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 Executive Office of Health & Human Services
 Department of Developmental Services
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 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
 Commissioner

EMH/ecw

cc: Jeanne Adamo, Hearing Officer
 Gail Gillespie, Regional Director
 Marianne Meacham, General Counsel
 Maria Blanciforte, Assistant General Counsel
 Kristen O'Melia, Regional Eligibility Manager
 Randine Parry, 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 115 CMR 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 [REDACTED], Massachusetts.

Those present at all or part of the hearing were:

[REDACTED]
Maria Blanciforte, Esq.
Randine Parry Ph. D.
Levi Roman

Mother of the Appellant
Counsel for DDS
Licensed Psychologist
Observer, DDS Legal Intern

The Fair Hearing proceeded under the informal rules concerning evidence with approximately three hours of testimony presented. The Appellant’s evidence consists of sworn oral testimony from [REDACTED], the Appellant’s mother, and sixteen exhibits. The evidence presented on behalf of the Department consists of twenty-one exhibits and sworn oral testimony from Dr. Randine Parry, DDS’s Licensed Psychologist. The Hearing Officer also entered excerpts of DDS regulations as exhibits for the record.

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, Mr. [REDACTED], is a nineteen year old male who lives at home [REDACTED]. The Appellant’s father is “legal guardian of the person” for his son and the Appellant’s mother has authorization to act as legal guardian in place of her husband. The Appellant was born with [REDACTED], a complicated birth defect that has required numerous surgeries and medical interventions. The Appellant’s diagnoses include Asperger’s Disorder, Bipolar Disorder, NOS, with psychotic features, Obsessive Compulsive Disorder, and Schizoaffective Disorder.

The Appellant had been receiving the DDS Children’s services during his childhood years. He applied for DDS Adult Services on [REDACTED], 2009 and 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], 2009, at which time the Appellant’s ineligibility ruling was upheld. The Appellant appealed that decision, and a Fair Hearing was held on [REDACTED], 2010. The Appellant was not present at the hearing; his mother, Ms. [REDACTED], served as her son’s authorized representative.

SUMMARY OF THE EVIDENCE PRESENTED:

EXHIBITS:

The following exhibits were accepted into evidence:

APPELLANT Exhibit #1

Letter, dated March 25, 2010, from [REDACTED], LICSW, Ph.D., summarizing her impressions of the Appellant's neurocognitive profile and her professional impressions regarding the Appellant's need of DDS services.

APPELLANT Exhibit #2

Letter, dated June 23, 2010, from [REDACTED], LMHC, documenting that the Appellant is a student of the [REDACTED], which is a [REDACTED] program for students with special needs. Ms. [REDACTED] states her support of the Appellant's appeal and her belief that the Appellant is eligible for services from the Department of Developmental Services.

APPELLANT Exhibit #3

Letter dated June 23, 2010, from [REDACTED], Coordinator at the [REDACTED], with attached copy of the Appellant's Quarterly Report Card and Progress Report and with a copy of the Appellant's 2009-2010 IEP.

APPELLANT Exhibit #4

Letter dated [REDACTED], 2010, from [REDACTED], [REDACTED] Schools, stating that the Appellant is one of the most complex students with whom she has worked in her thirty years as a Special Educator, and urging a reassessment of the Appellant needs as he will continue to require supports due to his multiple developmental disabilities that pervasively and severely impair his ability in all areas of his life.

APPELLANT Exhibit #5

Letter dated [REDACTED], 2010, from [REDACTED], M.D., Child and Adolescent Psychiatrist, stating her recommendation that the Appellant would greatly benefit from continued services through the Department of Developmental Services as his Asperger's Disorder as well as his other comorbid psychiatric diagnoses greatly impact his cognitive ability to cope with his activities of daily living.

APPELLANT Exhibit #6

Letter dated [REDACTED], 2010, from [REDACTED], LICSW, in support of the Appellant's appeal to the Department stating that although the Appellant's IQ does not meet the Department's very rigid IQ requirements, the Appellant does have significant developmental disabilities, and he is not able to function at the level of his IQ test results. Mr. [REDACTED] points out the name change from the Department of Mental Retardation to the Department of Developmental Services and urges the Department to change, as did its name, and reconsider offering services to adults who have developmental

disabilities that are not limited to severe intellectual impairment.

APPELLANT Exhibit #7

An undated letter, from the Appellant's PCA, [REDACTED], in support of the Appellant's appeal and expressing her concerns that the Appellant is unable to maintain a safe environment without support and is therefore at high risk for preventable accidents.

APPELLANT Exhibit #8

Letter dated [REDACTED], 2010, from [REDACTED], M.S.W., M.Ed., and [REDACTED], L.M.H.C., of the [REDACTED], in support of the Appellant's appeal for DDS Adult services stating that a continuation of services will be needed to help the Appellant transition into life after high school.

APPELLANT Exhibit #9

Letter dated [REDACTED], 2010, from the Appellant's physician, [REDACTED], M.D., stating his clinical opinion that due to the Appellant's significant psychological impairments, including Schizoaffective Disorder, Asperger's Disorder, and severe OCD Disorder, the Appellant is a strong candidate in need of DDS services.

APPELLANT Exhibit #10

Letter to Commissioner Howe, from Representative George N. Peterson, Jr., dated [REDACTED], 2010, stating his support of the Appellant's appeal and questioning the eligibility requirement of an IQ score below 70.

APPELLANT Exhibit #11

Letter to Department of Developmental Services Board of Appeals, from State Senator, James B. Eldridge, dated [REDACTED], 2010, in support of the Appellant's appeal.

APPELLANT Exhibit #12

Letter in support of the Appellant's appeal, dated [REDACTED] 2010, from [REDACTED], the Appellant's neighbor and friend, stating the difficulties the Appellant has had to deal with, his need for continued services, and the respect she has developed for the Appellant's parents who have supported their son and fought to help their child in any way possible.

APPELLANT Exhibit #13

An undated letter in support of the Appellant's appeal, from [REDACTED], respite worker for the Appellant, noting a recent fluctuation in the Appellant's abilities, and the Appellant's need for continued supports.

APPELLANT Exhibit #14a

Permanent Decree of Guardianship for the Appellant by reason of mental illness, naming the Appellant's father, Mr. [REDACTED] as permanent guardian of the person, dated [REDACTED], 2009.

APPELLANT Exhibit #14b

An "Authorization" form, dated [REDACTED], 2009, signed by the Appellant's guardian, Mr. [REDACTED], authorizing the Appellant's mother, [REDACTED], to act in place of her husband as [REDACTED] legal guardian and perform all things that a legal guardian is authorized to perform on behalf of their son.

APPELLANT Exhibit #15

Excerpts from 115 CMR 1.03- Interagency Agreements with Department of Mental Health.

APPELLANT Exhibit #16

An email, dated June 11, 2010, from [REDACTED] to the [REDACTED] Family outlining a recent scenario where the Appellant experienced some difficulties.

DDS Exhibit #1

Statutes and Regulations Defining "Eligibility"¹

DDS Exhibit #2

The Appellant's DDS Eligibility Report, dated [REDACTED], 2009.

DDS Exhibit #3

The Appellant's Application for DDS Eligibility, dated [REDACTED], 2009.

DDS Exhibit #4

DDS Adult Eligibility Determination Notification, sent to the Appellant, denying eligibility, signed by Roberta Lewonis, Regional Eligibility Manager, dated [REDACTED], 2009.

DDS Exhibit #5

Letter to Ms. Gail Gillespie, Regional Director, from the Appellant's mother, Ms. [REDACTED] in [REDACTED], requesting an appeal of the Department's finding of ineligibility, received by DDS on [REDACTED], 2009.

DDS Exhibit #6

Sign in Sheet for the Appellant's Informal Conference Meeting, dated [REDACTED], 2009.

DDS Exhibit #7

DDS's Decision Letter re: Informal Conference for the Appellant, signed by Roberta Lewonis, Community Systems Director, dated [REDACTED], 2010.

DDS Exhibit #8

Letter to Ms. Gail Gillespie, Regional Director, from the Appellant's mother, Ms. [REDACTED], requesting a second Informal Conference, received

¹ Excerpts from 104 CMR 21.02 and 104 CMR 21.86 were submitted in error & not applicable to this hearing.
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by DDS on March 25, 2010.

DDS Exhibit #9

A Fair Hearing request letter from the Appellant's mother, Ms. [REDACTED], dated [REDACTED], 2010, sent to DDS Commissioner Howe, date stamped as received on [REDACTED], 2010.

DDS Exhibit #10

Notice sent by DDS, to the Appellant, concerning receipt of a Fair Hearing request, dated [REDACTED], 2010.

DDS Exhibit #11

DDS's Fair Hearing Schedule Notice, dated [REDACTED], 2010, sent from Elisabete Wolfgang, Hearing Administrator, to the Appellant.

DDS Exhibit #12

Psychiatric Evaluation of the Appellant, by [REDACTED], M.D., dated [REDACTED], 1998.

DDS Exhibit #13

The Appellant's [REDACTED], 2001 [REDACTED] Hospital [REDACTED] Psychiatry Evaluation Summary, signed by [REDACTED], M.D., Ph.D..

DDS Exhibit #14

Confidential Psychological Testing Report conducted by [REDACTED] and [REDACTED], Psy.D. with results of a WISC-IV and other evaluations, administered to the Appellant on several dates in [REDACTED] of [REDACTED] at the Appellants age of 12 years, 7 months.

DDS Exhibit #15

Letter from the Appellant's psychiatrist, Dr. [REDACTED], M.D., in support of inclusion as a client of the Massachusetts Department of Mental Health (DMH), dated [REDACTED], 2005.

DDS Exhibit #16

Psychological Evaluation of the Appellant at the Appellant's age of 14 years, with the results of a WASI and other evaluations, conducted by [REDACTED], Ph.D., ABPP, dated [REDACTED].

DDS Exhibit #17

Educational Evaluation of the Appellant at the Appellant's age of 15 years, [REDACTED], with the results of a Woodcock Johnson III Test of Achievement Form A, [REDACTED], M.Ed., conducted over a three day period in [REDACTED] 2007.

DDS Exhibit #18

Neuropsychological Assessment administered in [REDACTED] [REDACTED] of 2007, at the Appellant's age of 16 years, [REDACTED], with the

results of a WAIS-III conducted by [REDACTED], Ph.D.

DDS Exhibit #19

Neuropsychological Assessment administered in over a three day period in [REDACTED] of 2009, at the Appellant's age of 18 years [REDACTED], with the results of a WAIS-III conducted by [REDACTED], Ph.D.

DDS Exhibit #20

The results of the Appellant's functional assessment, using an ABAS-II, conducted by [REDACTED], using the Appellant's mother, Ms. [REDACTED], as the rater, dated [REDACTED], 2009.

DDS Exhibit #21

Curriculum Vita of Randine E. Parry, Ph. D.

Hearing Officer Exhibit #1

Excerpts from 115 CMR 6.04 General Eligibility

Hearing Officer Exhibit #2

Excerpts from 115 CMR 2.01 Definitions

OPENING STATEMENTS:

Summary of Appellant's Opening Statement:

The Appellant's mother, Ms. [REDACTED], represented her son at the hearing. Ms. [REDACTED] argued that DDS's finding of ineligibility should be overturned. Ms. [REDACTED] stated that her son received DDS Children Services and his need for services has not changed. She questions why DDS would change her son's eligibility status when his needs have not changed. He is not able to care for himself and will continue to be in need of services as an adult. Ms. [REDACTED] disagrees with the premise that the one single criteria of an IQ score should render her son ineligible for DDS adult services and stated that her son's higher IQ gives a false impression of his abilities. Ms. [REDACTED] points out that DDS has changed its name from the Department of Mental Retardation to the Department of Developmental Services, and it seems incongruent with the Department's new name and philosophy to exclude a person at age eighteen based only on an IQ score. Ms. [REDACTED] stated that she was very involved with the Department's progressive efforts to include people with Autism and Autism Spectrum Disorders and to fund treatment for these individuals. She feels that it is wrong to have allotted the funding for this effort only to young children; no funding was given to the post school services population and that is when school funding and DDS children's funding ends. Ms. [REDACTED] is requesting a reconsideration of the DDS's decision to deny her son Adult Service pointing out that all of the professionals who make up her son treatment team have submitted letters in support of eligibility.

Summary of DDS's Opening Statement:

Attorney Maria Blanciforte represented DDS, stating that the Appellant was denied eligibility based on the Department's 115 CMR eligibility regulations. Attorney Blanciforte stated that the Appellant does not meet the criteria for Mental Retardation as defined by these

regulations. The Department does not dispute that the Appellant has significant problems; however, DDS regulations are clear. To be eligible for adult services from the Department, an individual must meet the regulatory guidelines for IQ and adaptive behavior. The Appellant has never met the regulatory guidelines for IQ in particular. Therefore his denial is appropriate, and the Department will present evidence to substantiate the finding of ineligibility for DDS adult services.

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. The Appellant lives at home with his parents. (Testimony Ms. [REDACTED])
2. The Appellant attends a day program at [REDACTED] which is funded through special educational services of the Appellant's town. (Testimony Ms. [REDACTED])
3. The Appellant is under guardianship with his father named as guardian of the person. The guardianship was granted due to mental illness. (Appellant Exhibit #14a)
4. The Appellant has been diagnosed with [REDACTED], Asperger's Disorder, Bipolar Disorder, NOS, with psychotic features, Obsessive Compulsive Disorder, and Schizoaffective Disorder. Previous diagnoses have included PTSD, PDD/NOS, Reactive Attachment Disorder, Oppositional Defiant Disorder, Nonverbal Learning Disorder, and Psychotic Disorder, NOS. (DDS Exhibit #2)
5. Treatment associated with the Appellant's [REDACTED] required multiple hospitalizations and surgeries. The Appellant developed post-traumatic syndrome related to his medical history. (DDS Exhibit #13)
6. The Appellant has required inpatient psychiatric hospitalizations beginning at the age ten years. He attended a number of therapeutic schools in his elementary school years, including [REDACTED], [REDACTED], [REDACTED], and [REDACTED], to which he was admitted due to his increasingly aggressive behaviors, [REDACTED]. (DDS Exhibit #15 & #17)
7. As a result of a multi-specialty evaluation including Psychiatry and Neurology in [REDACTED] 2009 at [REDACTED] conducted to evaluate the Appellant's diagnosis of a pervasive developmental disorder versus schizoaffective disorder, a determination was made that the Appellant psychiatric issues are the primary factor limiting his functional capabilities. (DDS Exhibit #19)
8. After much advocacy on the part of the Appellant's parents, the Appellant was found to be eligible and now receives services from the Department of Mental Health (DMH). (Testimony Ms. [REDACTED])

9. The Appellant has been found eligible and receives SSI benefits due to his multiple disabilities. SSI benefits were forthcoming without any question of eligibility. (Testimony Ms. [REDACTED])
10. The Department of Developmental Services was previously called the Department of Mental Retardation. Ms. [REDACTED] and others have interpreted this to mean that the department would offer services to include a broader spectrum of individuals with developmental disabilities. (Testimony Ms. [REDACTED])
11. No regulatory change for eligibility accompanied the change in the Department's name from the Department of Mental Retardation (DMR) to the Department of Developmental Services (DDS). (Hearing Officer Exhibit #s 1 and #2 & Testimony, Dr. Parry)
12. Ms. [REDACTED] [REDACTED] has argued that since 115 CMR 1.03: Interagency Agreement with Department of Mental Health mandates that the Commissioners of DMH and DDS must work together and may not "deprive any individual who also has mental illness from equal access to services offered by the Department of Mental Health", the Appellant should not be deprived of services from DDS (Testimony Ms. [REDACTED])
13. DDS regulations found at 115 CMR 1.03, Interagency Agreement with Department of Mental Health, speak to the possible development of interagency agreements between the Commissioner of Mental Health and the Commissioner of Developmental Services for individuals who are eligible for both types of services and stipulate that no such agreement shall "deprive any individual who also has mental illness from equal access to services offered by the Department of Mental Health." (Appellant Exhibit #15)
14. 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. Thus, the regulations have both (1) a cognitive and (2) an adaptive functioning component and both components must be present prior to age 18 years. The specific regulations and definitions are found in 115 CMR 6.04 and 2.01 (Hearing Officer Exhibits #1 and #2 & Testimony Dr. Parry).
15. The Department has defined the first component, the cognitive component, of "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. Thus the determination of "significantly sub-average intellectual functioning" must be made by a qualified professional who assesses the person using professionally approved valid and comprehensive testing instruments. A licensed psychologist is qualified by training and licensure to administer approved IQ tests. (Hearing Officer Exhibits #1 and #2 & Testimony Dr. Parry).

16. The Department regulations have also defined the second component, the adaptive functioning component. The adaptive functioning component of the regulations requires testing of adaptive functioning that falls two standard deviations below the mean (a test score of 70) or 1.5 standard deviations below the mean in two of three domain areas (a test score of 77 in two of three domains). The domains of adaptive functioning that are assessed are:
- a) areas of independent living/practical skills;
 - b) cognitive, communication, and academic/conceptual skills; and
 - c) social competence/social skills.

The regulations again require that the adaptive functioning testing is conducted using professionally approved valid and comprehensive testing instruments. (Hearing Officer Exhibits #1 and #2 & Testimony Dr. Parry).

17. The Department has found that the Appellant meets the adaptive functioning component of the regulations as a person with "significant limitations in adaptive functioning". However, these limitations in adaptive functioning have not been found to be related to a sub-average intellectual functioning. The regulations require that both components must be present to be eligible for Department services. (Hearing Officer Exhibits #1 and #2 & Testimony Dr. Parry).
18. The criteria for DDS Children's Services are different from the criteria for DDS Adult Services; the criteria for Children's Services allows the inclusion of the following additional diagnosis termed "Closely Related Developmental Conditions" that are not included in the criteria for Adult Services. (Hearing Officer Exhibits #1 & #2)

Closely Related Developmental Conditions means genetic, neurodevelopmental or physical disorders that have a significant overlap with intellectual disability, and result in similar support needs. For the purposes of 115 CMR 6.06(1), closely related developmental conditions may include:

- (a) Williams Syndrome
- (b) Prader-Willi Syndrome
- (c) Lesch-Nyhan Syndrome
- (d) Angelman Syndrome
- (e) Cri du Chat Syndrome
- (f) Down Syndrome
- (g) Fragile X Syndrome
- (h) Cerebral Palsy
- (i) Pervasive Developmental Disorders including the following specified autism spectrum disorders: Autistic Disorder, Rett's Syndrome, Childhood Disintegrative Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified (NOS)
- (j) Spina Bifida (Myelomeningocele type MMC)
- (k) Tuberous Sclerosis
- (l) Fetal Alcohol Syndrome or
- (m) any other developmental disorder that the Department determines to be a closely related developmental condition.

19. The Appellant has received DDS Children's Services as a child. His eligibility as a child was related to his diagnosis with a "closely related condition". (Testimony, Dr. Parry)
20. Upon turning age 18, the Appellant is no longer eligible for DDS Children's services and to continue receiving DDS services would need to apply for DDS Adult services under a different set of eligibility criteria. (Hearing Officer Exhibit #1)
21. Dr. Parry is a Ph.D. Licensed Clinical Psychologist with over forty years of experience as a Clinical Psychology and thirty-three years of experience in the field of Mental Retardation. As the Metro Region's Eligibility Psychologist, Dr. Parry is responsible for making determinations regarding eligibility for children and adults applying for Department services in the Metro Region. (DDS Exhibit #21 & Testimony Dr. Parry)
22. Dr. Parry, as the Department's Licensed Psychologist, made a determination regarding the Appellant's application for DDS Adult Services. In doing so she reviewed all documents related to comprehensive testing of the Appellant's intellectual functioning to determine if the Appellant fell at or below the Mild Range of intelligence. (Testimony Dr. Parry) In determining eligibility, Dr. Parry looks for intellectual deficits with a Full Scale IQ of 70 or below; looks at whether the intellectual deficits manifested during the developmental period prior to age 18; looks for adaptive behavior deficits related to cognitive deficits; and, looks at whether the cognitive or adaptive behavior deficits are due to psychiatric illness or other causes unrelated to Mental Retardation.
23. Dr. Parry has testified that in accordance with Department regulation the Appellant's adaptive functioning test results are not considered until it has been determined that the Appellant meets the Department's cognitive deficit requirement of two standard deviations below the mean (a Full Scale IQ of 70). Department eligibility regulations require that Mental Retardation exists concurrently and is related to significant limitations in adaptive functioning. The Department has interpreted their regulation to mean that the first requirement for eligibility is a diagnosis of Mental Retardation and a second requirement is significant limitations in adaptive functioning related to the Mental Retardation. This is the Department's practice since significant limitations in adaptive functioning can be the result of conditions other than Mental Retardation. Significant limitations in adaptive functioning can be caused by mental illness, significant psychological problems, and, or, other medical problems that impede upon an individual's ability to function. Thus a finding of significant limitation in adaptive functioning is considered a factor in the determination of eligibility only after an individual has been determined to meet the cognitive requirement within the definition of Mental Retardation.
24. The Appellant applied for DDS Adult services in [REDACTED] 2009 and was denied based on eligibility, specifically that he did not meet the cognitive requirement of a Full Scale IQ of 70 or below. (DDS Exhibits #3, & #4)
25. The Appellant's significant deficits in adaptive functioning, (his difficulties with functioning on a day to day basis), are not disputed by the Department. The Appellant's adaptive functioning tests results in the ABAS II indicate significant limitations that meet the Department's requirement. Additionally the many exhibits from professionals who have known and worked with the Appellant support the presence of significant limitations in adaptive functioning. (DDS Exhibit #20, & Appellant Exhibits #1

through #13)

26. The Appellant has been prescribed psychotropic medications. The record indicates the following medications as of June 2009: Depakote, Lithium, Seroquel and Clonidine. The Appellant has reportedly received the following medication trials in the past: Haldol, Cogentin, Paxil, Zoloft, Risperdal, Tenex, Celexa, Zyprexa, Anafranil, Topamax, Geodon, Abilify, and Lamictal. (DDS Exhibit #2)

27. The following cognitive test results have been reported in the evidence presented:

<u>EXHIBIT</u>	<u>AGE</u>	<u>DATE</u>	<u>ASSESSMENT</u>	<u>VIQ</u>	<u>PIQ</u>	<u>Full Scale IQ</u>
DDS#14	6 years	1997	WISC-III	115	81	not calculated
DDS#14	7 yrs.	1998	WISC-Revised	113	98	not calculated
DDS#16	8 yrs.	1999	Stanford-Binet-IV			102
DDS#14	9 yrs.	2000	WASi	114	78	not calculated
DDS#14	12 yrs.	2004	WISC-IV	124	82	84
DDS#16	14 yrs.	2006	WASI	102	85	92
DDS#18	16 yrs.	2007	WAIS-III	94	93	86
DDS#19	18 yrs.	2009	WAIS-IV	108	77	82

28. The Appellant has never tested at or below 70 on any of the Index Scores or Full Scale Scores of the cognitive tests in evidence. (DDS Exhibits #14, #16, #18, & #19 and Testimony Ms.)

29. The Woodcock Johnson Achievement test conducted when the Appellant was fifteen years old resulted in performance level scores that ranged from low average to above average. (DDS Exhibit # 17)

30. The ABAS-II is a test administered by DDS staff to measure adaptive functioning. The Appellant's ABAS-II resulted in a GAC composite score of 62, a level that indicates significant limitations in adaptive functioning. (DDS Exhibit #20)

31. No evidence has been presented to show that the Appellant has ever been given a diagnosis of Mental Retardation as a result of cognitive testing. (DDS Exhibits #14, #16,#18,)

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 he 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 (Hearing Officer Exhibit #2) and setting regulatory standards by which an individual may be determined eligible for DDS services (Hearing Officer Exhibit #1).

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

- c) areas of independent living/practical skills;
- d) cognitive, communication, and academic/conceptual skills; and
- e) social competence/social skills.”

CONCLUSIONS:

- While issue has been raised by the Appellant, and by some of those who have submitted supportive statements regarding the Appellant's need for services, that a requirement for an IQ of 70 or below should be overlooked, the Department is bound by regulation to assess eligibility using the standards set out in 115 CMR 6.04, and as defined in 115 CMR 2.01. Thus, an arbitrary disregard for the statutory requirements is not within the purview of this Fair Hearing.
- The Appellant has met the domicile requirement for eligibility. The issue in questions is the level of the Appellant's cognitive deficit, specifically if the Appellant has met his burden of proving by a preponderance of the evidence that his is a person with Mental Retardation as defined by the Department of Developmental Services which must be established by FSIQ at or below 70 that is not the result of other causes unrelated to Mental Retardation.
- The argument raised by the Appellant regarding the requirement set out in 115CMR 1.03: Interagency Agreements with Department of Mental Health has no bearing in this matter. The DDS regulations found at 115 CMR 1.03 speaks to the possible development of interagency agreements between the Commissioner of Mental Health and the Commissioner of Developmental Services for individuals who are eligible for both types of services. The Appellant has not been found to be eligible for DDS adult services. Thus the stipulating language regarding a proposed agreement requiring that an individual who also has mental illness to have equal access to services offered by the Department of Mental Health is meant for individuals who have been found to be eligible for both DMH and DDS services. That is not the case in this matter. (Appellant Exhibit #15)
- The argument raised by the Appellant regarding an allegation that the Appellant's Non Verbal Learning Disability is the reason that the Appellant scores higher in IQ tests and therefore the IQ results are not indicative of the Appellant's cognition, has been misstated. In order to obtain credit on cognitive tests, an individual must give the proper information or perform the requested task. The Appellant would not score out of the range of Mental Retardation if he did not have the cognitive capacity to do so. While the Appellant's strengths in some cognitive areas and weaknesses in other cognitive areas may be indicative of a Non Verbal Learning Disability, the resulting Index Scores and, or, Full Scale IQ scores from the cognitive testing conducted on the Appellant have been reported as valid indicators of the Appellant's level of cognitive functioning and therefore are valid indicators of the Appellant's cognition irrespective of a Non Verbal Learning Disability.
- The criteria for DDS Children's Services that are offered from birth to age eighteen, are different from the criteria for DDS Adult Services that begin at age eighteen. The criteria for Children's Services allows the inclusion of multiple additional diagnosis considered to be "closely related developmental conditions", and as a result, many who receive DDS Children's services due to a diagnosis of a related developmental condition, are not eligible for, and do not receive, DDS Adult services. The Appellant's situation is one such example; he received DDS Children's services due to a diagnosis of a related

developmental condition and will not automatically be eligible for DDS Adult services.

- The Appellant's diagnosis of: [REDACTED], Asperger's Disorder, Bipolar Disorder, NOS, with psychotic features, Obsessive Compulsive Disorder, and Schizoaffective Disorder, and the Appellant's previous diagnoses of: PTSD, PDD/NOS, Reactive Attachment Disorder, Oppositional Defiant Disorder, Nonverbal Learning Disorder, and Psychotic Disorder, NOS, are not conditions or disorders that would, in and of themselves, render the Appellant eligible for DDS Adult services. The Appellant would also need to meet the cognitive requirement of a diagnosis of Mental Retardation to be eligible for DDS adult services. The record indicates that the Appellant has not ever received an IQ score that would indicate the presence of Mental Retardation.
- The Appellant's significant limitation in adaptive functioning is not disputed. However, regulations do not allow eligibility to be determined based on adaptive functioning alone; adaptive functioning deficits can be result of conditions other than Mental Retardation. Significant limitations in adaptive functioning can be caused by mental illness and other medical problems that impede upon an individual's ability to function. A person very well could be functioning in the range of Mental Retardation but unless it is demonstrated through valid IQ test results that the cause of the significant adaptive deficits is due to Mental Retardation, eligibility for DDS services is not allowed. In the Appellant's case, there is evidence of significant mental disabilities that could impede upon his ability to function, and the Appellant's significant limitation in adaptive functioning has not been shown to be the result of Mental Retardation as Mental Retardation has not been diagnosed. No proof of Mental Retardation has been submitted in this matter. On the contrary, proof of intelligence significantly above the level required for a diagnosis of Mental Retardation is in the record.
- The Appellant's significant problems and need for services and supports is also not disputed. The multiple letters describing the Appellant and the efforts of his parents show Mr. & Ms. [REDACTED] to be compassionate and devoted parents. Their extraordinary parenting has no doubt helped their son tremendously and they are to be commended for their advocacy. However, the presence of a diagnosis of Mental Retardation is a requirement in determining eligibility for DDS adult services; a diagnosis that must be made by a qualified professional who comes that determination based on comprehensive and valid IQ testing results. No diagnosis of Mental Retardation by a qualified licensed psychologist has been made in this case.

In summary, upon a comprehensive review of the oral testimony and documentary evidence submitted in this matter, I find that the Appellant has not met the burden of proof in this matter and has not demonstrated by a preponderance of the evidence that he meets the Department's definition of Mental Retardation. The preponderance of the evidence points to an overall cognitive ability falling significantly above the range required for eligibility of DDS services. 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. 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: _____

Jeanne Adamo
Hearing Officer