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

Elin M. Howe  
 Commissioner

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2010

MA

Re: Appeal of - Final Decision

Dear :

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your son'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  
 John Gcenty, 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.*<sup>1</sup> A fair hearing was held on [REDACTED] 2009 at the DDS<sup>2</sup> [REDACTED] Area Office, [REDACTED], MA.

Those present at the hearing:

[REDACTED]	Appellant
[REDACTED]	Mother of Appellant
[REDACTED]	Father of Appellant
John C. Geenty, Jr.	Attorney for DDS
Richard P. Costigan	Psychologist for DDS
Elizabeth Duffy	Observer – DDS Attorney

At the hearing, the Department submitted Exhibits 1-12 plus a cover list of exhibits as well as a separate listing of the Appellant's IQ scores. The Appellant did not submit any additional exhibits. The hearing lasted approximately one hour and forty-five minutes. Mr. and Mrs. [REDACTED] testified on behalf of the Appellant, who added some testimony, and Dr. Costigan testified on behalf of the Department.

**ISSUE PRESENTED:**

The issue for this hearing is whether the Appellant, [REDACTED], meets the definition of mental retardation and is thereby eligible for DDS services. As explained below, I find that the Appellant does not meet the definition of mental retardation and therefore is not eligible for services from the Department of Developmental Services.

**SUMMARY OF THE EVIDENCE**

**Exhibit 1.** Packet of motions, notices, and correspondence between the Department and the Appellant's family, including Fair Hearing Notices; Notice of Appearance, Request for Production of Documents, Request for Continuance and Notice of Disappearance of Attorney Frederick M. Misilo for the Appellant; Department's [REDACTED], 2009 letter post-*Informal Conference* denying eligibility; and the Department's [REDACTED], 2009 acknowledgement of Appellant's request for a fair hearing.

**Exhibit 2.** Curriculum Vitae of Richard P. Costigan, Psy.D.

**Exhibit 3.** Report of Psychological Testing dated [REDACTED] 2006. The testing was done by [REDACTED], Ph.D, School Psychologist, when the Appellant was 18 years [REDACTED] old as part of a three year re-evaluation process. Dr. [REDACTED] administered the Wechsler Adult Intelligence Scale –Third Edition (WAIS-III), with the following results: Verbal IQ 77-87, Performance IQ 79-93, and Full Scale IQ 77-85. According to Dr. [REDACTED], the Appellant's overall level of cognitive ability was in the low average/borderline range. There was a significant difference between the Appellant's scores on verbal tasks as compared to working memory and processing speed. Index scale scores were Verbal Comprehension 88-

<sup>1</sup> The Appellant's application for services was submitted in [REDACTED] 2006, which pre-dates the June 2, 2006 change in Department regulations defining mental retardation. Therefore, the regulations in effect in [REDACTED] 2006 will be used to decide this matter.

<sup>2</sup> 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.

99 (32<sup>nd</sup> percentile), Perceptual Organization 80-94 (18<sup>th</sup> percentile), Working Memory 60-74 (1<sup>st</sup> percentile), and Processing Speed 63-81 (2<sup>nd</sup> percentile).

**Exhibit 4 and 5.** Wechsler Intelligence Scale for Children – Third Edition (WISC-III) Tables and Graphs (Exh 4) and Psychological Report (Exh 5), both dated [REDACTED] 1999. The WISC-III was administered to the Appellant by [REDACTED], NCSP, School Psychologist, when the Appellant was 11 years [REDACTED]. During testing the Appellant had difficulty with sustained effort, at times appeared frustrated, had difficulty expressing his ideas and answers, and he appeared to be somewhat anxious and easily distracted but he did not demonstrate other ADHD type behaviors. His scores on the WISC-III were Verbal IQ 70, Performance IQ 75, and Full Scale IQ 70. He performed equally well on verbal and nonverbal tasks. Index scores were Verbal Comprehension (VCI) 73, Perceptual Organization (POI) 83, Freedom from Distractibility (FfD) 64, and Processing Speed (PSI) 58. Verbal subtest scores ranged from a low of 1 in Comprehension to a high of 8 on Similarities with other scores ranging in-between, and Performance subtest scores ranged from 2's on Coding and Symbol Search to 8's in Picture Arrangement and Object Assembly.

**Exhibit 6.** Psychological Report dated [REDACTED] 1996 when the Appellant was 8 years [REDACTED]. [REDACTED], NCSP, School Psychologist, administered the WISC-III to the Appellant for a three year evaluation. During testing the Appellant was easily distracted and had a short attention span. His scores on the WISC-III were Verbal IQ 65, Performance IQ 69,<sup>3</sup> and Full Scale IQ 70. His index scores were Verbal Comprehension 69, Perceptual Performance 77, Freedom from Distractibility 61, and Speed of Mental Processing 88. The Appellant was functioning within the borderline range of overall cognitive abilities.

**Exhibit 7.** [REDACTED] 1992 Psychological Evaluation done by [REDACTED], School Psychologist, when the Appellant was 4 years [REDACTED] old. Ms. [REDACTED] administered the Stanford-Binet Intelligence Scale – Fourth Edition (SB:FE). During testing the Appellant was distracted by toys, and perseveration and echolalia were observed on more difficult items. The Appellant's scores on the SB:FE were: Verbal Reasoning 89, Abstract Visual Reasoning 98, Quantitative Reasoning 82, Short-Term Memory 89, and Test Composite 87. The Composite Score placed the Appellant in the low average range of intellectual functioning. The examiner suggested that the scores might have been an underestimate of the Appellant's potential.

**Exhibits 8, 9, and 11.** Three separate Eligibility Reports dated [REDACTED], 2009, [REDACTED] 2007, and [REDACTED] 2006, all prepared by Dr. Richard Costigan. In each of these Dr. Costigan reviewed the various cognitive testing scores in the file as well as the ABAS-II results, and in each case recommended that the Appellant does not meet the criteria for Department services.

**Exhibit 10.** [REDACTED], 2007 Review of Psychometric Records from [REDACTED], Ph.D. of [REDACTED]. Per the request of the Department, Dr. [REDACTED] reviewed various records of the Appellant in relation to the American Psychological Association criteria for mental retardation.<sup>4</sup>

**Exhibit 12.** ABAS-II dated [REDACTED], 2006 and rated by the Appellant's parents. Under the regulations in effect at the time of the Appellant's application, only the specific subtest scores were considered, not the Composite Scores. The Appellant's subtest scores were Communication 6, Community Use 4, Functional Academics 4, Home Living 1, Health and Safety 1, Leisure 5, Self-Care 1, Self-Direction 2, and Social 2.

## TESTIMONY

<sup>3</sup> Dr. Costigan testified that if the subtest scores were accurately reported, the Performance IQ score should be 80, but this would not change the Full Scale IQ score of 70.

<sup>4</sup> Many of the documents reviewed in this [REDACTED] report were not submitted into the hearing record. These are therefore hearsay and given little weight in this decision. Further, Dr. Costigan testified that [REDACTED] is asked to compare records not to the Department's definition but to the APA definition of mental retardation, to avoid its rendering an eligibility opinion on the basis of Department standards. Accordingly, I give less weight to Dr. [REDACTED]' report.

The above exhibits were entered into the record and the parties and their witnesses were sworn in. Both parties made a brief opening statement. At the outset, Dr. Costigan provided a brief overview of the regulations in effect when the Appellant's application was filed.

Mr. and Mrs. [REDACTED] testified on behalf of the Appellant. Mrs. [REDACTED] testified that the Appellant did not speak at the age of two. Mrs. [REDACTED] said the Appellant had no eye-hand coordination. He was socially limited and only played with his brothers, especially his oldest brother ([REDACTED]). The Appellant added that he played with some other children but hasn't since elementary school. At the age of two he went to Early Intervention in [REDACTED]. At the age of 3 or 4 his diagnosis was thought to be Pervasive Developmental Disorder (PDD), which was later confirmed and has consistently remained his diagnosis since then.

Mr. [REDACTED] said [REDACTED] Elementary School initially tested the Appellant and placed him in the high end of mental retardation. He received special education services from the beginning of schooling. He has had one-on-one teaching and mostly separate classes, although he had some inclusion classes and did well with those. He did not take the MCAS.

The [REDACTED]s discussed the Appellant's limited functioning. Mrs. [REDACTED] said the Appellant is gullible and too trusting. He would give anyone the shirt off his back. He gives away a lot of his money to people on the street collecting for various causes and does not have good judgment. He doesn't understand money, could not pay bills on time, and needs supervision. He did know the price of a diet pepsi since he buys one every time he goes to the store. He can use the microwave but otherwise can't cook because he would leave the stove unattended. He showers without reminders, but because he is concerned with the plight of polar bears and is fastidious when it comes to environmental conservation, he doesn't want to use energy to warm the water. Apparently when he is not in school the Appellant is either with his parents or his grandmother who lives next door. He'll go with his mother to the store but if he goes off on his own for a short while he'll become concerned and come looking for her. He manages where things are familiar, like in school, but would not be able to venture anywhere new on his own. With the help of a job coach, he works every Wednesday for a few hours at the [REDACTED] and at [REDACTED] College emptying trash, recycling, filling condiments and cleaning tables.

Mrs. [REDACTED] said the Appellant did better at taking tests as he got older. She said he needs services because of his limited functioning and he needs protection and job coaching. She said the schools did a good job and have been helpful in allowing him to remain in the community, but he will need services when he turns 22.

Dr. Richard Costigan testified on behalf of the Department. He has been employed by the Department for about seven years as a Regional Eligibility Psychologist and is also the Clinical Director of the Worcester Area Office. He reviews numerous eligibility applications each year. He was declared an expert witness.

Dr. Costigan reviewed the various documents in the Appellant's file. First he reviewed the evaluation done on [REDACTED] 1992 when the A was 4 years [REDACTED] old (Exh 7). He said the Stanford-Binet Fourth Edition (SB:FE) is broken down into an overall score and composite scores. The Appellant's scores were Composite Score of 87 (upper end of low average range); Verbal Reasoning 89 (upper end of low average range); Abstract/Visual Reasoning 98 (solidly in the average range); Quantitative Reasoning 82 (lower end of the low average range); and Short-Term Memory 89 (upper end of the low average range).

The Appellant's overall score on the SB:FE was in the low average range with abstract or perceptual reasoning skills in the average range. Dr. Costigan noted some interference in the test taking behavior, which he said was consistent with the Appellant's diagnosis of PDD. Dr. Costigan noted that the Appellant's scores dramatically declined in subsequent testing, particularly with short-term memory.

Dr. Costigan next reviewed Exhibit 6, a Psychological Report from [REDACTED], dated [REDACTED] 1996. Mr. [REDACTED] administered the WISC-III when the Appellant was 8 years [REDACTED] old. Dr. Costigan noted a number of interfering behaviors during testing, all symptoms of the Appellant's PDD. The Appellant's scores were Full Scale IQ 70, Verbal IQ 65, and Performance IQ 69. However, Dr. Costigan said there was a mistake either in the Performance score or the Performance subtest scores. He said if the scoring in Picture Completion (8), Coding (10) and Picture Arrangement (9) was accurate, this would have yielded a Performance IQ score of 80. So either the subtest scores or the Performance IQ were reported incorrectly. Either way, the Full Scale score of 70 remained the same and was accurate.

Dr. Costigan also referred to the Woodcock Johnson – Revised, Tests of Achievement, which gives a sense of how the Appellant functioned academically. His scores of Reading 75, Reading Comprehension 82, and Math Calculation 77 ranged from borderline to low average.

Dr. Costigan next reviewed Exhibits 4 and 5 dated [REDACTED] 1999 when the Appellant was 11 years [REDACTED] old. Exhibit 4 included the results – table and graphs – from the testing reported in Exhibit 5. The Appellant demonstrated a number of interfering behaviors during test taking on the WISC-III. He obtained a Full Scale IQ of 70, a Verbal IQ of 70, and a Performance IQ of 75. The Appellant's index scores were Verbal Comprehension 73, Perceptual Organization 83, Freedom from Distractibility 64, and Processing Speed 58. Dr. Costigan testified that the latter two scores, both in the extremely low range, were influenced by the Appellant's PDD.

Dr. Costigan also reviewed the Appellant's scores on the Wechsler Individual Achievement Test (WIAT) including Basic Reading 83, Mathematics 77 (borderline), and Reading Comprehension 80 (low average). The Appellant's score of 61 on Numerical Operations was consistent with his level of distraction and limits with short-term memory. Dr. Costigan summarized that while the Appellant had some strength in reading, comprehension and spelling skills, he had significant weaknesses in mathematics and concentration.

Next Dr. Costigan reviewed Exhibit 3, the Report of Psychological Testing from [REDACTED] 2006 when the Appellant was 18 years [REDACTED] old. [REDACTED] administered the WAIS-III in which the Appellant scores were Full Scale IQ 81, Verbal IQ 82, and Performance IQ 86, all of which were solidly in the low average range. Dr. Costigan noted the significance of the Appellant's subtest score of 8 in Vocabulary which was solidly in the average range. He said Vocabulary is the score most highly correlated with overall IQ and most highly correlated with verbal functioning. Dr. Costigan also noted significant skills on the Performance subtests. Picture Arrangement was in the above average range and Matrix Reasoning showed some higher order non-verbal perceptual constructional skills. Consistent with other reports, Dr. Costigan noted some scores in the severely impaired range, including attention and concentration (Digit Symbol and Symbol Search). The Appellant's VCI score of 93 was in the average range. Again, consistent with every other report except the first evaluation, the scores reflected significant impairment in the Appellant's working memory and processing speed.

In response to a question from this hearing officer regarding the discrepancy across tests in subtest scores, particularly in Coding, Dr. Costigan suggested that individuals with PDD typically perform better some times and worse at others. Overall, though, because one cannot fake smart, the higher test scores would be more accurately representative of the Appellant's cognitive functioning. On the other hand, behaviors typical of PDD may interfere with test taking and result in lower scores.

Dr. Costigan next reviewed the ABAS-II, dated [REDACTED] 2006. As part of the eligibility process the Appellant's parents completed this form to rate the Appellant's behavior across nine different adaptive functions.<sup>5</sup> Of the areas that were assessed, five showed significant impairment within the Department

<sup>5</sup> Normally there are ten areas of adaptive functioning assessed, but since the Appellant was not employed in a regular job when his parents rated him, the Work area does not appear on this assessment.

regulatory criteria. Dr. Costigan said that the ABAS-II indicates the Appellant does meet the Department's adaptive criteria.

After reviewing his three Eligibility Reports (Exhs 8, 9, 11), Dr. Costigan reviewed a [REDACTED] 2007 Review of Psychometric Records by ServiceNet (Exh 10). He explained that the Department has a contract with ServiceNet to provide an independent review of the Appellant's records and offer an opinion as to whether he met the diagnostic criteria of the American Psychological Association (APA) for mental retardation. Dr. [REDACTED] at ServiceNet concluded that the Appellant's records suggest that he has developmental and neurocognitive deficits, but that he failed to meet the relevant psychometric criteria based on a strict reading of the APA diagnostic guidelines.<sup>6</sup>

## FINDINGS AND CONCLUSIONS

The Appellant filed his application for services on [REDACTED], 2006. He meets the domicile and adaptive functioning requirements of the Department. The issue for this hearing is whether he meets the Department's definition of mental retardation and is thereby eligible for services.

### 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 2.01: Definitions – Mental Retardation

Consistent with its statutory mandate, the Department adopted the American Association on Mental Retardation (AAMR) 1992 standards as the clinical authority to which it referred in determining whether an individual has "inadequately developed or impaired intelligence." The AAMR standards established a three-prong test: (a) the individual must have significantly sub average intellectual functioning defined as an IQ score of approximately 70 to 75 or below, based on assessments that include one or more individually administered general intelligence tests; (b) related limitations in two or more of the following adaptive skill areas: communication, self care, home living, social skills, community use, self direction, health and safety, functional academics, leisure and work must exist concurrently with sub average intellectual functioning; and (c) the individual must have manifested the criteria (a) and (b) before the age of 18.

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 . . . .

<sup>6</sup> According to Dr. Costigan, the APA criteria for mental retardation is the same as the Department's standard in its definition of mental retardation, that is, two standard deviations below the mean. This is somewhat inconsistent with Department regulations defining mental retardation as an IQ score in the range of 70-75, the upper range of which would not be two standard deviations above the mean. It would, however, harmonize Dr. Costigan's testimony that ServiceNet was asked to compare the record to something other than the Department standard (*see*, footnote 4). Inasmuch as I have given limited weight to the exhibit, Dr. [REDACTED]'s conclusion as it relates to the merits of the Appellant's appeal is also given limited weight.

## Finding of Fact and Conclusions of Law

The Appellant, born on [REDACTED] 1988, is 21 years old. He lives with his parents in [REDACTED] MA. He was delayed in language development and went to Early Intervention at the age of two. He has been diagnosed with Pervasive Developmental Disorder. The Appellant received special education services since he began school. He is currently in school and with the assistance of a job coach he works a few hours once a week. He did not take the MCAS.

The Appellant is severely impaired in his adaptive functioning. His parents credibly testified to the Appellant's many adaptive limitations. He cannot successfully judge situations because he is too trusting and gullible, he has limited social interactions, he does not understand money, and he would not be able to live on his own. The Department conceded that based on the results of the ABAS-II (Exh 12), the Appellant had significant limitations in the areas of Home Living, Health and Safety, Self-Care, Self-Direction, and Social, and therefore he met the Department's criteria for adaptive limitations.

The remaining issue is whether the Appellant meets the cognitive prong of the Department's criteria for eligibility. In making this determination, we have three cognitive tests from before and one from shortly after the Appellant turned 18, the results of which are as follows:

Year/age	Test	Exh#	VIQ	PIQ	FSIQ	VCI	POI	FDI	PSI	WM
1. 2006 (18. [REDACTED])	WAIS-III <sup>7</sup>	3	82	86	81	93	87		72	67
2. 1999 (11. [REDACTED])	WISC-III	4,5	70	75	70	73	83	64	58	
3. 1996 (8. [REDACTED])	WISC-III	6	65	69/80 <sup>8</sup>	70	69	77	61	88	
4. 1992 (4. [REDACTED])	SB:FE	7	VR 89	AVR 98	QR 82	S-TM 89	Composite 87			

The results of these tests are variable. In the earliest evaluation in the record, the Appellant's overall scores were in the low average range of intellectual functioning, with the examiner's added caveat that they may be an underestimate of the Appellant's potential. These scores would place the Appellant above the Department's criteria for eligibility that requires an IQ score of approximately 70 to 75 or below.

Two subsequent tests, however, both WISC-IIIs, reveal very different scores. The Full Scale scores on the two WISC-III tests in 1996 and 1999 were both 70 (Exhibits 6 and 4/5). On their face, these scores fall within the Department's eligibility criteria, but notable in each of these tests, as in all of the Appellant's testing, was the presence of significant behavioral issues during testing that would have interfered with the Appellant's test taking and ultimately his scores. In the 1996 evaluation the Appellant had a short attention span and was easily distracted by both internal and external stimuli. He either did not hear or did not process what was being said such as instructions, and he quit rather than guess at answers when he perceived difficulty. In the 1999 testing, the Appellant had difficulty with sustained effort and at times appeared frustrated, had difficulty expressing his ideas and answers, and appeared anxious and easily distracted. These distraction levels, which are typical symptoms of PDD, would have affected the Appellant's scores.<sup>9</sup>

<sup>7</sup> Scores reported are the median of the range given by the test administrator.

<sup>8</sup> See, footnote 3.

<sup>9</sup> In the 1996 testing, the examiner tested for but found no specific learning disability present, referring instead to the effect of PDD on the Appellant's academics.

On the most recent testing in the record from 2006, the Appellant tested in the low average/borderline range of ability, with a Full Scale IQ of 81. Noteworthy was the significant difference between the Appellant's relative strengths in oral/verbal/language reasoning (VCI 93, 32<sup>nd</sup> percentile) and his weakness in working memory (67, 1<sup>st</sup> percentile) and processing speed (72, 2<sup>nd</sup> percentile).

Looking at all of the test scores in this case presents a varied picture. Some of the Appellant's scores fall within the Department's eligibility rules, others do not. To resolve this discrepancy, I am persuaded by testimony from Dr. Costigan, the Department's psychologist, who was qualified as an expert witness. He testified that individuals like the Appellant who have been diagnosed with PDD typically perform differently from one test to another. The symptoms of PDD, which include being easily distracted, can negatively affect short-term memory and other test scores. An individual with PDD may perform better or worse at any given time depending on the level of distraction present at the time of the evaluation. Accordingly, they may be less distracted and do better on one test, but more distracted and do less well on the next. This is the pattern with the Appellant.

In the final analysis, I find that the Appellant's scores on the two WISC-III evaluations are not representative of the Appellant's cognitive abilities. As Dr. Costigan noted, one cannot fake smart. The fact that the Appellant twice had higher full scale IQ scores (in the low average range) is not likely to have occurred by chance. More likely, the Appellant was less distracted during these two evaluations than during the WISC-III evaluations. In the Appellant's case, the basis of his distractibility stems from his PDD, not from mental retardation.

I find the Appellant's scores on the WAIS-III to be more representative of his cognitive abilities than the scores on the two WISC-III evaluations. Further, I find that symptoms of the Appellant's PDD were likely responsible for the lower scores on the WISC evaluations rather than a significant cognitive impairment. Accordingly, I find that the Appellant does not have significantly sub average intellectual functioning defined as an IQ score of approximately 70 to 75 or below as defined by Department regulations and that therefore he is not mentally retarded.

Despite being unable to meet the Department's definition of mental retardation, the Appellant faces significant challenges in his day-to-day functioning. Because of serious concerns for his safety, judgment and well-being, the Appellant is incapable of independent living. When not in school he is either with his parents or his grandmother who lives next door. As seen on the ABAS-II, the Appellant shows severe limitations in several areas of adaptive functioning, and so will need assistance in the future to assure his safety. However, because the Appellant's cognitive functioning exceeds the threshold set by the Department, he has not been able to establish eligibility from the Department for services.

### **Conclusion**

Based on my determination that the Appellant does not have sub-average intellectual functioning as defined by the AAMR standards and incorporated into the Department regulations, 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