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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 client's 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: Elizabeth Silver, Hearing Officer
 Terry O'Hare, Regional Director
 Marianne Meacham, General Counsel
 Cynthia Gagne, Assistant General Counsel
 Damien Arthur, Regional Eligibility Manager
 Richard Costigan, Psychologist

File

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF DEVELOPMENTAL SERVICES**

In Re: Appeal of [REDACTED]

This decision is issued pursuant to MGL Chapter 30A and the regulations promulgated thereto, 115 CMR 6.00 *et seq.* A fair hearing was held on [REDACTED] 2010 at the DDS¹ [REDACTED] Office in [REDACTED], MA.²

Those present or participating at the hearing:

[REDACTED]	Attorney for Appellant
	Father of Appellant
	Mother of Appellant
	Neuropsychologist for Appellant
C. J. Gagne	Attorney for DDS
Richard Costigan	Psychologist for DDS

At the hearing, the Department submitted Exhibits 1-18 and the Appellant submitted Exhibits 19-20. The hearing lasted approximately five hours and forty-five minutes. Mr. and Mrs. [REDACTED] and Dr. [REDACTED] testified on behalf of the Appellant, and Dr. Costigan testified on behalf of the Department.

ISSUE PRESENTED:

The issue for this hearing is whether the Appellant, [REDACTED], meets the Department's definition of mental retardation and is thereby eligible for DDS services.

SUMMARY OF THE EVIDENCE

Exhibit 1. Curriculum Vitae of Richard P. Costigan, Psy.D.

Exhibit 2. Eligibility Report of Richard Costigan dated [REDACTED] 2009. In this report, Dr. Costigan reviewed the evidence in the record, which is described in detail below. Dr. Costigan noted the significant difference between the Appellant's verbal comprehension skills, which fell in the upper end of the average range, and his scores in the nonverbal domains that largely fell within the extremely low range. Dr. Costigan concluded that the Appellant did not meet the DDS criteria for eligibility based on the overall cognitive abilities falling above the Department's requirements in five of the comprehensive cognitive assessments in the record.

Exhibit 3. [REDACTED] 1994 Psychological Evaluation done when the Appellant was 3 years old. The Appellant had been referred because of concerns about his diminished social interaction and play skills. [REDACTED], Ph.D., Pediatric Psychologist, administered the Mental Scale of the Bayley Scales of Infant Development: Second Edition (Bayley II), which showed tremendous variability in performance as well as variability in attention and cooperation. The Appellant's performance spanned the 18- to 42-month level. His areas of relative strength were his fund of information, vocabulary, and problems solving skills. Areas of relative weakness included social

¹ On June 30, 2009, the Department changed its name from the Department of Mental Retardation (DMR) to the Department of Developmental Services. I will refer to the Department's new name in this decision.

² Both parties submitted Proposed Findings of Fact, the last of which was received on [REDACTED] 2010.

relatedness, symbolic and imitative play skills, and reciprocal interaction/communication. Dr. [REDACTED] felt the results were indicative of a mild form of Pervasive Developmental Disorder (PDD).

Exhibit 4. [REDACTED] 1995 Psychological Evaluation again done by [REDACTED], Ph.D., Pediatric Psychologist. The Appellant was 4 years [REDACTED] at the time. Dr. [REDACTED] readministered tasks from the Bayley II. During testing the Appellant's attention and cooperation were inconsistent in that attention varied depending on the level of interest in the task. Test results showed that the Appellant had made significant progress since prior testing in social relatedness, communication, and play skills. He continued to demonstrate qualitative difficulties with peer interaction and pragmatic use of language. He also demonstrated delays in perceptual-motor and gross motor skills. His sustained attention to tasks was fairly limited. The Appellant had an excellent fund of general information and good memory skills.

Exhibit 5. Psychological Evaluation dated [REDACTED], and [REDACTED] 1996 when the Appellant was 5 years [REDACTED] old. Dr. [REDACTED] was again the evaluator. She administered the McCarthy Scales of Children's Abilities on which the Appellant scored within the borderline range. Again there were issues concerning attention to tasks. Testing results showed a very significant discrepancy between verbal (his relative strength) and nonverbal/perceptual performance skills (his relative weakness) as seen in his scores: Verbal 48, Perceptual-Performance 28, Quantitative 40, and Memory 44. Overall the Appellant's verbal performance was within the average range. Dr. [REDACTED] felt the Appellant's developmental disability was still best characterized within the pervasive developmental disorders spectrum (PDD-NOS).

Exhibit 6. Psychological Assessment done on [REDACTED], and [REDACTED], 1997 when the Appellant was 6 years [REDACTED] old. Testing was done by [REDACTED], LICSW, under the supervision of a Certified School Psychologist. Mr. [REDACTED] administered the Kaufman Assessment Battery for Children (K-ABC) in which the Appellant scored 98 (average) in Sequential Processing and 85 (below average) in Simultaneous Processing. His Mental Processing Composite score of 88 (below average), was not seen to measure overall cognitive abilities because of the Appellant's stronger performance on the Sequential Scale. Further, because of perseverative behavior and distractibility issues, the evaluator noted the results of the assessment should be taken with caution.

Exhibit 7. Psychological Consultation dated [REDACTED] 1997 when the Appellant was 6 years [REDACTED] old and attending a full day integrated preschool program. Dr. [REDACTED] was again the consultant. She administered the Woodcock-Johnson Tests of Achievement (WJ-R) during which the Appellant had some attention issues, although they had improved somewhat since prior testing. His test scores, which ranged from a low of 99 in Science to a high of 115 in Letter-Word Identification and Humanities, were at or above the first grade level. The Hyperactivity Index on the Conners Rating Scales was at the borderline of clinical significance.

Exhibit 8. Psychological Consultation dated [REDACTED] 1998 when the Appellant was 7 years [REDACTED] old and in a full day kindergarten class. Dr. [REDACTED] was again the consultant. She again administered the WJ-R achievement tests during which the Appellant initially exhibited sustained attention to structured tasks but became more inattentive and distracted as task difficulty increased. His scores ranged from 88 on Calculation to 117 on Passage Comprehension. The Appellant continued to show relative strength in reading where he was functioning well above age level and grade placement. Testing results also demonstrated that he comprehended the meaning and usage of words, and that he manifested a strong fund of general knowledge that was significantly above his current grade placement. Math and written language were areas of relative

weakness, but both were within the broad range of normal for his age. This report again confirmed a diagnosis of PDD.

Exhibit 9. Psychological Consultation again by Dr. [REDACTED], this one done on [REDACTED] 1999 when the Appellant was 8 years [REDACTED] old and in an inclusion first grade. Dr. [REDACTED] again administered the WJ-R achievement tests, the results of which showed the Appellant to have made steady progress academically and to have been at or above grade level in all academic areas. Scores ranged from a low of 87 on Calculation to 117 in Dictation. Over the course of the prior year the Appellant had made significant gains in reading, comprehension, and written language, and somewhat slower progress in math. He was reading at the beginning to middle 3rd grade level and had made at least two years' worth of progress in written language development. Attention skills were somewhat improved with medication (Ritalin) although he continued to demonstrate internal distractibility.

Exhibit 10. Cognitive Evaluation done by [REDACTED], M.Ed., CAGS, Certified School Psychologist, on [REDACTED] 2000 when the Appellant was 8 years [REDACTED] and mainstreamed into a regular second grade classroom. Overall test results were determined to be a valid measure of the Appellant's then current levels of ability. Mostly the Appellant was able to sustain adequate attention during testing but he had great difficulty with attention to nonverbal tasks. Ms. [REDACTED] administered the Woodcock-Johnson Psycho-Educational Battery-Revised (WJ-R, 1989) Tests of Cognitive Ability. She did not report an overall score at the request of the Appellant's parents. Test score results were Comprehension-Knowledge 106 (66th %, average range), Short-Term Memory 108 (69th %, average range), Visual Processing 109 (73rd %, average range), Auditory Processing 109 (72nd %, average range), Long-Term Retrieval 128 (97th %, superior range), Fluid Reasoning 93 (32nd %, average range), and Processing Speed 35 (0.1 %, very low range). Ms. [REDACTED] concluded that most areas of functioning were in the average to above average range.

Exhibit 11. Educational Evaluation dated [REDACTED] 2000, just a few days after the previously reported evaluation. [REDACTED], Examiner, administered the WJ-R Tests of Achievement. The Appellant's scores were Broad Reading 119 (90th %, high average range), Basic Reading Skills 118 (89th %, high average range), Broad Math 83 (13th %), Basic Mathematics Skills 79 (8th %, low range), Mathematics Reasoning 93 (31st %, average range), and Factual Knowledge 101 (54th %, average range).

Exhibit 12. Educational Evaluation done [REDACTED] 2003 by [REDACTED], Examiner, when the Appellant was 11 years [REDACTED] and in grade 5.5. Ms. [REDACTED] administered the WJ III Tests of Achievement. The Appellant's scores were Broad Reading 93 (32nd %, average range), Broad Math 90 (26th %, low average to average range), Broad Written Language 86 (17th %, low average)³, Math Calculation Skills 86 (17th %, low average), and Written Expression 68 (2nd %, very low to low range). The Appellant's Academic Skills were average at 105 (64th %), Academic Fluency 75 (5th %, limited to average), and Academic Applications of 90 (26th %, limited to average). In summary, Ms. [REDACTED] said the Appellant's oral language skills were average compared to others at his age level. His fluency with academic tasks was low and his academic skills and ability to apply those skills were within the average range. The Appellant's performance in broad reading and math was average, low average in math calculation skills and written language, and very low in written expression.

³ Within the results of Broad Written Language, the Appellant's performance was average to advanced on tasks requiring the ability to spell orally presented words correctly, and very limited on tasks requiring the ability to write rapidly with ease, requiring minimal analytic attention or problem-solving.

Exhibit 13. Psychological Evaluation done [REDACTED], [REDACTED] and [REDACTED], 2003 by [REDACTED], M.Ed., CAGS, Certified School Psychologist, when the Appellant was 11 years [REDACTED] old and in the 5th grade. Ms. [REDACTED] again administered the WJ III: Tests of Cognitive Ability. The Appellant's General Intellectual Ability (GIA Ext) score of 94 was in the 36th percentile and in the average range. Other scores were Long-Term Retrieval 135 (99th %, very superior),⁴ Phonemic Awareness 117 (88th %, high average to superior), Short-Term Memory 115 (84th %, average to high average), Auditory Processing 112 (80th %, average to high average), Working Memory 112 (80th %, average to high average), Fluid Reasoning 103 (58th %, average), Comprehensive Knowledge 94 (35th %, average), and Processing Speed 32 (< 0.1 %, very low range). In summary, the Appellant's performance was very superior in long-term retrieval; high average in auditory processing, short-term memory, phonemic awareness, and working memory; average in comprehension-knowledge, visual spatial thinking and fluid reasoning; and very low in processing speed.

Exhibit 14. Educational Evaluation done by Mrs. [REDACTED], Examiner on [REDACTED] 2005 when the Appellant was 14 years [REDACTED] and in grade 8.8. Mrs. [REDACTED] administered the WJ III Tests of Achievement which yielded the following scores: Broad Math 76 (6th %), Basic Reading Skills 116 (85th %, high average), Math Calculation Skills 78 (7th %, low to low average), and Math Reasoning 87 (20th %, low average). The Appellant's Academic Skills score of 109 was in the 73rd percentile and his Academic Knowledge score of 101 was in the 54th percentile. In summary, Mrs. [REDACTED] said compared to others at his grade level, the Appellant's academic knowledge and skills were in the average range, basic reading skills were in the high average range, math reasoning was in the low average range, and math calculation skills were in the low range.

Exhibit 15. Psychological Evaluation dated [REDACTED] 2006 done by [REDACTED], CAGS, School Psychologist, when the Appellant was 15 years [REDACTED] old and in the 8th grade. Among other tests, Ms. [REDACTED] administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) on which the Appellant's scores were Full Scale 78, Verbal Comprehension Index 91 and Perceptual Reasoning Index 82. His Processing Speed Index score was in the extremely low range (0.1%) and working Memory Index was in the average range (61st %). Ms. [REDACTED] indicated that she thought the Appellant exhibited many characteristics related to a nonverbal learning disability, but given his behaviors, test results and past diagnosis of PDD, there was more to the Appellant's profile that had yet to be determined. She suggested further consultation for purposes of updating his diagnosis and future planning.

Exhibit 16. Psychological Report done by [REDACTED], MS, CAGS, LMHC, Certified School Psychologist, Licensed Mental Health Counselor. Mr. [REDACTED] met with the Appellant on five occasions in [REDACTED] 2009 as part of the Appellant's three year re-evaluation process when he was 18 years old and in the 11th grade. Among other tests, Mr. [REDACTED] administered the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV). The Appellant's scores were Full Scale IQ 76, Verbal Comprehension Index 107, Perceptual Reasoning Index 67, Working Memory Index 89, and Processing Speed 50. Mr. [REDACTED] noted these results were consistent with the prior evaluation, and they showed relative strengths in conceptual language development and relative weaknesses in processing information. He said the Appellant's social and emotional development was progressing in a manner typical of an individual negotiating symptoms of Autism.

⁴ While the Appellant's overall long-term retrieval standard score was within the very superior range when compared to others his age, his performance varied on two different types of storage and retrieval tasks. It was very advanced on tasks requiring associative and meaningful memory, and average on tasks requiring fluent retrieval of previously learned information.

Exhibit 17. Neuropsychological Testing Report done by [REDACTED], Ph.D. in [REDACTED] and [REDACTED] 2009 when the Appellant was 18 years [REDACTED]. He was in the 12th grade at the time. Dr. [REDACTED] reviewed the Appellant's referral information as well as Mr. [REDACTED]'s psychological testing (Exh 16). Dr. [REDACTED] said the Appellant's scores on the WAIS-IV administered by Mr. [REDACTED] pointed to "... a very significant disability in right hemisphere functioning and share characteristics of a Non-Verbal Based Learning Disability."

Dr. [REDACTED] administered a wide array of tests the results of which were viewed as a valid measure of the Appellant's current functioning. He also interviewed the Appellant's parents. Dr. [REDACTED] administered the General Ability Measure for Adults (GAMA), a non-verbal test. The Appellant's score on the GAMA was 63, which fell in the well-below average category of mental ability. After reviewing subtest scores, Dr. [REDACTED] noted that the results indicated the Appellant's intellectual function was in the mentally deficient range. He concluded that the results from this testing continued to show significant deficits in Processing Speed, as well as the previously seen wide discrepancy between cognitive functioning of verbal versus non-verbal material. In his recommendations, Dr. [REDACTED] noted again that the Appellant was functioning on two levels with verbal reasoning in the average range, but his ability to synthesize, organize, and retrieve information from multiple sources was almost uniformly at the deficient range on tasks requiring visual spatial processing, processes that are mediated by right hemisphere functioning. Dr. [REDACTED] took issue with Mr. [REDACTED]'s calculation of the Appellant's IQ score of 76 stating it was misleading because it averages an area of relative cognitive ability with other skills that are clearly deficient.

Exhibit 18. Summary of Neuropsychiatric and Neuropsychological Findings by [REDACTED] MD, dated [REDACTED] 2009. For this report, Dr. [REDACTED] reviewed and reported on the findings of Dr. [REDACTED] (Exh 17), interviewed the Appellant's parents, and examined the Appellant. Dr. [REDACTED] concurred with Dr. [REDACTED]'s report of severe visuospatial disorientation on the part of the Appellant. Also consistent with Dr. [REDACTED]'s findings, Dr. [REDACTED]'s opinion was that the Appellant qualified for a diagnosis of Mild Mental Retardation by testing, Moderate Mental Retardation by examination and history. He referred to Dr. [REDACTED]'s test results, which indicated the Appellant's borderline-to-average verbal skills co-existed with severe impairments in executive functions, interpersonal development, social adaptation, and general maturity. In his prognosis, Dr. [REDACTED] said that the Appellant would need significant institutional support in the immediate future because of his transition from a structured school environment, and that he will need such supports in the long-term since his parents will not be able to care for him indefinitely. Dr. [REDACTED] thus urged DDS eligibility, and offered that the Appellant would be a good candidate for services because of his history of responding to and benefiting from help that is offered him.

Exhibit 19. Curriculum Vitae for [REDACTED], Ph.D.

Exhibit 20. Curriculum Vitae for [REDACTED], MD.

TESTIMONY

At the outset, the parties stipulated that both psychologists present and testifying at the hearing were qualified as expert witnesses. The Department further indicated that it did not contest the issue of domicile or adaptive functioning.⁵

⁵ Inasmuch as the parties are in agreement on adaptive functioning, I will not go into detail regarding testing or other evidence concerning adaptive assessments.

Exhibits 1-20 were entered into the record, and Mr. and Mrs. [REDACTED], Dr. [REDACTED], and Dr. Costigan were sworn in. Both parties made brief opening statements.

[REDACTED] testified on behalf of his son. Mr. [REDACTED] lives with his wife, their daughter [REDACTED] who is 13 years old, and the Appellant who was 18 at the time of the hearing. Mr. [REDACTED] is employed at [REDACTED] in [REDACTED], which focuses on students with diagnosed learning differences. He teaches social sciences.

Mr. [REDACTED] testified that he and his wife had always felt that the Appellant was functioning at a sub-average intellectual level. He didn't walk until he was 18 months old. He was referred to the [REDACTED] program from daycare at the age of 2 – [REDACTED] because he hadn't met certain cognitive milestones. He had poor eye-hand coordination compared to friends, was late in tying shoes (he still doesn't tie them), and was late in the use of table utensils (he is still not proficient – the [REDACTED]s have to cut his food). He didn't, and still doesn't, have an idea of purposefulness of activity or play. The [REDACTED]s brought the Appellant to see a pediatric psychopharmacologist at [REDACTED] Hospital around 1998 who recommended getting a definitive psychiatric evaluation. But since the Appellant getting the services he needed through the schools, the [REDACTED]s did not feel any urgency about getting an evaluation done then.

Mr. [REDACTED] said the Appellant repeated a year in preschool because he wasn't meeting academic milestones. He has had a one-on-one aide from time he started going to school. Mainstreaming attempts were unsuccessful. The Appellant is now in the Life Skills program, which includes the neediest students in district. He does not do well in the one academic class he takes and does not do well in the program in general. He has a one-on-one aide who provides constant cueing and redirection. Although he can remain in the school system until he is 22, he will not get a degree.

With respect to daily functioning, Mr. [REDACTED] said he or his wife has to wake the Appellant in the mornings because he does not get up on his own. He doesn't understand punctuality and he doesn't understand that activities are linear, so dressing and hygiene take a long time.

Cross-examination initially focused on the many reports from Dr. [REDACTED] and the fact that they highlighted the Appellant's many academic strengths and achievements, seemingly in conflict with Mr. [REDACTED]'s testimony regarding the Appellant's abilities. Mr. [REDACTED] acknowledged the 1998 report from Dr. [REDACTED] (Exh 8) indicated that the Appellant had strong academic skills and that he manifested relative strength in reading, but Mr. [REDACTED] said the Appellant only did well if forced to and if he was in a highly structured situation. He said from the beginning the Appellant had trouble reading, and one of the reasons they got the Appellant vision therapy was because of the reading problem. Mr. [REDACTED] disagreed with the notion that the Appellant's reading had any academic utility. Presently his recreational reading includes books like Thomas the Tank or books about trucks or machinery, most of which are at the 5 or 6 year old level.

Mr. [REDACTED] disagreed with Dr. [REDACTED]'s statement that the Appellant "has made steady progress... His grade level functioning in reading, and his general knowledge base, are significantly above his current grade placement." He also disagreed with Dr. [REDACTED]'s 1999 report (Exh 9) in which she reported the Appellant to have been making steady academic progress and was at or above grade level in all academic areas. He said he and his wife knew there was something wrong with the Appellant but latched on to any praise or positive assessment they got as Dr. [REDACTED]'s reports gave them hope that the Appellant would be normal.

On re-direct Mr. [REDACTED] clarified that looking back on Dr. [REDACTED]'s evaluations, he now thinks her descriptions of the Appellant's abilities were overstated.

Mrs. [REDACTED] testified on her son's behalf. She is a [REDACTED] teacher [REDACTED] at [REDACTED]. She said because the Appellant was their first child they didn't realize there were problems until a pre-school teacher contacted them regarding the Appellant's delays.

Mrs. [REDACTED] said it was a big transition for the Appellant to go from the [REDACTED] program at [REDACTED] Elementary School to a bigger school with more transitions during the day, and things just got harder for him. She said the Appellant is going to school now but he isn't really learning. He only has one academic course through the Life Skills program (English) but is failing that. The Life Skills program is for children with the most severe needs at the school. They go to a work site twice a week. Mrs. [REDACTED] said the Appellant chooses his sites, but he is not really able to handle any work. Despite having an aide, he still loses focus and won't know what questions to ask even if he needs help.

Mrs. [REDACTED] said the Appellant has no sense of time so they need to wake him up every morning. In addition, it takes an hour and a half to get him out of the house because he needs to be cued every step of the way. His personal hygiene needs to be directed. Because he has no sense of moderation, they have to fill a small bottle of shampoo otherwise he would use the whole bottle. They have to cut his food for him and put on the ketchup otherwise he'd pour out the whole bottle. She said their primary concern was for the Appellant's safety. He can't take public transportation so he gets picked up and dropped off when he goes to school. He will talk to anyone even if he doesn't know the person.

Dr. [REDACTED] testified next on behalf of the Appellant. After reviewing his credentials (Exh 19), he testified that the majority of reports in the record are psychoeducational and measured the Appellant's academic achievement and abilities in learning situations. However, he said there is a difference between educational achievement and intellectual functioning, the latter of which is usually a test or process by which IQ is derived and which measures intellectual ability. Academic achievement tests assess a subject's success in having learned various subjects and they are compared to peers at age and grade level.

Dr. [REDACTED] reviewed Dr. [REDACTED]'s reports (Exhs 3,4,5,7,8,9). He said they were primarily tests of psychoeducational functioning as opposed to intellectual functioning, and the first ones were from before the Appellant turned 6 years old. Dr. [REDACTED] said intellectual functioning assesses the ability of an individual to use raw intellectual skills in applied settings that are more neutral to academic achievement – that is, not an academic subject but problem solving skills. He said IQ tests begin to approach reliability at around age 6, and the Wechsler, which is first administered at age 6, is the gold standard of IQ tests. He said it is generally understood that IQ scores before age 6 are not reliable. Here, the Appellant's testing before age 6 was primarily of a psychoeducational nature and was administered at a time of questionable reliability for drawing conclusions as to intellectual ability.

Dr. [REDACTED] testified that he had administered thousands of neuropsychological tests. He said while he is familiar with them, he does not use the Woodcock Johnson or achievement oriented tests frequently. He prefers using the WIAT, achievement tests that are part of the Wechsler scales, and he usually administers it in concert with IQ testing.

Dr. [REDACTED] questioned the credentials of the testers other than Dr. [REDACTED], none of whom were at a doctoral level. Some had a master's degree, some had CAGS, but Dr. [REDACTED] was the only tester who had a PhD.

Dr. [REDACTED] reviewed the results of his testing of the Appellant (Exh 17). He said he did a comprehensive assessment of the Appellant's intellectual functioning in a more integrated manner so as to understand the nature of the Appellant's intellectual functioning.

Dr. [REDACTED] reviewed each test he administered. He said the General Ability Measure for Adults (GAMA) is an IQ test. Dr. [REDACTED] said he normally administers the GAMA and the WAIS-IV together, but in this case he could not use the WAIS-IV because the Appellant had been given a WAIS within the year so he had concerns about the practice effect. He said the GAMA is a non-verbal test using abstract geometric designs in a range of problem solving situations that include the four subtests of matching, analogy, sequencing, and construction.

Dr. [REDACTED] testified in support of the GAMA as a reliable IQ test. He said it is a very good measure of one's problem-solving skills and it is considered to be a valid, reliable test. He said the GAMA lacks cultural bias and is given to individuals who speak other languages as well as to individuals with wide discrepancies in intellectual functioning. He said that due to its problem solving nature and the fact that no cues are provided, the GAMA is a very good measure of the ability to problem solve independently, whereas some subjects in the Wechsler scale provide cues.

Dr. [REDACTED] said that based on a score of 63 on the GAMA, the Appellant had sub-average intellectual functioning, and that he was functioning at two levels. In the verbal domain, he was functioning at the low-average to average level, but in the non-verbal domain he was reliably deficient.

Dr. [REDACTED] took issue with the Full-Scale IQ reported by [REDACTED] (Exh 16) because there was a 40 point difference between the VCI and the PRI. He said in cases with that kind of discrepancy he does not even compute a full scale IQ let alone report it. Dr. [REDACTED] also believed that Mr. [REDACTED] did not go into enough specifics as to whether the Appellant's need for extended periods of time to complete answers on Digits Backward influenced some of his scores.⁶ Dr. [REDACTED] believed these delays compromised the reliability of the scores. He also challenged Mr. [REDACTED]'s assertion that the Appellant's scores on Digit Span and Arithmetic were an underestimate of his true ability.

Dr. [REDACTED] said if the scores were taken separately, he would not question the verbal comprehension score of 107 since his own testing also showed the Appellant tested in the average range. After reviewing the other scores from this WAIS-IV, Dr. Fuller's assessment is that the Appellant was functioning at two different levels intellectually and at one of those levels he was clearly mentally deficient.

Dr. [REDACTED] reviewed the report from [REDACTED] who, he noted, has a CAGS and signed as a School Psychologist (Exh 15). He said that since Ms. [REDACTED] administered one of the Wechsler scales there is an IQ score, but she was inconclusive in her findings as she did not provide a processing speed score. However, he assumed the score was in the mentally deficient range since the two reported subtests (Coding and Symbol Search) were both "1's". Dr. [REDACTED] noted that the Working Memory subtest scores had a large discrepancy (Letter-Number 7, Digit Span 15). As a result, he

⁶ At different times the Appellant took five minutes, ten minutes, then seven minutes to respond with complete answers.

believed it significant that Ms. ██████ was unclear diagnostically about the Appellant's condition and recommended additional (neuropsychological) testing to assist in completing his profile.

Next, Dr. ██████ addressed Dr. Costigan's eligibility report (Exh 2). He noted Dr. Costigan's reference to the Woodcock Johnson-Revised Tests of Achievement and said this is an achievement test, not a cognitive IQ test of intellectual ability, and it does not give a measure of intellectual functioning. He said the McCarthy Scales are given to young children (the Appellant was 4 or 5 years old) when his brain was still developing, so the test was of limited reliability in understanding the Appellant's eventual or longer term intellectual functioning. Dr. ██████ said the results of the Kaufman Assessment Battery for Children (K-ABC) approached a more reliable measure since the Appellant was 6 at the time of testing, but it is still seen as part of a developmental sequence.

Dr. ██████ next addressed Dr. Costigan's quotation from Kaufman regarding the GAMA.⁷ He said the GAMA is, indeed, a measure of perceptual organization, visual-spatial skills and processing speed and it does not necessarily correlate with verbal abilities because it is using nonverbal stimuli. But Dr. ██████ said he gave tests that assess verbal abilities, including the Boston Naming, the Word Context of the Delis Kaplan, and the BRIEF-A and the Appellant's abilities to read and comprehend and comment on his own experience were all of a verbal nature. The Numerical Operations refers to arithmetic, which is a left-side function as well.

Dr. ██████ said Dr. ██████, who is an MD, used the testing that Dr. ██████ had done and then did some of his own testing. Dr. ██████ concluded diagnostically that the Appellant met the criteria for mild mental retardation and that he met the criteria for moderate mental retardation with a more integrative analysis including history and his own clinical and psychiatric observations of the Appellant.

Regarding the co-morbidity issue raised Dr. Costigan, Dr. ██████ said it is not unusual that children with mental deficiency have additional psychiatric diagnoses. Further, he said ADHD and PDD at earlier ages are not uncommon for individuals who eventually receive diagnoses of mental deficiency. He said mental deficiency often appears in assessments early on as a developmental disorder, and ADHD frequently interfaces with learning disabilities.

After reviewing all the records, prior testing, Dr. Costigan's eligibility report, and the results of the testing he administered, Dr. ██████ concluded that the Appellant had sub-average intellectual functioning, he had it prior to the age of 18, and that this level of intellectual functioning existed in his childhood.

On cross-examination, Dr. ██████ provided his definition of sub-average intellectual functioning as having an IQ score of below 70.

With respect to his testing, Dr. ██████ testified the GAMA does not have any verbal subtests, but contended it is a comprehensive IQ test, and a comprehensive IQ test does not require both components. He said the verbal subtests he administered were not within an intellectual functioning test. Dr. ██████ said not every IQ test has both verbal and nonverbal components. He said the GAMA is nonverbal and does not have a measure of a verbal IQ, but it is comprehensive.

⁷ "Validity studies indicate that [the GAMA] may best be characterized as a measure of perceptual organization, visual-spatial skills and processing speed . . . It bears little relationship to verbal abilities as measured by other tests of cognitive ability." Kaufman, A. S., Lichtenberger, E.O. (2006) Assessing Adolescent and Adult Intelligence, Third Edition, Wiley & sons.

He said the Boston Naming, Word Context of the Delis Kaplan, and the BRIEF-A subtests measured verbal skills as part of a comprehensive neuropsychological examination.

In comparison to the Wechsler, which has 10 core or required subtests, Dr. [REDACTED] said the GAMA has only four subtests. He said his recollection was that the Stanford-Binet assesses both the verbal and nonverbal IQ, but he said he does not administer it because he finds it of limited utility. He acknowledged that the GAMA doesn't yield a verbal IQ score and that he could not come up with a verbal IQ score for the Appellant from the tests he administered. He did not know the statistical reliability of the GAMA but knew it was a valid test based on research and his attendance at conferences.

When challenged about the GAMA providing an incomplete picture of a person's overall cognitive abilities because it doesn't test the verbal IQ, Dr. [REDACTED] said that assertion was based on the assumption that any reliable measure of overall cognitive ability must have verbal and nonverbal components. He acknowledged that the Wechsler was the gold standard in terms of its use and how widely researched it is, and he again acknowledged that it has both a verbal and nonverbal component. But again he maintained that a comprehensive test does not require both verbal and nonverbal components.

With respect to Exhibit 3, the psychological evaluation done when the Appellant was 3 years old, Dr. [REDACTED] said the test was not as reliable as it would have been after the age of 6. In any event, he could not say this test supported finding an IQ of 70 or below. In Exhibit 5, the McCarthy Scales were administered when the Appellant was 5 years 2 months. Dr. [REDACTED] said the Appellant's perceptual performance was more than two standard deviations below the norm but the verbal scores were average. He said this report was laying the foundation for understanding that the Appellant was functioning on two different levels.

Dr. [REDACTED] said the K-ABC (Exh 6) was a valid measurement of the Appellant's intellectual functioning at the time and agreed that none of the scores were 70 or below. He reviewed the Appellant's scores.

Dr. [REDACTED] said he does not use the Woodcock Johnson tests of cognitive ability so was not that familiar with it. But he agreed that it tests cognitive ability and provides a valid indicator of generalized intelligence, but said it does not yield an IQ score. He reviewed the Appellant's test scores: Long-Term Retrieval -128 (superior range), Short-Term Memory -108 (high end of average range), Processing Speed - 35 (deficient range), Visual and Auditory Processing -109 (high end of average range), Comprehension-Knowledge -106 (middle to high end of average range), Fluid Reasoning - 93 (low end of average range), and Memory Names -148 (very superior range). (Exh 13).

When asked whether it was fair to say that this test did not support the conclusion the Appellant had an IQ score of 70 or below, Dr. [REDACTED] said the test didn't generate an IQ score, and there were several performances in the grossly deficient range (Processing Speed 35, Visual Matching 38, and Cross Out 47). Dr. [REDACTED] said he focused his analysis on the WAIS-IV and WISC-IV because they yielded IQ scores. He said the WJ yielded discrete measures of some abilities, and those results were consistent with later testing that yielded low nonverbal scores, and showed attention, sustained concentration and focus problems.

Dr. █████ said he agreed that the Appellant was solidly at the average level with regard to verbal skills. However, in the nonverbal areas, particularly areas that require independent strategizing, he was at the significantly deficient level. Dr. █████ said this split is consistent throughout all testing.

Dr. █████ was next asked about the WJ III Tests of Cognitive Ability in Exhibit 13. He noted that he does not know this test closely as he administers the WIAT for achievement. He said the Appellant's GIA (General Intellectual Ability) score (ext) of 94 doesn't have any meaning other than it's in the average range. Dr. █████ said he viewed the Appellant's scores in terms of discrepancies and noted the almost three standard deviation difference between Thinking Ability (116) and Cognitive Efficiency (71).

In looking at the WISC-IV in Exhibit 15, Dr. █████ again agreed that the Wechsler was the gold standard and is a good indicator of someone's overall IQ. He declined to give an opinion as to whether the VCI score of 91 and PRI score of 82 support the conclusion that the Appellant's overall IQ score was 70 or below because he said the test was incomplete. He based this statement on the fact that the examiner fell short of discussing the discrepancy between the VCI/PRI and the WMI/PSI scores. Also, he said the examiner commented that there was more to the Appellant's profile that needed to be determined, which Dr. █████ took to refer to IQ, not diagnosis. He said there needed to be more discussion given the discrepancy in scores. The results continued to show that the Appellant was functioning at two levels, and the Processing Speed score raised the question whether his ability to problem solve independently - a key aspect of WISC-IV - was below 70. Dr. █████ noted the examiner's comment under Attention and Concentration that the Appellant's strong showing in Working Memory was due to his strong performance in Digit Span, which is more a measure of rote memory. But his lower score in Letter-Number was more reflective of a working memory weakness, which is characteristic of ADHD.

When asked whether he would diagnose the Appellant as mentally retarded, Dr. █████ said he would diagnosis him as having two levels of intellectual functioning. In the verbal area he is not mentally retarded, but in the nonverbal area across a range of IQ tests (such as the GAMA) and several nonverbal tests, he is in the deficient range.

Asked about Mr. █████'s report (Exh 16), Dr. █████ said he might diagnose someone with a VCI of 107 as mentally retarded because it is mathematically possible to have full scale IQ or a preponderance of subtest scores in the deficient range and still have high verbal score on the WAIS-IV. Also, he might diagnose someone as mentally retarded if there was a lot of evidence to suggest that there were specific issues related to a wide discrepancy or profoundly low functioning in several areas of cognition. He said he uses an integrative approach.

When asked whether he agreed that verbal comprehension was a major indicator of IQ, Dr. █████ testified that it is an indicator, but there are also three other indicators. Therefore he would look for the additional three factors that would come closer to or below the 70 to counterbalance the 107, and he would also look at the nature of the differences because discrepancy is very important. He said there would need to be areas that are lower, but in this case, where there is such a vast difference in scores, he would look at the type of functioning in all areas.

Dr. █████ said he considered the GAMA a general measure of intellectual ability. Together, the GAMA and the WAIS-IV (Exh 16) support the conclusion that overall the Appellant's IQ is 70 or below since scores on two of the four areas were 70 or below (PRI-67 and PSI-50). Dr. █████ did not accept the examiner's statement that Working Memory was an underestimate of the Appellant's ability because of the Appellant's delay in answering questions. He said the delays raised questions

about whether the Appellant was getting accommodations in the testing because it was puzzling that it would take the Appellant seven minutes to repeat five digits.

On re-direct, Dr. [REDACTED] repeated testimony about the difference between achievement tests and measures of intellectual functioning. He also reiterated his testimony that he believed it was possible to have strong nonverbal skills and weak verbal skills and have mental deficiency, as well as the opposite situation. Dr. [REDACTED] said a factor that went into his thinking was literature that reports people who are verbally strong tend to be under-identified as mentally deficient because our society emphasizes verbal aspects of functioning.

This Hearing Officer asked Dr. [REDACTED] why he could separate out one aspect of intellectual functioning, disregard the other, and claim to meet the Department regulations. Dr. [REDACTED] responded that it has to do with the vast discrepancy between the Appellant's two areas of functioning. He said in terms of the WAIS-IV, half of the Appellant's functioning was in the deficient range. He said it becomes a matter of whether one views each half or each function as a measure of intellectual ability or if one averages both and comes up with just one number. Dr. [REDACTED] argued that if one averages all 10 subtests, the Appellant comes up slightly above 70, but his position was that there was such a wide discrepancy that the Appellant was functioning at two different levels so averaging was inappropriate. He said he administered the GAMA as an alternative test and although it is a nonverbal test, it is a test of general ability. Without significant deviation on the four subtests, the Appellant was in the deficient range.

Dr. Richard Costigan testified on behalf of the Department. He is the Clinical Director of [REDACTED] Office and for the past six years a part-time Eligibility Psychologist for DDS. In that position he makes about 1400 eligibility determinations annually. He has also had experience administering standardized IQ tests and experience and education in interpreting IQ tests. He teaches a graduate course in psychological evaluation using Wechsler instruments at Worcester State College.

After Dr. Costigan reviewed the Department's regulatory criteria, he discussed the various exhibits in the record. He said because the Appellant was quite young when the McCarthy Scales were administered (Exh 5), Dr. [REDACTED] raised issues about whether testing provided a valid measurement. He said Dr. [REDACTED] also raised the distinct difference between verbal and nonverbal scores (Verbal 48, average range; Perceptual-Performance 28, extremely low range; Quantitative 40, low average range; and Memory 44, low average range). Dr. Costigan noted that attention was a significant factor, and that the test should be interpreted with caution.

Dr. Costigan next reviewed the Woodcock-Johnson Tests of Achievement (Exh 7) and noted that all of the Appellant's test scores were average to above average. Dr. Costigan would not draw any conclusion from this report about IQ since it is an achievement test, not an IQ test, and the results compared the Appellant in achievement to his peers. Dr. Costigan did say that there is a significant correlation between IQ scores and achievement scores.

With respect to the Kaufman Assessment (Exh 6), Dr. Costigan said the K-ABC is a valid instrument measuring overall cognitive abilities. The Appellant's scores were Sequential Processing 98 (45th %, average), Simultaneous Processing 85 (16th %, below average), and Mental Processing score of 88 (21st %, below average). Dr. Costigan noted that the examiner cautioned that the test results should be considered with caution due to the fact that the Appellant was easily distractible, impulsive, and tended to perseverate verbally. Dr. Costigan's interpretation was that the Appellant scored in the low average to average range across index scores. He said that there

was a likelihood the scores would have been higher had the Appellant's performance not been negatively impacted by his behavior during testing.

In the Woodcock-Johnson-R Tests of Achievement in Exhibit 8, the Appellant's scores overall were in the average to above average range.

Dr. Costigan next reviewed Exhibit 10, in which the Woodcock-Johnson (WJ-R) Tests of Cognitive Ability were administered to the Appellant. Dr. Costigan said this test is acceptable in terms of an overall comprehensive cognitive evaluation and it is a valid indicator of generalized intelligence. It provides an overall general intelligence ability (GIA) score that looks at overall functioning as well as a number of specific subtest scores, and has a good correlation with a full scale IQ on the WAIS, WISC-IV, and Stanford-Binet. Although the examiner did not provide a GIA, the Appellant's other scores, consistent with many of the scores in other evaluations, showed very strong verbal skills and very poor processing speed skills. His verbal skills were in the average to above average range but processing speed skills were in the extremely low range. Dr. Costigan agreed with the examiner that the Appellant's complex cognitive profile showed most areas of functioning in the average to above average range, and the primary area of weakness was processing non-verbal symbolic representation.

In the next Woodcock-Johnson (WJ-R) Tests of Achievement (Exh 11), Dr. Costigan noted that the Appellant was 8 years [REDACTED] old at the time of testing. Most of his scores were in the average to above average range. The exceptions were Math Skills, which was in the borderline range, and Calculation Skills, which was in the middle of the borderline range. Overall, Dr. Costigan said the scores were in the average range, which was consistent with previous achievement testing.

Dr. Costigan next reviewed Exhibit 12, a Woodcock-Johnson III Tests of Achievement given when the Appellant was 11 years [REDACTED] old. In this report, Dr. Costigan said the Appellant's academic scores started to decline. Writing Fluency and Written Expression were both below the 3rd percentile. In other scores, Broad Reading and Broad Math were just in the average range, Broad Written Language was in the low average range, and Academic Fluency was in the borderline range.

The Woodcock-Johnson III Tests of Cognitive Ability were again administered in the course of the [REDACTED] 2003 Psychological Evaluation (Exh 13). Dr. Costigan said the WJ correlates well with IQ, but it doesn't have exactly the same type of testing to it. He said it's also highly verbally influenced so it does not pick up on a lot of the visual-spatial aspects, which is its weakness. For these reasons he prefers the Wechsler. The Appellant's GIA score of 94 placed him in the average range.

Dr. Costigan next reviewed the WJ III Test of Achievement done when the A was 14 years [REDACTED] [REDACTED] (Exh 14). The Index Scores were Broad Math 76, in the 6th percentile, Reading Skills 116 in the 85th percentile, Math Calculation 78, which was at the higher end of the borderline range, and Math Reasoning 87, which was at the higher end of the low average range. The overall Academic Skills score of 109 was in the average range, and Academic Knowledge of 101 was in the average range. Dr. Costigan said these results, in which the Appellant was very close to age equivalent in most tests and significantly above in some, were slightly better than those in the previous assessment.

Dr. Costigan next reviewed the WISC-IV, which was completed in [REDACTED] 2006 when the Appellant was 15 years [REDACTED] (Exh 15). He said the Wechsler was the standard most used across clinical settings. The Appellant's scores were Full Scale 78, VCI 91, PRI 82, and although no number was

given, the PSI was in the extremely low range. When asked if he could draw a conclusion from the scores as to whether the Appellant met DDS eligibility criteria, he said that the VCI and PRI comprise most of the subtests in the Wechsler and are most highly correlated with overall IQ. The Appellant scored a 91 on the VCI, which was solidly at the end of the average range, and 82 on the PRI, which is in the lower end of low average range. Even noting the extremely low score on PSI, Dr. Costigan said the results were not an indication of overall cognitive functioning being two standard deviations below the mean. In addition, the Working Memory score was in the average range. Therefore, three of the four Index scores were significantly above the extremely low range and actually in the low average to average range. Dr. Costigan said these results did not meet the criteria for DDS eligibility.

Next Dr. Costigan reviewed the results of the WAIS-IV, the adult version of the Wechsler, given to the Appellant the month he turned 18 (Exh 16). The Appellant's scores were VCI 107, which was in the average range, PRI 67, in the extremely low range, WMI 89, low average range, and PSI 50, in the extremely low range. Dr. Costigan noted the examiner's comment that the working memory was a low estimate of the Appellant's true ability. Dr. Costigan did not draw any conclusions from the full scale IQ score. Given the discrepancy between the VCI score of 107 and the PRI score of 67, reporting the full scale score was not consistent with the standards of the profession and the full scale score was not representative of the Appellant's functioning.

When asked whether he would diagnose the Appellant as being mentally deficient with a VCI score of 107, he said he would not. He said at the 62nd percentile, there had to be a different explanation for the other low scores than a diagnosis of mental retardation. He agreed that the Appellant had two different levels of functioning. In the verbal domain he was average to low average on most measures, and in the nonverbal domain he was in the extremely low range with the exception of the PRI score of 82 on the WISC-IV. Dr. Costigan noted that in many ways the Appellant presented a pretty clean profile in that there was not much variation from test to test. He consistently showed average to above-average verbal skills and fairly consistently showed lower visual spatial construction skills (again with the exception of the WISC-IV). Also, Processing Speed was below the first percentile in every report.

Dr. Costigan said the Department chose the IQ eligibility level of 70 in order to capture for service the person who has overall cognitive functioning in the 3rd percentile or below. One would not usually find someone with VCI skills at 107 and adaptive functioning below the 1st percentile, however the Appellant's cognitive functioning overall throughout all of his evaluations, especially in the verbal domain, was significantly above 70. Dr. Costigan said there is significant right hemisphere involvement, and throughout many evaluations there were suggestions of a nonverbal learning disability. There is also a diagnosis of PDD-NOS, which would affect nonverbal reasoning.

Dr. Costigan said he was not that familiar with the GAMA and had to research it. He found that it looks at right hemisphere functioning and visual organization. The results of the GAMA (Exh 17) were consistent with previous testing and highlighted the Appellant's right hemisphere and executive functioning issues.

In terms of meeting Department eligibility criteria, Dr. Costigan said deficiency in one type of intelligence scoring is not enough because the Department looks at global assessment of functioning, which means looking at all areas of cognitive functioning. He said the Department would want to see the two levels of functioning a lot closer to find eligibility, and he would not find individuals who scored 107 on the VCI eligible for DDS services, nor would he make a diagnosis of

mental retardation. Instead he would look for a more clinically appropriate diagnostic category.

Dr. Costigan testified that he disagreed with the diagnosis rendered by Dr. [REDACTED] (Exh 18) because none of the tests besides the GAMA resulted in cognitive functioning below 70. Further, the Appellant's achievement testing placed him significantly above the 6th grade level, so by definition the Appellant would not meet the definition of mild or moderate mental retardation which requires progress to end at about the 6th and 2nd grade level, respectively.

With respect to independent living, Dr. Costigan agreed that the Appellant is someone who requires supports. He said the Appellant's adaptive skills, executive functioning skills, and his capacity to handle day-to-day activities, are deficient.

Based on the evidence submitted by the Appellant, Dr. Costigan concluded that the Appellant does not meet the criteria of showing significant cognitive functioning at 70 or below.

On cross-examination, Dr. Costigan admitted that he never examined or tested the Appellant. He also acknowledged that there is nothing in the regulations at 115 CMR 2.01 regarding achievement tests, or which IQ tests can be used, or whether the tests must be verbal or nonverbal. However, Dr. Costigan said the regulations do say the tests must be comprehensive. Dr. Costigan also acknowledged that Dr. [REDACTED] was a psychiatrist, which meant he could evaluate and render a diagnosis. Dr. Costigan also admitted that he never administered the GAMA, but he said testing had to be a global assessment including both verbal and nonverbal skills.

On re-direct, Dr. Costigan noted other regulations that specifically concern DDS hiring clinical psychologists competent in the area of psychological assessment and interpretation of assessments. Their job is to interpret evaluations to make informed decisions as to whether an individual meets the regulatory criteria.

Both parties made brief closing statements. Since then, both parties have submitted Proposed Findings of Fact.⁸

FINDINGS AND CONCLUSIONS

The Law

M.G.L c. 123B §1 defines a mentally retarded person as follows:

[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.

A mentally retarded person may be considered mentally ill provided that no mentally retarded person shall be considered mentally ill solely by virtue of his mental retardation.

115 CMR 6.04 sets forth the general eligibility requirements for DDS services. In relevant part these provide:

⁸ Attorneys for both parties have done an exceptional job in sifting through a large volume of records and testimony in preparing and presenting their proposed findings.

- (1) 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. . . .

115 CMR 2.01 provides the following definitions:

Mental Retardation

Mental Retardation means significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. A person with mental retardation may be considered to be mentally ill as defined in 104 CMR (Department of Mental Health), provided that no person with mental retardation shall be considered to be mentally ill solely by reason of his or her mental retardation.

Significantly Sub-average Intellectual Functioning

Significantly Sub-average Intellectual Functioning means 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.

Significant Limitations in Adaptive Functioning

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.

115 CMR 6.02(3) addresses the eligibility determination process. The last paragraph of that section provides, in relevant part:

The eligibility determination process shall include . . . consideration of assessments and psychological test results. Only qualified practitioners can administer and interpret psychological tests. The Department Regional Eligibility Team Psychologist may consider the psychometric properties of intelligence tests and other assessment instruments when interpreting test results, and may consider relevant data in making clinical judgment about the presence or absence of intellectual disability.

115 CMR 6.34 sets the standard and burden of proof. In relevant part these provide:

- (1) - Standard of Proof. The standard of proof on all issues shall be a preponderance of the evidence.
- (2) - Burden of Proof. The burden of proof shall be on the appellant

Findings of Fact and Conclusions of Law

The issue in this case is whether the Appellant, [REDACTED], meets the Department's definition of mental retardation. For the reasons set forth below, I find that the Appellant does not meet the Department's definition of mental retardation and therefore is not eligible for Department services.

The Appellant applied for DDS services on [REDACTED] 2009. Born [REDACTED] 1991, the Appellant was 18 years old at the time of the hearing; since then he has turned 19. He meets the domicile requirement of the Department, and by stipulation of the parties, also meets the Department's adaptive functioning eligibility criteria.

The Appellant is the first-born child of [REDACTED] and [REDACTED]. The [REDACTED]'s noticed delays in milestones when the Appellant was young. He did not walk until he was 18 months old. He was referred to the REACH program at the age of 2 – [REDACTED] because of failure to reach cognitive milestones. Had poor eye-hand coordination compared to friends, and was late in tying shoes and in the use of table utensils.

The Appellant repeated a year in preschool because he wasn't meeting academic milestones. He has had special education services since he began school, and since the 7th grade has been in separate classrooms. Currently he is in the Life Skills program and has a one-on-one aide. His is failing the one academic class he takes, and is not doing well in the program in general.

Achievement Testing

The Appellant has had numerous achievement tests starting in [REDACTED] 1994 when he was 3 years old. As early as that time, testing on the Bayley II showed tremendous variability in performance as well as variability in attention and cooperation (Exh 3). Results were believed to indicate a mild form of Pervasive Developmental Disorder. Attention issues arose on the Bayley when again administered at the time the Appellant was 4 [REDACTED] years old.

Achievement testing when the Appellant was 6 [REDACTED] years old again showed some attention issues coinciding with test scores at or above the first grade level (Exh 7). Attention issues continued to be an issue in achievement testing at the age of 7 [REDACTED] years, but the Appellant also tested above grade level in reading. The diagnosis of PDD was again confirmed. In 1999 at the age of 8 [REDACTED] years, the Appellant was at or above grade level in all academic areas (Exh 9). Attention skills continued to be a problem. In 2000, most areas of the Appellant's functioning were in the average to high average range (Exh 11).

Scores from educational testing done in 2003 (Exh 12) when the Appellant was 11 [REDACTED] and in the 5th grade were in mostly in the low average to average range, with Written Expression in the very low- to low range. The Appellant's other scores in Academic Skills (105), Academic Fluency (75), and Academic Applications (90) were average to limited- to average.

Finally, the most recent educational testing took place in 2005 when the Appellant was 14 [REDACTED] (Exh 14). Compared to others at his grade level, the Appellant's academic knowledge and skills were in the average range, and his performance in basic reading skills was high average, math reasoning was low average, and math calculation skills was low.

Cognitive Testing

From the beginning, the consistent pattern throughout the Appellant's cognitive testing showed a significant difference between the Appellant's verbal comprehension skills, which generally fell in the upper end of the average range, and his nonverbal scores, which largely fell in the extremely low range.

In 1996, the date of the earliest cognitive test in the record, the examiner discussed the "very significant discrepancy between verbal and nonverbal/perceptual-performance skills, in favor of the former." (Exh 5). The Appellant's verbal performance was within the average range. In 1997 the examiner's summary includes: "[The Appellant's] performance on the K-ABC indicated that his sequential processing abilities are in the average range while his simultaneous processing abilities are below average." (Exh 6). From 2000 testing, the examiner noted: "Current testing reveals a cognitive profile that is complex with most area (sic) of functioning in the average to above average range. [The Appellant's] primary area of weakness is his difficulty processing non-verbal symbolic representation. His primary area of strength is his facility with the acquisition of some aspects of language, especially vocabulary." (Exh 10).

The examiner in 2003 noted very superior performance in long-term retrieval compared to a significant relative weakness in processing speed. (Exh 13). Again in 2006, the examiner noted verbal skills in the average range while processing speed was extremely low. (Exh 15). The evaluator in 2009 (Exh 16) said: "Current assessment results reveal a pattern of strengths and challenges that are consistent with [the Appellant's] prior evaluation, and are endemic to his symptoms of Autism. [His] personal strengths include his conceptual language development . . ." and ". . . he continues to be significantly challenged by his difficulties processing information . . ." Dr. [REDACTED] noted later in 2009 (Exh 17) that the scores from the 2009 testing in Exhibit 16 showed ". . . that [the Appellant] was functioning at two different level cognitively . . ." and that ". . . testing would point toward a very significant disability in right hemisphere functioning and share characteristics of a Non-Verbal Based Learning Disability." (Exh 17). Testing by Dr. [REDACTED] also showed the Appellant to be functioning at two different levels.

We have the benefit of numerous cognitive evaluations of the Appellant that provide IQ testing from the age of 5⁹ to the age of 18¹⁰ years of age as follows:

<u>Year/age</u>	<u>Test</u>	<u>Exh#</u>	<u>V</u>	<u>P-P</u>	<u>Q</u>	<u>M</u>					
1. 1996 (5 ⁹)	MSCA	5	48	28	40	44	(mean: 50, SD 10)				
<u>Year/age</u>	<u>Test</u>	<u>Exh#</u>	<u>Sequential</u>		<u>Simultaneous</u>		<u>Mental</u>				
2. 1997 (6 ¹⁰)	K-ABC	6	98		85		88				
<u>Year/age</u>	<u>Test</u>	<u>Exh#</u>	<u>GIA</u>	<u>Comp/Know</u>	<u>S/T Mem</u>	<u>VP</u>	<u>AP</u>	<u>L/T Ret</u>	<u>FR</u>	<u>PS</u>	
3. 2000 (8 ¹⁰)	WJ-R	10		106	108	109	109	128	93	35	
4. 2003 (11 ¹⁰)	WJ-R	13	94	94	115		112	135	103	32	
<u>Year/age</u>	<u>Test</u>	<u>Exh#</u>	<u>FSIQ</u>	<u>VCI</u>	<u>PSI</u>	<u>PRI</u>	<u>WMI</u>				

⁹ It was generally agreed by both experts that testing done under the age of 6 had limited value, and that IQ tests begin to approach reliability around the age of 6. Therefore I give less weight to the earliest test, but note it is consistent with the Appellant's pattern of discrepant verbal and nonverbal scores.

5. 2006 (15)	WISC-IV	15	78	91	0.1%	82	61 st %
6. 2009 (18)	WAIS-IV	16	76	107	50	67	89
7. 2009 (18)	GAMA	17	63				

Both Dr. Costigan and Dr. [REDACTED] were in agreement on many facts in this appeal. They agreed that testing prior to the age of 6 had limited value. They also agreed that the Wechsler tests are the gold standard of IQ tests. They further agreed that the full scale IQ score is not typically reported when there is a wide disparity between verbal and non-verbal scores, which was the case in Exhibits 15 and 16. They both also agree, however, that the VCI score of 107 in Exhibit 15 was not questionable. And they both agree that the Appellant has significantly disparate verbal and nonverbal scores, with verbal skills solidly in the average range and processing speed and other tasks that involve right hemisphere functioning being significantly deficient. They both recognize that the Appellant functions on two levels, and that he carries diagnoses of PDD and ADHD.

Dr. [REDACTED] raised or took issue with many aspects of the testing in the record presumably to minimize the impact of test results that placed the Appellant above the Department's threshold IQ score of 70. Dr. [REDACTED]'s issues addressed 1) testing done before the age of 6; 2) the fact that Woodcock-Johnson cognitive tests do not yield IQ scores; 3) qualifications of examiners without a Ph.D or MD; 4) the reporting of the full scale score in Exhibits 15 and 16; 5) the inconclusive results and recommendation for additional testing in Exhibit 15; and 6) the failure of the examiner to discuss the discrepancy between test scores, also in Exhibit 15.

Ultimately, even assuming the legitimacy of at least some of these issues, the crucial question for purposes of this hearing turns on whether the significant deficiency in the Appellant's nonverbal skills in and of itself constitutes mental retardation irrespective of the Appellant's verbal abilities, which have consistently tested in the average range. Dr. [REDACTED] argues that it does, and points to the results of the GAMA score of 63 along with Dr. [REDACTED]'s conclusion that the Appellant qualified for a diagnosis of Mild Mental Retardation by testing, Moderate Mental Retardation by examination and history. Dr. Costigan's position is to the contrary. He argues that the GAMA is a nonverbal test and is limited to looking at right hemisphere functioning and visual organization. Further, while the Appellant clearly had a deficiency in that area, Department eligibility criteria requires a global assessment of functioning, which necessitates a review of all areas of cognitive functioning, including verbal.

The Appellant's attorney correctly argues that Department regulations are silent as to the type of IQ testing that must be administered, and specifically do not specify whether testing must be verbal and/or nonverbal. However, as Dr. Costigan noted, the regulations do provide that the testing must be comprehensive.¹⁰ The regulations also specifically authorize the Department psychologist to consider the psychometric properties of intelligence tests in the process of interpreting test results.¹¹

In determining which of the IQ tests in the record meet the requirement of "comprehensive," the parties' agreement that the Wechsler is the gold standard of IQ tests suggests these IQ tests deserve the greater weight. Further, unlike the GAMA, the Wechslers test both verbal and non-verbal

¹⁰ 115 CMR 2.01 defines 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. Emphasis added.

¹¹ See, 115 CMR 6.02(3), *supra*.

skills. While Dr. █████ contends that the GAMA is comprehensive, and also that he administered verbal tests apart from the GAMA (Boston Naming, Word Context of the Delis Kaplan, and the BRIEF-A), those tests do not yield IQ scores. Thus, I am not persuaded that the GAMA is a comprehensive IQ test within the meaning of the Department regulations given its restriction of testing to the nonverbal arena. But even were it to be considered comprehensive, I do not find that it carries the same weight as the Wechsler, which tests both verbal and nonverbal skills.¹²

Apart from the GAMA, the results of the cognitive tests in the record indicate that the Appellant has verbal skills in the average range, perceptual reasoning skills in the extremely low to low average range, processing speed in the extremely low range, and working memory in the low average range. Other than the Appellant's processing speed scores, there is only one score (PRI of 67 on the WAIS-IV) below the Department's threshold level of 70. Results of achievement tests were also consistently in the average to above average range, again with the exception of processing speed.

Dr. █████ acknowledged that his testing also found the Appellant's verbal skills to be in the average range. However, he argued that the Appellant was functioning intellectually at two different levels, and his nonverbal skills were significantly deficient. On that basis, he believed the Appellant was eligible for Department services.¹³

While there is no question the Appellant has significant deficiencies in his nonverbal skills, I do not accept the notion that this deficiency alone rises to the level of meeting the Department's definition of mental retardation. Rather, as Dr. Costigan testified, a determination on the question of mental retardation requires the Department to make a global assessment of functioning, which means making a review of overall cognitive functioning, not isolated components of cognitive functioning. Thus, I reject the Appellant's argument that his nonverbal deficiency in and of itself is sufficient for a finding of mental retardation and instead look to the full panoply of test results. To do otherwise would alter the definition of mental retardation from one of global functioning to one of piecemeal functioning. In that vein, I reject Dr. █████'s analysis in which he viewed the choice as limited to either looking at each function separately as a measure of intellectual ability or as averaging the two together and coming up with one number. The alternative approach, which I adopt, is that one should look at overall functioning, not as an average, but as an integrative whole.

In looking at the full range of cognitive tests, I find that most of the Appellant's scores exceed the levels required by the Department for eligibility purposes. There is no dispute that his verbal skills are in the average range on all of the cognitive assessments as set forth above. Indeed, in virtually all areas with the exception of processing speed, scores exceed the Department's criteria. Accordingly, I find that the Appellant does not meet the definition of mental retardation.¹⁴

CONCLUSION

¹² The fact that the full scale scores in both Wechsler tests were reported inappropriately does not invalidate the test itself or the reliability of the other reported scores.

¹³ When asked if he would diagnose the Appellant as mentally retarded, notably Dr. █████ did not respond with an unequivocal yes. His response was that he would diagnose the Appellant as having two levels of intellectual functioning, that is, in the verbal area he was not mentally retarded, but in the nonverbal area across a range of IQ tests (such as GAMA) and several nonverbal tests he was in the deficient range.

¹⁴ I do note that the Appellant has demonstrated significant limitations in adaptive functioning. There is no dispute that he will need supports and supervision throughout his life, and cannot manage independent living.

Based on my determination that the Appellant has not shown that he meets the Department's definition of mental retardation, I conclude that he is not eligible for DDS services.

APPEAL RIGHTS

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

Date: _____

Elizabeth A. Silver
Hearing Officer