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 Executive Office of Health & Human Services  
 Department of Developmental Services  
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JudyAnn Bigby, M.D.  
 Secretary

Elin M. Howe  
 Commissioner

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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*  
 Elin M. Howe  
 Commissioner

EMH/ecw

cc: Marcia Hudgins, Hearing Officer  
 Richard O'Meara, Regional Director  
 Marianne Meacham, General Counsel  
 James Bergeron, 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 (DDS) (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on [REDACTED] 2009 and concluded on [REDACTED] 2010 at the DDS [REDACTED] Area Office in [REDACTED], Massachusetts. The hearing was continued for several months in order for the Appellant to obtain information relative to her intellectual functioning prior to age 18 and to have a second evaluation of her adaptive functioning completed. Those present for the all or part of the proceedings were:

[REDACTED]  
Bob Cheney

[REDACTED]  
Frederick V. Johnson, Ph.D.

Ann T. Nardozzi

James Bergeron

Appellant

Appellant's Advocate/DDS

Appellant's therapist [REDACTED]

DDS Psychologist

DDS Human Service Coordinator

Attorney for DDS

The evidence consists of joint documents submitted jointly by the Appellant and DDS numbered 1-26 and approximately four hours of testimony.

The Appellant offered no expert testimony.

**ISSUE PRESENTED**

Whether the Appellant meets the eligibility criteria for DDS supports by reason of mental retardation as set out in 115 CMR 6.04(1).

**SUMMARY OF THE EVIDENCE PRESENTED**

1. This Appeal is based on the Appellant's denial of eligibility for DDS services. (5, 9, 20)
2. The Appellant is a 52-year old woman who resides in [REDACTED], Massachusetts. (4)
3. The Appellant's State Approved Missouri Cumulative Record containing her IQ scores prior to age 18 was entered into evidence. (24)
4. Five evaluations of the Appellant's intellectual functioning after the age of 18 were entered into evidence. (13-17)

5. Two Adaptive Behavior Assessment System-Second Edition (ABAS-II) Adult Forms were entered into evidence. (18, 25)
6. An Eligibility Report was entered into evidence. (5)
7. A Curriculum Vita for Frederick V. Johnson, Psy.D. was entered into evidence. (1)
8. According to the Appellant's 7<sup>th</sup>-12<sup>th</sup> grade Cumulative Record, she (██████████ at that time) attended Special Education classes from grade 8 through 12. The record indicates that she graduated in 1977 when she was almost 20 years of age. The record states that when the Appellant was given the California Test of Mental Maturity at age 15, she received Language Quotient of 80, a Non-Language Quotient of 65 and an Intelligence Quotient of 71. The record also reports that on the Slosson Intelligence Test, the Appellant scored a 61. At age 18 years 4 months, the Appellant scored in the 2<sup>nd</sup> percentile overall on a school and college ability test. (24)

██████████ In 1983 when the Appellant was 25 years of age, she was evaluated by ██████████ ██████████ Ph.D. On this occasion, the Appellant was given the Wechsler Adult Intelligence Scale-Revised edition (WAIS-R). Dr. ██████████ observed that the Appellant was rather passive and has limited interests. He noted that she did not show any serious personality problems beyond the limits of her judgment imposed by her poor cognitive skills. He also pointed out based on her scores on the Wide Range Achievement Test; she has very limited academic skills. On the WAIS-R, the Appellant received a Verbal IQ score of 69, a Performance IQ score of 75 and a Full Scale IQ score of 71. Dr. ██████████ stated that the Appellant was functioning at a mildly retarded level. He also noted that her judgment and reasoning are very limited. (13)

██████████ In 1993 when the Appellant was 35 years of age, she was evaluated by ██████████ ██████████, Ph.D. On this occasion, the Appellant was given the WAIS-R. Dr. ██████████ noted that the Appellant suffers from anxiety and depression and is rather easily flustered. He also stated that her memory for distant events is extremely suspect. He pointed out that the Appellant did not appear to be hallucinated or delusional and did not present with symptoms of an acute psychosis. On this administration of the WAIS-R, the Appellant received a Verbal IQ score of 66, a Performance IQ score of 75 and a Full Scale IQ score of 69. According to Dr. ██████████, this score places the Appellant in the crease between mild mental retardation and borderline intellectual functioning. Dr. ██████████ felt that because of the Appellant was so tentative in her response to the WAIS-R, her IQ scores – particularly the Verbal IQ were skewed toward somewhat of a conservative estimate of her actual intelligence. Dr. ██████████ tested the Appellant using the Peabody Picture Vocabulary Test (PPVT) and concluded that her receptive vocabulary intelligence was around the borderline range of intellectual functioning and opined that this level is more accurate than the WAIS-R. He stated that the Appellant's academic achievement is around the borderline range at least in the areas of reading and spelling. Dr. ██████████'s Summary stated that the results of the Appellant's psychological evaluation most likely reflect an

individual who is probably not mentally retarded. In his opinion, the Appellant actual functional ability may be more severely impaired due to her emotional problems. He suggested that she would benefit from some type of case management supervision. (14)

11. In 1996 when the Appellant was 38 years of age [REDACTED], she was tested by [REDACTED] Ed.D. and [REDACTED], Ph.D., a Licensed Clinical Psychologist. On this occasion, the Appellant was given the WAIS-R. The report states that given the emotional interference experienced by the Appellant during the testing, the results of the test must be viewed as minimal estimates of her actual potential. The Appellant received a Verbal IQ score of 68, a Performance IQ score of 75 and a Full Scale IQ score of 70. The testers made the comment that the Appellant's scores are consistent with the previous evaluation. The report states that the results of the Appellant's projective testing are suggestive of extreme guardedness, defensiveness and limited resources for coping with stress. The testers conclude that the Appellant is struggling with feelings of low self-esteem around her cognitive limitations and learning delays. (15)

12. In 2002 when the Appellant was 44 years of age, she was evaluated by [REDACTED] M.Ed., a Licensed Psychologist. On this occasion, the Appellant was given the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). The report states that there were no indications of hallucinations or delusional thinking; however it was noted that the Appellant exhibited an anxious and somewhat agitated affect. The Appellant received a Verbal IQ score of 63, a Performance IQ score of 69 and a Full Scale IQ score of 63. The tester stated that the Appellant's performance on the WAIS-III appeared to superficially suggest a rather consistent pattern of functioning in the mildly mentally retarded range. He went on to state that the Appellant's responses on the various projective measures appear to suggest a relatively higher level of functioning than one might expect with someone with more significant mental retardation and appear to be consistent with previous hypotheses of functioning potentials at least into the borderline range and possibly higher. Mr. [REDACTED] opined that the deterioration from previous test scores may be the result of increased emotional factors in the Appellant's functioning, especially her level of anxiety and depression and accompanying avoidant behaviors. Mr. [REDACTED] believed that at the time of his evaluation, the Appellant was functioning as an individual who would be appropriate for services under DMR in that she required much structure, guidance and support. (16)

[REDACTED] In 2007 when the Appellant was 49 years of age, she was evaluated by [REDACTED] Ph.D. This evaluation was performed in conjunction with a hospitalization due to suicidal thoughts. Dr. [REDACTED] stated in his report that he gave the Appellant subtests from the WAIS as well as a number of other tests. On the WAIS, the Appellant earned a Verbal IQ score of 76, a Performance IQ score of 69 and a Full Scale IQ score of 71. The tester noted that the Appellant was unable to score on the Picture Arrangement subtest. Dr. [REDACTED] stated that the Appellant was cooperative at the time of the evaluation and that his findings indicate a borderline intellectual retardation. (17)

14. The Appellant's adaptive behavior was assessed on two occasions by Ann T. Nardozzi using the Adaptive Behavior Assessment System-Second Edition (ABAS-II).

The first time Ms. Nardozzi administered the ABAS-II to the Appellant was in [REDACTED] 2007. At that time, the Appellant was 50 years of age. On this administration of the ABAS-II, the Appellant received scaled scores ranging from a 3 in Social to a 12 in Health and Safety. Her General Composite Score (GAC) was 79. The 2<sup>nd</sup> time Ms. Nardozzi administered the ABAS-II was in [REDACTED] 2010 when the Appellant was 52 years of age. [REDACTED] participated in, and assisted the Appellant in the completion of this survey. On this administration of the ABAS-II, the Appellant received scaled scores ranging from a 3 in Social to an 8 in Community Use. Her scaled score on Health and Safety was a 7. Her GAC was 66. (18, 25)

15. Robert Cheney, a DDS employee appointed to act as the Appellant's advocate presented information and testified on her behalf. He also questioned Dr. Johnson, DDS's expert witness. Mr. Cheney was present at both the [REDACTED] 2009 and the [REDACTED] 2010 hearings. Mr. Cheney explained that the Appellant had difficulty with housekeeping and with organization as well as with transportation and managing her finances. He stated that throughout her formal education she had been in special education classes. He also stated that she had been diagnosed with mental retardation as well as with memory problems. He explained that the Appellant had no one to help her on a day to day basis although she does have cousins who would like to help. He noted that because she has difficulty managing her money, Family Services has provided her with a Representative Payee. At the 2<sup>nd</sup> hearing, the Appellant's educational record was offered as evidence of her mental retardation. Mr. Cheney noted that according to the Appellant's record, she obtained an IQ score of 71 on the California Test of Mental Maturity and an IQ score of 61 on the Slosson Intelligence Test. He stated that she graduated from high school at age 22 and was in mostly special education classes.<sup>1</sup> Mr. Cheney questioned the manner in which the 2<sup>nd</sup> ABAS-II was administered in that the Appellant was present during the administration and was given a number of prompts. Mr. Cheney pointed out that the Appellant had applied for DDS services on two previous occasions. He stated that she would not have known to request an advocate and was not able to obtain her educational records without the assistance of such an individual. (24, 25)

16. [REDACTED] testified on behalf of the Appellant and asked questions relative to the administration of the 2<sup>nd</sup> ABAS-II. Ms. [REDACTED] was present for both the [REDACTED] 2009 and the [REDACTED] 2010 hearings. She was the Appellant's therapist at the time of the 1<sup>st</sup> hearing, but at the second hearing was no longer acting in that capacity. Ms. [REDACTED] stated that she worked with the Appellant for two years around issues of depression. She stated that the Appellant had been diagnosed with mental retardation. She stated that the Appellant's depression is brought on by frustrations and the many challenges that she faces. Ms. [REDACTED] testified that transportation by bus is difficult for the Appellant and believes that the Appellant's intellectual disability interferes with her problem solving. She stated that the Appellant doesn't understand her medical issues and pointed out that the Appellant, who suffers from diabetes doesn't know what to do if she receives a high number when testing her blood sugars. This assertion was verified by the Appellant. Ms. [REDACTED] stated that she believes that the Appellant is at risk and is in need of case management. She stated

<sup>1</sup> According to the Appellant's Cumulative Record, she graduated from high school in [REDACTED] 1977 which would mean that she graduated at age 19 years [REDACTED]. (24)

that the Appellant's mental health issues have improved with therapy which is provided through MassHealth and noted that therapy is not case management. Ms. [REDACTED] testified that she believes that DDS is the appropriate agency to provide the Appellant with case management. Ms. [REDACTED] raised questions and concerns about the administration of the 2<sup>nd</sup> ABAS-II stating that both she and the Appellant were present when the questions were being posed and both gave answers to the questions. (25)

17. Ann Nardozi testified for DDS at the hearing in [REDACTED] 2010. She stated that she is a DDS Intake and Eligibility Specialist and has been in her position for 6-7 years. She testified that she has degrees in Elementary Education and Special Education. She stated that she had worked for DDS (formerly DMR) since 1980 and in her 23 years with the Department has completed between 800-1000 eligibility applications. She stated that the Appellant initiated the most current application process in [REDACTED] 2007. She went on to testify that she administered two ABAS-IIs to the Appellant as part of this process. Ms. Nardozi testified that the 1<sup>st</sup> ABAS-II was given to the Appellant as an unstructured interview and that the Appellant was a willing participant. She stated that the ABAS-II was then reviewed and verified by the Eligibility Team and the scores were tallied. The witness stated that she conducted an unstructured interview with the Appellant in order to get an accurate snapshot of her adaptive behaviors. (18, 25)

On cross-examination the witness stated that she initially received training on how to administer the ABAS by a Licensed Clinical Social Worker (LCSW) in 2002. She was given a manual at that time. She stated that she was not necessarily taught to skip questions adding that when an applicant is self-reporting, it is her practice to skip around. She stated that she was never told not to skip around. She stated that she did not get the feeling that the Appellant was trying to please her when answering the ABAS-II questions. She stated that the ABAS-II is not a test but rather it is an assessment. She stated that she gives examples to the individual so that he or she can understand the questions. Ms. Nardozi agreed that the Appellant scored pretty low on the 2<sup>nd</sup> ABAS-II. (25)

On redirect examination, Ms. Nardozi stated that she felt that Ms. [REDACTED] answered the questions relative to the Appellant to the best of her ability and explained that the applicant can bring anyone he or she wants to the interview.

18. Frederick V. Johnson, Psy.D. was qualified as an expert witness and testified for DDS. He was present at both the [REDACTED] 2009 and [REDACTED] 2010 hearings. At the [REDACTED] hearing, Dr. Johnson stated that he was the DDS Eligibility Psychologist relative to the Appellant's application and that he had made the initial determination that the Appellant was not eligible for DDS services. At that hearing, he testified that he made this determination because he was given no information from the Appellant's developmental period. He also stated that she did not meet the criteria for adaptive functioning deficits required under the DDS regulations in that her overall composite score of 79 on the ABAS-II was not two standard deviations below the mean, nor were her scores on 2 out of 3 domains 1.5 deviations below the mean. He explained that 100 is the mean on the ABAS-II, 70 is two standard deviations below the mean and 78 is 1.5 standard deviations below the mean. Dr. Johnson stated that in his opinion, the Appellant's low IQ

scores are due to her depression and anxiety. He noted the possibility of childhood trauma which was raised in some of the test reports that he reviewed as well as the presence of hoarding behaviors displayed by the Appellant. Dr. Johnson stated that he believes that the Appellant has borderline intellectual functioning and that emotional factors play a part in her low IQ scores. Dr. Johnson stated that he had met with the Appellant and her presentation did not alter his view that she is not mentally retarded. At the hearing in [REDACTED] 2010, Dr. Johnson testified that after reviewing the Appellant's educational records which provided IQ scores obtained during the developmental period and a 2<sup>nd</sup> ABAS-II, his opinion of ineligibility was unchanged. He stated that the new documentation provided by the Appellant was equivocal in that there was no comprehensive childhood testing provided, only IQ scores. Dr. Johnson stated that the 25 point difference between the Appellant's Language test score of 80 and her Non-Language test score of 65 raises the issue of a learning disability. He pointed out that the Slosson Intelligence Test where the Appellant received a 61 was a heavily verbally oriented test, and he did not put much stock in the Appellant's score of 61. He stated that just because someone is in special education classes, it does not mean they are mentally retarded. He stated that an individual could be in such classes due to behavioral issues or a learning disability. Dr. Johnson stated that the Appellant's 1<sup>st</sup> ABAS-II didn't fall within the range required for a finding of mental retardation as set out in the DDS regulations. He testified that the 2<sup>nd</sup> ABAS-II shows things that the Appellant can't do, but he believes that the Appellant can't do them due to something other than low intellectual functioning. He stated that mental illness may play a role in the Appellant's adaptive deficits and that the ABAS-II scores require interpretation. Dr. Johnson testified that in his opinion the Appellant is not mentally retarded but has borderline intellectual functioning and adaptive problems due to mental illness. When cross-examined about how the ABAS-II is to be administered, Dr. Johnson stated that there is no requirement that the survey be given as a structured interview although he conceded that a structured interview is probably the best way to administer the instrument. He noted that the ABAS-II instructions permit the tool to be mailed to the individual to complete. (1, 5, 14, 15, 18, 24, 25)

## FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite her need for a support system, I find that the Appellant has failed to show by a preponderance of the evidence that she meets the DDS eligibility criteria. My specific reasons are as follows:

In order to be eligible for DMR supports, an individual who is 18 years of age or older must meet the two criteria set forth at 115 CMR 6.04: (a) she must be domiciled in the Commonwealth, (b) she must be a person with Mental Retardation as defined in 115 CMR 2.01. By statute, M.G.L. c. 123B, section 1, a mentally retarded person "is 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." Consistent with its statutory mandate, the Department has promulgated regulations which define mental retardation. The Department's regulations define mental retardation as significantly sub-

average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. Significantly sub-average intellectual functioning is defined as an intelligence score that is indicated by a score of 70 or below as determined from the findings of an assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners. Significant limitations in adaptive functioning is defined as 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 an 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. There is no dispute that the Appellant meets the first criterion and I specifically find that she meets that criterion. I also find that she has significant imitations in adaptive functioning in that her most current and likely most accurate ABAS-II rendered a General Composite Score of 66 which is within the requirement of two standard deviations below the mean. However, I find that she is not mentally retarded as that term is defined in 115 CMR 2.01.

Neither of the two IQ scores obtained during the Appellant's developmental period (71 and 61) is accompanied by test reports. Without such test reports, I am unable to determine the test conditions, the qualifications of the examiners, the opinions of the examiners as to the validity of the tests or their interpretations of the test scores. Furthermore, even if I were to consider such scores, the IQ score of 71 that she received on the California Test of Mental Maturity is beyond the score considered by DDS to be significantly sub-average. Additionally, that score is comprised of 2 scores that have a 25 point difference between them which according to DDS's expert witness indicates a learning disability, not mental retardation.

Although I gave some consideration to the Appellant's scores of 70 or below obtained after the developmental period, these low scores were called into question by some examiners who opined that the Appellant's depression and anxiety likely had a negative effect on her performance and that she most likely falls within the borderline range of intellectual functioning. It was DDS's expert witness's opinion that the Appellant's mental problems interfered with her performance on the IQ tests causing her scores to be somewhat lower than her intellectual ability. No expert testimony was offered to counter this opinion. I find that a lack of competent evidence of the presence of significantly sub-average intellectual functioning during the developmental period coupled with the opinions of experts that the Appellant's mental health issues likely have a negative impact on her performance on IQ tests leads to the conclusion that she has failed to meet her burden. Because I find that the Appellant does not have significantly sub-average intellectual functioning, I do not find it necessary to address her limitations in adaptive functioning. Adaptive functioning deficits can be caused by a variety of conditions. Because the Appellant does not meet first prong of the DDS definition of mental retardation, I did not consider her adaptive limitations in reaching my decision.

**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 [115 CMR 6.34(5)].

Date: \_\_\_\_\_

\_\_\_\_\_  
Marcia A. Hudgins  
Hearing Officer