

The Commonwealth of Massachusetts

Executive Office of Health & Human Services
Department of Developmental Services
500 Harrison Avenue
Boston, MA 02118

Deval L. Patrick
Governor
Timothy P. Murray
Lieutenant Governor

JudyAnn Bigby, M.D. Secretary

Elin M. Howe Commissioner

Area Code (617) 727-5608 TTY: (617) 624-7590

2010

MA

Re: Appeal of

- Final Decision

Dear

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your eligibility determination.

The hearing officer made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DDS regulations. Your appeal is therefore DENIED.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with Massachusetts General Laws, Chapter 30A. The regulations governing the appeal process are 115 CMR 6.30-6.34 and 801 CMR 1.01-1.04.

Sincerely,

Elin M. Howe Commissioner

EMH/ecw

cc:

Jeanne Adamo, Hearing Officer

Richard O'Meara, Regional Director Marianne Meacham, General Counsel

Elizabeth Duffy, Assistant General Counsel

Elizabeth Moran Liuzzo, Regional Eligibility Manager

Frederick Johnson, Psychologist

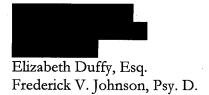
File

COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF DEVELOPMENTAL SERVICES

In Re: Appeal of

This decision is issued pursuant to the regulations of the Department of Developmental
Services 115CMR 6.30 – 6.34 (formerly known as Department of Mental Retardation,
hereinafter referred to as "DDS" or "Department") and M.G.L. c. 30A. A fair hearing was
held on 2010 at the Department's in
Massachusetts

Those present at the hearing were:



Appellant
Mother of the Appellant
Case Manager
Counsel for DDS
Licensed Psychologist

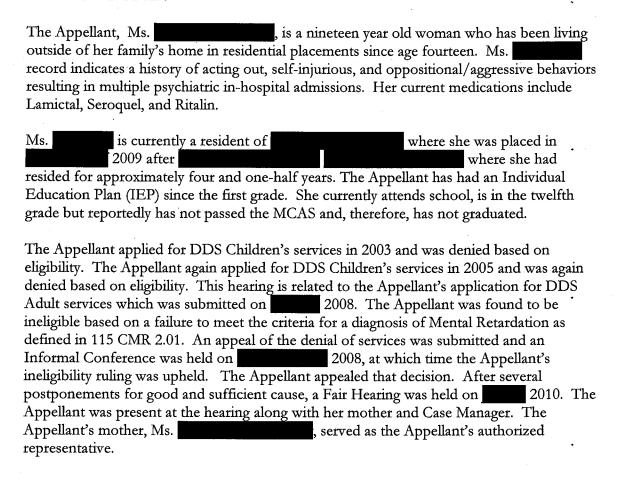
The Fair Hearing proceeded under the informal rules concerning evidence with approximately three and one-half hours of testimony presented. The Appellant's evidence consists of three exhibits jointly submitted with the Department and sworn oral testimony from the Appellant, the Appellant's mother, and the Appellant's Case Manager. The evidence presented on behalf of the Department consists of twenty-one exhibits and sworn oral testimony from the Department's Licensed Psychologist.

At the close of the fair hearing, the Department requested and was granted additional time to submit a closing argument to the Hearing Officer. The record was closed on 2010.

ISSUE PRESENTED:

Whether the Appellant is eligible for DDS services by reason of Mental Retardation as defined in 115 CMR 6.04(1)

BACKGROUND:



SUMMARY OF THE EVIDENCE PRESENTED:

EXHIBITS:

The Department submitted twenty-one exhibits, three of which were submitted jointly with the Appellant. The following exhibits were accepted into evidence:

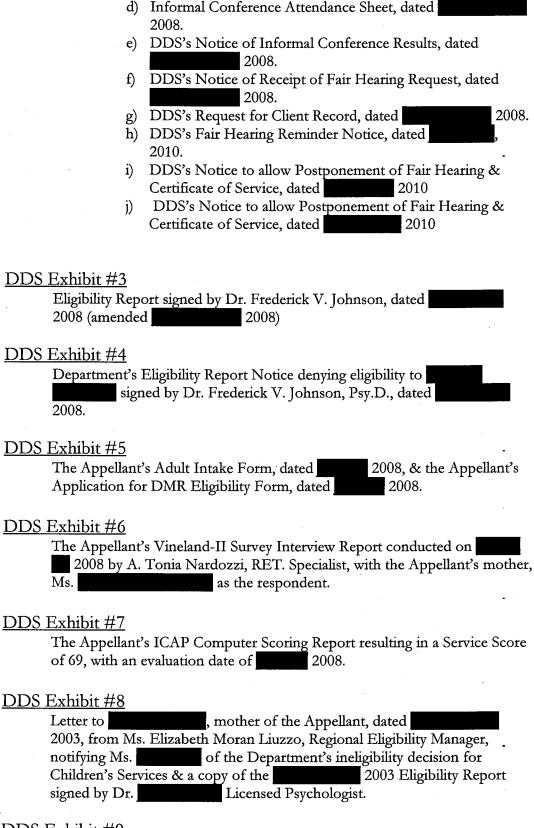
DDS Exhibit #1

Excerpts from 115 CMR 6.04 General Eligibility Excerpts from 115 CMR 2.01 Definitions

DDS Exhibit #2

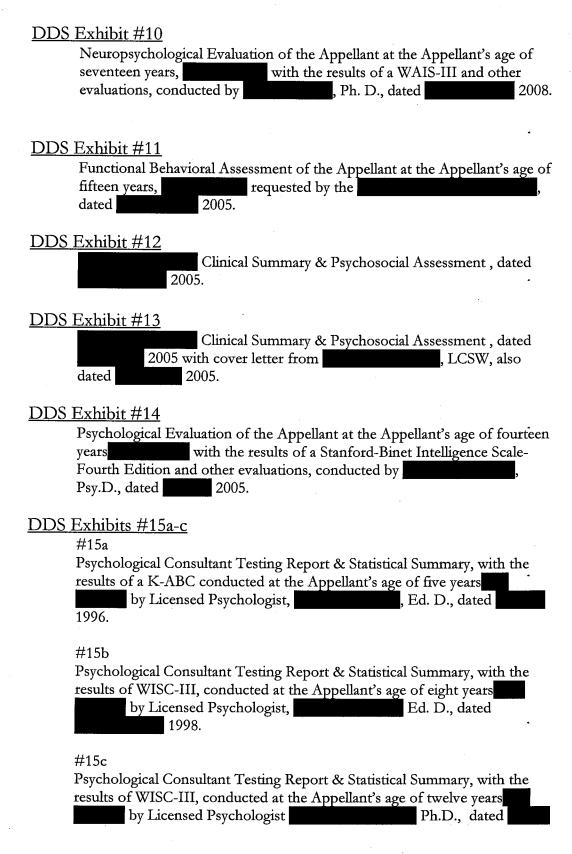
Correspondence RE: Eligibility Appeal

- a) DDS's denial of eligibility, dated 2008
- b) Appellant's request for an Informal Conference, dated 2008
- c) DDS's Notice of Informal Conference, dated 2008.

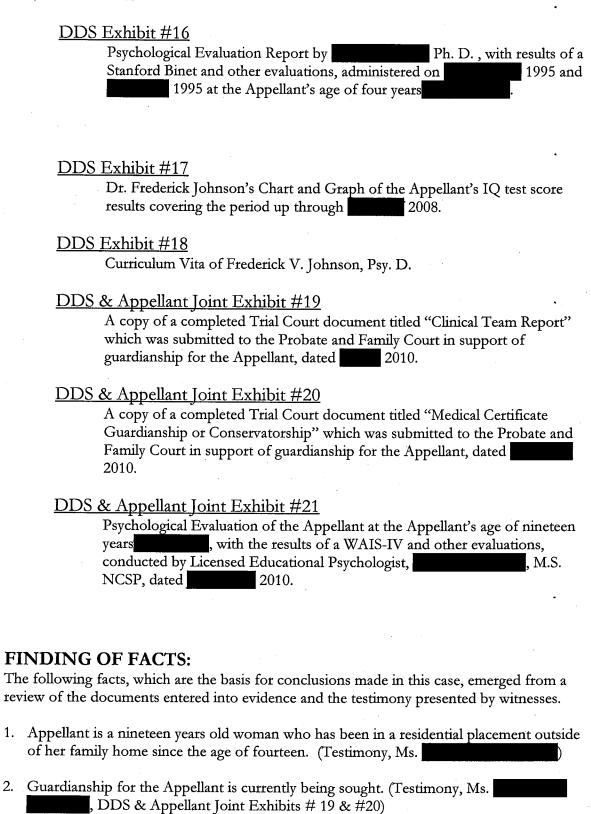


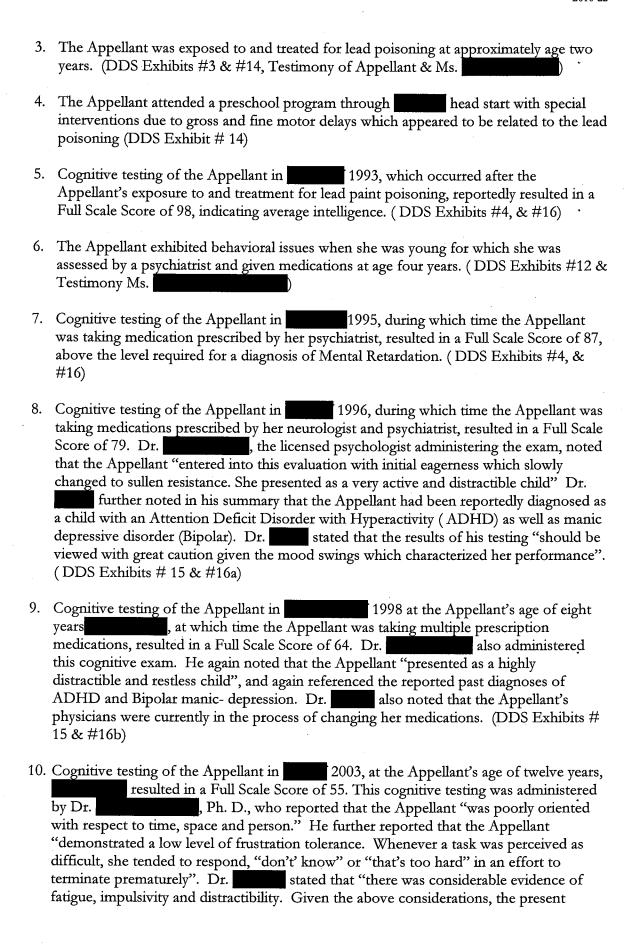
DDS Exhibit #9

Copy of the Appellant's Social Security Card, Birth Certificate and Mass Health Insurance Card.



2003.





intelligence results should be viewed as minimal estimates of intellectual potential." (DDS Exhibits # 15 & #16c) 11. The Appellant applied for DMR Children's Services in 2003 and was denied based on eligibility. (DDS Exhibits # 3 & #8) , Ph.D., the licensed psychologist who evaluated the Appellant's application for DDS Children's Services in 2003 stated the following in his report: "from the comments on her I.E.P., it would seem that is capable of learning and developing at a normal pace, but that her psychiatric and behavioral problems are the primary factors impeding this." (DDS Exhibit #8) 13. The Appellant re-applied for DMR Children's Services in 2005 and was again found not eligible. (DDS Exhibit #3) 14. Cognitive testing of the Appellant in 2005, at the Appellant's age of fourteen resulted in a Full Scale Score of 60. This cognitive testing was administered by Dr. , Psy.D., who reported that the Appellant "was "functioning in the mentally deficient range of intelligence with a relative difference · between her verbal and non-verbal functioning." Dr. report also notes the following: "She has great difficulty concentrating and focusing on tasks, She is impulsive in her problem solving and tends to have trouble censoring her thinking" Dr. also states that the Appellant's "poor organization skills, weak word finding, poor impulse control, rigid thinking, and slow processing skills all interfere significantly with her cognitive processing and thus significantly impact her ability to learn at or near the level of her age-mates." Dr. further states that " also exhibits some maladaptive behaviors. She is stubborn and sullen, has temper tantrums, runs. away, exhibits anxiety and tics, is physically aggressive and swears inappropriately. These behaviors contribute to difficulty managing her at home and in school. These behaviors do not eliminate the possibility of mental retardation but do suggest that additional emotional issues impacting her behaviors and contributing to her difficulty in learning. Thus, there are significant signs and symptoms of mental retardation but in addition there are signs and symptoms of emotional issues contributing to her deficient adaptive functions." (DDS Exhibit # 14) Dr. reported the following Diagnostic Formulations in her report: Axis I: Attention Deficit Hyperactivity Disorder, 214.01 Post Traumatic Stress disorder, 309.81 Axis II: Mild Mental Retardation, 317 Paranoid Personality Features Axis III: Lead Poisoning, eczema Axis IV: Sever problems with primary support, educational issues (DDS Exhibit # 14) 15. The Appellant has experienced (DDS Exhibit #12) 16. The Appellant has a history of significant behavior problems with a history of . The Appellant has received psychiatric diagnoses that

Disorder NOS, (DDS Exhibits #8 & #10 & #11) 17. The Appellant's mental health difficulties have been treated in outpatient counseling both individually and as a family unit. The Appellant has also been treated on multiple occasions through inpatient psychiatric hospitalization. The Appellant's psychiatric hospitalizations include the following: (DDS Exhibits #11 and & #13) 18. The Appellant has allegedly been the victim of sexual abuse. (Testimony of the Appellant) 19. A Functional Behavioral Assessment conducted by "Behavioral Development & Educational Services LLC" in 2005 at the Appellant's age of fifteen years, reported that the Appellant's mother and the staff at the Appellant's residence at stated the following three main areas of concern: (1) Arguing/complaining, (2) Tantrums, and (3) Unsafe Behaviors. The unsafe behaviors included (DDS Exhibit #11) 20. Cognitive testing of the Appellant in 2008, at the Appellant's age of seventeen resulted in a Full Scale Score of 64. The Appellant was referred for testing "to address issues surrounding differential diagnosis, cognitive potential and preferential learning style, question of psychosis, and capacity to maintain intentional focus and tolerate frustrating circumstances." Dr. , Ph. D., conducted the neuropsychological evaluation and reported that the "results of the assessment reflect an individual who currently functions in the "mentally deficient" range but does not seem to have evidenced any significant deterioration in cognitive from her last evaluation in 2005." (DDS Exhibit # 10) 21. The Appellant has been placed in multiple residential settings since age fourteen including placements at the following specialized settings: where she currently resides. (DDS Exhibits # 10, #11, & Testimony of Appellant) 22. The is a 24 hour, 7 day per week with awake overnight staffing. (Testimony 23. The Appellant is reportedly adjusting to her latest residential placement at

however, she continues to struggle academically (Testimony

include: Psychotic Disorder NOS, Bipolar Disorder, ADHS, PDD, PTSD, & Mood

24.	The most recent cognitive evaluation of the Appellant was conducted by on 2010. (DDS & Appellant Joint Exhibit #21)
25.	Cognitive testing of the Appellant in 2010, at the Appellant's age of nineteen years resulted in a Full Scale Score of 80. The cognitive testing was a component of a Psychological Evaluation which was conducted by the cognitive assessment was administered by the cognitive assessment was adm
26.	Report that "contrary to the apparent designation of mild mental retardation, based upon previous testing conducted while attended the exhibits normative skill functioning with language processing and nonverbal reasoning. However, she exhibits substantial deficits with working memory and processing speed. It is conjectured that be exhibiting some deficits related to executive functioning which would impact both he academic and life functions." (DDS Exhibit #21)
27.	The WAIS-IV administered by M.S. NCSP as part of the 2010 Psychological Evaluation, resulted in a Full Scale IQ of 80. (Testimony Dr. Frederick Johnson)
28.	In order to be eligible for DDS adult services, Department regulations require the person to have significantly sub-average intellectual functioning manifesting before age 18 and existing concurrently and related to significant limitations in adaptive functioning. The specific regulations and definitions are found in 115 CMR 6.04 and 2.01 (DDS Exhibit #1 & Testimony Dr. Frederick Johnson).
	The Department has defined "significantly sub-average intellectual functioning" as an intelligence test score that is indicated by a score of 70 or below as determined from the findings of assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners. The regulations have both a cognitive and an adaptive functioning component; to meet the adaptive functioning component of the regulations a person must have "significant limitations in adaptive functioning" existing concurrently and related to the sub-average intellectual functioning. The regulations require that both

30. Dr. Frederick Johnson, DDS's Licensed Psychologist, is properly credentialed and qualified by licensure and experience in the field of Developmental Disabilities to assess

components must be present to be eligible for Department services. (Testimony Dr.-

Frederick Johnson)

and evaluate cognitive testing and adaptive testing results. (DDS Exhibit # 18)

- 31. Variability in IQ test scores is not typical of someone with Mental Retardation. (Testimony Dr. Frederick Johnson)
- 32. An individual who is tested for IQ using one of any of the professionally recognized and approved cognitive testing instruments, cannot score out of the range of Mental Retardation if he or she does not have the capacity to do so. A person must give the proper information or perform the requested task in order to obtain the IQ score, and a person cannot give information that he or she does not know. In contrast, a person can score lower for a variety of reasons for example: psychiatric difficulties, attention difficulties, fatigue, environmental distractions, poor motivation, poor rapport with the examiner, problems with medication, and any other situation that would impact on the person's ability to perform. (Testimony Dr. Frederick Johnson)
- 33. In assessing a person's application for DDS adult services, Dr. Johnson uses the Department's regulatory requirements and assesses eligibility primarily using comprehensive tests of intellectual functioning, as many as possible, along with adaptive behavior assessment results. Dr. Johnson also looks at documents related to psychiatric information that could mitigate his opinion about the score results. In addition, Dr. Johnson looks at achievement scores to see if they are consistent with the person's presentation in terms of the person's intellectual functioning on IQ tests. (Testimony Dr. Frederick Johnson)
- 34. Dr. Johnson reviewed all the documents submitted by the Appellant in support of eligibility and, on 2008, determined that the Appellant did not meet the Regulatory requirements for Adult Service eligibility. (DDS Exhibit #3)
- 35. Dr. Johnson testified that the latest cognitive evaluation confirms his opinion that the Appellant is not mentally retarded. And, after hearing all the evidence presented at the Fair Hearing, he had not changed his opinion that the Appellant is ineligible for DDS Adult Services. Dr. Johnson acknowledged that the Appellant does have deficits but stated that in his clinical opinion the Appellant does not meet the criteria for service eligibility from the Department. (Testimony Dr. Frederick Johnson)

RECOMMENDED DECISION:

After a thorough review of all of the evidence, I find that the Appellant has not shown by a preponderance of the evidence that she meets the DDS eligibility criteria. I find that the weight of the evidence shows that the Appellant does not meet the Department's definition of Mental Retardation and therefore is not mentally retarded as that term is used in statute and regulation for the determination of DDS supports as defined in 115 CMR 2.01. My reasons are as follows:

REGULATORY REQUIREMENTS:

Massachusetts General Law c. 123B, section 1, defines a mentally retarded person as "a person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department, is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." In accordance with statutory and regulatory authority, the Department has promulgated regulations both defining Mental Retardation (Exhibit #3) and setting regulatory standards by which an individual may be determined eligible for DDS services (Exhibit #2).

In order to be eligible for DDS supports, an individual who is 18 year of age or older must meet the criteria for general eligibility requirements set forth at 115 CMR 6.04 & the definitions set forth at 115 CMR 2.01 as follows:

The General Eligibility requirements for services from the Department of Developmental Services (DDS) are found in 115 CMR 6.04 where it states the following: "persons who are 18 years of age or older are eligible for supports provided, purchased, or arranged by the Department if the person:

- a) Is domiciled in the Commonwealth; and
- b) Is a person with Mental Retardation as defined in 115 CMR 2.01"

The Department's definition of "Mental Retardation" found in 115 CMR 2.01 with its incorporated definition of "significantly sub-average intellectual functioning" and "significant limitations in adaptive functioning" is stated as follows:

"Mental retardation means significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18."

The Department's definition of "significantly sub-average intellectual functioning" found in 115 CMR 2.01 is stated as follows:

"...an intelligence test score that is indicated by a score of 70 or below as determined from the findings of assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners."

And, the Department's definition of "significant limitation in adaptive functioning" found in 115 CMR 2.01 requires a test score of 70 to meet the requirement of two standard deviations below the mean or a test score of 77 to meet the requirement 1.5 standard deviations below the mean, and is stated as follows:

- "...an overall composite adaptive functioning limitation that is two standard deviations below the mean or adaptive functioning limitations in two out of three domains at 1.5 standard deviations below the mean of the appropriate norming sample determined from the findings of assessment using a comprehensive, standardized measure of adaptive behavior, interpreted by a qualified practitioner. The domains of adaptive functioning that are assessed shall be
 - a) areas of independent living/practical skills;
 - b) cognitive, communication, and academic/conceptual skills; and

c) social competence/social skills."

FINDINGS and CONCLUSIONS:

- O The Appellant has met the domicile requirement for eligibility. The issue in question is whether the Appellant has met her burden of proving by a preponderance of the evidence that she is a person with Mental Retardation as that term us used and defined by the Department of Developmental Services.
- O There are several components that must be met for a diagnosis of Mental Retardation by the Department:
 - 1. The onset of Mental Retardation must occur during the developmental period.
 - 2. The diagnosis of Mental Retardation must be determined by qualified psychologists using valid and comprehensive IQ tests that are administered properly in accordance with professional standards.
 - 3. The valid and comprehensive IQ tests must established a diagnosis of Mental Retardation by a Full Scale IQ (FSIQ) of 70 (the level of Mild Mental Retardation) or below.
 - 4. Significant limitations in adaptive functioning related to Mental Retardation must be present and established by valid tests administered in accordance with Department standards.
 - 5. A determination must be made by qualified psychologists that cognitive or adaptive behavior deficits are not due to psychiatric illness or other causes unrelated to Mental Retardation.
- O The qualifications of the professionals who conducted the cognitive tests in evidence are not in question, and the IQ testing instruments used were valid tests, administered properly in accordance with professional standards. The time of onset within the developmental period is also not an issue in this appeal.
- O The presence of significant limitations in adaptive functioning is not in question as the Department has acknowledged that the Appellant has limitations in adaptive functioning; the Appellant's adaptive functioning test score from the Vineland II survey report resulted in an overall Adaptive Behavior Composite Score of 63, a score within the regulatory criteria for DDS eligibility. (DDS Exhibit #6)
- The question before us is the level of the Appellant's cognitive deficit, specifically if the Appellant is diagnosed with Mild Mental Retardation which must be established by FSIQ at or below 70 that is not the result of psychiatric illness or other causes unrelated to Mental Retardation.

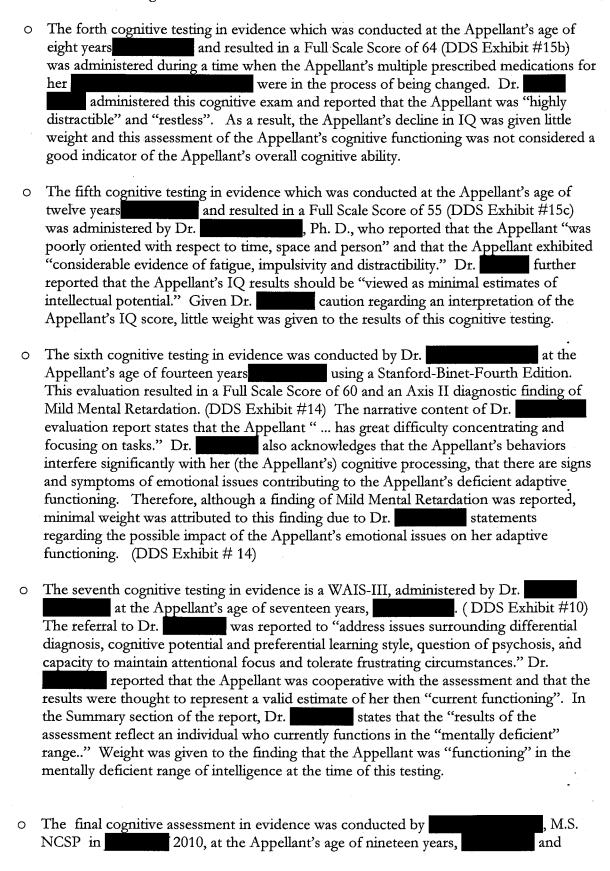
36. The following cognitive assessments are in evidence:

EXHIBIT	AGE	DATE	TEST	SCORE
DDS# 16	2 yrs	1993	Stanford Binet	Full Scale 98
DDS# 16	4 yrs	1995	Stanford Binet	Full Scale 87
DDS# 15a	5 yrs	1996	K-ABC	Full Scale 79
DDS# 15b	8 yrs	1998	WISC- III	Full Scale 64
DDS# 15c	12 yrs	2003	WISC- III	Full Scale 55
DDS# 14	14 yrs	2005	Stanford Binet	Full Scale 60
DDS# 10	17 yrs	2008	WAIS- III	Full Scale 64
DDS# 21	19 yrs	2010	WAIS- IV	Full Scale 80 ¹

- O Given that the Appellant has been diagnosed with disorders including, ADHD, Post-traumatic Stress Disorder, that can cause difficulties with maintaining attention, as well as diagnoses of possible psychiatric disorders that can also mitigate the results of cognitive testing, careful attention was given to the narrative report sections of each cognitive assessment so as to fully assess the Appellant's level of cooperation at the time of testing and to weigh the extent of the Appellant's ability to focus at the time of the testing.
- The first cognitive testing reportedly conducted at the Appellant's age of two years, using a Stanford Binet (DDS Exhibit #16) is significant in that it indicates that the Appellant was able to score within the normal range of intelligence after exposure to and treatment of lead poisoning.
- The second cognitive testing in evidence also using a Stanford Binet was conducted at the Appellant's age of four years, and resulted in a Full Scale Score of 87. (DDS Exhibit #16) A Full Scale IQ of 87 falls outside the range required for a diagnosis of Mental Retardation. Additionally, the Stanford Binet was reportedly administered at a time when the Appellant was taking prescribed medication for behavioral issues. The decline in the cognitive test result from the previously reported Full Scale IQ was therefore consider to be possibly influenced by the medication taken at the time of testing.
- The third cognitive testing in evidence which was conducted at the Appellant's age of five years and resulted in a Full Scale Score of 79 (DDS Exhibit #15a) was again administered at a time when the Appellant was taking prescribed medication for behavioral issues. Dr. the licensed psychologist administering the exam, noted that the Appellant's cooperation faded into a "sullen resistance" and that the Appellant presented as "a very active and distractible child". Dr. stated that the results of his testing should be viewed with "great caution" given the mood swings which characterized the Appellant's performance. Thus, little weight was given to the

¹ The determination of a Full Scale of 80 was calculated by Dr. Frederick Johnson using scores of the WAIS-IV Index data results.

results of this cognitive assessment.



resulted in a Full Scale Score of 80. (DDS Exhibit #21) This testing was not available to the Department at the time that the initial finding of ineligibility was made. However, it does affirm the Department's assessment that the Appellant is capable of functioning above the range of intelligence necessary for a diagnosis of Mental Retardation. The Appellant's Verbal Comprehension Index (VCI) which is a measure of verbal concept formation, verbal reasoning, and knowledge obtained from one's environment, fell within the average range, and the Appellant's Perceptual Reasoning Index (PRI) which is a measure of perceptual and fluid reasoning, spatial processing, and visual motor integrations, similarly fell within the average range. (DDS Exhibit #21) Based on the reported Index Scores within this evaluation, Dr. Frederick Johnson calculated a Full Scale IQ score to fall at 80. Additionally, , the Licensed Psychologist conducting the evaluation, reported that "contrary to the apparent designation of mild attended the mental retardation, based upon previous testing conducted while the results of present testing indicates that exhibits normative skill functioning with language processing and nonverbal reasoning." (DDS Exhibit #21) The greatest weight was given to the results of this evaluation.

- After considering all the evidence in this matter, I found that the Department's assessment that the Appellant's overall cognitive functioning falls above the level of cognition necessary for a diagnosis of Mental Retardation, to be, more likely than not, a correct assessment of the Appellant's cognitive capability. I have come to this finding for the following reasons:
 - 1. A person cannot score out of the range of Mental Retardation on approved cognitive tests if that person does not have the capacity to do so; a person must give the proper information or perform the requested task in order to obtain credit on cognitive tests. A person may perform poorer on a test due to multiple reasons, but cannot perform better than his or her ability. The Appellant scored an 80 in her most recent cognitive assessment, above the level required for a diagnosis of Mental Retardation; this would not be possible if the Appellant did not have the cognitive capacity to do so. (DDS Exhibit #21)
 - 2. There exists adequate evidence to determine that the Appellant's psychiatric disorders and possibly the Appellant's medications, more likely than not, negatively impacted the other cognitive tests where the Appellant's scores fell below a FSIQ of 70.

In summary, upon a comprehensive review of the oral testimony and documentary evidence submitted in this matter, I find that the preponderance of the evidence supports the Department's interpretation that the Appellant's psychiatric and behavioral disorders did mitigate the results of several cognitive tests and that the Appellant's overall cognitive ability falls above the range required for eligibility of DDS services. The Appellant's multiple cognitive assessment results while indicating that the Appellant was functioning at the cognitively lower levels indicated in each report, are not, in this case, verification of the presence of Mental Retardation. The evidence indicates that the Appellant's behavioral and psychiatric issues impacted upon her ability to adequately

focus at the time that several assessment were conducted. The Department eligibility regulations require that a finding of DDS eligibility cannot be made without an overall cognitive ability in the range indicated by a valid FSIQ score of 70 or below. A valid FSIQ score is one obtained when the results are not mitigated by psychiatric illness or other causes unrelated to Mental Retardation. As the Appellant has not met the burden of proof in this matter, I cannot, and do not find for the Appellant. I further find that the evidence presented by DDS supports a finding that DDS followed established standards and procedures in considering the Appellant's eligibility. Therefore, DDS's determination of ineligibly is upheld.

A	n	n	T	A	T	
А	. 1-	r	\mathbf{E}	Α	Ш.	҈.

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L.c.30A [115CMR 6.34(5)]

Date:	<u> </u>	
	Jeanne Adamo	
	Hearing Officer	