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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,


 Elin M. Howe
 Commissioner

EMH/ecw

cc: Elizabeth Silver, Hearing Officer
 Gail Gillespie, Regional Director
 Marianne Meacham, General Counsel
 Maria Blanciforte, Assistant General Counsel
 Kristen O'Melia, Regional Eligibility Manager
 Randine Parry, Psychologist
 File

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF DEVELOPMENTAL SERVICES**

In Re: Appeal of [REDACTED]

This decision is issued pursuant to 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] MA.

Those present and participating at the hearing:

For the Appellant:

[REDACTED]	Appellant
[REDACTED]	Attorney, [REDACTED]
[REDACTED]	Father of Appellant
[REDACTED]	Sister of Appellant
[REDACTED] Ph.D.	Disabilities Consultant
[REDACTED] , LICSW	Social Work Supervisor, [REDACTED]
[REDACTED]	[REDACTED] Social Work Intern

For the Department:

Randine Parry	Psychologist
Maria Blanciforte.	Attorney

At the hearing, the Department submitted Exhibits 1-12, and Appellant's attorney submitted Exhibit 13. The hearing lasted approximately two and a half hours. [REDACTED], [REDACTED], [REDACTED], [REDACTED], and the Appellant testified on behalf of the Appellant. Randine Parry 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. Appellant's Application for DMR¹ eligibility dated [REDACTED] 2009 and Adult Intake Information Form dated [REDACTED] 2009.

Exhibit 2. [REDACTED] 2009 letter from DDS to the Appellant denying eligibility for Department services.

Exhibit 3. Informal Conference attendance record dated [REDACTED] 2009.

Exhibit 4. DDS's [REDACTED] 2009 letter to the Appellant post Informal Conference again denying eligibility for Department services.

Exhibit 5. [REDACTED] 2010 Notice of Fair Hearing.

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.

Exhibit 6. Evaluation dated [REDACTED] 2000 when the Appellant was 11 [REDACTED] years old from [REDACTED] Public Schools, School Psychological Services. The evaluator is unknown as there is no signature line or identification of the individual responsible for the report. The evaluation reports on prior evaluations from [REDACTED] 1994 when the Appellant was 5 [REDACTED] years old and which revealed depressed language development and a bilingual home, and one from [REDACTED] 1997 when the Appellant was 8 [REDACTED] years old and showed scores on the Wechsler Intelligence Scale for Children –Third Edition (WISC-III) in the borderline range.

This evaluation reported scores on a WISC-III as falling overall in the borderline range at the 6th percentile with the Verbal score in the low average range at the 12th percentile and the Performance score in the borderline range at the 6th percentile. Whoever conducted this evaluation concluded that current testing suggested that the Appellant's delays were significant and presented a "skills profile not similar to children in a language based learning disabilities class."

Exhibit 7. Psychological Test Report reporting on an evaluation done [REDACTED] 2006 by [REDACTED], Ph.D. when the Appellant was 16 [REDACTED] years old. The Appellant was referred in order to evaluate his cognitive and emotional functioning and to aid in planning for him.

By way of background information, the Appellant was born in [REDACTED] and moved to the United States when he was [REDACTED] old. He was raised by his grandmother and his father. At the time of the evaluation he was living at the [REDACTED]. He had some history of impulsive behavior, fire setting, possible hallucinations, receptive and expressive language difficulties, attention problems, and perhaps some undiagnosed learning problems. He had been diagnosed with ADHD.

The Appellant was cooperative during testing but appeared to be anxious about the length of testing. One of the behavioral observations was that the Appellant's lack of self-confidence might have artificially lowered some of his scores by inhibiting his ability to respond spontaneously to some items. On mental status examination, the evaluator's impression was that the Appellant had both cognitive and emotional components to his expressive language difficulties.

On WISC-IV, the Appellant's Full Scale IQ score was 74, and Index scores were Verbal Comprehension (VCI) 79, Perceptual Reasoning (PRI) 79, Working Memory (WMI) 88, and Processing Speed (PSI) 73. Overall the Appellant's score was within the Borderline range and at the 4th percentile, but there were indications that the overall score was meaningless and an underestimate of the Appellant's intellectual potential. On the Test of Nonverbal Intelligence-Third Edition (TNVI-III), the Appellant had an intellectual quotient of 98, which was in the 45th percentile and which would have been consistent with a Wechsler score in the average range. Academic achievement testing also yielded scores much higher than might have been anticipated from his scores on the WISC-IV. Reading was 97 (42nd percentile), Spelling was 103 (53rd percentile), and Arithmetic was 95 (37th percentile). His Axis I Diagnoses were Oppositional Defiant Disorder, Impulse Control Disorder NOS, R/O Expressive Language Disorder, and ADHD NOS. Axis II was Deferred.

Exhibit 8. Neuropsychological Evaluation done by [REDACTED], Psy.D, and [REDACTED], Ph.D on [REDACTED], 2007 when the Appellant was 18 [REDACTED] years old and a senior at [REDACTED] School. He was referred by his Department of Social Services² worker for evaluation to get a better understanding of his cognitive functioning in order to assist in developing appropriate goals for future functioning. The Appellant's diagnoses at the time were Mixed Receptive-Expressive Language Disorder, ADHD, Oppositional Defiant Disorder, Learning Disorder NOS, and Enuresis.

Background history indicates that the Appellant was possibly drug-exposed in utero. At the age of four, when he went to live with his father, the Appellant's speech, language, and motor functioning were significantly

² The Department of Social Services has changed its name to the Department of Children and Families (DCF). I will refer to it by its new name hereafter.

delayed. He was enuretic, displayed uncoordinated and atypical motor activity, and was diagnosed with global developmental delays. He had attended public schools in [REDACTED] and [REDACTED], and the specialized school setting at [REDACTED]. He passed the MCAS his senior year and was on par to graduate from high school that spring.

In this evaluation, the Appellant was given the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III). Overall attitude and behavior during testing suggested the findings were valid. On the WAIS-III, the Appellant had a Full Scale IQ score of 87 (19th percentile – low average), Performance IQ score of 90 (average), and Verbal IQ score of 86 (low average). His index scores were VCI 89 (23rd percentile, low average range), POI 95 (37th percentile, mid-lower average range), WMI 84 (14th percentile, lower end low average range), and PSI 81 (10th percentile, lower end of low average range). Overall, the Appellant displayed low average cognitive functioning with discrete performances ranging from mid-lower average to the lower end of low average.

The Appellant's overall performance on the Wechsler Individual Achievement Test-2nd Edition (WIAT-II) placed him within the lower end of the average range with a Total Score of 91 (27th percentile).

In summary, the evaluators said the Appellant's overall intellectual functioning was in the low average range. There was mild to moderate variability among the Appellant's aggregate cognitive abilities within the different domains assessed. The difference between the stronger visual-spatial abilities and weaker attention, working memory, and information processing abilities was statistically significant and clinically meaningful. Academic skills overall placed the Appellant within the lower end of the average range.

Taking into account all of the testing, the evaluators concluded that overall the Appellant continued to present with a pattern of cognitive deficits that were consistent with his established diagnoses of ADHD, Combined Type, and Expressive Receptive Language Disorder.

Exhibit 9. Psychological Evaluation Report done [REDACTED] 2009 and [REDACTED] 2009 when the Appellant was 20 [REDACTED] years old by [REDACTED], M.A. and [REDACTED], Psy.D. The Appellant had been referred for evaluation to clarify his abilities and eligibility for additional services when there was some question about the appropriateness of an independent living placement.

In addition to some of the background noted in above exhibits, this report indicates that the Appellant became involved with the Department of Children and Families at the age of 15 following reports of sexualized behaviors. At the time of the evaluation he had been living at [REDACTED] for six months.

Ms. [REDACTED] administered the WAIS-III. During testing, the Appellant was cooperative, generally focused and engaged. His IQ scores were: Full Scale IQ 89 (23rd percentile), Verbal 85 (16th percentile), and Performance 95 (37th percentile). Index scores were VCI 84 (14th percentile – low average), POI 103 (58th percentile – average to high average), WMI 92 (30th percentile - average), and PSI 71 (3rd percentile - borderline).

According to the evaluators, the Appellant's overall pattern of scores was reflective of significant variability with some skills more fully developed than verbal comprehension and processing speed skills. As a result, they believed that the Appellant's Full Scale IQ score might not have been a reliable measure of his overall intellectual functioning, and that given his deficits and weaknesses, the Full Scale score might have been an overestimate of his daily functioning.

An Adaptive Functioning evaluation revealed significant deficits in the Appellant's skills. On the Vineland Behavior Scales, the Appellant's Adaptive Behavior Composite Score was 61, which was in the Low Range. Ms. [REDACTED] noted that these scores represented serious and significant impairments in daily functioning.

In summary, the evaluators noted that the Appellant exhibited deficits in areas that hampered daily functioning. His cognitive abilities were variable. The deficits made it difficult for the Appellant to put his knowledge or

reasoning skills into practice meaningfully. The variability in his scores was said to be characteristic of a profile of an individual with executive functioning difficulties. His scores suggested intact non-verbal reasoning, along with an inability to use this reasoning in practice or day-to-day situations. The evaluators concluded that the evaluation supported the diagnosis of ADHD and Expressive-Receptive Language Disorder. Also, the measured discrepancies between cognitive skills and actual functional abilities warranted a diagnosis of Pervasive Developmental Disorder (PDD) NOS.

Exhibit 10. Evaluation done [REDACTED] 2009 by [REDACTED], Ph.D, when the Appellant was 20 [REDACTED] years old. This rather cursory evaluation came just a few days after the previous evaluation (Exh 9), and employed the same IQ test as in the prior evaluation. The Appellant had been referred for an assessment to assist in his vocational planning with the [REDACTED]. As noted, Dr. [REDACTED] administered the WAIS-III, the same test administered to the Appellant just a few days earlier. The Appellant had IQ scores of Full Scale 91 (average), Verbal 85 (low average) and Performance 100 (average). The 15-point difference between the Verbal and Performance scores were statistically significant. No Index scores were reported. The Appellant's potential was seen as being at least Average and perhaps greater with compromise due to difficulties in 1) his ability to define words – to use language to express his ideas and observations; 2) his use of social reasoning – he needed help identifying and responding appropriately to social cues; and 3) rote skills on tasks that were times – he needed cues, prompts, structure, and extra time to complete work.

On the Wide Range Achievement Test (WRAT-3), the Appellant's scores were Reading 88 (low-average) and Arithmetic 84 (low average). Dr. [REDACTED]' diagnostic impression was ADHD, Depressive Disorder NOS, and Learning Disorder NOS.

Exhibit 11. Curriculum Vitae for Randine E. Parry, Ph.D.

Exhibit 12. Eligibility Report prepared by Randine E. Parry, Ph.D. After reviewing the test scores, diagnoses, and other information in the evaluations described above, Dr. Parry recommended that the Appellant was not eligible for DDS services because he did not have significantly sub-average intellectual functioning.

Exhibit 13. Adaptive Functioning Evaluation Report done [REDACTED] and [REDACTED] 2009 by [REDACTED] and [REDACTED], Psy.D, Licensed Psychologist, when the Appellant was 20 [REDACTED] years old. This evaluation reports on the results of the Vineland referenced in Exhibit 9. The respondent was [REDACTED], who was the Appellant's caseworker at [REDACTED] residential facility where the Appellant was living at the time of the evaluation. The Appellant's scores were Communication 62 (low), Daily Living Skills 57 (low), Socialization 68 (low), and Adaptive Behavior Composite 61 (low). These results, which had a percentile rank of 1, indicated that the Appellant's adaptive behaviors were a serious and significant area of impairment.

TESTIMONY

Exhibits 1-13 were entered into the record. The Appellant, [REDACTED], [REDACTED], [REDACTED], and Randine Parry were sworn in. The Department objected on hearsay grounds to the entry of Exhibit 13 into the record because it was unsigned. This hearing officer allowed the report to be admitted indicating that a lack of signature would to the weight given to the report, but does not render it inadmissible. As the Department's attorney also indicated that the Department conceded that the Appellant met the adaptive functioning prong of the eligibility criteria, the admission of this exhibit had no adverse effect on the Department's case.³

The parties made brief opening statements.

³ I note that Exhibit 6, submitted by the Department, also has no signature, indeed it does not even indicate the author of the report.

██████████, Ph.D, testified first for the Appellant. She works as a health and disabilities consultant. She also teaches in the field of disabilities and acts as a consultant to adults with disabilities as well as families who have children with disabilities. She also sat on educational planning teams in schools systems for children with disabilities as an advocate for the children. She is a trained clinical social worker and Ph.D in education. She has been in the field for 40 years. Dr. ██████████ was director of social services at ██████████ for 18 years and in that capacity provided expert testimony in a case involving a child in the hospital.

Dr. ██████████ reviewed the Appellant's records. She testified that he had symptoms when he was very young but his symptoms weren't identified at that time. She said there was little known about autism spectrum disorders then, including Pervasive Developmental Disorder (PDD). The Appellant was diagnosed with Attention Deficit Disorder (ADD), but Dr. ██████████ said ADD can be co-morbid with autism spectrum disorders as well. She said the Appellant doesn't have a classic case of autism, as is the case for many people with PDD. She said within the last few years some of the Appellant's records have identified PDD.

Dr. ██████████ gave some examples from the record of symptoms the Appellant displayed when he was younger that indicated PDD. She said the records mentioned the Appellant cutting up some of his underwear when he was younger, which she said would indicate some tactile defensiveness which is present among children with autism spectrum disorder. Another example she gave involved the time the Appellant was sent to a substantially separate program and one of his goals in the program was to develop empathy. She said children with autism spectrum disorders sometimes have difficulty understanding that people have thoughts different from their own. Other reports discussed the Appellant having difficulty with rigidity. Also, the fact that the Appellant was obsessive about and homing in on certain activities he liked to do was symptomatic of children with autism spectrum disorders. Finally, the Appellant had some difficulties with language when he was younger.

Dr. ██████████ voiced concern about the Appellant aging out of Department of Children and Families (DCF) care without support. She talked to the Appellant's foster mother and said it sounded like the Appellant still had a great deal of difficulty with self-care, and that hygiene has been a major issue through the years. According to Dr. ██████████, the Appellant's foster mother said she needed to remind the Appellant to get up, to shower, to take dishes to the sink when he's done eating, and to get himself going for appointments. She also said the Appellant still has problems with urination and he could lie in wet clothes for hours.

Dr. ██████████ said despite the Appellant's IQ, his activities of daily living and ability to function needed to be taken into account. Without structure or a coach or some other person to provide support, Dr. ██████████ said the Appellant will have a great deal of difficulty. She noted the discrepancy between the Appellant's IQ scores and his adaptive functioning and acknowledged that he did well on some portions of the IQ testing. However, she said that it is important to look at behavioral functioning as well. She said a person can present in a certain way on certain isolated tests, which will raise the IQ level. She noted that the Appellant's performance level was much higher than his verbal scores, so the performance scores could be enough to raise his overall IQ level. But Dr. ██████████ was concerned that Department eligibility requirements only look at IQ, but that's not sufficient in terms of how one functions on a day-to-day level and instead one has to look at a person's functioning capacity in order to determine if he needs continuing support services. Dr. ██████████ noted that the Vineland showed the Appellant functioning between a 5 and 9 year old level.

Dr. ██████████ thought that in the right structured environment and with the proper amount of support, the Appellant had the potential ability to manage money and get a job.

██████████ next testified for the Appellant. She has been employed at ██████████ ██████████ Center for about a year and a half. Before that she worked for ten years at the ██████████ ██████████ in ██████████ MA, and prior to that at ██████████ for five years.

Ms. [REDACTED] first met the Appellant in [REDACTED] 2007 when he became resident at [REDACTED] through a DCF placement. While there, Ms. [REDACTED] said the Appellant struggled with hygiene and enuresis, he needed reminders to change his clothes or change the sheets, he had a difficult time figuring out how to relate to peers in an age appropriate way, and he struggled with age-appropriate interactions with the staff. Ms. [REDACTED] said the Appellant also struggled educationally and needed a significant amount of help. She said he got help through the school's disability services, but even with that he struggled in class and in doing homework. Ms. [REDACTED] also said the Appellant needed step-by-step prompts to complete his activities of daily living including showering and brushing his teeth. If he was not prompted, he wouldn't bring a towel to the shower. He'd still take the shower but he'd put his clothes on without drying off.

Ms. [REDACTED] said the Appellant always tried as hard as he could and wanted to please staff and peers. He never had a consequence at [REDACTED].

Ms. [REDACTED] said the Appellant has also struggled with employment. He always wanted to work and applied for many jobs. At times he started jobs, but he was never successful in learning the required tasks. If he was given more than one instruction at a time he couldn't follow it. For example, through staff connections he was hired at [REDACTED]. They spent a day trying to train him on simple tasks but the manager felt he wasn't able to master those tasks. At [REDACTED] where the Appellant has been volunteering for a couple of years, the manager said the Appellant was trying hard but there were limited tasks that he could do and they wouldn't feel comfortable with him doing anything independently. All the tasks he did were supervised, and they didn't feel they could offer a paid position because he couldn't perform the tasks independently. Ms. [REDACTED] said there were some things the Appellant was able to do successfully at [REDACTED], including delivering meals [REDACTED]. The driver would give the Appellant the meals and he would bring them to the door.

Ms. [REDACTED] said the Appellant was pleasant and sociable with clients and the driver of van.

Ms. [REDACTED] described a time when DCF forced the Appellant into independent living (against [REDACTED]'s recommendation) and it didn't work out. She said he transitioned from [REDACTED] into a more independent level of care at [REDACTED] and from there DCF placed him in a rooming house in the community. He had very difficult time settling in and could not unpack his belongings. He had inappropriate conversations with other tenants of the rooming house. One woman complained to the landlord with safety concerns because the Appellant had made inappropriate sexual comments to her. Ms. [REDACTED] recognized that the Appellant's intention was to be social, not threatening, but his inability to negotiate that situation resulted in this woman feeling threatened. Ms. [REDACTED] said the Appellant forgot to take his medication when he was there, which resulted in his pacing anxiously and being unable to manage his situation. The arrangement only lasted a few days before DCF agreed it was not an appropriate placement and returned him to [REDACTED].

Ms. [REDACTED] discussed the Appellant's decision to take classes at [REDACTED]. She said it was a difficult year for him there. He still needs to pass a class to place into the program he wants. Despite getting support from the school's disability services, the Appellant wasn't successful in passing the class either the first semester or when he re-took it in the second semester. She said the Appellant could not negotiate interaction with disability services on his own. She said he would show up at their office but wouldn't let people know he was there, so he wouldn't get help. But Ms. [REDACTED] said the Appellant is always willing to accept help and makes as best use of it as he can. She thought that with support he could maintain a job in a supportive environment as he does at [REDACTED] and that with support he could live semi-independently.

On cross-examination, Ms. [REDACTED] said she's known the Appellant since [REDACTED] 2007. She said he does not live in her program now, but she has observed him in living situations. With respect to the Appellant's classes at [REDACTED] she clarified that [REDACTED] might allow the Appellant to continue taking classes but DCF would not continue to pay since he failed the same class twice.

At this point in the hearing the Appellant testified that the class he was taking was Introduction to Language Arts. He said he had a very difficult time with that class. Under questioning from the Department's attorney as to whether he thought he might pass if given another opportunity, he said, "Yes, in regards to actually having the support I need to actually pass it." When asked what kind of support he needed, he said, "As much support as I could possibly get. It's hard to ask for help, but accepting the help is a good quality for me." He said he passed the class called Critical Thinking.

Returning to the cross-examination of Ms. [REDACTED], she concurred that the Appellant had passed some classes, but he barely passed with a very low grade. The teacher told Ms. [REDACTED] that he made such an effort and accepted help, so he deserved to pass. She said the Appellant's goal was to enter automotive program, but he has to complete academic courses to be admitted to the program.

On re-direct, Ms. [REDACTED] said that her fear for the Appellant when he ages out is that he will be homeless. She has tried to identify resources, but her concern is that the Appellant will have nowhere to go besides a homeless shelter. She is concerned that he can't support himself financially, emotionally, or practically, and he wouldn't be successful in living independently without supports in place.

On re-cross-examination, Ms. [REDACTED] said that they have submitted an application for adult foster care through MassHealth but have not yet heard if it has been approved. Also, Massachusetts Rehabilitation Commission (MRC) has determined the Appellant eligible for employment but not housing services, and he was referred to the vocational advancement center in [REDACTED].

[REDACTED] next testified for the Appellant. She is the Appellant's sister. Ms. [REDACTED] said she last lived with the Appellant around 2001 when [REDACTED] was taken into DCF custody and placed in a facility. She has stayed in touch with him since then. Ms. [REDACTED] is aware of some of the struggles the Appellant has faced, including his constant need for reminders to do things. She said functioning without support is challenging for the Appellant. He tries hard but just can't do the things he needs to do to be successful. Even when he is in a supportive environment, he doesn't improve. Ms. [REDACTED] said the Appellant needs help beyond what we see on paper, and he won't make it without help. She said she does not have the resources or finances or living arrangement to be able to help him. She said the Appellant picks things up from everyone around the table to put together coherent sentences, which is what he thinks people want to hear. She said he doesn't really get it, but he's good at fooling people. But he loses his train of thought. He could be talking about the Celtics, then in the next minute he'll be talking about the weather, and he's lost the thread. She said the Appellant needs help and without it he's not going anywhere.

[REDACTED], the Appellant's father, testified next for the Appellant. He said he last lived with the Appellant around 2004 when he was 15. He said he has known that his son needed help since he was four years old. Mr. [REDACTED] said he understands that his son ages out at age 22. He said the Appellant couldn't live with him because he couldn't support the Appellant or provide the help he needs. On cross-examination he clarified that he has been looking for help for the Appellant since he was four years old. He said when he first came to the United States and took him for medical help, the doctor told him that when the Appellant was 19 or 20 he would act like he's six years old because he has some kind of problem. Mr. [REDACTED] looked for help everywhere but other than DCF, the Appellant has not qualified for help. He said if the Appellant doesn't get help once he turns 22, he will land in jail or be dead because he can't handle anything on his own.

The Department proceeded with its case. They first asked the Appellant some questions. In response to questions, he said he was living in [REDACTED], with a foster parent and one other individual with whom he gets along well. He said a normal day for him is going to school. He added that he struggles hard with school and has a hard time asking for help. He said after he finishes with classes he heads home and tries to do his homework but is not as successful as he thought he would be. When asked what his first language was and he answered Haitian Creole, his father and sister interrupted to say English was his first language, and that he understands Creole to some degree but he has never spoken it.

Upon further questioning, the Appellant said he takes public transportation to school. School is in [REDACTED] so he takes public transportation to [REDACTED] station where he is picked up by a school shuttle bus. He said he wants to become an auto mechanic but it's not as easy as he thought it would be. He said he also likes to play games a lot, including card games and video games. He said he likes all kinds of music, and also likes golf. Later he clarified that he plays golf with a worker at [REDACTED]. The Appellant said it was hard to find help and without DCF services when he turns 22 he said he would be in a much worse situation than he is already in. When asked what medications he takes, he said he takes Celexa, Concerta, and Abilify.

On questioning from his own lawyer, the Appellant clarified that he only went to school a few days a week and on other days went to [REDACTED] where he volunteered. Wednesday was his availability day. The Appellant acknowledged that he had a problem with absences from both school and [REDACTED].

In response to more questions, the Appellant said he needed help taking his medications and that his foster mother helps him with this every day. He acknowledged that for the three days when he was living in the rooming house he wasn't taking his medications and he was pacing back and forth. The Appellant's sister added that when she spends weekends with the Appellant she has remind him constantly about taking his medications.

Randine Parry testified for the Department. She said that she has been a Department Psychologist for 33 years. She does intake and eligibility as well as other jobs. She has done several thousand eligibilities in recent years and testified at a couple of dozen fair hearings. She reviewed the Department's eligibility process.

Dr. Parry testified that she was familiar with the Appellant's file. She said there was not much information in the record for the Appellant prior to the age of 11. She said she determined that the Appellant didn't meet Department criteria based on intellectual functioning since the Appellant's scores were in the low average range and some areas in average range. In addition, Dr. Parry said academic assessments were mostly in the low average to average to above average range. She concluded that the Appellant did not meet the significant intellectual limitations requirement of the Department. Dr. Parry reviewed the Appellant's diagnoses, and noted that he consistently carried a diagnosis of ADHD but others changed over the years. These included Opposition Defiant Disorder, Impulse Control Disorder, Learning Disorder, Expressive Receptive Language Disorder, Dysthymic Disorder, and PDD NOS, which was diagnosed later.

Dr. Parry reviewed the exhibits in the record. Exhibit 6, an evaluation done in [REDACTED] 2000, included an evaluation for children. The Appellant's Full Scale score was 77. Dr. Parry explained that these old tests discussed results by percentile and that she translated the percentile to a number. The Verbal scores overall were in the low average range (82) and Performance scores were in the borderline range (77). Dr. Parry noted that the Appellant was in a class for language-based learning disabilities. She also noted that he was raised in a bilingual home.

Dr. Parry next reviewed Exhibit 7, which she said was done at a more difficult time in Appellant's life. She explained that the Appellant was having some problems and was at the [REDACTED] for a number of behavioral issues. She said he was 16 at the time and was on some medications including Ritalin for ADHD. She noted the evaluator observed the Appellant to be cooperative during testing but that he appeared anxious, and that his lack of self-confidence may have artificially lowered some scores.

Dr. Parry discussed the results of the Wechsler on which the Appellant scored 79 on both the VCI and PRI, both in the upper borderline range, WMI 88, PSI 73, and Full Scale IQ 74. Dr. Parry noted that the evaluator said the Appellant's functioning was suggestive of higher intellectual potential than his overall score on the Wechsler would have otherwise indicated. Dr. Parry IQ reviewed the IQ score of 98 on the Test of Nonverbal Intelligence, which she said was solidly in the average range. Then she reviewed the academic tests in which the Appellant scored 97 in Reading, which was at the high school level and in the average range, 103 in

Spelling, which also was at the high school level and in the average range, and 95 in Arithmetic, which was at the 8th grade level and in the average range. She also reviewed the Appellant diagnoses and surmised that this was probably a difficult time in the Appellant's life for him.

Dr. Parry turned to Exhibit 8, which was an evaluation done in 2007 when the Appellant was still at [REDACTED] but had been there for a while. The Appellant had just turned 18. Dr. Parry reviewed the Appellant's diagnoses and medications. She said the IQ test given to the Appellant was an adult test, which does not rely as much on speed as children's tests. She said the Appellant's Full Scale IQ score was 87, which was well into the low average range, the Verbal IQ score was 86 and the Performance IQ score was 90. Index scores were VCI 89, POI 95, in the average range, and WMI 84. The PSI score, which Dr. Parry explained was the speed at which the Appellant did things, was 81. Dr. Parry said this score was the Appellant's relative weakness but it was in the low average range.

In a 2009 evaluation found in Exhibit 9, Dr. Parry reviewed the evaluator's behavioral observations and then the Appellant's scores. His Full Scale IQ score of 89 was at the top of the low average range, the Verbal IQ score of 85 was in the middle of the low average range, and the Performance IQ score of 95 was in the average range. Index scores were VCI 84, low average, POI 103 average, WMI 92 average, and PSI 71. Dr. Parry noted that the Appellant was consistently diagnosed with ADHD through the years.

Dr. Parry next reviewed Exhibit 10, which was an evaluation requested by the Massachusetts Rehabilitation Commission. On the Wechsler Adult Intelligence Scale-III (WAIS-III), the Appellant's scores were Verbal IQ 85, Performance IQ 100, and Full Scale IQ 91. Dr. Parry also reviewed the scores on the Wide Range Achievement Test-3 (WRAT-3) in which the Appellant scored 88 on Reading and 84 on Arithmetic, both of which were in the low average range. Dr. Parry said these academic scores were slightly lower than the Appellant's prior scores, but his IQ scores were consistent with former tests. Dr. Parry also reviewed the Appellant's diagnoses.

Dr. Parry said the two adult intelligence test scores were very consistent, both of which were in the low average range. In summary, Dr. Parry said all of the Appellant's intelligence evaluations indicated intellectual abilities that were considerably higher than what was required by Department criteria. Dr. Parry's opinion at the hearing was that the Appellant does not meet the intellectual criteria for Department services since his intellectual functioning was at least in the low average range.

On cross-examination, Dr. Parry denied that there would have been a rehearsal component to the Appellant's answers in Exhibit 8. She said the evaluation was a different test than the Appellant had taken previously. She also said that it was possible the Appellant had an unidentified diagnosis of PDD in 2007, but that that would not have changed the results of his intelligence test scores. Finally, Dr. Parry agreed that Exhibit 10 was based on the Appellant's self-reporting, but added that the evaluation in Exhibit 10 was not the basis of the Department's decision.

Both parties made brief 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] 1989, the Appellant is 21 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 definition of mental retardation.

The Appellant was born in [REDACTED] and came to the United States when he was just a few months old. Background history indicates that the Appellant was possibly drug-exposed in utero. When he came to the United States he lived with his maternal grandmother until he was four years old and then went to live with his father.

The Appellant reportedly had significant delays in speech, language, and motor functioning. When he came to live with his father he was enuretic, displayed uncoordinated and atypical motor activity, and could barely speak. He was diagnosed with global developmental delays. He has a history of significant emotional, behavioral, and psychosocial difficulties including poor impulse control and social judgment. The Department of Children and Families (previously Department of Social Services) took custody of the Appellant when he was about 15, and placed him at [REDACTED] and [REDACTED] in [REDACTED], MA. At one point DCF placed the Appellant in a rooming house to live independently, but that attempt failed after just three days. The Appellant had stopped taking his medications, was pacing in his apartment, and made inappropriate sexual comments to another resident.

The Appellant attended public schools in [REDACTED] and completed high school in [REDACTED] after passing the MCAS. He has taken some classes at [REDACTED]. He passed at least one class reportedly because of the amount of effort he put in to the class, but has been unable to pass Introduction to Language Arts despite taking it twice and getting help from the school disability services program. This class is a prerequisite to the Appellant's admission into an automotive repair program, which has been a goal of his. It is unclear whether he will be able to take the Language Arts class a third time. Besides school, the Appellant volunteers with a community group serving meals to housebound individuals.

The Appellant currently lives with a foster mother with whom he was placed by DCF. He continues to have a diagnosis of ADHD, he has a more recent diagnosis of PDD, and he is taking Celexa, Concerta, and Abilify.

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 this aspect of eligibility criteria in detail, but will note that the Department's position is based on an Adaptive Functioning evaluation that revealed significant deficits in the Appellant's skills. On the Vineland Behavior Scales, the Appellant's scores were Communication 62 (low), Daily Living Skills 57 (low), Socialization 68 (low), and Adaptive Behavior Composite 61 (low). These results, which were in the first percentile, confirm that the Appellant's adaptive behaviors and daily functioning are significantly impaired.

I also note the extensive testimony in particular from Dr. [REDACTED], Ms. [REDACTED], and Ms. [REDACTED], who all credibly described the extent and nature of the Appellant's significant limitations in adaptive functioning.

Cognitive Functioning

From the earliest record, the Appellant's cognitive testing has resulted in scores that exceed the Department criteria for eligibility. We have the benefit of several IQ tests in the record, which are summarized below.

<u>Year/age</u>	<u>Test</u>	<u>Exh#</u>	<u>FSIQ</u>	<u>VCI</u>	<u>PRI</u>	<u>WMI</u>	<u>PSI</u>	<u>POI</u>	<u>Verbal</u>	<u>Perf</u>
1997 (8)	WISC-III	6 ⁴	borderline							
2000 (11)	WISC-III	6	borderline						low av	borderline
2006 (16)	WISC-IV	7	74	79	79	88	73			

⁴ Because this exhibit is unsigned and there is no indication of who conducted the evaluation or his or her credentials, I give this report significantly less weight than the other evaluations in the record.

								2010-28	
2007 (18.)	WAIS-III	8	87	89	84	81	95	86	90
2009 (20.)	WAIS-III	9	89	84	92	71	103	85	95
2009 (20.)	WAIS-III	10 ⁵	91					85	100

In addition, on the Test of Nonverbal Intelligence-Third Edition (TNVI-III), the Appellant had an intellectual quotient of 98, which was in the 45th percentile and which would have been consistent with a Wechsler score in the average range.

Academic achievement testing yielded scores that were generally in the average range. In 2006, on the Wide Range Achievement Test (Exh 7), the Appellant's scores were Reading 97 (42nd percentile), Spelling 103 (53rd percentile), and Arithmetic 95 (37th percentile). In 2007 on the Wechsler Individual Achievement Test-2nd Edition (Exh 8), the Appellant's overall performance placed him within the lower end of the average range with a Total Score of 91 (27th percentile). His Composite scores were Reading 94, Mathematics 94, Written Language 100, and Oral Language 82. In 2009 on the Wide Range Assessment Test (Exh 10), the Appellant's scores were Reading 88 (low average) and Arithmetic 84 (low average).

The Appellant's overall score on the Wechsler in 2006 placed him in the Borderline range. However, the evaluator cautioned that this score was meaningless and instead thought there were suggestions of much higher intellectual potential. After extensive testing in 2007 (Exh 8), the evaluators concluded that the Appellant's overall intellectual functioning was in the low average range with some variability among aggregate cognitive abilities. Overall academic skills were in the lower end of the average range. The evaluators noted that the Appellant continued to present with a pattern of cognitive deficits that were consistent with his established diagnoses of ADHD, Combined Type, and Expressive Receptive Language Disorder. In 2009, the Appellant's cognitive abilities ranged from borderline to average (Exh 9). In that evaluation, however, the Appellant's overall pattern of scores was reflective of significant variability with some skills more fully developed than verbal comprehension and processing speed skills. As a result, the evaluators believed that the Appellant's Full Scale IQ score might not have been a reliable measure of his overall intellectual functioning, and that given his deficits and weaknesses, the Full Scale score might have been an overestimate of his daily functioning.

The Department psychologist concluded that all of the above test scores were above the Department's eligibility criteria for intellectual functioning and as such the Appellant was not eligible for adult services from the Department. Indeed, in the many exhibits in which diagnoses were included, none mentioned a diagnosis of mental retardation.

One evaluator noted that the Appellant's significant limitations in adaptive functioning affected his ability to put his knowledge or reasoning skills into practice meaningfully (Exh 9). In their descriptions of the Appellant's adaptive limitations, the Appellant's witnesses credibly provided many examples of this phenomenon. The evaluators from the 2009 report (Exh 9) also noted that the Appellant exhibited deficits in areas that hampered daily functioning. They also noted, however, that the variability in the Appellant's intellectual functioning scores was said to be characteristic of a profile of an individual with executive functioning difficulties, not mental retardation. These same evaluators noted that the Appellant's scores suggested intact non-verbal reasoning, along with an inability to use this reasoning in practice or day-to-day situations. They concluded that the evaluation results supported the diagnosis of ADHD and Expressive-Receptive Language Disorder, and that the measured discrepancies between cognitive skills and actual functional abilities warranted a diagnosis of Pervasive Developmental Disorder (PDD) NOS. Notably, neither these evaluators, nor any others, concluded that the Appellant was mentally retarded.

The Appellant's attorney has compellingly argued that the Appellant's functional limitations inhibit his ability to use what intellectual knowledge he has, so effectively he does not have the cognitive abilities that are

⁵ As noted above in the description of the exhibits, this WAIS-III was administered just days after a previous WAIS-III (see, Exh 9). Accordingly, I give the IQ scores in this evaluation very little weight. I do note, however, that the Appellant's scores, which were in the low average to average range, were consistent with the scores achieved in the prior WAIS-III.

suggested by his IQ test scores. His witnesses credibly testified to the Appellant's limits in his daily activities and at least one evaluation, as noted above, indicates that his Full Scale IQ score may be an overestimate of his daily functioning abilities.

Even with such severe adaptive limitations, however, Department laws and regulations are clear that limitations in adaptive functioning, even in those cases as severe as the Appellant's, are insufficient alone to meet the Department's eligibility criteria. An applicant must meet the definition of mental retardation to be eligible for services, and this definition extends beyond significant limitations in adaptive functioning. Mental retardation is defined as significantly sub-average intellectual functioning that *exists concurrently and is related to* significant limitations in adaptive functioning. Thus, to be eligible for Department services, one must establish that he has the requisite cognitive limitations that exist alongside and related to adaptive limitations. Department regulations are not satisfied if significant adaptive limitations result from some reason other than limitations in cognitive functioning, as would be the case, for example, if mental illness were the underlying cause for adaptive limitations. Similarly, Department regulations are not satisfied if the applicant does not meet the Department's threshold requirements for cognitive limitations. Those limitations, defined above under Significantly Sub-average Intellectual Functioning, are shown by "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."

The Appellant has the burden of proving beyond a preponderance of the evidence that he meets the Department's eligibility criteria. In this case, because his IQ scores through the years have consistently exceeded the Department's threshold requirement of a score of 70 or below, the Appellant has not proven that he has significant sub-average intellectual functioning. Accordingly, because he does not have sub-average intellectual limitations, he has not been able to show that his adaptive limitations exist concurrently and are related to sub-average intellectual functioning. As a result, the Appellant has not met his burden of establishing eligibility for Department services.

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: [REDACTED] 2010

Elizabeth A. Silver
Hearing Officer