



The Commonwealth of Massachusetts

Executive Office of Health & Human Services

Department of Developmental Services

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2010

MA

Re: Appeal of - Final Decision

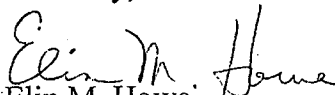
Dear :

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your daughter'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 daughter'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: Jeanne Adamo, 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 115 CMR 6.30 – 6.34 (formerly known as Department of Mental Retardation, hereinafter referred to as “DDS” or “Department”) and M.G.L. C.30A. A fair hearing was held on [REDACTED] 2010 at the [REDACTED] in [REDACTED] Massachusetts.

Those present at the hearing were:



Barbara Green Whitbeck, Esq.
Patricia Shook Ph.D.

Appellant
Mother & co-guardian
Father & co-guardian
[REDACTED] Administrator
[REDACTED] Administrator
Counsel for DDS
Licensed Psychologist

ISSUE PRESENTED:

Whether the Appellant is eligible for DDS services by reason of Mental Retardation as defined in 115 CMR 6.04(1)

BACKGROUND:

The Appellant, Ms. [REDACTED], is a nineteen year old woman who lives at home with her parents. The Appellant was diagnosed with Pervasive Developmental Disorder (PDD) at age three. She was placed in a specialized preschool program at that time and entered a [REDACTED] in the first grade. She currently attends the [REDACTED] where she has been a student for several years. The Appellant is enrolled in [REDACTED] at [REDACTED] where she participates in work related opportunities with a job coach. The [REDACTED] Probate and Family Court determined that the Appellant is an incapacitated person and appointed the Appellant’s parents as her co-guardians on [REDACTED] 2010 at the Appellant’s age of eighteen.

The Appellant applied for DDS services and was denied based on insufficient information to make a determination that Mental Retardation was present as defined by DDS Regulation at 115 CMR 2.01. The Department requested and funded additional cognitive testing for the purpose of diagnostic clarification and to aid in the determination of eligibility for DDS

services. After assessing the results of an independent psychological evaluation conducted for that purpose on [REDACTED] 2010 by licensed Psychologist [REDACTED], Psy.D., the Department denied eligibility for the Appellant based on a failure to meet the criteria for a diagnosis of Mental Retardation as defined in 115 CMR 2.01. An appeal of the denial of services was submitted and an Informal Conference was held on [REDACTED] 2010, at which time the Appellant's ineligibility ruling was upheld. The Appellant appealed that decision and, a Fair Hearing was held on [REDACTED] 2010.

The Fair Hearing proceeded under the informal rules concerning evidence with approximately two hours of testimony presented. The Appellant's evidence consists of six exhibits and sworn oral testimony from the Appellant Ms. [REDACTED], Mr. [REDACTED], the Appellant's teacher, and Ms. [REDACTED], the Appellant's mother. The evidence presented on behalf of the Department consists of fifteen exhibits and sworn oral testimony from Dr. Patricia Shook, the Department's Licensed Psychologist. The Appellant's mother, Ms. [REDACTED] served as the Appellant's Authorized Representative.

SUMMARY OF THE EVIDENCE PRESENTED:

OPENING STATEMENTS:

Summary of Appellant's Opening Statement:

The Appellant's mother, Ms. [REDACTED], stated that her daughter's denial of DDS services should be reconsidered due to the fact that there are huge discrepancies in the cognitive sub testing results, many of which are extremely low. Ms. [REDACTED] argued that not enough validity was given to the lower ranges of these sub test results and that the Full Scale Scores do not show the entire picture of her daughter as she is not able to function without supervision and support. Ms. [REDACTED] pointed out that the teachers who have known [REDACTED] for many years agree that she should be eligible for DDS services, and Mr. [REDACTED] will testify regarding why the teachers believe that [REDACTED] should be found eligible for DDS services.

Summary of DDS's Opening Statement:

Attorney Barbara Green-Whitbeck represented DDS, stating that the Appellant was denied eligibility based on the Department's 115 CMR eligibility regulations. Attorney Whitbeck stated that the Appellant does not meet the criteria for Mental Retardation as defined by these regulations. Therefore her denial is appropriate, and the Department will present evidence to support DDS's decision that the Appellant is ineligible for DDS adult services.

EXHIBITS:

The following exhibits were accepted into evidence:

Appellant Exhibit #1

A Three Year Evaluation of the Appellant, conducted on [REDACTED] 2009, by

██████████, ██████████ Teacher, and ██████████, M.Ed.

Appellant Exhibit #2

A Three Year Evaluation of the Appellant, conducted on ██████████ 2006, by ██████████, ██████████ Teacher, and ██████████, ██████████ Teacher.

Appellant Exhibit #3

A Speech and Language Evaluation conducted on ██████████ 2009, at the Appellant's age of seventeen years, ██████████, by ██████████, M.S., CCC-SPL, Speech and Language Pathologist.

Appellant Exhibit #4

A Communication Evaluation conducted in ██████████ 2007, at the Appellant's age of fifteen years, ██████████, by ██████████, M.S., CF-Speech-Language Pathologist.

Appellant Exhibit #5

Clinical Team Report regarding the Appellant, submitted to the Probate and Family Court in ██████████ 2010, as part of a request for guardianship.

Appellant Exhibit #6

Copy of the guardianship determination made by the Probate and Family Court stating that the Appellant is an incapacitated person and granting permanent guardianship to the Appellant's parents, dated ██████████ 2010.

DDS Exhibit #1

Curriculum Vita of Dr. Patricia H Shook, Ph.D.

DDS Exhibit #2

Copy of 115 CMR 2.01 Definitions

DDS Exhibit #3

Excerpts from 115 CMR 6.04 General Eligibility

DDS Exhibit #4

Letter to the Appellant dated ██████████ 2010, from Paula J. Potvin, Regional Eligibility Manager, notifying the Appellant of the results of the Informal Conference held on ██████████ 2010.

DDS Exhibit #5

Letter from the Appellant, sent to Commissioner Elin Howe, requesting a Fair Hearing, dated ██████████ 2010.

DDS Exhibit #6

DDS's Notice of Receipt of Fair Hearing Request, sent by Elisabete C. Wolfgang, Hearing Administrator, to the Appellant's mother, dated ██████████ 2010.

DDS Exhibit #7

DDS's Fair Hearing Scheduling Notice, sent by Elisabete C. Wolfgang, Hearing Administrator, to the Appellant's mother, dated [REDACTED] 2010.

DDS Exhibit #8

Psychological Evaluation Report of the Appellant, conducted on [REDACTED] 2006, at the Appellant's age of fifteen years, [REDACTED], by School Psychologist, [REDACTED], CAGS, NCSP.

DDS Exhibit #9

Cognitive Testing Report on the Appellant conducted on [REDACTED] 2009, at the Appellant's age of seventeen years, [REDACTED] by [REDACTED] of the [REDACTED].

DDS Exhibit #10

A second Cognitive Testing Report on the Appellant conducted on [REDACTED] 2009, at the Appellant's age of seventeen years, [REDACTED], by [REDACTED] of the [REDACTED].

DDS Exhibit #11

Psychological Evaluation of the Appellant, conducted on [REDACTED] 2009, at the Appellant's age of eighteen years [REDACTED], by School Psychologist, [REDACTED], CAGS, NCSP of the [REDACTED].

DDS Exhibit #12

Psychological Evaluation Report of the Appellant, conducted on [REDACTED] 2010, at the Appellant's age of eighteen years, [REDACTED] by Licensed Psychologist, [REDACTED], Psy.D. using a Stanford Binet Intelligence Scales, 5th Edition.

DDS Exhibit #13

Department's Adult Eligibility Determination denying eligibility to the Appellant, signed by Dr. Patricia Shook, dated [REDACTED] 2009.

DDS Exhibit #14

Eligibility determination notes recorded by Dr. Patricia Shook, dated [REDACTED] 2010, denying eligibility to the Appellant.

DDS Exhibit #15

Copy of an article by the Association for Assessment in Counseling and Education (AACE) regarding the Slosson Intelligence Test Revised (SIT-R).

FINDING OF FACTS:

The following facts, which are the basis for conclusions made in this case, emerged from a review of the documents entered into evidence and the testimony presented by witnesses.

1. The Appellant lives at home with her parents. (Testimony Ms. [REDACTED])
2. The Appellant was diagnosed with Pervasive Developmental Disorder (PDD) at age three and placed in a specialized preschool program. She entered a [REDACTED] in the first grade and has been at [REDACTED] for several years. The Appellant is currently enrolled in the [REDACTED] where she participates in work related opportunities with a job coach. (DDS Exhibit #12 & Testimony Mr. [REDACTED])
3. PDD is a diagnosis on the Autism Spectrum. (DDS Exhibit #13)
4. A diagnosis of PDD is not a diagnosis of Mental Retardation. However, a diagnosis of PDD does not exclude a possible diagnosis of Mental Retardation. (Testimony Dr. Patricia Shook)
5. Mr. [REDACTED] is employed at [REDACTED] and has been directly involved in and aware of the Appellant's progress at [REDACTED]. Mr. [REDACTED] testified that due to the Appellant's deficits, she has not been able to progress to a point where she could work without the one to one instruction of a job coach. (Testimony Mr. [REDACTED])
6. Mr. [REDACTED] testified that the Appellant did not function at the level that would be expected given her cognitive test results; she was not able to attain a level of proficiency in many areas needed to progress to independent living even though she had tried her best to do so. (Testimony Mr. [REDACTED])
7. It is Mr. [REDACTED] professional opinion as an educator that the Appellant will not ever be able to maintain employment without the aid of a job coach. Mr. [REDACTED] opined that the Appellant would not obtain adequate services from other agencies and that without DDS services, the Appellant would not receive the support needed to continue in her work related activities. (Testimony Mr. [REDACTED])
8. It is Ms. [REDACTED] opinion that since DDS has changed its name from the Department of Mental Retardation to the Department of Developmental Services, there should be more validity given to the person's total picture and a person should not be disqualified for DDS services due to the Full Scale IQ score. (Testimony Ms. [REDACTED]. [REDACTED])
9. There are five cognitive evaluations in evidence. (DDS Exhibits # 8, #9, #10, #11, & #12)
10. The earliest cognitive evaluation in evidence was conducted by School Psychologist, [REDACTED], CAGS, NCSP, at the Appellant's age of fifteen years, [REDACTED] using a SIT-R and a TONI-3. The Appellant obtained a Standard Score of 41 in the extremely low range on the SIT-3 and a Deviation Quotient of 95 in the average range

on the TONI-3. (DDS Exhibit #8)

11. The SIT-R and TONI-3 are testing instruments designed for use in screening. (Testimony Dr. Patricia Shook)
12. The SIT-R is a screening instrument used for estimating the cognitive ability of an individual, public school student, college student, mental patient or mentally handicapped person. Because the SIT-R is a screening instrument it alone should not be used in final placement decisions. (Testimony Dr. Patricia Shook & DDS Exhibit #15 page 2)
13. The second and third cognitive tests are reported to have been conducted on the same day and reported in error to have occurred at the Appellant's age of sixteen years, [REDACTED]. The date listed for these cognitive tests is [REDACTED] 2009 which would have occurred at the Appellant's age of seventeen years, [REDACTED]. (DDS Exhibits #9, #10, & #13)
14. The Appellant received a Full Scale IQ of 72 on the WISC-IV conducted on [REDACTED] 2009 (DDS Exhibit #9)
15. The Appellant received a Full Scale IQ of 88 on the WAIS-IV conducted on [REDACTED] 2009 (DDS Exhibit #10)
16. The reports of the two cognitive tests conducted on [REDACTED] 2009 do not indicate which test was administered first, nor do they indicate why it was determined that both tests would be necessary. Dr. Shook attempted to gather additional information regarding this atypical practice by contacting the [REDACTED], but was not able to speak to the examiner as he is no longer employed there. (Testimony Dr. Patricia Shook)
17. Dr. Shook testified that the Wechsler Intelligence Scale for Children Fourth Edition (WISC-IV) is designed to test children up to the age of sixteen years and is therefore not a valid and reliable indication of cognition for the Appellant who was seventeen years, [REDACTED] at the time of testing. (Testimony Dr. Shook & DDS Exhibit #13)
18. Dr. Shook testified that the Wechsler Adult Intelligence Scale Fourth Edition (WAIS-IV) is the correct test for a seventeen year old. It is designed to test individuals from age sixteen and up and therefore would be considered the proper test for the Appellant who was seventeen years, [REDACTED] at the time of the [REDACTED] 2009 testing. (Testimony Dr. Shook & DDS Exhibit #13)
19. Dr. Shook opined that the cognitive testing can be exhausting and the Appellant would most probably be tired after taking the first test and would most probably not test at her maximum ability for the second test. However, there is no way to determine which test was administered first to the Appellant on [REDACTED] 2009. (Testimony Dr. Shook)
20. Dr. Shook testified that given the atypical testing practice of administering two cognitive test on the same day, the validity of the WAIS-IV (the age appropriate test) was difficult to assess. (Testimony Dr. Shook & DDS Exhibit #13)
21. Dr. Shook had three cognitive testing reports available to her prior to making her initial determination of ineligibility, DDS Exhibits # 8, #9, and #10; Dr. Shook determined all

three to be insufficient to form a valid and reliable assessment of the presence of Mental Retardation for the Appellant and therefore denied the Appellant's request for DDS services based on insufficient information. (Testimony Dr. Patricia Shook)

22. The Department informed the Appellant's family that additional cognitive testing would be necessary. Arrangements were made for [REDACTED] to test the Appellant again. (Testimony Dr. Patricia Shook)
23. The [REDACTED] performed another cognitive assessment using the WAIS-IV testing instrument which became the fourth cognitive test in evidence. This WAIS-IV was administered to the Appellant by School Psychologist, [REDACTED], CAGS, NCSP, on [REDACTED] 2009, [REDACTED] months after the previous WAIS-IV had been administered to the Appellant. The overall intellectual functioning was reported as a Full Scale IQ of 72, in the Borderline range of intelligence, and was reported to be extremely scattered. Ms. [REDACTED] stated that the Appellant's Full Scale score must be interpreted with extreme caution. (DDS Exhibits #11 & #10)
24. Dr. Shook presented the Appellant case to her peers for review and consultation; the result was a recommendation that a different cognitive test, the Stanford Binet Intelligence Scales- 5th Edition, was needed for diagnostic clarification in order to appropriately make a determination regarding eligibility for DDS services. (Testimony Dr. Patricia Shook)
25. The Department informed the Appellant's family that a Stanford Binet cognitive test result would be needed to properly determine eligibility, and the Department funded the Stanford Binet testing that was conducted by Dr. [REDACTED], Psy. D., on [REDACTED] 2010. (Testimony Dr. Patricia Shook DDS Exhibit #12)
26. The Stanford Binet conducted by Dr. [REDACTED] on [REDACTED] 2010 resulted in a Full scale IQ of 75, with a Non Verbal IQ of 74 and a Verbal IQ of 78. The subtest scores were very widely scattered with Fluid Reasoning at 106 in the upper end of Average, Knowledge at 77 in the Borderline range, Quantitative Reasoning at 67 in the Mild Retardation range, Visuospatial Skills at 62 in the Mild Retardation range, and Working Memory at 83 in the low Average range of intelligence. (DDS Exhibit #12)
27. Dr. Patricia Shook made her final determination that the Appellant was not eligible for DDS services after reviewing all information that had been submitted which included all the cognitive test results (DDS Exhibits #8, #9, #10, #11, & #12) and found that the Appellant was ineligible due to a failure to meet the Department's definition of Mental Retardation as defined in DDS regulation. (Testimony Dr. Patricia Shook)
28. Ms. [REDACTED] argued that the Full Scale IQ score in the last cognitive testing, conducted by Dr. [REDACTED] is not an accurate depiction of her daughter given that the Full Scale IQ was obtained with subtest results that had as much as a 44 point discrepancy, and pointed out that Dr. [REDACTED] stated in his report that the Appellant's overall "cognitive functioning is estimated to be in the Borderline range. However, this does not accurately depict her capabilities as there is a very wide scatter" (DDS Exhibit #12 at page 2)

29. The Department administered a Vineland Adaptive Behavior Scales Second Edition (Vineland-II) to assess the Appellant's adaptive functioning in ██████████ 2009 using Ms. ██████████ as the respondent; the Appellant received a Vineland-II Adaptive Behavior Composite score of 61, in the low range. (DDS Exhibit #13)
30. Dr. ██████████ administered a Vineland Adaptive Behavior Scales-II on ██████████ 2010, based on his observation and interview, which resulted in a Adaptive Behavior Composite score of 75, in the low range compared to the population as a whole. (DDS Exhibit #12)
31. Ms. ██████████ pointed out that her daughter tested in the low range of Adaptive Behavior both when tested by DDS and when tested by Dr. ██████████ and that her daughter was not able to function without supervision. (DDS Exhibit #13 & Exhibit #12)
32. The ██████████ Probate and Family Court determined that the Appellant is an incapacitated person and appointed the Appellant's parents as co-guardians for their daughter on ██████████ 2010 at the Appellant's age of eighteen.(Appellant Exhibit #6)
33. The ██████████ Probate and Family Court made their determination regarding the Appellant based on a Full Scale IQ of 72. (Appellant Exhibit #5)
34. The criteria for determining that an individual is an "incapacitated person" is defined in G.L.c. 190B, §5-101(12) . (Appellant Exhibit #5)
35. The regulations and definitions for determining DDS eligibility which are found at 145 CMR 6.04 and 2.01, differ from the criteria used to determine the need for guardianship. (Testimony Dr. Patricia Shook)
36. A diagnosis of Mental Retardation can only be made by qualified professionals following criteria set out in professional standards. However, psychologists in the field have more flexibility to make a diagnosis of Mental Retardation than Dr. Shook does as the Department's eligibility psychologist; as DDS's eligibility psychologist, Dr. Shook must adhere to the regulations and the manner in which Mental Retardation is defined in .115 CMR 2.01. (Testimony Dr. Patricia Shook)
37. None of the qualified clinicians who administered the cognitive evaluations in evidence reported a diagnosis of Mental Retardation. (DDS Exhibits # 8, #9, #10, #11, #12)
38. Dr. Patricia Shook, DDS's Licensed Psychologist, is properly credentialed and qualified by licensure and experience in the field of Developmental Disabilities to assess and evaluate cognitive testing and adaptive testing results. (DDS Exhibit # 1)
39. In order to be eligible for DDS adult services, Department regulations require the person to have significantly sub-average intellectual functioning manifesting before age 18 and existing concurrently and related to significant limitations in adaptive functioning. (DDS Exhibits #2 & #3)
40. The Department has defined "significantly sub-average intellectual functioning" as an intelligence test score that is indicated by a score of 70 or below as determined from the findings of assessment using valid and comprehensive, individual measures of

intelligence that are administered in standardized formats and interpreted by qualified practitioners. The regulations have both a cognitive and an adaptive functioning component; to meet the adaptive functioning component of the regulations a person must have "significant limitations in adaptive functioning" existing concurrently and related to the sub-average intellectual functioning. The regulations require that both components must be present to be eligible for Department services. (Testimony Dr. Patricia Shook)

41. In assessing the Appellant's application for DDS adult services, Dr. Shook used the Department's regulatory requirements and assessed eligibility using the cognitive test results in evidence. After reviewing all the documents submitted by the Appellant in support of eligibility, Dr Shook found that the Appellant's IQ scores were above the level required for a finding of eligibility and determined that the Appellant did not meet the Regulatory requirements for Adult Service eligibility. (Testimony, Dr. Patricia Shook)
42. Dr. Patricia Shook testified that after hearing all the evidence presented at the Fair Hearing, she had not changed her opinion that the Appellant is ineligible for DDS Adult Services. Dr. Shook acknowledged that the Appellant does have cognitive deficits in the Borderline range of intelligence, but stated that, in her clinical opinion, the Appellant does not meet the criteria for service eligibility from the Department. (Testimony Dr. Patricia Shook)

RECOMMENDED DECISION:

After a thorough review of all of the evidence, I find that the Appellant has not shown by a preponderance of the evidence that she meets the DDS eligibility criteria. I find that the weight of the evidence shows that the Appellant does not meet the Department's definition of Mental Retardation and therefore is not mentally retarded as that term is used in statute and regulation for the determination of DDS supports as defined in 115 CMR 2.01. My reasons are as follows:

REGULATORY REQUIREMENTS:

Massachusetts General Law c. 123B, section 1, defines a mentally retarded person as "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." In accordance with statutory and regulatory authority, the Department has promulgated regulations both defining Mental Retardation (Exhibit #2) and setting regulatory standards by which an individual may be determined eligible for DDS services (Exhibit #3).

In order to be eligible for DDS supports, an individual who is 18 year of age or older must meet the criteria for general eligibility requirements set forth at 115 CMR 6.04 & the definitions set forth at 115 CMR 2.01 as follows:

The General Eligibility requirements for services from the Department of Developmental Services (DDS) are found in 115 CMR 6.04 where it states the following:

“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”

The Department’s definition of “Mental Retardation” found in 115 CMR 2.01 with its incorporated definition of “significantly sub-average intellectual functioning” and “significant limitations in adaptive functioning” is stated as follows:

“Mental retardation means significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18.”

The Department’s definition of “significantly sub-average intellectual functioning” found in 115 CMR 2.01 is stated as follows:

“...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.”

And, the Department’s definition of “significant limitation in adaptive functioning” found in 115 CMR 2.01 requires a test score of 70 to meet the requirement of two standard deviations below the mean or a test score of 77 to meet the requirement 1.5 standard deviations below the mean, and is stated as follows:

“...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.”

CONCLUSIONS:

- o The Appellant has met the domicile requirement for eligibility. The question before us is whether the Appellant has met her burden of proving by a preponderance of the evidence that she is a person with Mental Retardation as that term is used and defined by the Department of Developmental Services. While the Department of Developmental Services has recently undergone a name change, none of the regulations that determine eligibility have changed. Thus the regulations remain as they were prior to the name change from the Department of Mental Retardation to the Department of Developmental Services.

- There are several components that must be met for a diagnosis of Mental Retardation by the Department:
 1. Mental Retardation must manifest before age eighteen.
 2. The diagnosis of Mental Retardation must be determined by qualified psychologists using valid and comprehensive IQ tests that are administered properly in accordance with professional standards.
 3. The valid and comprehensive IQ tests must establish a diagnosis of Mental Retardation by a Full Scale IQ at the level of Mild Retardation or below (FSIQ of 70 or below).
 4. Significant limitations in adaptive functioning related to Mental Retardation must be present and established by valid tests administered in accordance with Department standards.
 5. A determination must be made by qualified psychologists that cognitive or adaptive behavior deficits are not due to psychiatric illness or other causes unrelated to Mental Retardation.

- The qualifications of the professionals who conducted the cognitive tests in evidence are not in question. The age that developmental issues became apparent is also not in question. In addition, the presence of significant limitations in adaptive functioning is not in question as the Department has acknowledged that the Appellant has limitations in adaptive functioning; the Appellant's adaptive functioning test score from the Vineland II survey report conducted by the Department resulted in an overall Adaptive Behavior Composite Score of 61, a score within the regulatory criteria for DDS eligibility.

- The question before us is the level of the Appellant's cognitive deficit, specifically if the Appellant who has been diagnosed with Pervasive Developmental Disorder and who has tested with variability in IQ subtest scores is a person who meets the diagnosis of Mild Mental Retardation.

- The Appellant has been determined to be an incapacitated person by the [REDACTED] Probate and Family Court. As a result the Appellant's parents were appointed co-guardians for their daughter. However, the criteria used to determine guardianship is not the same criteria used to determine Mental Retardation. The standard used to determine Mental Retardation by the professional community and DDS regulation is a Full Scale IQ of 70 or below; the Appellant application for guardianship notes a Full Scale IQ of 72. Thus the fact that the Appellant is under the court appointed guardianship of her parents does not indicate the presence of Mental Retardation as defined in DDS eligibility regulations.

- Appellant's need for services and supports is supported by the results of the two Vineland II adaptive behavior assessments in evidence and the testimony of Mr. [REDACTED]. However, the fact that one would benefit from DDS services does not override the prerequisite to meet the eligibility requirements set out in regulation. To meet the Department's eligibility requirements, the Appellant must not only meet the adaptive behavior assessment criteria but also meet the cognitive criteria of an IQ at or below two standard deviations below the mean which is represented by a Full Scale IQ of 70 or below.

- The following cognitive assessments are in evidence:

<u>EXHIBIT</u>	<u>AGE</u>	<u>DATE</u>	<u>TEST</u>	<u>FULL SCALE IQ</u>	<u>INDEX IQ Scores</u>
DDS# 8	15 yrs	██████████	2006	TONI-3	Quotient 95 (Average Range of IQ)
DDS# 8	15 yrs	██████████	2006	SIT-R	Total Standard 41 (Deficient Range of IQ)
DDS# 9	17 yrs	██████████	2009	WISC-IV	Full Scale 72 VIQ 57, P IQ 84
DDS# 10	17 yrs	██████████	2009	WAIS-IV	Full Scale 88 VIQ 70, PIQ 98
DDS# 11	18 yrs	██████████	2009	WAIS-IV	Full Scale 72 VIQ 66, PIQ 73
DDS# 12	18 yrs	██████████	2010	Stanford Binet-5th	Full Scale 75 NVIQ 74, VIQ 78

- The results of the TONI-3 and the SIT-R (DDS Exhibit #8) were considered but given little weight in my recommended decision as the evidence presented shows that the TONI-3 and the SIT-R are instruments used mainly for screening individuals to determine if further testing is indicated.
- The results of the WISC-IV (DDS Exhibit #9) were given no weight in my recommended decision as this test was administered improperly at the Appellant's age of 17 years, ██████████ and therefore not administered in accordance with professional standards.
- The results of the WAIS-IV (DDS Exhibit #10) conducted in ██████████ 2009 were given little weight in my recommended decision as this test, which was administered on the same day as the WISC-IV, did not explain the purpose of administering two tests in one day and did not offer a comprehensive narrative. The results of this test did indicate a significant variation in composite scores and that the Appellant has the ability to score in the low average range of intelligence.
- The results of the WAIS-IV (DDS Exhibit #11) conducted in ██████████ 2009 were also given little weight in my recommended decision as this test was administered only six months after the previous WAIS-IV. Ms. ██████████, the Psychologist conducting this evaluation, determined that the Appellant's overall intellectual functioning was extremely scattered and fell in the Borderline Range of intelligence. Although Ms. ██████████ stated that Full Scale IQ score of 72 must be interpreted with extreme caution, she did not state a belief that the Appellant's overall cognition fell in the mentally retarded range and did not make a diagnosis of Mental Retardation.
- The results of the Stanford Binet-5th Edition (DDS Exhibit #12) conducted in ██████████ 2010 were given significant weight in my recommended decision as this IQ test meets all the qualifications of a valid test administered properly in accordance with professional standards. Dr. ██████████ reports a Full Scale Score of 74 and states that the Appellant "did not present with cognitive functioning fully indicative of the presence of Mental Retardation". Although he qualifies this statement by acknowledging that the Appellant has a "variety of substantial challenges in certain aspects of both her intellectual and adaptive resources" that are "consistent with her having been previously diagnosed with Pervasive Developmental Disorder", Dr. ██████████ does not make a diagnosis of Mental Retardation.

- The variability in subtest results present throughout all of the Appellant's cognitive testing is not atypical for a person who is diagnosed with Pervasive Developmental Disorder (PDD), which is an Autism Spectrum Disorder (ASD). However, PDD is not a diagnosis of Mental Retardation. Some individuals with PDD will meet the definition of Mental Retardation, but in order to do so, a diagnosis of Mental Retardation must be made using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners. While the psychologists who conducted cognitive testing on the Appellant reported that the test results must be interpreted with caution due to the pattern of variability in sub test scores, none of the psychologist made a diagnosis of Mental Retardation. In addition, Dr. Shook, who is properly credentialed and qualified by licensure and experience in the field of Developmental Disabilities to assess and evaluate cognitive testing and adaptive testing results, has made a professional determination that the variability present in the Appellant's IQ test results does not indicate the presence of Mental Retardation.
- While the IQ testing results in evidence show that the Appellant does have cognitive limitations and variability in sub testing results, the professionals conducting the assessments have placed the Appellant's level of cognition in the Borderline range of intelligence, just above the level required for a diagnosis of Mental Retardation.

In summary, the Appellant has the burden of proof in this matter, to show through a preponderance of the evidence that she is a person who meets the Department's definition of Mental Retardation. While there is ample evidence of wide variability or "scatter" in sub test results with some of the sub test results in the deficient ranges of intelligence, variability in sub testing results alone do not indicate the presence of Mental Retardation; variability in sub testing results requires a careful analysis by professionals in determining the person's abilities and level of cognition. The pattern of IQ test results that is present in the Appellant's case has not been proven to be a pattern that meets the accepted definition of Mental Retardation; no such diagnosis has been made by a qualified psychologist. In addition, all the valid IQ test results indicate a Full Scale IQ score above the level required for a diagnosis of Mental Retardation. Although the Appellant has shown that she is functioning within the adaptive behavior definition that would meet the requirements of a mentally retarded person, the results of the cognitive testing do not support a diagnosis of Mental Retardation as required for DDS eligibility. It is also noted that while the Appellant's case is difficult in that she tested with variability and her test results fell just above the level required for a diagnosis of Mental Retardation, the evidence indicates that the Department made additional efforts to aid in a fair determination of eligibility by requesting and funding a Stanford Benet IQ test; the evidence indicates that the Department requested and funded this additional cognitive test for the purpose of diagnostic clarification and to aid in the determination of eligibility for DDS services.

Upon a comprehensive review of the oral testimony and documentary evidence submitted in this matter, I find that the preponderance of the evidence supports the Department's finding that the Appellant's overall cognitive ability falls in the Borderline range of intelligence, above the range required for eligibility of DDS services. The Appellant's difficulties with adaptive functioning, while indicating that the Appellant is functioning at a low level, are not verification of the presence of Mental Retardation. The Department eligibility regulations require that a finding of DDS eligibility cannot be made without an overall cognitive ability in the range indicated that would be in the Mild Mental Retardation level or below which is shown by a valid FSIQ score of 70 or below. The Appellant's variation in sub test scores with some scores in the Extremely Low range and others in the Average range have not.

been determined to be indicative of Mental Retardation by any of the psychologists who have conducted IQ testing on the Appellant. As the Appellant has not met the burden of proof in this matter, I cannot, and do not find for the Appellant. I further find that the evidence presented by DDS supports a finding that DDS followed established standards and procedures in considering the Appellant's eligibility. Therefore, DDS's determination of ineligibility is upheld.

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 [115CMR 6.34(5)]

Date: _____

Jeanne Adamo
Hearing Officer