2010 - 13

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Developmental Services
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Boston, MA 02118-2439

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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: Elizabeth Silver, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
John Geenty, Assistant General Counsel
Damien Arthur, Regional Eligibility Manager
Bradley Crenshaw, 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 DDS [redacted] Office, [redacted], MA.

Those present and participating at the hearing:

[redacted]	Appellant
[redacted]	Mother of Appellant
Bradley Crenshaw	Psychologist for DDS
John Geenty, Jr.	Attorney for DDS

At the hearing, the Department submitted Exhibits 1-11. The hearing lasted approximately one and a half hours. [redacted] and the Appellant testified on his behalf and Dr. Crenshaw 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. For the reasons set forth below, I determine that he is not mentally retarded and therefore not eligible for Department services.

SUMMARY OF THE EVIDENCE

Exhibit 1. Correspondence between the Department and the Appellant's family, including request for and notices of the fair hearing, notice of and report from [redacted]10 informal conference upholding the denial of eligibility, Appellant's [redacted]09 appeal of DDS's initial denial of services, and DDS's [redacted]09 denial of services.

Exhibit 2. Curriculum Vitae of Brad Crenshaw, Ph.D., Ph.D.

Exhibit 3. School Psychology Evaluation done [redacted]99 by [redacted], MA, CAGS, Associate School Psychologist, when the Appellant was 9 years [redacted] old and in the 2nd grade. The Appellant had been referred for a multidisciplinary evaluation to determine his academic and cognitive levels and his motor ability. During testing the Appellant was cooperative although he exhibited motor behavior marked by fidgeting and restlessness. Ms [redacted] therefore said she presented test results with reservations, although she believed the results were best considered to be a rough estimate of the Appellant's level of functioning at the time.

Ms. [redacted] administered the Wechsler Intelligence Scale for Children – Third Edition (WISC-III). The Appellant's scores were Verbal IQ 87, Performance IQ 73, and Full Scale IQ 78. Factor scores were Verbal Comprehension (VCI) 89, Perceptual Organization (POI) 79, and Freedom from Distractibility (FFD) 75. Ms. [redacted] summarized that the Appellant had overall borderline intellectual functioning. Also, the Verbal-Performance split was statistically significant at 14 points. Test results were offered with reservations due to the Appellant's distractibility during the evaluation.

Exhibit 4. Learning Assessment from the [redacted] Public Schools done [redacted]02 - [redacted]02 by [redacted], MS, CCC-SLP, Special Education teacher, when the Appellant was 12 years old and in the 5th grade. He was evaluated as part of his three year re-evaluation. Background information indicated the Appellant had significant learning deficits, with deficits in the areas of Processing Speed and Short Term Memory.

Results of testing were judged to be an accurate reflection of the Appellant's learning skills. Ms. [redacted] administered the Woodcock-Johnson III Tests of Cognitive Ability (WJ-III COG) on which the Appellant scored in the Low Average to Average range on all 11 of the Cluster Skills and on all but two[1] of the 15 Individual Test Results, with scores ranging from 81 to 102. He had average skills in the areas of Verbal Ability, Long-Term Retrieval and Fluid Reasoning, and low average abilities in Thinking Ability, Cognitive Efficiency, Broad Attention, Phonemic Awareness, Processing Speed, Short-term Memory, Working Memory, and Executive Processes.

Ms. [redacted] also administered the Woodcock Johnson Tests of Achievement (WJ-III ACH) on which the Appellant's scores again were all in the Low Average to Average range with the one exception of Written Expression (65).

Exhibit 5. Psycho-Educational Evaluation dated [redacted]02 done by Dr. [redacted], Certified School Psychologist, Licensed Psychologist, when the Appellant was 12 years [redacted] old. The Appellant had been referred pursuant to the three year re-evaluation process. At the time the Appellant was enrolled in a regular classroom and a program for the learning disabled. Background information supplied indicated that the Appellant had had several surgeries and hospitalizations during infancy and early childhood secondary to a dysfunctional and impaired heart. He had always attended public schools, and at the time of the report he was getting extra help from his teachers. He was reported by his mother and teachers to have had social skills issues including difficulty interacting with others as his behaviors tended to be immature.

Dr. [redacted] administered the WISC-III. During testing the Appellant's attention and concentration skills fluctuated significantly, so test results were presented with reservations, although they were best considered to be a rough estimate of the Appellant's level of functioning at the time. Test scores were: Verbal IQ 91, Performance IQ 72, and Full Scale IQ 80. These scores placed the Appellant in the Low Average range of intelligence. Because of the significant 19 point difference between the Verbal and Performance scores, the Full Scale score was not considered to be an accurate summary of general intelligence ability. Dr. [redacted] said that the Appellant's Verbal score of 91 was the better representation of the way the Appellant solved problems. The Appellant's factor scores were Verbal Comprehension 93, Perceptual Organization 77, Freedom From Distraction 84, and Processing Speed-77.

Dr. [redacted] also administered the Kaufman Test of Education Achievement – Brief (KTEA-B) on which the Appellant had standard scores of 115 on Mathematics (84th percentile), 99 on Reading (47th percentile), 99 on Spelling (42nd percentile), and 102 on the Battery Composite (55th percentile).

Exhibit 6. Neuropsychological Evaluation done over three sessions on [redacted], and [redacted], 2004 when the Appellant was 14 years [redacted] old. [redacted], Ph.D, evaluated the Appellant at his parents' referral in order to assess higher cortical functions and patterns of cognitive strength and

[1] The two scores below low average were Visual Matching-78 (Low), and Retrieval Fluency-65 (Very Low).

weakness and to rule out or define neurobehavioral contributors to a host of academic and behavioral concerns.

In her background report, Dr. [redacted] noted that the Appellant became cyanotic three hours after delivery. He was diagnosed with heterotaxy/asplenia syndrome, a congenital condition that affects asymmetric organs such as the heart, liver, intestines, and spleen. He was born with only a single functional heart ventricle and required several surgical procedures to improve his cardiac functioning. In addition to becoming cyanotic shortly after birth, he experienced chronic hypoxia (low blood oxygen levels) until he underwent a fontan surgical procedure at the age of 12.

Dr. [redacted] administered the WISC-IV, the results of which she said provided evidence of a pattern of functional deficits that was consistent with compromise of frontal brain systems and functions. Dr. [redacted] thought the most likely etiology of these functional deficits was the cyanotic episode shortly after birth, acute and chronic hypoxia, and anomalous brain formation associated with heterotaxy. The Appellant's overall tests scores revealed borderline intellectual functioning with a Full Scale IQ of 72. His index scores were Perceptual Reasoning (PRI) 98, Verbal Comprehension (VCI) 91, Working Memory (WMI) 77, and Processing Speed (PSI) 62.

Exhibit 7. Psychological Evaluation done on [redacted]08 when the Appellant was 17 years [redacted] old and in the 11th grade. [redacted], Ph.D., NCSP, evaluated the Appellant as part of his three year re-evaluation. She administered the Wechsler Adult Intelligence Scale third Edition (WAIS-III), which yielded the following scores: Verbal IQ 91 (average), Performance IQ 81 (low average), and Full Scale IQ 87 (low average). Index scores were VCI-96 (average), POI-91 (average), WMI-75 (borderline), and PSI-69 (low). Dr. [redacted] concluded that the Appellant was demonstrating a profile of significant cognitive variability, with significantly better skills on tasks requiring language use and understanding and visual spatial problem solving, than on tasks requiring sustained auditory attention or concentration, or speed of information processing.

Exhibit 8. [redacted] High School assessment done on [redacted]08 and [redacted]08 when the Appellant was almost 18 years old and in the 11th grade. [redacted], M.Ed., Learning Center Teacher, administered the WJ-III COG. The Appellant's performance was average in comprehension-knowledge and long-term retrieval, low average in visual-spatial thinking and fluid reasoning, low in auditory processing and short-term memory, and very low in processing speed.

Ms. [redacted] also administered the WJ-III ACH on which the Appellant's performance on reading comprehension and basic writing skills was average, low average on broad reading and broad mathematics, and low on math calculation skills. There were no significant discrepancies found between the Appellant's overall intellectual ability and his reading, math, or written language.

Exhibit 9. Report of Neuropsychological Evaluation done over the course of four visits on [redacted]09, [redacted]10, [redacted]10, and [redacted]10 by [redacted], Psy.D. The Appellant was 19 years [redacted] old at the time. He was referred for evaluation to determine his level of functioning and to obtain recommendations for treatment planning.

Dr. [redacted] reviewed some of the Appellant's history, including his medical condition and educational history, as well as some adaptive functioning. At the time of the evaluation, the Appellant had begun using public transportation independently and was employed stocking shelves and putting clothes on a hanger. More recently he had been engaging in unsafe and risky behaviors. In his impressions, Dr. [redacted] noted that the Appellant's overall profile was consistent with neurologically-based frontal systems dysfunction giving rise to both a dysexecutive syndrome

(including symptoms of ADHD), and a neuropsychiatric disorder characterized by atypical and aggressive behaviors.

Dr. [redacted] administered the Stanford Binet-5 (SB-5) which yielded the following scores: Verbal IQ 85 (low average), Nonverbal IQ 81 (low average), Full Scale IQ 82 (low average), Fluid Reasoning 94 (average), Knowledge 74 (borderline), Quantitative Reasoning 86 (low average), Visual-Spatial Processing 85 (low average) and Working Memory 83 (low average). Overall, the Appellant had low average intellectual functioning.

Dr. [redacted] also administered the Adaptive Behavior Assessment System II (ABAS-II) on which the Appellant's parents were the raters. The Appellant's scores were GAC 54, Conceptual 59, Social 61, and Practical 54.

Exhibit 10. Eligibility Report dated [redacted]05 prepared by Richard Costigan, Psy.D, initially recommending that the Appellant was not eligible for Children's services from the Department. Also attached to this exhibit is an [redacted]05 letter to DDS from [redacted], Ph.D clarifying the Appellant's condition. After submission of Dr. [redacted]'s letter, Dr. Costigan determined the Appellant met the eligibility criteria for DDS Children's services.

Exhibit 11. Eligibility Report dated [redacted]09 prepared by Bradley J. Crenshaw, Ph.D. in which Dr. Crenshaw reviewed the Appellant's testing history and on the basis of the Appellant's scores recommended that he was not eligible for Adult DDS services.

TESTIMONY

Exhibits 1-11 were entered into the record. The Appellant, [redacted], and Bradley Crenshaw were sworn in. The parties made brief opening statements. The Department indicated that the only issue on appeal was the Appellant's cognitive functioning as it conceded that the Appellant met the adaptive limitations prong of the Department regulations.

[redacted] testified on behalf of the Appellant. She said that the Appellant was born with a serious heart defect, which was apparent within the first twelve hours of birth. He was rushed to [redacted] Hospital where he had open heart surgery in his first day of life. He had four surgeries in his first year of life, along with many other procedures. He also had failure to thrive and couldn't take in milk. She said from the beginning the Appellant had developmental issues with speech and general knowledge, which were delayed, but he did walk on time. The Appellant was almost four years old when he had his final surgery, but there was a problem coming out of surgery and he had to be intubated for several weeks.

Ms. [redacted] said the Appellant has had difficulties from the beginning. He was in early intervention and a special pre-school program, and had a lot of emotional issues. He couldn't get along with other children. Also, he had problems with balance and speech. The Appellant went to public schools in [redacted] where the family was living. After a year of kindergarten, the [redacted]s did not think the Appellant was ready for first grade, so he spent a year in the Readiness program and the following year began first grade with a small group of about 15 students. From there he continued to progress every year to the next grade.

Ms. [redacted] explained that the Appellant had ADHD early on and had difficulty focusing, so it was hard for him to learn and to fit in. He was in general classrooms, but had special education services and would be pulled out of regular classes for help. The family moved from [redacted] to

[redacted] when the Appellant was in the third grade. This was a difficult change for him. He continued with special education services and needed particular help with social skills. She said the Appellant never seemed to have any friends and he couldn't function in school and do regular things.

Ms. [redacted] testified that the Appellant attended public schools through high school. He had particularly strong special education services from third through sixth grades. When he switched to middle school, he started having more problems trying to fit in. Ms. [redacted] said the Appellant started attending [redacted] in high school because he was having so much trouble in sophomore or junior year that they decided he needed the more structured school for his behavior. So in the Appellant's junior and senior years he went to the public high school in the morning and [redacted] in the afternoon. This year he has been going to [redacted] full time from [redacted], and they are looking for a residential placement for next year.

In terms of the Appellant's cognitive functioning, Ms. [redacted] explained that she and her husband kept thinking there was something wrong. She said the Appellant had knowledge but he could not write what he knew. It was discouraging for him. He could read at the high school level and knew the words, but didn't understand what he was reading. So by the fifth grade they knew that there were problems besides ADHD. They asked for a neuropsychological evaluation. As part of the evaluation the Appellant had an MRI, which revealed that he had had brain damage during one of his surgeries. This was the first the [redacted]s knew learned had been brain involvement, which helped them understand why he wasn't doing well in school and was having problems.

Since then, Ms. [redacted] said the Appellant has had an additional evaluation, which was similar to the earlier evaluation. The evaluation in 2010 (Exh 9) indicated that the Appellant's "overall profile is consistent with neurologically-based frontal systems dysfunction giving rise to both a dysexecutive syndrome (including symptoms of ADHD) and a neuropsychiatric disorder characterized by atypical and aggressive behaviors."

All along the Appellant had been seeing a specialist to figure out which medications he should be taking. As his diagnosis through sixth grade was ADHD, he was taking Ritalin, but that caused tics. Over time he had tried other medications. As he has gotten older he has had more serious behavior problems, and now he takes heart medications, Abilify and Concerta.

Ms[redacted] concluded by saying that the Appellant's IQ was 72 some years ago. She said processing has been the Appellant's main problem as he falls apart under time constraints. She said it is clear that the Appellant needs help given his cognitive and behavioral issues, and all the counselors and specialists agree that he needs help. She said that as he has gotten older it is even more obvious that he needs help to be able to live in community.

This hearing officer asked the Appellant some questions. He said his birthday is [redacted], 1990, and that he is 20 years old. He lives with his mother, father, and sister, who is 17. He said he has been going to [redacted] for 3 years. He goes five days a week and has programs in life skills, vocational skills, and is learning how to take care of himself. There are about 10 students in his class. He said unrelated to school he works 10-15 hours per week at the Stop and Shop in [redacted].

Dr. Bradley Crenshaw testified on behalf of the Department. As a Department psychologist, he said he does intake and eligibility reviews. Dr. Crenshaw was qualified as an expert witness.

Before getting into a review of the exhibits in the record, Dr. Crenshaw reviewed the Department eligibility regulations. Then he reviewed Exhibit 3, focusing on the results of the WISC-III. The Appellant's scores were Verbal IQ 87, Performance IQ 73, and Full Scale IQ 78. Dr. Crenshaw said the Verbal Comprehension looks at verbal skills, performance reasoning looks at spatial organization and planning, Freedom from Distraction indicates attention, and processing speed indicates the speed with which someone employs his intellect in a focused way. Dr. Crenshaw also noted the factor scores of Verbal Comprehension (VCI) 89, Perceptual Organization (POI) 79, and Freedom from Distractibility (FFD) 75.

Dr. Crenshaw next reviewed the Woodcock-Johnson III (W-J III) testing done from [redacted]02 – [redacted]02 (Exh 4). He said that achievement tests are educational, which is different from the WISC or WAIS. Dr. Crenshaw explained that the Woodcock-Johnson tests of cognition are broken down differently than Wechsler. Dr. Crenshaw reviewed the Appellant's scores, which varied between the low average and average range.

Dr. Crenshaw next reviewed Exhibit 5, which included the results of a WISC-III given on [redacted]02. He said the Appellant's scores were Verbal IQ 91, Performance IQ 72, and Full Scale IQ 80, and factor scores were Verbal Comprehension 93, Perceptual Organization 77, Freedom From Distractibility 84, and Processing Speed 77. Dr. Crenshaw explained how he calculated factor scores, and then concluded that the full scale score was in the low average range.

Dr. Crenshaw next reviewed the WISC-IV given on [redacted]04 (Exh 6). He said the Appellant's scores were Full Scale IQ 72, Verbal Comprehension 91, Perceptual Reasoning 98, Working Memory 77, and Processing Speed 62. Dr. Crenshaw said the full scale score of 72 placed the Appellant in the borderline range. However, Dr. Crenshaw noted that the factor scores for verbal and spatial intelligence, which were essentially within average limits, were brought down by the scores in attention span (77) and speed of processing (62), so averaged together the result is in the borderline range. He noted, however, that there is a significant discrepancy between the factor scores, and as a result the full scale score of 72 is not interpretable. Instead Dr. Crenshaw explained that the full scale score is significantly lower than, and therefore not representative of, the Appellant's intellect.

Dr. Crenshaw next reviewed Exhibit 7, a WAIS-III test administered on [redacted]08. Dr. Crenshaw noted that the Appellant was 17 years [redacted], so he was given the adult version of the Wechsler. He noted the Appellant's scores were Verbal IQ 91, Performance IQ 81, and Full Scale IQ 87, which placed the Appellant in the low average range. Dr. Crenshaw reviewed the Appellant's factor scores, which were VCI 96, POI 91, WMI 75, PSI 69, and noted the same split in scores as in previous testing. When he compared the results of the two Wechsler tests,[2] Dr. Crenshaw noted similar patterns in which intellect was within average limits but focus was limited. With limited focus, he explained that it was harder for the Appellant to apply himself to a task and it would take him longer to organize. As a result, the Appellant's speed was limited.

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[2]

Factor	WISC-IV (Exh 6)	WAIS-III (Exh 7)
VCI	91	96
PRI	98	91
Attn	77	75
PSI	62	69

In Exhibit 8, a school evaluation done on [redacted]08, Dr. Crenshaw said the Appellant was given a Woodcock Johnson battery of tests including both cognitive and achievement tests. He explained that cognitive test scores were reported in a percentile rank as opposed to scaled scores, and the Appellant's scores were as follows: General Intellectual Ability - 8th percentile, Verbal Ability was 44th percentile, Thinking Ability 15th percentile, Cognitive Efficiency 1st percentile, Comprehension Knowledge 44th percentile, Long-Term Retrieval 39th percentile, Visual-Spatial Thinking 25th percentile, Auditory Processing 8th percentile, Fluid Reasoning 22nd percentile, and Short-Term Memory 2nd percentile. Dr. Crenshaw explained that the percentage of General Intellectual Ability, for example, means that 92 % of people did better than the Appellant. He agreed with Ms. [redacted] that the score was significant, but Department criteria required the Appellant's score to be at the 2nd percentile. Dr. Crenshaw said he was not saying the Appellant did not have difficulty, it was just that his scores were not as severe as is required by Department criteria.

Dr. Crenshaw explained that Exhibit 10 is an Eligibility Report regarding the Appellant's application for Department Children's services. He said initially the Department had recommended that the Appellant was not eligible for services, but after Dr. [redacted] wrote a letter clarifying the Appellant's condition, Dr. Costigan determined the Appellant was eligible for children's services from the Department.

Dr. Crenshaw next reviewed Exhibit 9 in which Dr. [redacted] administered a thorough neuropsychological battery of tests, so he was looking at other aspects of cognition besides intellect. Dr. Crenshaw said the salient test was the Stanford Binet, on which the Appellant had scores of Nonverbal IQ 81, Verbal IQ 85, and Full Scale IQ 82, and factor scores of Fluid Reasoning 94, Knowledge 74, Quantitative Reasoning 86, Visual-Spatial Processing 85, and Working Memory 83. Dr. Crenshaw said these scores placed the Appellant in the low average range cognitively, so that even though testing was done beyond the developmental period, the Appellant's scores did not change from previous testing.

Finally, Dr. Crenshaw reviewed the Eligibility Report he prepared on [redacted]09 (Exh 11). He said at the time he wrote the report he had reviewed all of the information in the record except for Exhibit 9, although he was not sure he included reference to one of the Woodcock Johnson tests. After reviewing all of the exhibits, including Exhibit 9, Dr. Crenshaw said the Appellant's verbal abilities are essentially within average limits, and his visual processing has been in the average range since 2004, so there has been cognitive growth over time. Dr. Crenshaw noted that the Appellant's scores have never been below borderline, and those scores were at a younger age. Dr. Crenshaw said that his impressions and recommendations were that the Appellant did not meet Department regulations for services based on his intellectual abilities, which were above the Department's eligibility levels.

The parties waived closing statements.

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:

> (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 6.34 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 meets the Department's definition of mental retardation. Born [redacted] 1990, the Appellant is 20 years old. He meets the domicile requirement of the

Department and, as the Department conceded, he also meets the adaptive functioning prong of the Department's regulations. However, for the reasons set forth below, I find that the Appellant does not meet the Department's cognitive eligibility criteria.

The Appellant currently lives at home with his parents and his sister. He attends [redacted] where he participates in life skills and vocational programming. He works 10-15 hours a week [redacted] at the local Stop and Shop.

The Appellant has had significant medical problems starting with his birth. He was born with a serious heart defect necessitating surgery on that day as well as a number of additional surgeries in his first year of life. The Appellant became cyanotic three hours after delivery, and was diagnosed with heterotaxy/asplenia syndrome, a congenital condition that affects asymmetric organs such as the heart, liver, intestines, and spleen. He was born with only a single functional heart ventricle and has required several surgical procedures to improve his cardiac functioning. In addition to becoming cyanotic shortly after birth, he experienced chronic hypoxia (low blood oxygen levels) until he underwent a fontan surgical procedure at the age of 12.

The results of a WISC-IV, administered in 2004 (Exh 6), showed evidence of a pattern of functional deficits that was consistent with compromise of frontal brain systems and functions. Dr. [redacted], who administered this test, thought the most likely etiology of these functional deficits was the cyanotic episode shortly after birth, acute and chronic hypoxia, and anomalous brain formation associated with heterotaxy.

As the Appellant's mother credibly testified, the Appellant has had difficulties from the beginning. He exhibited delays in fine and gross motor skills. He had difficulty focusing and was diagnosed with ADHD early on. Behaviorally he also had difficulties, and never seemed to have any friends. As he has aged, his behavior problems have become more difficult. A recent evaluation indicated that the Appellant's "overall profile is consistent with neurologically-based frontal systems dysfunction giving rise to both a dysexecutive syndrome (including symptoms of ADHD) and a neuropsychiatric disorder characterized by atypical and aggressive behaviors." (Exh 9).

Adaptive Functioning

As noted, the Department has indicated that it concedes that the Appellant meets the Department criteria with respect to adaptive functioning. Accordingly, I will not review the evidence that addresses this area.

Cognitive Functioning

From the earliest record, the Appellant's cognitive testing has resulted in scores that exceed the Department criteria for eligibility. In 1999, the Appellant's scores on the WISC-III were VIQ 87, PIQ 73, and FSIQ 78. Factor scores were VCI 89, POI 79, and FFD 75. The examiner said these scores placed the Appellant overall in the borderline range of intellectual functioning (Exh 3).

In 2002, on the Woodcock-Johnson III Tests of Cognitive Ability, the Appellant scored in the Low Average to Average range on all 11 Cluster Skills and on all but two of the 15 Individual Test Results (Exh 4).

In 2002, again on a WISC-III, the Appellant's scores were VIQ 91, PIQ 72, and FSIQ 80. The Appellant's factor scores were VCI-93, POI-77, FFD-84, and PSI-77. These scores placed the

Appellant in the Low Average range of intelligence. Because of the significant 19 point difference between the verbal and performance scores, the full scale score was not considered an accurate summary of general intelligence ability. The examiner believed that the Appellant's verbal score of 91 was the better representation of the Appellant's problem solving ability (Exh 5).

In 2004, on a WISC-IV, the Appellant's overall tests scores revealed borderline intellectual functioning with a Full Scale IQ of 72. His index scores were PRI 98, VCI 91, WMI 77, and PSI 62 (Exh 6).

In 2008, the Appellant was administered the WAIS-III which yielded scores of VIQ 91 (average), PIQ 81 (low average), and FSIQ 87 (low average). Index scores were VCI-96 (average), POI-91 (average), WMI-75 (borderline), and PSI-69 (low) (Exh 7).

In 2008, on another Woodcock-Johnson III Test of Cognitive Ability, the Appellant's performance was average in comprehension-knowledge and long-term retrieval, low average in visual-spatial thinking and fluid reasoning, low in auditory processing and short-term memory, and very low in processing speed (Exh 8).

Finally, in 2010, the Appellant was given a Stanford Binet, on which the Appellant had scores of VIQ 85 (low average), NVIQ 81 (low average), FSIQ 82 (low average), Fluid Reasoning 94 (average), Knowledge 74 (borderline), Quantitative Reasoning 86 (low average), Visual-Spatial Processing 85) (low average) and Working Memory 83 (low average). Overall, the Appellant had low average intellectual functioning.

In all but the earliest testing, the Appellant's cognitive testing scores have consistently been in the low average to average range, which exceed the Department's threshold requirement of an intelligence test score that is indicated by a score of 70 or below. Even the earlier testing, which resulted in the lowest full scale IQ score of all testing, placed the Appellant in the borderline range of intellectual functioning, which also exceeds the Department's threshold.

As Dr. Crenshaw noted in his Eligibility Report (Exh 11), after isolating the factor scores indicating intellectual power itself, it can be seen that the Appellant's verbal intellect has consistently been measured within the Average Range. His visual processing has never been lower than Borderline range, and since he entered his teens his abilities have also been measured within the Average range.

It is clear that the Appellant has significant limitations in adaptive functioning and will need supports. However, in reviewing this case I must consider whether the Appellant has demonstrated that he meets the Department's definition of mental retardation. Because his intellectual functioning has consistently tested within the Low Average to Average range, his cognitive functioning places him significantly above the Department's threshold for eligibility. Accordingly, since he has not shown that he has sub-average intellectual functioning, I conclude that he is not eligible for Adult services from the Department.

CONCLUSION

Based on my determination that the Appellant has not shown that he has sub-average intellectual functioning, he has not been able to show by a preponderance of the evidence that he meets the Department's definition of mental retardation. Therefore, I conclude 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