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 Executive Office of Health & Human Services  
 Department of Developmental Services  
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 Lieutenant Governor

JudyAnn Bigby, M.D.  
 Secretary

Elin M. Howe  
 Commissioner

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2010

MA

Re: Appeal of - Final Decision

Dear :

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your 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 client's 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,

A handwritten signature in cursive script that reads "Elin M. Howe".

Elin M. Howe  
 Commissioner

EMH/ecw

cc: Marcia Hudgins, Hearing Officer  
 Amanda Chalmers, Regional Director  
 Marianne Meacham, General Counsel  
 Barbara Green Whitbeck, Assistant General Counsel  
 Paula Potvin, Regional Eligibility Manager  
 Patricia Shook, Psychologist  
 File

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF DEVELOPMENTAL SERVICES

In Re: Appeal of [REDACTED]

This decision is issued pursuant to the regulations of the Department of Developmental Services (DDS) (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on [REDACTED] 2010 at DDS's [REDACTED] in [REDACTED], Massachusetts. Those present for the proceedings were:

[REDACTED]  
[REDACTED], Ph.D.

Patricia Shook, Ph.D.  
Barbara Green Whitbeck

Appellant  
Appellant's father  
Appellant's mother  
Appellant's expert witness  
Attorney for the Appellant  
DDS psychologist  
DDS attorney

The evidence consists of documents submitted by the Appellant numbered A1-7 and Supplemental 1 (S1), documents submitted by DDS numbered D1-9 and approximately three hours of oral testimony. DDS does not dispute the low adaptive functioning exhibited by the Appellant.

**ISSUE PRESENTED**

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

**SUMMARY OF THE EVIDENCE PRESENTED**

1. This Appeal is based on the Appellant's denial of eligibility for DDS services. (D5)
2. The Appellant is a 18-year old man who currently resides with his parents and his [REDACTED] in [REDACTED], Massachusetts (A4, D4)
3. Four evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. (A1/D6, A2/D7, A3/D8, D9)
4. Three assessments of the Appellant's adaptive behavior were entered into evidence. (A3/D8, A5, D9)
5. An [REDACTED] Home Assessment was entered into evidence. (A4)
6. An ICAP Computer Scoring was entered into evidence (A6)

7. An Adult Eligibility Determination was entered into evidence (D5)
8. The Curriculum Vita of Dr. [REDACTED] was entered into evidence (A7)
9. The Curriculum Vita of Dr. Patricia H. Shook, Ph.D. was entered into evidence. (D1)
10. A Test Review Form was entered into evidence. (S1)
11. In [REDACTED] 2001 when the Appellant was 9 years [REDACTED] of age, he was evaluated by [REDACTED], MS, CAGA, a School Psychologist employed by the [REDACTED]. The Appellant was evaluated using the Wechsler Intelligence Scale for Children 3<sup>rd</sup> Edition (WISC-III). On this test the Appellant received a Verbal IQ score of 65, a Performance IQ score of 69 and a Full Scale IQ score of 64. Of note is the observation made by the tester that the Appellant was accompanied to the testing by classroom aides who were highly sensitive to the Appellant's needs and employed behavioral modifications that were necessary to complete the evaluation. Ms. [REDACTED] also points out that several times during the assessment, the Appellant appeared distracted and needed to be redirected to tasks. Another observation was that the Appellant's comprehension of task instructions was limited and directions often needed repetition, rewording or demonstration to support his understanding. Ms. [REDACTED] stated that the Appellant continues to display intellectual functioning in the mentally deficient range, but that a standardized assessment of a child like the Appellant may not yield his maximum potential. She concluded that the Appellant's profile can best be understood as falling on the continuum of Pervasive Developmental Disorder (PDD) and supports this by stated that he has significant difficulties in cognitive tasks, a slower rate of learning, disorganized patterns of learning, perseverative behaviors and an inability to understand abstract concepts. (A1/D6)
12. In [REDACTED] 2001 when the Appellant was 10 years of age, he was evaluated by [REDACTED], Ph.D., an employee of the [REDACTED]. The Appellant was again evaluated using the WISC-III. On this test, the Appellant received a Verbal IQ score of 63 a Performance IQ score of 84 and a Full Scale IQ score of 71. The tester noted that the Appellant had a hard time fully cooperating throughout the testing and seemed to get distracted by his own ideas. She also pointed out that it was difficult to find a way to motivate and re-direct the Appellant. Dr. [REDACTED] found that on this administration of the WISC-III, the Appellant scored overall in the borderline, slow learner range. She stated that he demonstrated that he could reason and perceive verbal relationships, as long as the language was not complex and pointed out that his relative strengths with nonverbal abilities can help him function with concept formation and with organization. In the section of her report labeled "Summary and Recommendations", Dr. [REDACTED] states that the Appellant's overall score does not completely reflect his strengths and weaknesses because he was often caught up with his own agenda and he did not put forth full effort into the task. She noted that that there was a significant discrepancy between the Appellant's verbal skills and his visual skills and concluded that such a profile is often consistent with language/learning disabilities (A2, D7)

13. In [REDACTED] 2008 when the Appellant was 16 years [REDACTED] of age, he was evaluated by [REDACTED] Psy.D, supervised by [REDACTED] Ph.D. Both were employed by the [REDACTED]. On this occasion, the Appellant was given the Wechsler Intelligence Scale for Children – 4<sup>th</sup> edition (WISC-IV). The teacher and parent forms of the Adaptive Behavior Assessment System (ABAS) were also administered. The tester pointed out that the Appellant appears to struggle with maintaining attention, impulse control, and completing multi-step directions. Dr. [REDACTED] stated that the Appellant needed to be redirected constantly to attend to the task at hand. Because of the discrepancies between the four indexes used to provide a Full Scale IQ score – Verbal Comprehension, Working Memory and Processing Index in which the Appellant's scores were lower than the 1<sup>st</sup> percentile and Perceptual Reasoning at the 8<sup>th</sup> percentile, Dr. [REDACTED] did not believe the Full Scale Score would be a valid representation of the Appellant's cognitive ability. She concluded that his neuropsychological profile showed clusters of reduced functioning in the area of intellectual and developmental disability noting that even though there are areas of relative strength, there are significant weaknesses in most areas within the cognitive and adaptive domains. (A3/D8)

14. In [REDACTED] 2009 when the Appellant was 17 years [REDACTED] of age, he was evaluated by [REDACTED] Psy.D. On this occasion, the Appellant was given the Wechsler Adult Intelligence Scale 4<sup>th</sup> edition (WAIS-IV). Dr. [REDACTED] report indicates that the Vineland Adaptive Behavior Scales 2<sup>nd</sup> edition (VABS-II) was computed through observation and interview. Dr. [REDACTED] pointed out that the Appellant complied with all the demands of the evaluation and displayed good effort. He stated that he considered the test results a valid measure of the Appellant's current level of cognitive functioning. On the WISV-IV, the Appellant received a Full Scale Composite Score of 73 which according to Dr. [REDACTED] falls within the borderline range of intellectual functioning.<sup>1</sup> Dr. [REDACTED] reported that the Appellant's Adaptive Behavior Composite score was a 54 which is low when compared to the population as a whole. He stated that the Appellant's Autism has an impact on his adaptive functioning. This diagnosis of Autism was obtained through information provided by the Appellant's mother. (D9)

15. The Appellant testified that he works at [REDACTED] and receives no pay. He stated that he would like to be a policeman, a fireman or a dentist and that to be a dentist one would have to go to a special school. He named some of his friends. When asked what he would do if he got lost, he stated that he would call security. He stated that if he had \$3.00 to buy bread and milk, it might not be enough.

16. [REDACTED], the Appellant's mother testified on his behalf. She stated that as a

<sup>1</sup> There was testimony by DDS's expert witness pointing out that the Appellant's Processing Speed Composite Score was a 74, not a 79 as reported by Dr. [REDACTED]. This discrepancy changed the Appellant's Full Scale Composite Score to a 72 still within the borderline range of intellectual functioning.

young child he didn't meet developmental milestones, was extremely quiet and slept a lot. She stated that he did not babble or wave. He began to speak at age 1-1.5 years. Mrs. [REDACTED] testified that the Appellant received early intervention, speech therapy and placement in a small class. She stated that the Appellant had an Individual Education Plan (IEP) beginning at age 4 and since then has always had a one on one aide in the classroom. Mrs. [REDACTED] testified that the Appellant cannot be left alone for any length of time and knows no boundaries. She stated that she shaves him, washes his face, helps him to dress and drives him to school. Mrs. [REDACTED] testified that the Appellant is very hard to control when he becomes angry and had been admitted once to [REDACTED]. She stated that he has no friends and due to his aggressive behavior cannot participate in the [REDACTED]. She explained that when the Appellant applied for DDS adult services, the family was told that he would need another test. She stated that DDS paid for the test and that it was performed by Dr. [REDACTED]. She explained that Dr. [REDACTED] came to the Appellant's house and that he did not spend more than 45 minutes there. Mrs. [REDACTED] estimated that the actual testing took no more than 25-30 minutes with and additional 20 to 25 minutes needed for breaks. (D9)

17. [REDACTED] Ph.D. testified as an expert witness for the Appellant. He stated that he reviewed the Appellant's test reports and was familiar with the DDS regulations. He stated that in his opinion the Appellant meets the criteria for DDS eligibility. His assessment is that the Appellant's test results are quite consistent in that he has good splinter skills, good verbal/language skills and exhibits very intrusive behaviors and poor judgment. He stated that the Appellant has a significant intellectual disability. Dr. [REDACTED] stated that he believed that Dr. [REDACTED]'s report relative to the Appellant's processing speed was out of whack and that it would have taken the Appellant longer to complete tasks given his impulsivity. In reviewing the earlier test reports, Dr. [REDACTED] stated that the processing speed of 50 was more accurate. This score was received on the test taken by the Appellant at age 9 years [REDACTED] and rendered a Full Scale IQ score of 64. He noted that the Full Scale IQ score of 71 that the Appellant received when he was 10 years of age should be viewed with some caution due to the practice effect. Dr. [REDACTED] testified that when taking into consideration the different levels of education of the two testers and the short amount of time between the two tests, he would think that the Appellant's score would be somewhere between a 64 and a 71. Dr. [REDACTED] reviewed the test given when the Appellant was 16 years [REDACTED] of age and agreed with the tester that the Full Scale IQ score should not be reported due to the presence of a great deal of scatter. He noted that the Appellant's processing speed was 50, the same as the test given at age 9 years [REDACTED]. He pointed out that the Appellant is very functionally impaired. Dr. [REDACTED] called into question the validity of the test administered to the Appellant by Dr. [REDACTED] although he did state that a Full Scale IQ score of 73 is not remarkably different than a 71. He pointed out the difference in the score the Appellant received on processing speed – 50 on 2 prior tests as opposed to 79 (revised to 74 – see footnote #1). He noted that some sub scale scores on this test seemed higher than those received by the Appellant on earlier tests. Dr. [REDACTED] stated that the recommended time for the administration of the test given by Dr. [REDACTED], the WAIS-IV is 60 to 90 minutes. Due to the Appellant's impulsivity and short attention

span and based on the Appellant's mother's estimation of the time taken out for breaks, Dr. [REDACTED] stated that in his opinion it would likely take the Appellant 90 minutes to complete the test. Dr. [REDACTED] agreed that the manual of the American Association of Intellectual and Developmental Disabilities (AAIDD) states that in order to find that someone has a significant limitation in intellectual functioning, clinical judgment must be applied. He stated that such a finding cannot be made by a statistical number alone. He also raised the notion of the standard error of measurement stating that it should be taken into account when looking at IQ scores. (A7, A1/D6, A2/D7, A3/4, S1, D9)

18. Patricia Shook, Ph.D. testified as an expert witness for DDS. She stated that she is a DDS Eligibility Specialist and has been in that position for four and a half years. She stated that she made the determination that the Appellant was not eligible for DDS services. She stated that the Appellant is domiciled in the state of Massachusetts. She explained that although the Appellant had been found eligible for services as a child, the 2006 DDS regulations required that in order to be found eligible for DDS adult services, an individual must have a significant intellectual disability which is defined as having an IQ of 70 or below as determined from valid, comprehensive IQ tests. She stated that she based her opinion on the DDS regulations which do not contain a standard error of measurement. She testified that because the Appellant did not meet the cognitive component of the regulatory requirement, his adaptive behaviors did not enter into her decision. Dr. Shook reviewed the WISC-III administered when the Appellant was 9 years [REDACTED] of age and pointed out that because of his lack of focus he was not performing to his maximum potential. She also noted a large discrepancy in his sub test scores. She concluded that this was an early test and that individuals can change over the developmental period. She reviewed the WISC-III given when the Appellant was 10 years of age and stated that much like in the previous test, he had difficulty cooperating and focusing. She noted a diagnosis of a language/learning disability and stated that she took the practice effect into consideration when reviewing this test. Dr. Shook reviewed the WISC-IV administered to the Appellant when he was 16 years [REDACTED] of age (no IQ score reported) and pointed out that it is difficult to assess an individual when he is not cooperating. She pointed out the Appellant's behavioral difficulties and stated that it is hard to know how well he could have done if he had done his best. Dr. Shook reviewed that WAIS-IV administered to the Appellant by Dr. [REDACTED] when he was 17 years [REDACTED] of age and explained that DDS will pay for additional testing it requests if the individual's insurance company will not. She explained that the applicants such as the Appellant are free to go for testing to any licensed individual. She also stated that Dr. [REDACTED] does not only do testing for DDS. Dr. Shook explained that in her opinion, the Appellant's higher score -- 73 (actually 72) is due to the fact that the Appellant was more cooperative with the tester. She opined that this is likely because the tester came to the Appellant's home where the Appellant was familiar with his surroundings and therefore less distracted. She stated that the average time for giving the WAIS-IV is 60-90 minutes. (D1, D5, A1/D6, A2/D7, A3/D8, D9)

On cross-examination, Dr. Shook stated that this was the first time she had met the

Appellant. She stated that it would take the average person 60-90 minutes to take the WAIS-IV but that the test could be administered to the Appellant more quickly because not so many questions would need to be asked. She agreed that if Dr. [REDACTED] made one mistake in scoring, he could have made others. She agreed that the Diagnostic and Statistical Manual of Mental Disorders- 4<sup>th</sup> edition (DSM-IV) allows for clinical judgment when making a diagnosis of mental retardation and explained that the standard error of measurement refers to the test, not to the individual score. Dr. Shook stated that DDS requires an IQ score of 70 or below in order for an individual to be determined to be mentally retarded. She agreed that using the definitions found in the DSM-IV or the AAIDD, the Appellant could be found to be mentally retarded. She stated that the scores of 64 and 71 that the Appellant received when he was 9 years [REDACTED] and 10 years of age respectively did not evidence a lot of practice effect. When asked to comment on the Appellant's low scores on the ICAP, Dr. Shook stated that there could be a lot of reasons for his deficits in adaptive behavior. (A1/D6, A2/D7)

On redirect, Dr. Shook testified that she did not use Dr. [REDACTED] Vineland results in reaching her decision that the Appellant was not eligible for DDS services. (D9)

#### FINDINGS AND CONCLUSIONS

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

In order to be eligible for DDS supports, an individual who is 18 years of age or older must meet the two criteria set forth at 115 CMR 6.04: (a) he must be domiciled in the Commonwealth, (b) he must be a person with Mental Retardation as defined in 115 CMR 2.01. By statute, M.G.L. c. 123B, section 1, a mentally retarded person "is a person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." Consistent with its statutory mandate, the Department has promulgated regulations which define mental retardation. The Department's regulations define mental retardation as significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. Significantly sub-average intellectual functioning is defined as an intelligence score that is indicated by a score of 70 or below as determined from the findings of an assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners. Significant limitations in adaptive functioning is defined as an overall composite adaptive functioning limitation that is two standard deviations below the mean or adaptive functioning limitations in two out of three domains at 1.5 standard deviations below the mean of the appropriate norming sample determined from the findings of an assessment using a comprehensive,

standardized measure of adaptive behavior, interpreted by a qualified practitioner. The domains of adaptive functioning that are assessed shall be: (a) areas of independent living/practical skills; (b) cognitive, communication, and academic/conceptual skills, and (c) social competence/social skills. There is no dispute that the Appellant meets the first criterion and I specifically find that he meets that criterion. However, I find that he is not mentally retarded as that term is defined in 115 CMR 2.01.

In the instant case there were four IQ test reports presented, only one of which reported a Full Scale IQ score of 70 or below. The tester who administered that test indicated that although the Appellant displayed intellectual functioning in the mentally deficient range, the assessment may not have yielded his maximum potential. She spoke of his distractibility and the need for him to be redirected to tasks. She suggested that the Appellant's profile fell within the continuum of PDD. The subsequent two examiners found the Appellant to be uncooperative and distracted, lacking in impulse control and commented on his lack of effort. One of these testers suggested that the Appellant's profile is consistent with a language/learning disability. I note that the administration of these tests was done at the examiners' offices. I find that the test that is most critical to my finding is the test administered by Dr. [REDACTED]. This is the test that is most current and reflects the cognitive functioning of the Appellant at or about this time. Dr. [REDACTED] is a licensed psychologist and is not an employee of DDS. Although DDS paid for the testing, the Appellant was free to go to any qualified examiner. This test was administered in the Appellant's home thereby making him more comfortable with his surroundings and less distractible. Dr. [REDACTED] commented that the Appellant complied with all the demands of the evaluation and displayed good effort. He was the only examiner to state that he believed the test results were a valid measure of the Appellant's cognitive functioning. Given this description of the Appellant's test taking behavior, I find it to be the most reliable measure of the Appellant's intellectual functioning. I find that his misreporting of the Appellant's processing speed score most likely to be a clerical error and not of great significance since it only added one point to the Appellant's Full Scale score.

The Appellant argues that DDS's approach to determining whether an individual has an intellectual disability is flawed and does not comport with clinical practice which takes both intellectual capacity and adaptive functioning into consideration. I agree that in the instant case adaptive functioning was not considered. However, adaptive functioning deficits can be caused by conditions other than mental retardation. DDS regulations do not require an individual's adaptive limitations to be examined if the individual does not have an IQ score of 70 or below.

The Appellant argues that in order to meet his burden he merely has to prove that it is more likely than not that he has an intellectual disability as defined by DDS. I do not agree. In order to find that the Appellant has met his burden, I must find that when fairly



considered, the evidence of his disability produces the stronger impression and is more convincing. In light of the earlier examiners' opinions that the Appellant was distracted, uncooperative and did not put forth his best effort when taking the various IQ tests, I am not convinced that the Appellant has significantly sub-average intellectual functioning. In fact it is likely that most of the test results underestimate his intellectual functioning. Because I find that the Appellant does not have significantly sub-average intellectual ability, I do not find it necessary to address his limitations in adaptive functioning. Unless the Appellant meets the 1<sup>st</sup> prong of the DDS definition of mental retardation, the fact that he may have significant adaptive limitations cannot be considered.

While it appears that the Appellant has many limitations and is in need of assistance, I find that he is not "mentally retarded" as that term is used in statute and regulation for the purpose of determining eligibility for DDS supports.

**APPEAL**

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

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

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