2010-22

The Commonwealth of Massachusetts

Executive Office of Health & Human Services

Department of Developmental Services

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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 [redacted]

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 [redacted] 2010 at the Department's [redacted] in [redacted] Massachusetts.

Those present at the hearing were:

[redacted]	Appellant
	Mother of the Appellant
	Case Manager
Elizabeth Duffy, Esq.	Counsel for DDS
Frederick V. Johnson, Psy. D.	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 [redacted] 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:

The Appellant, Ms. [redacted], is a nineteen year old woman who has been living outside of her family's home in residential placements since age fourteen. Ms. [redacted] record indicates a history of acting out, self-injurious, and oppositional/aggressive behaviors resulting in multiple psychiatric in-hospital admissions. Her current medications include Lamictal, Seroquel, and Ritalin.

Ms. [redacted] is currently a resident of [redacted] where she was placed in [redacted] 2009 after [redacted] where she had resided for approximately four and one-half years. The Appellant has had an Individual Education Plan (IEP) since the first grade. She currently attends school, is in the twelfth grade but reportedly has not passed the MCAS and, therefore, has not graduated.

The Appellant applied for DDS Children's services in 2003 and was denied based on eligibility. The Appellant again applied for DDS Children's services in 2005 and was again denied based on eligibility. This hearing is related to the Appellant's application for DDS Adult services which was submitted on [redacted] 2008. The Appellant was found to be ineligible based on a failure to meet the criteria for a diagnosis of Mental Retardation as defined in 115 CMR 2.01. An appeal of the denial of services was submitted and an Informal Conference was held on [redacted] 2008, at which time the Appellant's ineligibility ruling was upheld. The Appellant appealed that decision. After several postponements for good and sufficient cause, a Fair Hearing was held on [redacted] 2010. The Appellant was present at the hearing along with her mother and Case Manager. The Appellant's mother, Ms. [redacted], served as the Appellant's authorized representative.

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 [redacted] 2008
b) Appellant's request for an Informal Conference, dated [redacted] 2008
c) DDS's Notice of Informal Conference, dated [redacted] 2008.

d) Informal Conference Attendance Sheet, dated [redacted] 2008.
e) DDS's Notice of Informal Conference Results, dated [redacted] 2008.
f) DDS's Notice of Receipt of Fair Hearing Request, dated [redacted] 2008.
g) DDS's Request for Client Record, dated [redacted] 2008.
h) DDS's Fair Hearing Reminder Notice, dated [redacted], 2010.
i) DDS's Notice to allow Postponement of Fair Hearing & Certificate of Service, dated [redacted] 2010
j) DDS's Notice to allow Postponement of Fair Hearing & Certificate of Service, dated [redacted] 2010

DDS Exhibit #3

Eligibility Report signed by Dr. Frederick V. Johnson, dated [redacted] 2008 (amended [redacted] 2008)

DDS Exhibit #4

Department's Eligibility Report Notice denying eligibility to [redacted] signed by Dr. Frederick V. Johnson, Psy.D., dated [redacted] 2008.

DDS Exhibit #5

The Appellant's Adult Intake Form, dated [redacted] 2008, & the Appellant's Application for DMR Eligibility Form, dated [redacted] 2008.

DDS Exhibit #6

The Appellant's Vineland-II Survey Interview Report conducted on [redacted] 2008 by A. Tonia Nardozzi, RET. Specialist, with the Appellant's mother, Ms. [redacted] as the respondent.

DDS Exhibit #7

The Appellant's ICAP Computer Scoring Report resulting in a Service Score of 69, with an evaluation date of [redacted] 2008.

DDS Exhibit #8

Letter to [redacted], mother of the Appellant, dated [redacted] 2003, from Ms. Elizabeth Moran Liuzzo, Regional Eligibility Manager, notifying Ms. [redacted] of the Department's ineligibility decision for Children's Services & a copy of the [redacted] 2003 Eligibility Report signed by Dr. [redacted] Licensed Psychologist.

DDS Exhibit #9

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

DDS Exhibit #10

Neuropsychological Evaluation of the Appellant at the Appellant's age of seventeen years, [redacted] with the results of a WAIS-III and other evaluations, conducted by [redacted], Ph. D., dated [redacted] 2008.

DDS Exhibit #11

Functional Behavioral Assessment of the Appellant at the Appellant's age of fifteen years, [redacted] requested by the [redacted], dated [redacted] 2005.

DDS Exhibit #12

[redacted] Clinical Summary & Psychosocial Assessment , dated [redacted] 2005.

DDS Exhibit #13

[redacted] Clinical Summary & Psychosocial Assessment , dated [redacted] 2005 with cover letter from [redacted], LCSW, also dated [redacted] 2005.

DDS Exhibit #14

Psychological Evaluation of the Appellant at the Appellant's age of fourteen years [redacted] with the results of a Stanford-Binet Intelligence Scale-Fourth Edition and other evaluations, conducted by [redacted], Psy.D., dated [redacted] 2005.

DDS Exhibits #15a-c

#15a

Psychological Consultant Testing Report & Statistical Summary, with the results of a K-ABC conducted at the Appellant's age of five years [redacted] by Licensed Psychologist, [redacted], Ed. D., dated [redacted] 1996.

#15b

Psychological Consultant Testing Report & Statistical Summary, with the results of WISC-III, conducted at the Appellant's age of eight years [redacted] by Licensed Psychologist, [redacted] Ed. D., dated [redacted] 1998.

#15c

Psychological Consultant Testing Report & Statistical Summary, with the results of WISC-III, conducted at the Appellant's age of twelve years [redacted] by Licensed Psychologist [redacted] Ph.D., dated [redacted]

2003.

DDS Exhibit #16

Psychological Evaluation Report by [redacted] Ph. D. , with results of a Stanford Binet and other evaluations, administered on [redacted] 1995 and [redacted] 1995 at the Appellant's age of four years [redacted].

DDS Exhibit #17

Dr. Frederick Johnson's Chart and Graph of the Appellant's IQ test score results covering the period up through [redacted] 2008.

DDS Exhibit #18

Curriculum Vita of Frederick V. Johnson, Psy. D.

DDS & Appellant Joint Exhibit #19

A copy of a completed Trial Court document titled "Clinical Team Report" which was submitted to the Probate and Family Court in support of guardianship for the Appellant, dated [redacted] 2010.

DDS & Appellant Joint Exhibit #20

A copy of a completed Trial Court document titled "Medical Certificate Guardianship or Conservatorship" which was submitted to the Probate and Family Court in support of guardianship for the Appellant, dated [redacted] 2010.

DDS & Appellant Joint Exhibit #21

Psychological Evaluation of the Appellant at the Appellant's age of nineteen years [redacted], with the results of a WAIS-IV and other evaluations, conducted by Licensed Educational Psychologist, [redacted], M.S. NCSP, dated [redacted] 2010.

FINDING OF FACTS:

The following facts, which are the basis for conclusions made in this case, emerged from a review of the documents entered into evidence and the testimony presented by witnesses.

1. Appellant is a nineteen years old woman who has been in a residential placement outside of her family home since the age of fourteen. (Testimony, Ms. [redacted])

2. Guardianship for the Appellant is currently being sought. (Testimony, Ms. [redacted], DDS & Appellant Joint Exhibits # 19 & #20)

3. The Appellant was exposed to and treated for lead poisoning at approximately age two years. (DDS Exhibits #3 & #14, Testimony of Appellant & Ms. [redacted])

4. The Appellant attended a preschool program through [redacted] head start with special interventions due to gross and fine motor delays which appeared to be related to the lead poisoning (DDS Exhibit # 14)

5. Cognitive testing of the Appellant in [redacted] 1993, which occurred after the Appellant's exposure to and treatment for lead paint poisoning, reportedly resulted in a Full Scale Score of 98, indicating average intelligence. (DDS Exhibits #4, & #16)

6. The Appellant exhibited behavioral issues when she was young for which she was assessed by a psychiatrist and given medications at age four years. (DDS Exhibits #12 & Testimony Ms. [redacted])

7. Cognitive testing of the Appellant in [redacted] 1995, during which time the Appellant was taking medication prescribed by her psychiatrist, resulted in a Full Scale Score of 87, above the level required for a diagnosis of Mental Retardation. (DDS Exhibits #4, & #16)

8. Cognitive testing of the Appellant in [redacted] 1996, during which time the Appellant was taking medications prescribed by her neurologist and psychiatrist, resulted in a Full Scale Score of 79. Dr. [redacted], the licensed psychologist administering the exam, noted that the Appellant "entered into this evaluation with initial eagerness which slowly changed to sullen resistance. She presented as a very active and distractible child" Dr. [redacted] further noted in his summary that the Appellant had been reportedly diagnosed as a child with an Attention Deficit Disorder with Hyperactivity (ADHD) as well as manic depressive disorder (Bipolar). Dr. [redacted] stated that the results of his testing "should be viewed with great caution given the mood swings which characterized her performance". (DDS Exhibits # 15 & #16a)

9. Cognitive testing of the Appellant in [redacted] 1998 at the Appellant's age of eight years [redacted], at which time the Appellant was taking multiple prescription medications, resulted in a Full Scale Score of 64. Dr. [redacted] also administered this cognitive exam. He again noted that the Appellant "presented as a highly distractible and restless child", and again referenced the reported past diagnoses of ADHD and Bipolar manic- depression. Dr. [redacted] also noted that the Appellant's physicians were currently in the process of changing her medications. (DDS Exhibits # 15 & #16b)

10. Cognitive testing of the Appellant in [redacted] 2003, at the Appellant's age of twelve years, [redacted] resulted in a Full Scale Score of 55. This cognitive testing was administered by Dr. [redacted], Ph. D., who reported that the Appellant "was poorly oriented with respect to time, space and person." He further reported that the Appellant "demonstrated a low level of frustration tolerance. Whenever a task was perceived as difficult, she tended to respond, "don't' know" or "that's too hard" in an effort to terminate prematurely". Dr. [redacted] stated that "there was considerable evidence of fatigue, impulsivity and distractibility. Given the above considerations, the present

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 [redacted] 2003 and was denied based on eligibility. (DDS Exhibits # 3 & #8)

12. Dr. [redacted], Ph.D., the licensed psychologist who evaluated the Appellant's application for DDS Children's Services in [redacted] 2003 stated the following in his report: "from the comments on her I.E.P., it would seem that [redacted] 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 [redacted] 2005, at the Appellant's age of fourteen years [redacted] resulted in a Full Scale Score of 60. This cognitive testing was administered by Dr. [redacted], 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. [redacted] 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. [redacted] 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. [redacted] further states that "[redacted] 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 [redacted] has 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. [redacted] 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 [redacted]. (DDS Exhibit #12)

16. The Appellant has a history of significant behavior problems with a history of [redacted]. The Appellant has received psychiatric diagnoses that

include: Psychotic Disorder NOS, Bipolar Disorder, ADHS, PDD, PTSD, & Mood 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: [redacted], [redacted], and [redacted] (DDS Exhibits #11 & #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 [redacted] 2005 at the Appellant's age of fifteen years, reported that the Appellant's mother and the staff at the Appellant's residence at [redacted] stated the following three main areas of concern: (1)Arguing/complaining, (2) Tantrums, and (3) Unsafe Behaviors. The unsafe behaviors included [redacted].(DDS Exhibit #11)

20. Cognitive testing of the Appellant in [redacted] 2008, at the Appellant's age of seventeen years, [redacted] 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. [redacted], 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: [redacted] where she currently resides. (DDS Exhibits # 10, #11, & Testimony of Appellant)

22. The [redacted] is a 24 hour, 7 day per week [redacted] with awake overnight staffing. (Testimony [redacted])

23. The Appellant is reportedly adjusting to her latest residential placement at [redacted], however, she continues to struggle academically (Testimony [redacted])

24. The most recent cognitive evaluation of the Appellant was conducted by [redacted] on [redacted] 2010. (DDS & Appellant Joint Exhibit #21)

25. Cognitive testing of the Appellant in [redacted] 2010, at the Appellant's age of nineteen years [redacted] resulted in a Full Scale Score of 80. The cognitive testing was a component of a Psychological Evaluation which was conducted by [redacted]; the cognitive assessment was administered by [redacted], M.S. NCSP on [redacted] 2010. [redacted] reported that 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. [redacted] also reported that 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)

26. [redacted], M.S. NCSP, stated in her [redacted] 2010 Psychological Evaluation Report that "contrary to the apparent designation of mild mental retardation, based upon previous testing conducted while [redacted] attended the [redacted], the results of present testing indicates that [redacted] 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 [redacted] may be exhibiting some deficits related to executive functioning which would impact both her academic and life functions." (DDS Exhibit #21)

27. The WAIS-IV administered by [redacted], M.S. NCSP as part of the [redacted] 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).

29. 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 components must be present to be eligible for Department services. (Testimony Dr. Frederick Johnson)

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

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 [redacted] 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:

- 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.

- 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.

- 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.

- 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]

- 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, [redacted] 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, [redacted] 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 [redacted] 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. [redacted], 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. [redacted] 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.

- The forth cognitive testing in evidence which was conducted at the Appellant's age of eight years [redacted] and resulted in a Full Scale Score of 64 (DDS Exhibit #15b) was administered during a time when the Appellant's multiple prescribed medications for her [redacted] were in the process of being changed. Dr. [redacted] administered this cognitive exam and reported that the Appellant was "highly distractible" and "restless". As a result, the Appellant's decline in IQ was given little weight and this assessment of the Appellant's cognitive functioning was not considered a good indicator of the Appellant's overall cognitive ability.

- The fifth cognitive testing in evidence which was conducted at the Appellant's age of twelve years [redacted] and resulted in a Full Scale Score of 55 (DDS Exhibit #15c) was administered by Dr. [redacted], Ph. D., who reported that the Appellant "was poorly oriented with respect to time, space and person" and that the Appellant exhibited "considerable evidence of fatigue, impulsivity and distractibility." Dr. [redacted] further reported that the Appellant's IQ results should be "viewed as minimal estimates of intellectual potential." Given Dr. [redacted] caution regarding an interpretation of the Appellant's IQ score, little weight was given to the results of this cognitive testing.

- The sixth cognitive testing in evidence was conducted by Dr. [redacted] at the Appellant's age of fourteen years [redacted] using a Stanford-Binet-Fourth Edition. This evaluation resulted in a Full Scale Score of 60 and an Axis II diagnostic finding of Mild Mental Retardation. (DDS Exhibit #14) The narrative content of Dr. [redacted] evaluation report states that the Appellant " ... has great difficulty concentrating and focusing on tasks." Dr. [redacted] also acknowledges that the Appellant's behaviors interfere significantly with her (the Appellant's) cognitive processing, that there are signs and symptoms of emotional issues contributing to the Appellant's deficient adaptive functioning. Therefore, although a finding of Mild Mental Retardation was reported, minimal weight was attributed to this finding due to Dr. [redacted] statements regarding the possible impact of the Appellant's emotional issues on her adaptive functioning. (DDS Exhibit # 14)

- The seventh cognitive testing in evidence is a WAIS-III, administered by Dr. [redacted] at the Appellant's age of seventeen years, [redacted]. (DDS Exhibit #10) The referral to Dr. [redacted] was reported to "address issues surrounding differential diagnosis, cognitive potential and preferential learning style, question of psychosis, and capacity to maintain attentional focus and tolerate frustrating circumstances." Dr. [redacted] reported that the Appellant was cooperative with the assessment and that the results were thought to represent a valid estimate of her then "current functioning". In the Summary section of the report, Dr. [redacted] states that the "results of the assessment reflect an individual who currently functions in the "mentally deficient" range.." Weight was given to the finding that the Appellant was "functioning" in the mentally deficient range of intelligence at the time of this testing.

- The final cognitive assessment in evidence was conducted by [redacted], M.S. NCSP in [redacted] 2010, at the Appellant's age of nineteen years, [redacted] and

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, [redacted], the Licensed Psychologist conducting the evaluation, reported that "contrary to the apparent designation of mild mental retardation, based upon previous testing conducted while [redacted] attended the [redacted], the results of present testing indicates that [redacted] 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.

APPEAL:

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:_____

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Jeanne Adamo
Hearing Officer