

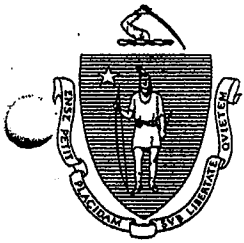
## The Commonwealth of Massachusetts

Executive Office of Health &amp; Human Services

Department of Developmental Services

500 Harrison Avenue

Boston, MA 02118-2439



Deval L. Patrick  
Governor

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Lieutenant Governor

JudyAnn Bigby, M.D.  
Secretary

Elin M. Howe  
Commissioner

Area Code (617) 727-5608  
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2010

MA

Re: Appeal of - Final Decision

Dear :

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your eligibility determination.

The hearing officer made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DDS regulations. Your appeal is therefore DENIED.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with Massachusetts General Laws, Chapter 30A. The regulations governing the appeal process are 115 CMR 6.30-6.34 and 801 CMR 1.01-1.04.

Sincerely,

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

Elin M. Howe  
Commissioner

EMH/ecw

cc: Elizabeth Silver, Hearing Officer  
Terry O'Hare, Regional Director  
Marianne Meacham, General Counsel  
Cynthia Gagne, 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.* A fair hearing was held on [REDACTED] 2010, at the DDS [REDACTED] Region Office, [REDACTED] MA.

Those present and participating at the hearing:

For the Appellant:

[REDACTED]	Appellant
Tamara Gofman	Department of Children and Families - Supervisor
Jeff Quigley	Department of Children and Families – Social Worker
[REDACTED]	[REDACTED] – Case Manager

For the Department:

Richard P. Costigan	Psychologist
Cynthia Gagne	Attorney

At the hearing, the Department submitted Exhibits 1- 13, and Exhibits 14-16 were submitted on behalf of the Appellant. The hearing lasted approximately four and a half hours. Tamara Gofman, Jeff Quigley, [REDACTED], and the Appellant testified on behalf of the Appellant. Richard Costigan 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. At the outset of the hearing the Department conceded that the Appellant met Department criteria for domicile and cognitive functioning, so the underlying issue for the hearing is whether the Appellant also meets the Department's adaptive functioning criteria.

**SUMMARY OF THE EVIDENCE**

**Exhibit 1.** Department of Developmental Services (DDS) [REDACTED]08 letter to Jeff Quigley acknowledging receipt of the Appellant's application for services.

**Exhibit 2.** DDS [REDACTED]09 letter denying the Appellant's application for services; Appellant's [REDACTED]09 appeal of the denial; [REDACTED]09 Informal Conference attendance sheet; and DDS [REDACTED]10 letter post Informal Conference denying eligibility.

**Exhibit 3.** [REDACTED] 2007 Monthly Summary from [REDACTED] completed by [REDACTED] MA, Easter Seals Clinician/Case Manager. The summary addresses the Appellant's Discharge Planning, Behavioral and Emotional Concerns, Educational and Vocational Skills, Independent Living Skills, Medical and Psychiatric Care, and Family Relations. At the time of the report the Appellant was about to be discharged from [REDACTED] to go into a foster home. Much of the report focused on the Appellant's behavioral issues including anger and her need to control her behavior. The report noted the following with respect to the Appellant: She had made some gains with receptive and expressive communication skills by asking for help independently. She had made significant gains as she was verbalizing her emotions and used assertive statements with staff and peers. Her goal in Independent Living Skills indicated she was capable of and independent at completing routines involving daily hygiene and domestic skills (room organization, laundry, floor cleaning and bathroom cleaning). She was cooking independently and tried new recipes from cookbooks. She rode her bike

independently in the community and took walks with a peer to the store. She was completely independent at the [REDACTED] and was riding public transportation with a peer in some situations.

**Exhibit 4.** Individualized Educational Plan (IEP) from the [REDACTED] with a meeting date of [REDACTED] 07. The Appellant, who was 16 years [REDACTED], had been at the [REDACTED] for about two years. The IEP notes that she was making progress there and her behavior in school and at her residence continued to improve. The Appellant was participating in community activities and she had made strides in her positive interaction with peers and adults. The results of the WISC-IV done in 2005 showed the Appellant to be in the upper half of the mild range of mental retardation. The IEP noted that the Appellant's emotional and intellectual disabilities impacted all areas of the curriculum. Under the category of Social/Emotional, the IEP noted that the Appellant made significant gains in expressive language skills where she was using assertive statements with peers and adults consistently across all settings. [REDACTED] employed her to do cleaning and food shopping. The Appellant was able to plan meals through recipe books and magazines. Finally, under [REDACTED], the Appellant displayed appropriate community safety skills while outing.

**Exhibit 5.** IEP covering [REDACTED] 09 – [REDACTED] 10. At the time of this IEP the Appellant's overall cognitive functioning was within the mild range of mental retardation. She did best on tasks that allowed her to use rote, over-learned problem solving strategies repetitively. Her disability noted on the IEP was Anxiety Disorder, Not Otherwise Specified (NOS), and Mild Mental Retardation (MMR). Under the category of Social Emotional Behavior the report says that the Appellant developed positive peer and staff relationships, was able to avoid negative peer interactions, and was able to initiate social interactions with staff and some peers. In the Vocational section it was reported that the Appellant was able to complete a variety of tasks in the Culinary Arts class, had knowledge of safety and sanitation procedures, worked well independently and with others, and was capable of performing jobs that involved multiple steps with minimal supervision.

**Exhibit 6.** Psychological Evaluation done by [REDACTED], M.S., Certified School Psychologist, on [REDACTED] 02- [REDACTED] 02 when the Appellant was 11 [REDACTED] years old. She was referred for assessment as part of her three-year evaluation. The Appellant had been residing at [REDACTED] since [REDACTED] 2001. By way of background, Ms. [REDACTED] noted that the Appellant entered foster care at 21 months because of parental drug abuse and housing problems. [REDACTED], the Appellant remained in that foster home until she was almost seven years old. After that, because of behavioral issues including physical aggression, she lived in several other foster care and residential placements. She began kindergarten as a Special Needs student and has continued to receive special education services. Her diagnoses, provided from a [REDACTED] 01 evaluation, included on Axis I Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, Conduct Disorder, and Mood Disorder, NOS; on Axis II Borderline Intellectual Functioning and Moderate to Severe Expressive and Receptive Language Disorder; on Axis III [REDACTED], and on Axis IV Severe early childhood neglect, physical abuse as a child, developmental delay, and much disruption in primary care support.

Ms. [REDACTED] reported on prior intelligence testing. On the Stanford-Binet – 4<sup>th</sup> Edition done in [REDACTED] 99, the results placed the Appellant's intellectual functioning in the Low Borderline Range. On the Wechsler Intelligence Scale for Children – 3<sup>rd</sup> Edition (WISC-III) given on [REDACTED] 98 the Appellant had IQ scores of Verbal 64, Performance 72, and Full Scale 65.

In this evaluation Ms. [REDACTED] administered the WISC-III on which the Appellant's IQ scores were Verbal 64, Performance 79, and Full Scale 69. Index scores were Verbal Comprehension (VCI) 64, Perceptual Organization (POI) 80, Freedom From Distractibility (FfD) 69, and Processing Speed (PSI) 88.

Under Social/ Emotional Functioning, Ms. [REDACTED] reported that the Appellant completed the Behavior Assessment System for Children (BASC), which showed lower than average problems in all areas as well as highly adaptive skills. However, the results of the Appellant's teacher and staff BASC, which contradicted the Appellant's self-report, indicated highly significant behaviors in all areas and low adaptive skills such as social skills, leadership, and study skills.

Under Adaptive Behaviors, Ms. [REDACTED] reported that the Appellant's teacher and staff completed the Adaptive Behavior Scale (ABS) – School version to assess the Appellant's adaptive skills. Her scores varied from very poor to average. Average scores were in Physical Development and Responsibility. Below Average scores were in Numbers and Time, Self-Direction and Social Behavior. Poor ratings were in Independent Functioning, Language Development, Prevocational/Vocational Activity and Socialization. Very Poor scores were in Economic Activity, Conformity, Trustworthiness, Stereotyped and Hyperactive Behavior, Self-Abusive Behavior, Social Engagement, and Disturbing Interpersonal Behavior.

**Exhibit 7.** Psychological Evaluation done by [REDACTED], Ph.D, on [REDACTED]05, [REDACTED]05 and [REDACTED]05 when the Appellant was 14 [REDACTED] years old. Dr. [REDACTED] described the Appellant's background much as described in Exhibit 6 above, and also noted that the Appellant lived in 36 different foster homes and treatment facilities between the ages of 21 months and 13 years old. He provided previously determined diagnoses including Mild Bipolar Disorder, Mixed, and ADHD by History, Trisomy x Syndrome, Impulse Control Disorder, NOS PTSD, and Mild Mental Retardation. Dr. [REDACTED]'s diagnostic impression at the conclusion of his evaluation included PTSD, Impulse Control Disorder NOS, Bipolar Disorder NOS, as well as Mild Mental Retardation.

Dr. [REDACTED] administered the WISC-IV, on which the Appellant had a Full Scale IQ score of 63 and Index scores of Verbal Comprehension 67, Perceptual Reasoning (PRI) 59, Working Memory (WMI) 74, and Processing Speed 85.

The Appellant's adaptive behaviors were evaluated in the residential setting on the Vineland Adaptive Behavior Scale (Vineland) by [REDACTED], a residential aide. The Appellant's scores were Communication 53, Daily Living Skills 84, Socialization 85, and an Adaptive Behavior Composite Score of 68.

**Exhibit 8.** Psychological Assessment done by [REDACTED], Psy.D. on [REDACTED]08 when the Appellant was 18 years old. She had been referred for a tri-annual assessment. At the time of the evaluation the Appellant had resided at the [REDACTED] in [REDACTED] for two years. She was in a fully self-contained special education school focused on independent living and pre-vocational skills. By way of background, Dr. [REDACTED] noted that when the Appellant was 12 years old she was admitted to the [REDACTED] where typical stays were two weeks. The Appellant's stay was 10 months. At the age of 13 she transitioned to the [REDACTED] in [REDACTED] where she resided until she was 15 years old, at which time she moved to the [REDACTED]. Dr. [REDACTED] noted that the Appellant made significant progress at the program. She had fewer behavioral problems. She held a job [REDACTED] planning the menu for the week and doing the shopping. She had a cell phone and although nervous about being by herself, the Appellant was trusted by the staff to go into the community, be where she said she would be, and return when she was supposed to return. Dr. [REDACTED] noted that the staff and the Appellant felt she was ready to make a transition out of the program.

Dr. [REDACTED] administered the Wechsler Adult Intelligence Scale – 4<sup>th</sup> Edition (WAIS-IV), which yielded a Full Scale score of 68. Index scores were VCI 72, PRI 72, WMI 66, and PSI 84.

To assess adaptive functioning, [REDACTED], [REDACTED] and [REDACTED] MA, Clinician and Case Manager<sup>1</sup> completed the Vineland Adaptive Behavior Scales – 2<sup>nd</sup> Edition (Vineland-II).<sup>2</sup> The Appellant's scores were Communication 67, Daily Living Skills 85, Socialization 80, and she had an Adaptive Behavior Composite score of 74.

<sup>1</sup> [REDACTED] is the person who completed Exhibit 3, the [REDACTED] 2007 Monthly Summary.

<sup>2</sup> [REDACTED] also was the Respondent on another Vineland given on [REDACTED]08, less than two months earlier. See, Exhibit 10. Scores on that Vineland were Communication 81, Daily Living Skills 95, Socialization 93, Motor Skills (Est) 121, and an Adaptive Behavior Composite score of 86. There was no explanation offered by either party why the two assessments that Ms. [REDACTED] was involved in, completed within a couple of months of each other, would vary so widely in scores.

With respect to Daily Living Skills, Dr. [REDACTED] noted that the Appellant learned many domestic skills but said these results did not mean she could do those skills *completely* independently. She said the Appellant could do them independently within the highly structured and routinized environment of the [REDACTED]. The staff prepared the same chore lists and schedule every day to help guide the Appellant. Dr. [REDACTED] said the Appellant's level of independence would likely regress without this structure. Later she stated that any change in the Appellant's environment would most likely precipitate a regression in her independent functioning.

With respect to Community Skills, Dr. [REDACTED] said the Appellant continued to work on going places independently. She was able to ride the bus independently, travel with a peer to and from the mall, and go the [REDACTED] once a week by herself. The Appellant was working on job skills and held a part-time job at [REDACTED] cleaning, meal planning and food shopping. Personal Skills was a challenge for the Appellant. She could not manage her own health care needs. She could remember which medications to take and when, but needed to be taught for a few weeks until the task became completely rote. Each time her medication regimen changed she required a few weeks of support to learn what she was supposed to take when. She needed full support to make and keep medical appointments. Dr. [REDACTED] said that with the Appellant's cognitive limitations and the Diabetes diagnosis, the Appellant would need ongoing support to ensure her medical needs were met.

Dr. [REDACTED] concluded that the Appellant was functioning very independently within the structured and routinized [REDACTED], which provided significant support and allowed the Appellant to use her strengths in rote learning on a daily basis. Dr. [REDACTED] also said that any change in the Appellant's environment would most likely precipitate a regression in her independent adaptive functioning. Finally, Dr. [REDACTED] concluded that the Appellant met the criteria for Mild Mental Retardation.

**Exhibit 9.** Case Conference Report Summary from [REDACTED], dated [REDACTED] 09. Although there is an attendance sheet attached to this report it is not signed so it is unclear who wrote it. At the time of the report, the Appellant was attending the [REDACTED] in [REDACTED]. She reportedly loved [REDACTED] and worked in [REDACTED], which she also really enjoyed. In the Treatment Plan Review, it was noted that the Appellant came to the group home with many skills and adjusted fairly well to life. Initially she needed quite a bit of prompting and assistance completing some routines such as chores and her room, but she was becoming increasingly more independent as time went on. She participated in many activities. The Appellant had expressed interest in foster care, which the group home staff was going to investigate.

**Exhibit 10.** Vineland-II completed [REDACTED] 08 when the Appellant was 17 [REDACTED] years old. [REDACTED], LICSW, was the examiner and [REDACTED] was the Respondent. The Appellant's scores were Communication 81, Daily Living Skills 95, Socialization 93, Motor Skills (Est) 121, and she had an Adaptive Behavior Composite score of 86. The Narrative Report furnished by Ms. [REDACTED] said that the Appellant's Adaptive Behavior Composite classified her general adaptive functioning as adequate but there was an unusually large amount of variation in her domain scores.

With respect to domain scores, Ms. [REDACTED] noted that the Communication score of 81 was moderately low, which indicated that the Appellant's communication skills were a weakness. The Socialization domain score of 93 was adequate for the Appellant's age group, and the Appellant's Daily Living Skills score of 95 represented an adequate level of adaptive functioning, but the Appellant's personal skills represented a weakness compared to her other Daily Living skills.

**Exhibit 11.** Adaptive Behavior Assessment System-Second Edition (ABAS-II) completed [REDACTED] 09 by [REDACTED] Program Manager, when the Appellant was 18 [REDACTED] years old. The Appellant's composite scores were Conceptual 72, Social 66, Practical 61, and GAC 60.

**Exhibit 12.** Adaptive Behavior Assessment System-Second Edition (ABAS-II) completed [REDACTED] 09 by [REDACTED] Teacher, when the Appellant was 18 [REDACTED] years old. The Appellant's composite scores were Conceptual 102, Social 103, Practical 97, and GAC 100.

**Exhibit 13.** Adaptive Behavior Assessment System-Second Edition (ABAS-II) completed [REDACTED] 09 by [REDACTED] Caregiver, when the Appellant was 18 [REDACTED] years old. The Appellant's composite scores were Conceptual 72, Social 78, Practical 74, and GAC 66.

**Exhibit 14.** Chapter 688 Student Referral Form dated [REDACTED] 10.

**Exhibit 15.** [REDACTED] Treatment Plan written subsequent to an [REDACTED] 10 Case Conference. The Appellant was in a foster care placement at the time of this plan. The report discusses goals in the areas of medical care, vocational skills, experiencing less anxiety, and developing skills to live independently in the community. In summary, the report noted that the Appellant had developed many independent living skills, however she still needed to fine-tune some of them. The Appellant was attending school and held a part-time job working at [REDACTED]. Diagnoses based on a [REDACTED] 10 report from [REDACTED], MA, were: Axis I, Anxiety Disorder NOS, and Axis II, Mild MR.

**Exhibit 16.** Copy of a [REDACTED] 10 email to [REDACTED], Jeffrey Quigley, [REDACTED] and [REDACTED] from [REDACTED] in which Ms. [REDACTED] described significantly disruptive behavior on the part of the Appellant after being asked if she was interested in checking out a new therapeutic group that was beginning at a group home.

## TESTIMONY

Exhibits 1-16 were entered into the record.<sup>3</sup> The Appellant, [REDACTED], Jeff Quigley, [REDACTED], and Richard Costigan were sworn in. It was clarified that the Appellant did not presently have a guardian, but DCF was pursuing one in court.

At the outset, Department's counsel indicated that the Department conceded that the Appellant was domiciled in Massachusetts and that the scores on her cognitive testing met the cognitive prong of the Department's eligibility requirements. However, the Department believed the Appellant did not meet the adaptive functioning prong of its regulations.

Jeff Quigley agreed to be the spokesperson on behalf of the Appellant. Before the Appellant proceeded, Mr. Quigley requested that Dr. Costigan provide an explanation regarding the Department eligibility criteria.<sup>4</sup> Dr. Costigan did so.

The Appellant made a brief opening statement.

Jeff Quigley from Department of Children and Families (DCF) CF testified first for the Appellant. Mr. Quigley is a social worker at DCF and the general coordinator of the Appellant's case. He has been with DCF since 1996 and has had at least monthly contact with the Appellant since then. Mr. Quigley said the Appellant has been in state care for protective reasons since the age of about three or four.

<sup>3</sup> The Department's attorney's objection to the admission of Exhibit 16 based on hearsay grounds was denied.

<sup>4</sup> The Department's attorney's objection to this explanation and motion to strike was denied.

Mr. Quigley provided background information for the Appellant. He said for most of her life she has been in countless placements including foster homes, hospital settings for psychiatric reasons, residential programs, and specialized foster care. Residential placement began at very young age. Mr. Quigley got involved with the Appellant when she was coming from [REDACTED] in [REDACTED]. She had also been at [REDACTED] for a year even though stays there are usually only a couple of weeks. She was there so long because they couldn't find a placement for the Appellant. She couldn't be stabilized and no one was willing to take her because of behavioral problems. DCF had inquired into more than 100 residential programs in Massachusetts, but all but one denied her. The one that would accept the Appellant [REDACTED] was full and couldn't place her for a long time.

At that point DCF broadened its search and found [REDACTED], which was willing to place the Appellant at [REDACTED], where she lived from about age 12 or 13 until she was 15. Mr. Quigley said the Appellant did a good job there. She was cooperative and learned how to slow down her aggression so people felt safe around her. As a result, she was able to step down to [REDACTED], which was still under the [REDACTED]. The Appellant stayed in a home setting from the age of about 15 until she was about 18 years old. She lived with four other girls and a multitude of staff.

Mr. Quigley said that by the age of 18 the Appellant started to advocate for herself to be stepped down to specialized foster care. Mr. Quigley said DCF concurred as long as the Appellant lived in a one-on-one situation with a foster parent specifically trained for this type of care. DCF looked for a placement for more than a year but no one was willing to take a chance given the Appellant's behavioral history. At that point DCF took the Appellant to visit the [REDACTED] through [REDACTED], another group home for older children aged 14 to 19. The Appellant didn't feel it was the best match for her but went there anyway because she didn't have any other options. Mr. Quigley said she did well in the program for the year she was there. She was able to control her anger and follow some rules and attend groups.

During the year the Appellant attended [REDACTED], a very hands-on program. He said the Appellant worked with the [REDACTED] and under very close supervision was able to help in the lunchroom. Mr. Quigley said during the year DCF started looking for foster care in the [REDACTED] area. They were successful in finding a specialized foster care setting in [REDACTED], which is where the Appellant currently lives. Mr. Quigley said the transition was difficult and took some time. He said the Appellant started visitation with her foster mother in [REDACTED] and made the full transition in [REDACTED]. The Appellant has the necessary one-on-one attention in a [REDACTED] home with a foster mother who provides specialized foster care. In addition, Mr. Quigley said the Appellant has a case worker she sees two- to four times a month for added support.

Mr. Quigley said that while in school the Appellant was eligible to take the MCAS but she wasn't able to meet the criteria so they gave her a certificate. She's still eligible for adult educational services through her IEP and she currently receives services through the [REDACTED]. The Appellant had summer tutoring. She will attend the [REDACTED] this [REDACTED] which provides [REDACTED] with a lot of one-on-one attention. There is [REDACTED] and according to the Appellant, every student goes at different times.

Mr. Quigley next testified to the Appellant's adaptive functioning. He said the goals noted in Exhibit 15<sup>5</sup> are part of the Appellant's everyday treatment plan to work on her adaptive skills. Her goals include being able to set up medical and dental appointments so she can address changes in her health. Mr. Quigley said often the Appellant needed to be prompted many times to remind her. He said the Appellant is able to take her medications but needs prompting from her foster parents.

Mr. Quigley and the Appellant testified regarding the Appellant's money management and math skills. The Appellant had a checking account. When Mr. Quigley asked the Appellant how she managed her money, she said, "Well, you go to the bank and you put the money in the bank." With a great deal of prompting and

<sup>5</sup> [REDACTED] Treatment Plan, p. 2.

specific questions, Mr. Quigley elicited the Appellant's testimony that some paperwork needed to be signed, she gets the paperwork from the bank, and she goes with someone to the bank, usually [REDACTED] or [REDACTED], who is her foster mother. Mr. Quigley also asked the Appellant some simple math questions but she was unable to answer them correctly stating she would need a calculator. He asked the Appellant how old [REDACTED] was (A: A year [REDACTED]), how old the Appellant was (A: 19), and how much older the Appellant was than [REDACTED] (A: 5 years). She knew 2 plus 2, but said 7 plus 9 equaled 11.

Upon further questioning the Appellant said she goes into a store on her own to buy things, but then testified that her foster mother would pay for an item she buys, which indicated that her foster mother was with her in the store. Asked if she ever goes to a store herself, she said, "If I'm there, yeah." Mr. Quigley clarified that once in a while the Appellant will walk to the store and buy something, but that the Appellant uses people around her to ask for help with money.

Mr. Quigley discussed conversations he has had with the Appellant about living on her own in her own apartment. The Appellant seemed to want this, but when told she would need a full time job to pay for it she said she could only work about two hours a week. She said, "I've only worked two hours mostly, I've never worked in a regular job, so how would I do that?" When asked about the reference in Exhibit 15 to a part-time job working at [REDACTED], the Appellant clarified that she doesn't work there any more, and it was only two hours a week. When she worked at [REDACTED] she said she [REDACTED]. She knew where they went because "the woman told me." The Appellant said she was now working at [REDACTED].

Mr. Quigley said the Appellant's dream is to work in a school classroom, so the [REDACTED] group met to discuss how to prepare for this goal. They investigated a college certificate program but learned that it required the Appellant to read at the 10<sup>th</sup> grade level but she was only at the 7<sup>th</sup> grade level. She had tutoring over the summer to work on her ABCs.

[REDACTED] testified for the Appellant. Ms. [REDACTED] is a case manager at [REDACTED]. She testified that has been at [REDACTED] for three years. Her training is in working with specialized foster families and clients with various physical and mental disabilities. She explained that [REDACTED] is a specialized foster care program that has community-based programs for older clients with supervised apartments as well as placements in foster homes. Ms. [REDACTED] has been the coordinator for the Appellant since [REDACTED] 2010. She meets with the Appellant two to four times a month to check in and see how things are going. Ms. [REDACTED] coordinates the Appellant's services from [REDACTED]. Services include a family support worker who helps with independent living skills and who helps get the Appellant services in the community for volunteering, jobs, or taking the bus.

Ms. [REDACTED] said the Appellant manages personal caretaking, hygiene, and personal skills well. She said the Appellant is able to brush her teeth, shower daily, and get dressed without prompting. She said the Appellant's daily living skills vary. She said the Appellant has the ability to do basic cooking and cleaning, but sometimes needs direction as to what steps to take next or in what order to do things or where to start a project. Ms. [REDACTED] said the Appellant can do basic household tasks like dishes, sweep the floor, vacuum, but these are things she is asked to do. If she is not sure how to do something or which product to use, she'll ask. Ms. [REDACTED] said the Appellant does a good job of getting her questions answered. She can cook simple meals if she has a simple recipe and someone is nearby to answer questions. If she's not sure of numbers like  $\frac{3}{4}$ , she'll ask. She can take the bus from [REDACTED] to [REDACTED]. She practiced this with [REDACTED], a caseworker, and someone takes her to the bus station and someone meets her at the other end. At first someone put her on the bus, but now she is dropped off. There are no stops in between getting on the bus and reaching her destination. Ms. [REDACTED] said the Appellant has the bus route pretty well mastered for that one specific route, but she is not able to generalize that to a route she's not familiar with. So, for example, the Appellant wouldn't be able to take the bus to [REDACTED] where she sometimes works because it's not something she knows how to do on her own.



Mr. Quigley said the Appellant could get things done when she's comfortable, but it takes a lot of support to get her to that point.

Asked about her social life, the Appellant said she has friends who she sees a lot. She said she calls them and meet part way downtown because she knows her way downtown. She said they would walk around together, sometimes alone, sometimes with adults. Mr. Quigley elicited testimony from the Appellant about a classmate who let her drive his car. He said the Appellant realized this was a not a good idea but she said it was fun. She also said it was safe because there were no other cars. She admitted she didn't have a license. The Appellant also talked about another time when she checked in with Mr. Quigley about a friend who was uninsured. After talking to Mr. Quigley she did not go driving with this friend. Mr. Quigley said these were two incidents he knew about. He said the kids involved in those incidents are kids the Appellant goes to school with and the kids she is attracted to. Mr. Quigley said that if he or his supervisor or Ms. [REDACTED] don't stay on top of the Appellant she runs the risk of being victimized.

The Appellant clarified that her house is in [REDACTED] [REDACTED] and the stores are so close to where she lives she can see them from the house. She also said her friend lives across the street so they meet in the middle and stay where people can see them.

Tamara Gofman testified that normally the transition to foster care is done overnight. However, because of the Appellant's anxiety, the transition to her foster mother's house took two months. Ms. Gofman described an incident where she was taking the Appellant somewhere for an extended period of time but she didn't have her medications. Ms. Gofman said the Appellant would not remember to take medications on her own. Someone has to remind her.

When asked about her cooking skills, the Appellant said she doesn't use the stove because it has gas flames and she doesn't like flames. Mr. Quigley testified that he thought that there would be a good chance a burner would be left on accidentally. He said she has always had help from staff to bake cookies or pie.

Mr. Quigley elicited testimony from the Appellant that she wanted to drive some day but she had no idea how to get a license or make car payments. She said she wanted a car and loved driving because it was fun. She admitted to some level of anxiety because so far she's only driven five miles an hour and thought if she went faster she would be scared.

With respect to the Appellant's behavior, Mr. Quigley said the Appellant can and will react strongly in a meeting if someone uses trigger words like mental retardation. He said the Appellant would get very upset to the point where she was unable to regroup. He said she would often get up and leave the meeting or she would pout and say, "I don't care, I don't care, I don't care." He said she would struggle to maintain herself if she hears criticisms. In a group of friends, Mr. Quigley said the Appellant is fine as long as there's nothing that makes her feel defensive. But with constructive criticism, or when people are not so nice, he said the Appellant needs supports.

Ms. Gofman testified that the Appellant will turn 20 soon and usually DCF refers people to independent living at that age. They are unable to do this for the Appellant. She is in specialized foster care, she has two caseworkers, and she needs the extra support. Ms. Gofman said the Appellant could not live independently because she couldn't handle bills, cooking, medications, or shopping on her own.

The Appellant testified that she wanted her own apartment but she also said she wanted someone to be available to her at all times, like a staff person who doesn't live there.

On cross-examination, asked about the Psychological Evaluation done in [REDACTED] 2008 (Exh 8), Mr. Quigley said he thought [REDACTED] was the licensed psychologist in [REDACTED] who did the psychological evaluations for [REDACTED]. Asked about the [REDACTED] 2007 Monthly Summary, Mr. Quigley

explained the reports are generated on a monthly basis to provide DCF with an update as to how the Appellant is doing in the program. He said [REDACTED], the author of Exhibit 3, was a clinician who did therapy and ran groups with the Appellant. He said she worked with the Appellant the entire time the Appellant was at [REDACTED], which he thought was two- to two and a half years. He said there is no protocol for disagreeing with anything in the summary since it is the opinion of the program.

When asked whether there was anything in Exhibit 3 with which he disagreed, Mr. Quigley listed the following:

1. Independent living was not a goal;
2. The Appellant was not ready to move to a foster care setting, she was only ready for specialized foster care, which is intense and only for one or two children in a foster home. In regular foster care there is no caseworker and there could be more than one or two children. Specialized foster care is child-specific;
3. The Appellant's goal in Independent Living Skills was not to improve on independent living skills as much as it was to improve on her skills overall. He said he may not disagree completely but the goal was not independent living;
4. The Appellant's cooking is not completely independent; he believes that cooking was supervised and someone gave the Appellant direction;
5. The Appellant does not supervise peers in the sense of taking them out, overseeing them, and telling them what to do. She has someone with her to provide help;
6. The Appellant is not completely independent at the [REDACTED] each week. There's a lot of structure in getting her to that point. When the Appellant takes part in a routine after working with someone to the point where she feels comfortable, she can then get through time frames and blocks because she's had that support. Mr. Quigley said the report reads as though one could ask the Appellant spontaneously to go to the grocery store and buy milk and whatever else she needs and come back. The Appellant could only do that after walking through the routine with support. He agreed that the Appellant was taught how to go to the [REDACTED] and was then able to go there independently; and
7. With respect to the part of the report that says the Appellant is riding public transportation with a peer independently, Mr. Quigley wanted it noted again that the Appellant was walked through this several times with a supervisor and when she does ride with a peer the peer is acting as a support, much like in a buddy system.

Mr. Quigley responded to the question why it is not a goal for the Appellant to achieve the skills to learn how to live independently. He said the Appellant would like to live independently, but also said she'd like someone to be there all the time, so Mr. Quigley doubted the Appellant's definition of independent is the same as everyone else's plus he didn't believe it was a real possibility. He couldn't say whether the Appellant could live independently with supports, but said he believed that was what the Appellant hoped for.

Mr. Quigley did not believe that the Appellant became more independent in her daily living skills between [REDACTED] 2007 and the present. He said he thought the Appellant reached a plateau. He believed she was able to take a skill like riding the bus, which she learned in [REDACTED], and do it in [REDACTED], but she needed the same supports and training to ride the bus in [REDACTED]. He said the Appellant would not be able to go to a bus stop and read a bus schedule on her own, so she hasn't made any progress.

The Department's attorney asked the Appellant some questions on cross-examination. The Appellant testified that at home she does the dishes and wipes off the table when asked. She organizes her room without being asked saying, "I'm a neat freak – it has to be organized exactly the way I want it to be. I don't want things out of order." The Appellant said she likes to cook macaroni and cheese from the box, grilled cheese and raman noodles, all of which she cooks in the microwave. She said she has tried recipes out of a cookbook including peanut-butter cookies, but she didn't remember how to make it. She said she read the recipe herself but she didn't read it all correctly and had to ask for help. At first she asked [REDACTED] from [REDACTED] for help, but after making them every other month eventually she could make them by herself. She said she had not tried any other recipes recently.

The Appellant also testified that she went to the mall and loved shopping for sneakers and skinny jeans. She said she goes with [REDACTED], other people from the program, or more recently with her foster mother. The Appellant said she decides which stores to go to and asks Mr. Quigley for money. She said he gives her a check and she takes it to the bank. Then she qualified this and said the check is in her foster mother's name and then her name. At the bank she said they tell her to "sign this thing and I sign it and they give me the money."

The Appellant said she likes to ride her bike but hasn't ridden since coming to [REDACTED] because she only rides on the sidewalk and [REDACTED] has a law prohibiting riding a bike on the sidewalk. She said it's scary to ride on the street. The Appellant said when she rode her bike in [REDACTED] she'd go to [REDACTED] with a friend. A staff person went with her at the beginning because of her anxiety but she said after she got used to it she and her friend went on their own. She said they would tell the people at [REDACTED] they were from [REDACTED] and be let in free. She said they did not ride their bikes back because it was dark, so someone would pick them up.

The Appellant said she "kinda" had a job. She said during the school year she worked at [REDACTED]. She worked an [REDACTED]. She said the decision to work was both hers and the [REDACTED]. She said she had worked at another [REDACTED]. The Appellant said a lot of people broke [REDACTED] so she had to take them to the lady at the desk who always said "thank you." The Appellant said she had a job in [REDACTED] where she had to [REDACTED] but she always went with the staff because they had the [REDACTED] and the Appellant didn't know the code. The Appellant said [REDACTED] wrote a list of the food to buy and she would try to get food on sale. She said she goes shopping now with her foster mother because her foster mother doesn't like to shop, and by going together the Appellant can get all the junk food she wants.

Dr. Richard Costigan testified on behalf of the Department. He reviewed his educational background and credentials, and his experience administering and interpreting IQ tests. As the Department's Eligibility Psychologist he said reviews thousands of IQ tests annually. He is the Clinical Director for the Department's Worcester Area office and has been employed by the Department for ten years. He was qualified as an expert.

Dr. Costigan said he reviewed the information submitted on behalf of the Appellant, made an initial determination, attended the Informal Conference, reviewed new evidence submitted after the Informal Conference, and made another determination. He said someone who scores at the 3<sup>rd</sup> percentile, or 1.5 standard deviations below the norm in two out of three domains (the 10<sup>th</sup> percentile), has very limited skills in terms of being able to function in the real world. He said it doesn't have to do with independent functioning or whether a person can function in the community, it depends on how their scores are in comparison to the rest of the population. He said he reviews every document to determine what issues besides actual pure intellect may affect adaptive functioning, so he looks at standardized tests scores as well as the qualitative information in the record.

Dr. Costigan said the documents he reviewed in the Appellant's case show that the Appellant had problems with receptive and expressive language and at one point she was diagnosed with moderate to severe expressive and receptive language skill problems. He said this has gotten much better over time. He referred to the [REDACTED] 2007 Monthly Summary (Exh 3) that discussed the gains the Appellant made with expressive and receptive skills.

Dr. Costigan said the Appellant has a real skill in asking for assistance when she doesn't know what to do. He referred to the Treatment and Independent Living Skills section of the [REDACTED] report (Exh 3) in which the clinician discussed a number of domains consistent with adaptive functioning skills in which the Appellant did quite well, including being independent with daily hygiene, domestic skills organization, and cleaning the bathroom and floors. Dr. Costigan also noted the report discussed what he considered to be high functioning skills including access to the community four times a week, independent bike riding and walking to the store with a peer, going independently to the [REDACTED] a week, and taking public transportation from

the school with a peer on [REDACTED]. Dr. Costigan said that if someone can do things independently even within the confines and constructs of a program, that is significantly above the overall 3<sup>rd</sup> percentile in adaptive functioning. He said people in the 3<sup>rd</sup> percentile are often not able to construct sentences in a meaningful way, they're not able to put thoughts forward in a way a person could understand them, they sometimes cannot understand the full context of what a person is asking, and sometimes they cannot understand simple requests and demands.

Dr. Costigan next reviewed the Confidential Psychological Evaluation from [REDACTED] 2002 done by [REDACTED], MS, Certified School Psychologist (Exh 6). On the WISC-III the Appellant's overall IQ score was 69. Dr. Costigan noted that there was a lot of scatter on this test. The Verbal Comprehension Index (VCI) score of 64 was below the 3<sup>rd</sup> percentile, which he said was consistent with the Appellant's verbal skills. Dr. Costigan said the Appellant had some pretty good skills putting things together and working with her hands, which was reflected in the Perceptual Organization Index (POI). He said the most significant index score was the 88 in Processing Speed (PSI), which was at the higher end of the low average range. Dr. Costigan noted that the PSI isn't that good of an indicator of IQ; he said it's a better indicator of psychomotor speed and the ability to do things with the hands. He said the Appellant's WISC-III presents a profile of someone who does have an intellectual disability but also has some very good psychomotor skills and some very good planning and sequencing skills as reflected by her POI and PSI scores. Dr. Costigan said there was some consistency throughout the Appellant's testing. He said he was selecting a piece of the cognitive testing he thought supported the Appellant's adaptive functioning and which explained why she could do things above her verbal skill level.

Dr. Costigan next reviewed the Psychological Evaluation completed at [REDACTED] 2005 (Exh 7). He said the Appellant's VCI score on the WISC-IV, which was in the extremely low range, was very consistent with the WISC-III (Exh 6). He noted that the Appellant's PRI went down significantly, but she maintained the PSI, which he again pointed out was notable because processing speed relates to the sequence of organizing and the Appellant's ability to do things with her hands. In that respect the PSI is important as it relates to adaptive functioning, not as it relates to intellectual functioning.

Dr. Costigan next discussed the WAIS-IV in Exhibit 8. He said the Appellant's Full Scale IQ (FSIQ) was 68, the VCI was 72, and the PRI was 72. He said the WAIS-IV includes the Working Memory Index (WMI) instead of the PSI. The Appellant's score on the WMI was 66. Dr. Costigan summarized the Appellant's overall cognitive functioning as being in the area of disability that is below the 3<sup>rd</sup> percentile, but he noted that she had some strengths including psychomotor speed, planning and organizing, and the capacity to work with her hands. Dr. Costigan testified that in looking at the Appellant in totality he was pretty convinced her intellectual disability met the Department's criteria, which is why he didn't ask for additional IQ testing. He said his determination was based on subtest scores and index scores, even though the PSI was quite high.

Dr. Costigan next reviewed the Appellant's adaptive assessment from the 2008 Vineland (Exh 10) administered by Elizabeth Cullinane, a licensed independent social worker who works for the Department. The respondent was [REDACTED]. Dr. Costigan noted that the overall score of 86 on the Adaptive Behavior Composite (ABC) was in the low average range and significantly above the Department's cutoff of 70. Dr. Costigan explained that motor skills scores are generally only reported up to a certain age and once a person gets beyond the age of 8 it's not that important. However, he said that the Appellant's estimated score of 120 is one standard deviation above the mean, which is in the high average range. He said the score was consistent with the Appellant's IQ scores. Other scores on the Vineland were Communication 81 (low average), Daily Living Skills 95 (average), and Socialization 93 (average). Dr. Costigan said it is uncommon to see the extreme wide disparity between scores.

Dr. Costigan reviewed another Vineland, this one completed by [REDACTED] (Exh 8). The Appellant's ABC score of 74 was in the 4<sup>th</sup> percentile. Dr. Costigan testified that there were significant differences in the three index scores in this evaluation, so the overall score was not as significant as the three index scores. He noted

the Appellant's scores of 67 on Communication, which was in the 1<sup>st</sup> percentile, 85 on Living Skills, in the low average range, and 80 on Socialization, which was in the lower end of the low average range. Dr. Costigan said Dr. [REDACTED] provided an age range for the various skills, including an age equivalent of 16.6 for Community Skills. He said this was comparable to the qualitative data. With regard to Personal Skills, the Appellant's age equivalent was 11.6 years. Dr. Costigan said the score showed some of the discrepancies between what is reported and how one scores. He said listening to the Appellant and others describe her skills with personal hygiene, his sense was that her skills were a lot higher than an 11 year old. He said an 11 year old can't do all those things independently. Dr. Costigan noted that the age equivalent for Socialization Skills was 16.3 and for Play and Leisure it was 10.6 years. He did not see these two scores as discrepant. He said a 10 year old is dependent upon others completely and don't create they're own hobbies or make their own arrangements. So he said 10 years old looks close to where the Appellant was functioning.

In the Vineland done in [REDACTED] and [REDACTED] 2005 (Exh 7), the Appellant was 14 [REDACTED] years old. Dr. Costigan noted the Appellant's score of 68 on the ABC, which he said is below the 3<sup>rd</sup> percentile. He said the results on this Vineland show enormous variability similar to the other Vinelands. He said the Appellant's Communication score was 53, which is below the .05 percentile, the Daily Living Skills score of 84 was low average, and the Socialization score of 85 was low average. Dr. Costigan said that even though the overall composite score was 68, that score was not a true representative of the Appellant. He said the results were similar to the previous Vineland where communication was significantly lower than the overall score, which means that the overall score is much less significant than the scatter between the three domain scores. He said when you look at two of those domains, Daily Living Skills and Socialization, the scores were in the low average range. Dr. Costigan also wanted to note that consistently the Appellant's lowest scores were on Communication Skills, which he said was consistent with the Appellant's receptive and expressive language disorders, so the low scores were to be expected.

Dr. Costigan reviewed the three Adaptive Behavior Assessments in the record (Exhs 11-13). He said they are a different type of instrument but are still normed on the general population. He said Exhibits 11-13 were provided after the informal conference. Dr. Costigan said he specifically asked the Appellant's representatives to find three people who knew her the best that could have a good sense of her of her adaptive functioning. Even though these were done after the age of 18, Dr. Costigan thought they would give him more data.

Dr. Costigan reviewed the scores on the first ABAS (Exh 11) completed [REDACTED] 09 by [REDACTED], program manager of [REDACTED]. The Appellant's scores were: General Adaptive Composite (GAC) 60 (.4%), Perceptual 72 (3<sup>rd</sup> %), Social 66 (1<sup>st</sup> %), and Practical 61 (.5%). Dr. Costigan said these scores were significantly different from the other assessments. He said it was striking that the Appellant's Communication scaled score of 7 was her highest scaled score on the ABAS, which he said was good to see because it shows her communication skills have improved. He said this was consistent with the two other ABAS.

Dr. Costigan reviewed the next ABAS (Exh 12), which was completed by [REDACTED]. Mr. Quigley clarified that Mr. [REDACTED] was an administrator at the [REDACTED] where the Appellant was schooled. Dr. Costigan reviewed the scores of 100 on the GAC, which was solidly in the average range, and Conceptual 102, Social 103, and Practical 97, all of which were also solidly in the average range. Dr. Costigan said he did not give this assessment that much because it was so different than other qualitative and quantitative documents.

The last ABAS (Exh 13) was completed on [REDACTED] 09 by [REDACTED] with the scores of GAC 66 (below the 3<sup>rd</sup> %), Conceptual 72, Social 78, and Practical 74. Dr. Costigan noted that two of the index scores are below 1.5 standard deviations below the mean and meet the Department's criteria. Dr. Costigan testified that he didn't give validity to any of the three ABAS' that were submitted because they were so different from what he observed in the informal conference and from what he read in the previous reports.

To make some sense of the significantly wide discrepancy in adaptive assessment scores, Dr. Costigan considered the informal conference, the Appellant's testimony at the hearing, and the Vinelands done before the Appellant turned 18. He said he believed the Appellant's communication scores have continually improved because of the hard work people have done. He said he would consider Communication to be the Appellant's lowest index score but he did not believe it would be two standard deviations below the norm.

Dr. Costigan said he was convinced that the Appellant's Practical scores were in the upper end of the borderline to low average range based on the qualitative documents he read as well as the Vinelands and the Socialization scores, which were also in the lower end of the low average range. Dr. Costigan said that did not mean he thought the Appellant could function independently; he specifically said he did not believe that she could. However, he said he believed the Appellant had adaptive skills outside the criteria for DDS services. He said the Appellant's scores were a lot higher than a number of individuals who have an intellectual disability. He thought this was a credit to the Appellant and her hard work. Dr. Costigan said that as a psychologist for the Department he does not get to make decisions based on what he thinks should happen, but he can only base it strictly upon the Department's criteria. After looking at all the qualitative and quantitative, Dr. Costigan's opinion was that the Appellant's adaptive functioning was outside and higher than the criteria for DDS eligibility.

Dr. Costigan concluded his testimony by saying that for most people DDS serves, their adaptive functioning scores are consistent with cognitive scores, which are pretty much all the same.

On cross-examination, Dr. Costigan agreed that it is possible that one person's perspective on adaptive functioning can be very different from that of another person. Dr. Costigan said he had no way of agreeing or disagreeing if the Appellant would regress in a transition. He said the only way he could know this would be to evaluate her. Dr. Costigan also said what can cause a regression can be multi-faceted. The skill itself is whether one can actually learn it and do it, that is, can a person actually complete the task of the skill. He said if there are other external variables, such as anxiety disorder or the person depends upon staff to do the skill, and the skill subsequently regresses, he said the Department still looks at the higher end of the skill – the person's able to complete the task and do it. He said it was that clearly defined.

This hearing officer asked how long the respondents to the adaptive assessments knew the Appellant. The Appellant said [REDACTED] (Exh 13) was staff that worked with the Appellant in [REDACTED]. Ms. [REDACTED] was there during the Appellant's entire stay from [REDACTED] 2009 to [REDACTED] 2010. The Appellant said she saw Ms. [REDACTED] every day. The Appellant said [REDACTED] (Exh 12) said he was the principle of her school at [REDACTED]. She said she has known him since her arrival in [REDACTED] 2010 and sees him every day during the week. The Appellant said [REDACTED] (Exh 11) was the program manager at [REDACTED], and [REDACTED] (Exh 8), whom the Appellant saw daily, was the [REDACTED] in [REDACTED] for the three years she was in [REDACTED]. Neither the Appellant nor anyone else knew who [REDACTED] was (Exh 7). According to the Appellant and Jeff Quigley, [REDACTED] (Exh 8) was a clinician who did therapy and ran groups with the Appellant the entire two and a half years the Appellant was at [REDACTED] in [REDACTED].

The parties made 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, and specifically whether she meets the Department's eligibility criteria with respect to adaptive functioning. Born [REDACTED] 1990, she is 19 years old. She meets the domicile requirement of the Department and, as the Department conceded, she also meets the cognitive prong of the Department's eligibility criteria.

The Appellant entered foster care at less than two years of age. She remained in this foster home until she was about seven years old. The Appellant was then taken out of that foster home and thereafter, because of severe behavioral issues, the Appellant began a series of countless other placements that included foster homes, a hospital setting for nearly a year because of psychiatric issues, residential programs, and specialized foster care. The earliest diagnoses reported in this case for the Appellant were from a [REDACTED] 2001 evaluation and included on Axis I Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, Conduct Disorder, and Mood Disorder, NOS; on Axis II Borderline Intellectual Functioning and Moderate to Severe Expressive and Receptive Language Disorder; on Axis III Stigmatism; and on Axis IV Severe early childhood neglect, physical abuse as a child, developmental delay, and much disruption in primary care support (Exh 6). The most recent diagnoses from [REDACTED] 2010 are on Axis I Anxiety Disorder NOS; on Axis II Mild MR; on Axis III: type II Diabetes, Asthma, Acid Reflux, Trisomy X; on Axis IV Family, Relationship Problems, School; and on Axis V GAF 39 (Exh 15).

The Department of Children and Family Services became involved with the Appellant when she was about three or four years old. Jeff Quigley has been the Appellant's social worker since about 1996. He continues to have at least monthly contact with her. Despite significant efforts, DCF could not place the Appellant because of her severe behavioral problems. The Appellant made progress with her aggressive behavior while at [REDACTED] and when she was about 15 years old was able to step down to a home setting where she lived with four other girls along with several staff. She then moved to [REDACTED] into another group home for older children, and most recently, in [REDACTED] 2010, DCF was able to place the Appellant into a specialized foster care arrangement in [REDACTED] where she presently resides. As of the hearing, DCF was in the process of trying to obtain guardianship over the Appellant.

### Cognitive Functioning

As noted, the Department indicated that the Appellant met its criteria with respect to cognitive functioning. Accordingly, I will not review this aspect of eligibility in detail, but will note the following test results.

<u>Year/age</u>	<u>Test</u>	<u>Exh#</u>	<u>FSIQ</u>	<u>Verbal</u>	<u>Perf</u>	<u>VCI</u>	<u>POI</u>	<u>FfD</u>	<u>PSI</u>	<u>PRI</u>	<u>WMI</u>
1998 (7)	WISC-III	6	65	64	72						
1999 (9)	S-B-4 <sup>th</sup>	6	low borderline range								
2002 (11)	WISC-III	6	69	64	79	64	80	69	88		
2005 (14)	WISC-IV	7	63			67			85	59	74
2008 (18)	WAIS-IV	8	68			72			84	72	66

Dr. Costigan said that the Appellant's test results present a profile of someone who does have an intellectual disability but also of someone with very good psychomotor and planning and sequencing skills. These latter scores in particular affected Dr. Costigan's opinion regarding the Appellant's adaptive functioning.

### Adaptive Functioning

The witnesses for the Appellant reviewed the Appellant's adaptive functioning on a day-to-day basis. Mr. Quigley credibly testified that the Appellant needs prompting to remind her to make appointments and to take her medications. He also noted the Appellant's inability to do basic math or manage money. He also convincingly testified that the Appellant would not be able to function independently in an apartment.<sup>6</sup>

<sup>6</sup> I accept Mr. Quigley's credible and persuasive testimony that the Appellant was and is not capable of independently doing the many activities listed in the [REDACTED] 2007 Monthly Summary (Exh 3). I also find credible his explanation that some of the things the Appellant was able to do were the result of lengthy, rote training and could not be replicated in other settings.



Similarly, [REDACTED], the Appellant's case manager, also credibly testified with respect to the Appellant's adaptive skills. She said the Appellant was capable of managing her personal caretaking and hygiene without prompting and that she can do some basic cooking and cleaning if someone is nearby to give direction. She can do simple household tasks if asked. She was able to take a bus on one route after many practice runs, but could not generalize this to any other route.

The Appellant's witnesses made it clear that the Appellant was only able to do certain things like ride a bus, take her medications, or cook a recipe only after extensive repetition of the exact same set of behaviors over an extended period of time. (See also Exh 8.) Moreover, the Appellant has always lived in a highly structured environment with a significant amount of one-on-one support, which has helped her learn some of these skills. But as Mr. Quigley also credibly testified, the Appellant cannot transfer what she learned in one setting to another setting, such as riding a bus. He said when she moved from [REDACTED] to [REDACTED], the Appellant had to relearn how to take the bus on a totally new route, and this required the same amount of rote, repetitive training as she had in [REDACTED] in the first instance. Dr. [REDACTED] psychological assessment supports Mr. Quigley's testimony in that she noted that the Appellant was not completely independent and that she could only do certain things within a highly structured and supportive environment. Further, without that highly structured and supportive environment, the Appellant's level of independence would regress. Thus, Mr. Quigley's testimony that the Appellant had not become more independent in her daily living skills between [REDACTED] 2007 and the hearing was credible.

The Appellant was helpful in elucidating some of her abilities and limitations. Her testimony was credible and forthright. Consistent with the testimony of Ms. [REDACTED], the Appellant said she was able to take care of her room. Consistent with Mr. Quigley's testimony, she demonstrated her limitations in math skills and money management. With respect to cooking she said she had help with her cookie recipe many times before she could make it on her own, but she could not remember the recipe at the hearing. She does not use the stove. As she described, her cooking skills are limited to using the microwave for a few prepared meals and making simple sandwiches. The Appellant clarified that she only worked a few hours a week and that it was under highly structured supervision and direction. She expressed her dream to drive a car but said she had no idea how to get a license or make car payments. She said she goes to stores with a friend but it became evident that the friend is across the street and they live in [REDACTED] by the stores they frequent. It also sounded as though any visits to the mall included an adult as a supervisor. Finally, the Appellant said she would like to live alone independently in an apartment, but on further questioning said she would want someone like a staff person to be there and available to provide help all the time.

Everyone at the hearing, including Dr. Costigan, concurred that the Appellant could not live independently. However, as Dr. Costigan also testified, the lack of ability to live independently is not determinative on whether an individual meets the Department's adaptive functioning eligibility criteria. He clarified that someone who scores at the 3<sup>rd</sup> percentile overall, or 1.5 standard deviations below the norm in two out of three domains, has very limited real-world skills. He said eligibility depends on someone's scores in comparison to the rest of the population and what, besides intellect, might affect adaptive functioning.

The Appellant's adaptive assessment scores are vastly discrepant. Seven assessments and a BASC yielded the following results.

<u>Year/age</u>	<u>Test</u>	<u>Exh#</u>	<u>Com/Con</u>	<u>DLS/Prac</u>	<u>Soc</u>	<u>ABC/GAC</u>	<u>M(est)<sup>7</sup></u>
2002 (11 [REDACTED])	BASC	6	Self: lower than average problems in all areas and highly adaptive skills Teacher: highly significant behaviors in all areas and low adaptive skills				
2002 (11 [REDACTED])	ABS	6	Scores varied from very poor to average.				

<sup>7</sup> Headings are from the Vineland/ABAS and stand for: Com/Con-Communication/Conceptual; DLS/Prac-Daily Living Skills/Practical; Soc-Socialization/Social; ABC/GAC-Adaptive Behavior composite/General Adaptive Composite; and M(est)-Motor Skills (estimate).

Average: Physical Development, Responsibility  
 Below Average: Numbers and Time, Self-Direction, Social Behavior.  
 Poor: Independent Functioning, Language Development,  
 Prevocational/Vocational Activity, Socialization.  
 Very Poor: Economic Activity, Conformity, Trustworthiness,  
 Stereotyped and Hyperactive Behavior, Self-Abusive Behavior,  
 Social Engagement, Disturbing Interpersonal Behavior

2005 (14)	Vineland	7	53	84	85	68	
2008 (17)	Vineland	10	81	95	93	86	121
2008 (18)	Vineland	8	67	85	80	74	
2009 (18)	ABAS-II	11	72	61	66	60	
2009 (18)	ABAS-II	12	102	97	103	100 <sup>8</sup>	
2009 (18)	ABAS-II	13	72	74	78	66	

Composite scores ranged from a low of 60 to a high of 100. Excluding consideration of Exhibit 12, two of the composite scores are below the Department's threshold of 70.<sup>9</sup> However, as Dr. Costigan testified, an overall composite score may not be representative of the Appellant's skills because her low scores in Communication bring down the overall score. Thus, since it is not valid to rely on the overall composite scores, it is necessary to consider the Appellant's scores within the domains.

Within the domains the Appellant's scores were not quite as divergent. As Dr. Costigan testified, the Communication/Conceptual results were consistently the Appellant's lowest scores and reflected her expressive and receptive expressive language disorder. Excluding the assessments done in Exhibits 11 and 12, the Appellant's Daily Living Skills/Practical domain scores were 84, 95, 85, and 74. Within the Social/Socialization domain, the Appellant's scores were 85, 93, 80, and 78. None of these scores reach the required eligibility level of 1.5 standard deviations below the norm.

Beyond numbers, it is evident that the Appellant does possess a number of adaptive skills. It is equally evident that she does not possess others. A great deal of testimony and some reports in the record document that the Appellant has been able to learn certain things, like riding a bus or taking medications, only because she is subjected to constant, repetitive, and lengthy training. In that way she is able to repeat that behavior as long as it continues to be exhibited in the exact same place and in the exact same way. If there is any deviation from that routine, as would occur with a move to another location, the Appellant cannot handle a similar activity in the subsequent location. In other words, the "skill" she acquired in one setting is not transferable to any other setting. In the Appellant's case, I find that these acquired behaviors do not constitute adaptive skills in the sense of the Department regulations.<sup>10</sup>

However, there are two important considerations in looking at the skills the Appellant does have. First, as Dr. Costigan testified, if someone can do things independently even within the confines and constructs of a

<sup>8</sup> Dr. Costigan testified that he did not give the ABAS in Exhibit 12 much validity because it was so different from the other qualitative and quantitative documents he reviewed. I agree, and accordingly give this assessment very little weight in the analysis of the Appellant's adaptive functioning.

<sup>9</sup> Dr. Costigan also later testified that he did not give validity to any of the three ABAS assessments because they were so different from what he observed in the informal conference and from the reports in the record. I would agree with Dr. Costigan with respect to Exhibit 11, which scores are significantly and inexplicably lower in most domains than the other assessments. However, unlike the ABAS' in Exhibits 11 and 12, the ABAS in Exhibit 13 lines up more closely with the testimony offered by the Appellant and the Appellant's witnesses, and this assessment was supposedly completed by an individuals who had known the Appellant for more than a year. Based on that consistency of testimony and scores, I do not reject the assessment in Exhibit 13.

<sup>10</sup> In that regard I reject counsel for the Department's argument that the ability to acquire a skill in the first instance, regardless of the individual's ability to transfer that skill to another setting, would suffice to constitute an adaptive skill within the context of Department regulations. I do not consider behavior that cannot be replicated in other environments without additional significant training to have been actually acquired.

structured program, those abilities may be above the Department's eligibility threshold for adaptive functioning. As he noted, the typical individual served by the Department, those in or below the 3<sup>rd</sup> percentile, are often unable to construct sentences in a meaningful way, they cannot articulate thoughts in comprehensible ways, they sometimes cannot understand the full context of what a person is asking, and sometimes they cannot understand simple requests and demands.

Second, and more compelling to the determination in this case, the Appellant does indeed exhibit skills in the domains of Socialization and Daily Living Skills. She testified to being a "neat freak" and that she kept her room organized and neat. She also testified to socializing, having friends, going shopping on a regular basis, and going out into the community. [REDACTED], the Appellant's case manager who coordinates the Appellant's services, meets with the Appellant two to four times a month. She testified that the Appellant was able to manage her own caretaking including hygiene. She said the Appellant can brush her teeth, shower daily, and get dressed without prompting. With prompting she can perform various household tasks like vacuuming and the dishes. Both Ms. [REDACTED] and Mr. Quigley testified to the Appellant's ability to perform other activities such as cooking simple recipes if she has someone on whom she can rely to answer questions when she hits a roadblock. These skills, which do translate from one setting to another, place the Appellant above the level of adaptive functioning required to meet the Department's eligibility criteria.<sup>11</sup>

An applicant must meet the definition of mental retardation to be eligible for services, and this definition extends beyond cognitive functioning limitations. Mental retardation is defined as significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Thus, to be eligible for Department services, one must establish that she has the requisite cognitive limitations that exist alongside and related to adaptive limitations.

The Appellant has the burden of proving beyond a preponderance of the evidence that she meets the Department's eligibility criteria. In this case, while she and her witnesses were persuasive about her inability to live and function independently, they were not able to show that the Appellant has significant limitations in adaptive functioning as defined by Department regulations.

## CONCLUSION

~~Based on my determination that the Appellant has not shown that she has significant limitations in adaptive functioning, she has not been able to show by a preponderance of the evidence that she meets the Department's definition of mental retardation. Therefore, I conclude she 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

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Elizabeth A. Silver  
Hearing Officer

<sup>11</sup> As noted above, this does not mean that the Appellant is able to function independently, but it does indicate that she possesses some skills that exceed the Department's threshold for services.