior was not evaluated. *Exh 1; TR I, 100, II, 123-125, 130-138, 146-148, 150-166*

10. An EDT (Eligibility Determination Team) meeting was held on July 26, 2011 following completion of District's evaluation. The EDT meeting lasted approximately 45 minutes to one hour. EDT members were not provided copies of the 27- page evaluation prior to the meeting. *Exhs. 1, 2; TR I, 33, 149, 158, 187*

11. None of the EDT participants had read the entire report other than the diagnostician, Dr. K, who briefed participants using a power point demonstration of sections of the evaluation. *TR I, 24, 26-27, 132-133, 145-146, 157-159, 186-187, 203-204, 216, 219*

12. The EDT meeting was held during summer recess when a number of staff familiar with Student were unavailable. Of the six staff persons who attended the meeting, only three of them had met Student personally. *Exh. 1, p 8; TR I, 33-34, 125, 157, 186, 203-204*

13. The individuals who spoke at the meeting were the diagnostician, the therapist, the IEP facilitator, and mother and grandparent, primarily. *TR I, 33, 188, 203*

14. The special ed teacher member of the EDT understood the report and agreed with the assessment that Student did not qualify. Based upon the scores, she believed that Student required special assistance in the primary areas she is struggling with which could be delivered in the regular classroom setting. *Exh, 2, p. 22; TR I, 160, 165, 168*

15. After a review of the educational diagnostician's report, the EDT determined that Student was not eligible for special education services under the category SLD (Specific Learning Disability). SLD was the only eligibility category considered by the team. *[The detailed summary of Student's strengths and weaknesses according to testing results using a standard battery of tests are enumerated in Exhibit 1, p. 6] Exh., 1, p. 8; TR I, 31-33, 162-165, 188*

16. Concerns about Student's classroom behaviors were articulated at the EDT meeting and tabled. Based upon the evaluation and Student's record, the team determined that these behaviors did not point to an emotional disturbance, *per se*. The EDT did not consider ED in the context of an IDEA disability at this meeting. The team recommended a psychological evaluation to address these concerns. *Exh 2; TR II, 146, 148*

17. The EDT discussed dyslexia at the meeting, relying on representations by the diagnostician that dyslexia was considered as part of her evaluation and was specifically ruled out for this student. *TR I, 53, 261*

18. Diagnostic testing for dyslexia is integrated in other SLD testing; there is no specific test for dyslexia required by NMPED. There was nothing in the standardized testing that indicated Student was displaying characteristics of dyslexia. *TR II, 134-136*

19. With respect to the NMPED form used by the EDT to determine SLD eligibility, all elements relating to the dual discrepancy model were reviewed by the EDT. For purposes of the evaluation, the same battery of standardized tests are used to determine dual discrepancy and severe discrepancy. Student did not meet the dual discrepancy criteria for eligibility. *Exh 1, p. 10-11, Exh 2, p. 27; TR III, 138-141*



20. There was some confusion by witnesses over the forms and process used by the LEA to document the consideration of dyslexia as part of SLD. *Exh.1, pp. 10-15; TR I, 69-70, 130, 140, 170-171, 184-185, 199-201, 260-261, 262-264*

21. The EDT discussed and recommended providing additional supports to Student through the SAT process, as well as the psychological evaluation of Student. *Exhs I, p. 9; TR I, 178*

22. The evaluator made several recommendations for reading interventions for Student, many of which were being implemented by Student's 3<sup>rd</sup> grade teacher at the time of the hearing. *Exh 2, p. 25; TR II, 234-235*

23. District did not provide Parent with the required PWN (Prior Written Notice) form used specifically for that purpose because the information (namely the reasons why Student did not qualify for special education under SLD eligibility) was provided on other forms. *Exh 1, p. 9; TR I, 137-138*

24. When the reading tests and questions were read aloud to Student in 2<sup>nd</sup> grade, she scored in the 20<sup>th</sup> to 40<sup>th</sup> percentile. When Student was required to read independently at the beginning of 3<sup>rd</sup> grade (2011-2012 school year), her overall reading scores were at the 4<sup>th</sup> percentile. Student's present teacher testified that a drop in percentile score was normal for students who transitioned from 2<sup>nd</sup> grade to 3<sup>rd</sup> grade. *Exh 31, pp. 10-11; TR I, 230-231, TR II, 230*

25. Student's 2<sup>nd</sup> grade teacher testified Student experienced significant academic growth as demonstrated in the MAPS testing (administered three times a year) and DRA scores. She received interventions. This teacher did not believe Student required special education. *TR*

*II, 179-183*

26. Student had been receiving differentiated instruction in reading along with other Tier I academic strategies throughout the statutory period in question. She also received Tier I and Tier II interventions for behavior. *Exh 2, pp. 2-3, Exh 9; TR I, 42-43*

27. Student demonstrated behavior problems at school since first grade and often complained of bullying. *Exh. 2, p. 13, Exhs. 7, 10, 11, 12, 14, 15,, 16, 17, 18, 20 , 21, 23; TR I, 49, 87-88, 236-237, 283-284; TR III, 39-53, 77, 93-94, 101*

28. Student visited the nurse's office 85 times during 2<sup>nd</sup> grade for minor complaints, usually during lunch or other unstructured time, and was sent home on a frequent basis. *Exh. 37; TR III, 5-16*

29. When Dr. K observed Student in the classroom for purposes of the evaluation (performed over a period of three hours on three different occasions) she noted numerous inappropriate classroom behaviors. While Student complains of bullying, she is often the instigator. *Exh. 2, pp 10-13, Exh 17; TR II, 33-45*

30. Behavior was not a big enough issue to warrant a referral by the 2<sup>nd</sup> grade teacher. Student's 3<sup>rd</sup> grade teacher reports there were no behavior problems to date. There were no discipline reports in the 2011-2012 school year to date. *TR I, 87-89, 115, TR II, 200, 224*

31. Parent expressed concerns about Student's behaviors consistently and repeatedly throughout Student's school experience. *TR III, 83-84, 86*

32. As a result of differentiated instruction, Student did not have access to the same science and social studies curriculum that students in higher level reading groups had. *TR II, 221*

33. Student scores at or above “making progress” levels on state standard-based assessments. Student’s scores were compared to her grade level peers in the LEA. *Exh 2; TR II, 166-168*

34. Teachers utilize differentiated teaching methods to address Student’s weaknesses, modifying assignments and accommodating educational needs. Teachers uniformly testified that these methods are sufficient to address Student’s needs. *Record as a whole*

35. According to her teachers, Student is making academic progress in all areas of her general education and is performing on average in the 3rd grade to date. *Exh 2, p. 27; Exh 31, pp. 10-11; TR I, 54, 63-64, 74, 230-232*

36. District’s position as testified to by District’s witnesses was that Student was making progress in reading (based on the diagnostician’s evaluation and teacher reports), even though Student’s percentile scores were decreasing. This testimony was uncontroverted. *Exh. 31, p. 11; TR I, 230-234*

37. In the opinion of the principal, not every student who doesn’t read at grade level should qualify for special education services. *TR I, 106*

38. Additional services are provided to all students who have a SAT folder or an Academic Improvement Plan under Tier II (e.g., after school tutoring, differentiated instruction, small groups, intervention time with added personnel). Tier I and Tier II interventions are provided on a case-by-case basis in the regular classroom for students who struggle with reading, even outside of a SAT referral. *TR I, 113-114, 120, TR II, 204-205, 212, 226-227, TR III, 160-164*

39. Student was disenrolled by her elementary school in May, 2011, only after

Parent informed District she was in the process of enrolling Student in another elementary school in the LEA. *Exh 2, p. 5*

40. An additional 25 days of school during the summer of 2011 was offered to Student under a K-3 Plus Grant at the school and was declined by Parent. *TR I, 113-114, 120*

41. Student had not been referred to the SAT process at the time of the hearing. *TR II, 242*

42. Parent requested that Student's behavior be evaluated in a letter written to the diagnostician on June 15<sup>th</sup>. According to the diagnostician, a psychological evaluation requires six weeks of observation over several environments. *Exh 3; TR I, 190*

43. District's position at the time of hearing was that it could not perform a psychological evaluation because of stay-put restrictions. The parties did not stipulate to a psychological evaluation prior to the hearing. District stipulated at the hearing that they would proceed with a psychological evaluation once stay-put conditions were lifted. *TR I, 13, 16, TR III, 113-114*

### CONCLUSIONS OF LAW

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

2. All procedural safeguards required by IDEA and its 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 under IDEA. *Schaffer 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 August 16, 2009. 34 CFR §300.507, 300.511(f)(2006); NMAC 6.31.2.13(I)(19)(b)

6. The DPHO does not have jurisdiction over SAT procedures. NMAC 6.31.2.7(A)(15); NMAC 6.29.1.9(D); *The Student Assistance Team (SAT) and the Three-Tier Model of Student Intervention*, NMPED revised Fall, 2009

7. District has not violated its Child Find responsibilities by failure to evaluate in all suspected areas of disability prior to the spring of 2011.

8. SLD was the only eligibility considered by District, with Parent assent.

9. Parent had sufficient notice of District's eligibility determination. There was not a denial of FAPE due to inadequacies in the PWN.

10. The use of a third party provider to shadow Student in 1st grade was at Parent discretion and not an obligation of District.

11. LEAs are responsible for determining methodology.

12. The EDT, which includes parents, is the sole determinant of whether a child is eligible under IDEA, and not parents alone.

13. Under IDEA, any identified disability must have a deleterious effect on the student's academic performance in order to qualify a student for special education services. Student's testing did not demonstrate a deleterious effect depriving Student of educational

benefit; Parent has not proved otherwise. *NMAC 6.31.2.13(I)(21)(b)*

14. District's method of discipline was applied to all children in regular education classes and was not used as a substitute for a FBA/BIP in Student's case.

15. Not every child who is struggling in school is IDEA eligible. A disability must first be identified as the contributing factor.

16. Parent has failed to prove by a preponderance of evidence that Student was denied FAPE.

## **DISCUSSION**

### **EVALUATION/ DETERMINATION OF ELIGIBILITY**

Only a group of qualified professionals, along with the parent, may determine whether an individual student has a disability and whether that disability has a negative impact on a student's academic performance. *Marshall Joint School Dist. v. C.D.*, 616 F.3d 632, 54 IDELR 307 (7<sup>th</sup> Cir. 2010) [*"But a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local educational agency."*]. 34 CFR §§300.306, 300.308 (2006)

#### ***Dyslexia***

The New Mexico regulation which became effective July 29, 2011 (three days following the EDT meeting) defines dyslexia as "*a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristics typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of*

*effective classroom instruction...*” NMAC 6.31.2.7(B)(6) Previous state regulations did not have a definition for dyslexia, specifically.

Dyslexia is covered under SLD in IDEA. 20 U.S.C. § 1401(30)(B). 34 CFR §300.8(c)(10) defines SLD as follows: “(I) *General: Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write spell, or to do mathematical calculations including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia...*” The foregoing is the definition that the EDT considered in its disqualification of Student for special education services. Parent did not show how the result would have been altered had the definition in the State’s new regulations been used instead. Testimony supported District’s position that dyslexia was considered by the EDT and ruled out.

***Behavior***

District did not believe behavior was that big a problem and did not consider Student’s behavior to be a suspected area of disability. Parent’s specific, definitive request for a behavior evaluation did not occur until later in the evaluation process, after the parties agreed late spring in the 2010-2011 school year to focus initially on academic concerns. This request occurred too late in the school year to effect prior to the commencement of the 2011-2012 school year.

It is clear from the record that the child has behavior problems which have persisted throughout her school career. Having trouble in school with peers does not necessarily equate to an IDEA disability requiring special education. Neither does inappropriate behaviors. The least restrictive environment should be a consideration for all students, not just those identified as

IDEA eligible. Certainly RTI and SAT interventions honor this principle and should be encouraged. District has committed to conducting a psychological evaluation apart from this decision.

***Specific Learning Disability***

The Eligibility Determination Team (EDT) came to the conclusion that Student does not qualify for special education services under the category SLD. This decision was based upon an extensive evaluation involving over three hours of classroom observation and over five hours of actual testing, utilizing numerous standardized tests and performed by a qualified educational diagnostician. Parent at no time requested an Independent Educational Evaluation (IEE). The testimony was uniform (albeit from school personnel) that Student was performing at or above grade level in most areas and that if there were deficiencies, Student's RTI/SAT Tier I interventions and/or Tier II interventions were sufficient to meet her educational needs. Student's behaviors (again as witnessed by school personnel) did not rise to the level of requiring a FBA/BIP or to the level of an ED disability.

There is no evidence in the record which contradicts the results reached by the EDT and diagnostician apart from Parent statements. Parents do not diagnose, they alone do not make the eligibility determination, nor do they dictate the avenues deemed necessary to address academic deficiencies. Determinations of eligibility are made by the EDT acting as a team which includes parents.

Parent failed to provide any proof that adhered to the legal requirements of IDEA. Under IDEA a claim must show: observation of relevant behavior and the relationship of that behavior to a student's academic functioning; observation of the student in the learning environment;



whether a student does not achieve adequately for his/her age or fails to meet state-approved grade-level standards; whether a student has not made sufficient progress to meet age or state-approved grade-level standards; and what instructional strategies have been used with the student. *34 CFR §300.311 (2006)*. Parent failed to meet her burden of proof with respect to her claim that Student has a SLD, including dyslexia.

### **LEA FORMS**

The forms which the EDT team completed on July 26, 2011 did not direct the team to consider whether the student had dyslexia specifically, nor did it define the characteristics for identification of student with dyslexia. This led to confusion among EDT members as to how dyslexia is actually diagnosed.<sup>2</sup> Participants at the EDT did, however, discuss dyslexia and relied upon explanation by the diagnostician for excluding it. This was not improper procedure.

### **PWN**

Parents had the opportunity to review Dr. K's evaluation prior to the EDT meeting and results were explained to them in detail at that meeting. Student was not denied FAPE as a result of procedural defects in District's PWN to Parent. "In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child's right to a FAPE; (ii) significantly impeded the parents' opportunity to

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<sup>2</sup> For example, the special education teacher did not know how the LEA determines dyslexia, "I do not know how an actual diagnosis of dyslexia is made." Other members of the EDT team did not know how to determine if Student was dyslexic: District's Director of Compliance & Accountability did not know the standards for determining whether a student is dyslexic, she had never attended an EDT where dyslexia was discussed. *Exh. 1 , pp. 10-15; TR I, 130, 161, 184-185, 199-201, 263-264*

participate in the decision-making process regarding the provision of a FAPE to the student; or (iii) caused a deprivation of educational benefits.” *NMAC 6.31.2.13(I)(21)(b)* The procedural oversight did not rise to the level of a denial of FAPE.

### **RTI/SAT PROCESS**

State regulations specifically mandate the three-tier model of student intervention “as a proactive system for early intervention for students who demonstrate a need for educational support for learning.” *NMAC 6.31.2.10(B)* For Tier II (which encompasses the SAT process): “*When it is determined that a student has an obvious disability or a serious and urgent problem, the SAT shall address the student’s needs promptly on an individualized basis which may include a referral for a multidisciplinary evaluation to determine possible eligibility for special education and related services consistent with the requirements of 34 CFR Sec. 300.300.*” *NMAC 6.29.9.1(D)(2)* District has conformed to this directive throughout Student’s schooling. Parent has failed to prove by a preponderance of evidence that District has ignored its responsibility with respect this student.

### **OTHER ISSUES**

All other issues raised in the request for due process are covered in the Findings of Fact and Conclusions of Law, above.

### **ORDER**

WHEREFORE IT IS HEREBY ORDERED THAT the Request for Due Process filed herein on August 26, 2011 is dismissed with prejudice.

Muriel McClelland  
Due Process Hearing Officer

**CERTIFICATE OF SERVICE**

I hereby certify that I emailed on November 6, 2011 and mailed by US mail on November 8, 2011 a copy of the foregoing Decision to the following persons:

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