2010-6

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
500 Harrison Avenue
Boston, MA 02118

Deval L. Patrick
Governor

Timothy P. Murray
Lieutenant Governor

JudyAnn Bigby, M.D.
Secretary

Elin M. Howe
Commissioner

Area Code (617) 727-5608
TTY: (617) 624-7590

2010

MA

Re: Appeal of - Final Decision

Dear :

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

The hearing officer made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DDS regulations. Your 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/eew
cc: Jeanne Adamo, Hearing Officer
Richard O'Meara, Regional Director
Marianne Meacham, General Counsel
James Bergeron, Assistant General Counsel
Elizabeth Moran Liuzzo, Regional Eligibility Manager
Frederick Johnson, 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 115CMR 6.30 – 6.34 (formerly known as Department of Mental Retardation, hereinafter referred to as "DDS" or "Department") and M.G.L. c. 30 A. A fair hearing was held on [redacted] 2009 at the Department's [redacted] in [redacted], Massachusetts.

Those present at the hearing were:

[redacted]	Appellant
	Mother of the Appellant
	Father of the Appellant
	Counsel for the Appellant
James Bergeron, Esq.	Counsel for DDS
Frederick V. Johnson, Psy. D.	Licensed Psychologist

The evidence consists of nineteen exhibits submitted by DDS, seven exhibits submitted by the Appellant, one document submitted by the Hearing Officer and approximately four hours of testimony.

At the close of the fair hearing, [redacted], counsel for the Appellant, requested and was granted an additional two weeks, until [redacted] 2009, to seek out further evidence in this matter. On [redacted] 2009 [redacted] petitioned to extend the date to [redacted] 2009. Finding that the request was for good and sufficient cause, the Hearing Officer allowed the extension of time and the record was held open until [redacted] 2009. No further evidence was forthcoming; the record was therefore closed on [redacted] 2009. Both Attorney [redacted] and Attorney Bergeron requested and were granted additional time to submit closing arguments to the Hearing Officer. The Parties were instructed to submit closing arguments by [redacted] 2010; both Parties submitted within the allowed time.

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 twenty-one year old woman who lives with her father, Mr. [redacted] and her mother, Ms. [redacted]. Mr. [redacted] is the legal guardian for his daughter. Both parents reportedly have significant health issues, however, Ms. [redacted]'s health status is extremely tentative and presented as the sole reason she was not named as a co-guardian for her daughter.

Prior to moving to Massachusetts, the Appellant lived in Rhode Island where she received special education services through the public school system as well as in-home community-based services. The Appellant has a history of aggressive behavior and many psychiatric hospitalizations. She has carried a variety of diagnoses through the years including: Tourette's Syndrome, Autism Spectrum Disorder, Generalized Anxiety Disorder, Mathematics Disorder, Communication Disorder NOS, Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, Depression, Mood Disorder NOS, Obsessive Compulsive Disorder, Bipolar Disorder, Asperger's Disorder and Pervasive Developmental Disorder, NOS. The record indicates that Appellant has undergone numerous trials with various psychotropic medications to treat her psychiatric disorders. She receives regularly scheduled outpatient psychiatric care and medication management from her psychiatrist, Dr. [redacted], who has been treating the Appellant for many years.

The Appellant applied for DDS adult services on [redacted] 2008 and was found to be ineligible 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] 2009, at which time Ms. [redacted]'s ineligibility ruling was upheld. The Appellant appealed that decision and a Fair Hearing was held on [redacted] 2009. The Appellant was present at the hearing along with her parents and was represented by [redacted] from [redacted] Legal Services, Inc.

SUMMARY OF THE EVIDENCE PRESENTED:

EXHIBITS:

The Department submitted the following exhibits which were accepted into evidence:

DDS Exhibit #1
Curriculum Vita of Frederick V. Johnson, Psy. D.

DDS Exhibit #2
Excerpts from 115 CMR 6.04 General Eligibility

DDS Exhibit #3
Excerpts from 115 CMR 2.01 Definitions

DDS Exhibit #4

DDS Eligibility Application requesting services for [redacted], received by the Southeast Regional office on [redacted] 2008.

DDS Exhibit #5

Department's Eligibility Report denying eligibility to [redacted], signed by Dr. Frederick V. Johnson, Psy.D., dated [redacted] 2008.

DDS Exhibit #6

Letter to [redacted] dated [redacted] 2008, from Ms. Beth Moran Liuzzo, Regional Eligibility Manager, notifying Ms. [redacted] of the Department's eligibility decision and her right to appeal that decision.

DDS Exhibit #7

Letter to Mr. Richard J. O'Meara, Southeast Regional Director, from [redacted] dated [redacted] 2008, requesting an appeal of the Departments finding of ineligibility.

DDS Exhibit #8

Attendance Sheet for [redacted]'s Informal Conference held on [redacted] 2009.

DDS Exhibit #9

DDS's Decision Letter re: Informal Conference for [redacted], signed by Beth Moran Liuzzo, Regional Eligibility Manger, dated [redacted], 2009.

DDS Exhibit #10

Letter, with attachments, to Commissioner Elin M. Howe, dated [redacted], 2009, from [redacted]., Counsel for [redacted], requesting a Fair Hearing.

DDS Exhibit #11

DDS Notice of Receipt of Fair Hearing Request, dated [redacted], 2009, sent from Elizabete Wolfgang, Hearing Administrator, to [redacted], Counsel for the Appellant.

DDS Exhibit #12

DDS's Fair Hearing Schedule Notice, dated [redacted] 2009, sent from Elizabete Wolfgang, Hearing Administrator, to [redacted], Counsel for the Appellant.

DDS Exhibit #13

The [redacted] School-[redacted]'s Six Month Evaluation Report for the Appellant, dated [redacted] 2003 at the Appellant's age of 15 years, [redacted].

DDS Exhibit #14

Psychological Evaluation by [redacted], Ph. D. and [redacted], M.S. of the [redacted] School, with results of a WISC-IV cognitive test administered on [redacted] 2004 at the Appellant's age of 16 years, [redacted].

DDS Exhibit #15

Psychological Evaluation Report by [redacted], Ph.D., with results of a WAIS-III cognitive test and other evaluations administered on [redacted] 2007 at the Appellants age of 18 years, [redacted].

DDS Exhibit #16

Psychological Evaluation Report by [redacted], Ed. D. DABPS from the [redacted] Hospital with results of a WAIS-III administered on [redacted] 2008 at the Appellants age of 20 years, [redacted].

DDS Exhibit #17

The Vineland-II Survey Interview Report conducted on [redacted] 2008 by A. [redacted], RET, with the Appellant's mother, Ms. [redacted] as the respondent.

DDS Exhibit #18

Commonwealth of Massachusetts Temporary Decree of Guardianship for [redacted], dated [redacted] 2008, appointing her father, Mr. [redacted] as temporary guardian.

DDS Exhibit #19a through 19f

Psychiatric Hospitalization Discharge Summaries from [redacted] Hospital:

DDS #19a - [redacted] Hospital Discharge Summary for [redacted], age 12 years, admitted to the Adolescent Program on [redacted] 2001 and discharged on [redacted] 2001.

DDS #19b - [redacted] Hospital Discharge Summary for [redacted], age 14 years, admitted to the Adolescent Program on [redacted] 2003 and discharged on [redacted] 2003.

DDS #19c - [redacted] Hospital Discharge Summary for [redacted], age 15 years [redacted], admitted to the Adolescent Program on [redacted], 2003 and discharged on [redacted] 2003.

DDS #19d - [redacted] Hospital Discharge Summary for [redacted], age 15 years [redacted], admitted to the Adolescent Program on [redacted] 2004 and discharged on [redacted] 2004.

DDS #19e - [redacted] Hospital Discharge Summary for [redacted], age 15 years [redacted], admitted to the Adolescent Program on [redacted] 2004 and discharged on [redacted] 2004.

DDS #19 f- [redacted] Hospital Discharge Summary for [redacted], age 15 years [redacted], admitted to the Adolescent Program on [redacted] 2004 and discharged on [redacted] 2004.

The Appellant submitted the following exhibits which were accepted into evidence:

Appellant Exhibit # 20

Letter from the Appellant's psychiatrist, [redacted], M.D, dated [redacted] 2009, regarding [redacted]'s diagnoses.

Appellant Exhibit #21

Letter to Ms. [redacted], from [redacted], Casework Supervisor, Rhode Island Department of Mental Health, Retardation and Hospitals, dated [redacted] 2007, regarding notification of eligibility for services from the Rhode Island Division of Developmental Disabilities.

Appellant Exhibit #22

The Following letters, notices and reports extending over the time period of [redacted] 2008 through [redacted] 2009:

- Notice to all residents of the [redacted] Apartments, [redacted] Massachusetts, from [redacted], dated [redacted], 2008, regarding a directive prohibiting loitering and smoking at the entrance to apartments.

- Thirteen 911 reports of the City of [redacted] 911 Police involving thirteen occasions where emergency 911 calls were made for or by the Appellant.

- Seventeen incident reports of the [redacted] Police Department documenting the circumstances around seventeen occasions where police were dispatched to the Appellant's residence.

- Correspondence to Mr. and Ms. [redacted] from [redacted], Managing Agent of [redacted], dated [redacted] 2009, requesting a meeting to discuss concerns about the Appellant's recent actions and condition.

- Correspondence to Mr. and Ms. [redacted] from [redacted], Managing Agent of [redacted] Apartments, dated [redacted] 2009, restating provisions of their lease and requesting supervision of the Appellant when she is out around the grounds of the apartment building.

Appellant Exhibit #23

Psychiatric hospital medical record reports from several psychiatric hospitals regarding the Appellant's past psychiatric admissions; the 189 paged exhibit consist of the following types of reports:

- Discharge Summary Reports,
- Patient History and Physical Examination Reports,
- Patient Discharge Instruction Sheet Reports,
- Emergency Physician Record Reports,
- Psychiatric Assessment Reports,
- Psychiatric Intake and Registration Reports,
- Authorization to Transfer Reports,
- Temporary Involuntary Hospitalization Authorizations,
- Crisis Emergency Department Screening Reports,
- Triage Screening Reports,
- Clinical Mental Status Reports,
- Clinical Social Work Progress Note Reports,
- Emergency Documentation Record Reports,
- Laboratory Reports,
- Medication Administration Record Reports,
- Therapeutic Assistant Plan for Care Reports, and
- Physician Order Sheets.

Appellant Exhibit #24

Letter from the Appellant's psychiatrist, [redacted], M.D, dated [redacted] 2009, regarding Dr. [redacted]'s knowledge of the Appellant's psychiatric history, diagnoses, and need for services.

Appellant Exhibit #25

Excerpts from Westlaw – Melican v. Morrisey. 20 Mass.L.Rptr.723, 2006 WL 1075465

Appellant Exhibit #26

DMR Adult Intake Form for the Appellant, dated [redacted] 2008 with attached two page DSS Information Sheet.

Hearing Officer Exhibit # 27

A [redacted] 2009 Facsimile sent subsequent to the Fair Hearing (during the extended time allowed for the hearing record to remain open), by [redacted], Counsel for the Appellant, regarding the results of Attorney [redacted] efforts to obtain information about a Wassermann IQ test purportedly conducted at the [redacted] School at the Appellant's age of 15 years.

OPENING STATEMENTS:

Appellant's Opening Statement:
Attorney [redacted] stated that there is no dispute as to the Appellant's domicile nor as to the Appellant's deficiencies in the adaptive skill areas; the issue today is whether the Appellant is Mentally Retarded under the applicable regulations and laws of Massachusetts. The Appellant's parents will testify that developmental delays were noted early in infancy, that the Appellant was seen at Rhode Island Hospital at age four due to developmental delays, and that she received special education supports throughout all of her schooling.

Attorney [redacted] stated that the Appellant's first IQ testing occurred at the [redacted] School at age 15 when she was given a Wassermann IQ assessment followed by another Wassermann IQ assessment one month later. Unfortunately the actual assessments cannot be located but the results are documented in Exhibit # 13 where it notes that the first Wassermann IQ resulted in a score of 68 and the second Wassermann IQ test given one month later resulted in a score of 66.

Attorney [redacted] argued that the Appellant's IQ scores should be looked at on a "totality of circumstances" basis because the Appellant falls into a very rare category; the Appellant is a person who has "splinter skill" areas, scoring much higher in verbal performance in relation to very low non-verbal performance scores. When this occurs, the Full Scale IQ score is an invalid indicator of the person's cognitive functioning. Furthermore, the [redacted] 2008 [redacted] Hospital evaluation (Exhibit #16) resulted in a Full Scale IQ score of 76 which is a score that falls very close to the score that would indicate Mental Retardation for purposes of this hearing if one considers the standard error of measurement. Attorney [redacted] also argued that the [redacted] 2007 IQ which the Department relied heavily upon (Exhibit #15) should be given less weight than the other IQ testing done at the [redacted] School and [redacted] Hospital because the [redacted] 2007 IQ testing along with the other assessments listed in that report were accomplished in only 40 minutes, and therefore not as in-depth an assessment as the [redacted] and [redacted] assessments.

Attorney [redacted] also pointed out that the Appellant received a 38 in the Vineland Adaptive Behavior Assessment; only 1% of the same aged population scored as low as the Appellant.

DDS's Opening Statement:
Attorney James Bergeron represented DDS stating that the issue on appeal is whether the Department's determination of the Appellant's ineligibility for supports is consistent with the standards and procedures established in the Department's eligibility regulations.

In accordance with salutatory authority, the Department has set the standards by which individuals are determined eligible. The record will show that procedure was followed and the finding is consistent with the Department's eligibility regulations. The Appellant has the burden of proof in this matter and must show by a preponderance of the evidence that she meets the Department's definition of Mental Retardation, that she is eligible for supports

and that the determination of the regional eligibility team was inconsistent with eligibility regulations.

Attorney Bergeron stated that the Department does not dispute that the Appellant has psychiatric issues and need for some type of assistance. However, the Department's expert, Dr. Robert Johnson, will comprehensively clarify that the Appellant does not meet the criteria for sub-average intellectual functioning as required for a finding of eligibility of DDS supports.

Attorney Bergeron stated that the evidence will support a life long history of psychiatric illness that has affected the Appellant's performance on cognitive intelligence tests, but, . despite this disability, the Appellant has demonstrated the capacity to attain, on multiple occasions, full scale IQ scores exceeding the criteria for a finding of eligibility for DDS supports. Furthermore, the Department will show that the evidence is quite inconclusive as to whether the Appellant has ever attained a full scale IQ score of 70 or below on a test of her cognitive intelligence. Through an analysis of the evidence, it will become clear that the Appellant does not meet the eligibility requirements for DDS services and therefore not eligible for DDS supports.

TESTIMONY:

Ms. [redacted] - testimony on behalf of the Appellant:
Ms. [redacted] testified about her daughter's failure to meet normal developmental milestones and the problems that she experienced with motor coordination throughout her childhood. Ms. [redacted] also recalled her daughter's educational difficulties starting with a private preschool where it immediately became apparent that the Appellant needed special educational services that would only be available in the public school system. The Appellant received special educational services first through the public school system and around the 9th grade when her behavior became more violent she was sent to the day program at the [redacted] School where structure is emphasized. The Appellant also obtained HBTS (home based therapy services) at this time and the combination of both the [redacted] School structure and the HBTS were successful in that the Appellant did not have any psychiatric admissions during this period.

Ms. [redacted] testified that the first IQ testing on her daughter occurred at the [redacted] School in Rhode Island, using a Wassermann IQ test; the Appellant was 15 years old. Ms. [redacted] was told at that time that the Wassermann test was an assessment that was more able to determine her daughter's intelligence because it was a test that relied less on verbal knowledge to score an IQ. The first Wassermann IQ test result was 68. Ms. [redacted] then requested retesting to verify the results. Another Wassermann IQ test was performed approximately one month later with a resulting score of 66. Ms. [redacted] was reportedly informed that the results indicated a primary diagnosis of Autism along with below average intelligence caused by the Autism. At age 16, the Appellant was approved for services from the Rhode Island equivalent of the Massachusetts DDS.

Ms. [redacted] testified that although the after school program activities offered in Rhode

Island were helpful, especially in supporting more community integration, her daughter continued to have significant problems with basic activities of daily living. Ms [redacted] testified regarding the many deficits in her daughter's ability to care for her own needs and her vulnerability to individuals who pretend to befriend her for sexual favors. Ms. [redacted] recalled her daughter's past unsuccessful attempts at employment. In [redacted] 2008, Mr. & Ms. [redacted] and the Appellant moved to Massachusetts and applied for DDS services.

Ms. [redacted] testified that her daughter was currently taking several Rx medications: Abilify as a mood stabilizer, Valium, Ambien , Clonidine, an antidepressant, some allergy medications, and birth control pills. The Appellant receives routine treatment by her primary care physician, dermatologist, podiatrist, ophthalmologist, and gynecologist. She is also treated by her psychiatrist, Dr. [redacted]. The Appellant began outpatient psychiatric treatment with Dr. [redacted] at age 15 years. Dr. [redacted] sees the Appellant for one hour a month and has recently modified her diagnosis, changing the Appellant's diagnosis from Autism to PDD. Dr. [redacted] reportedly felt that Autism was no longer the proper diagnosis because, in her opinion, the Appellant was not going to progress any further.

Ms. [redacted] – On Cross Exam:

Ms. [redacted] testified that, upon arrival in Massachusetts, the Appellant did apply and was found eligible for Massachusetts Department of Health (DMH) services based on the Appellant's diagnosis of Bipolar Disorder. Ms. [redacted] testified that her daughter was in a DMH group home for two weeks but sustained serious injury while there, and, as a result, Ms. [redacted] removed her daughter from that program. She recalled several problems: one instance where her daughter was not properly supervised, was allowed to cook on the stove and as a result, received a third degree burn; another instance where her daughter was not properly supervised and as a result had unprotected sex with a man who said that he would be her friend; and another instance where her daughter suffered food poisoning. Ms. [redacted] stated that her daughter did not receive the supervision needed to keep her safe; she no longer receives DMH services.

Ms. [redacted] testified that she did not recall any other IQ testing for her daughter prior to age 15, but stated that her daughter may have received some testing through the public schools. Ms. [redacted] was not able to obtain a definitive answer when she inquired into the possibility of any earlier IQ testing; the school systems were not able to say whether her daughter had or had not received such testing.

Ms. [redacted] testified that she was not aproved to become a permanent guardian for her daughter due to her (Ms. [redacted]'s) health; she has been diagnosed with a terminal brain hernia.

Mr. [redacted] - testimony on behalf of the Appellant:

Mr [redacted] testified that he is his daughter's temporary guardian. He testified that an application for temporary guardianship of the person was made to keep his daughter safe. Mr. [redacted] stated that his daughter is unable to keep herself safe from harm, often making decisions that place her in jeopardy. The guardianship is scheduled for review in [redacted] 2010.

Mr. [redacted] - On Cross Exam:

Mr. [redacted] testified that he was aware that his daughter's guardianship application was submitted due to mental illness and not mental retardation. Mr. [redacted] explained that he did not have the benefit of a lawyer when applying for guardianship, and when he asked the head clerk at the probate department to help with filling out the request for guardianship form, the clerk advised that he check off mental illness even though he had explained that his daughter had both mental illness and mental retardation.

Mr. [redacted] testified that Dr. [redacted] also filled out guardianship documents based on a diagnosis of mental illness because the application had been started that way and also because his daughter was receiving DMH services at that time.

Dr. Frederick Johnson- testimony on behalf of the Department:

Dr. Frederick Johnson testified as to his background and experience in the field of Developmental Disabilities and Mental Retardation, as to his current duties for the Southeast Region, and in particular to his expertise in the area of Department regulations relating to eligibility for services (DDS Exhibit #1). Dr. Johnson's credentials were accepted; he was recognized as an expert witness in the field of Mental Retardation and Department regulations relating to eligibility for DDS services.

Dr. Johnson stated that in order to be eligible for DDS adult services, Department regulations require a person to be domiciled in Massachusetts, to have significantly sub-average intellectual functioning manifesting before age 18 and existing concurrently and related to significant limitations in adaptive functioning. The specific regulations are found in 115 CMR 6.04 and 2.01 (DDS Exhibits #2 and #3). In summary, to meet the Department's definition of Mental Retardation, the person must meet the criteria for domicile in Massachusetts, must have a cognitive functioning of 70 or below on approved IQ assessment instruments, and must have adaptive scores at 70 or below on approved adaptive behavior assessments used by the Department. In addition, the Mental Retardation must manifest during the developmental period, before age 18. When making a determination regarding Mental Retardation, the Department must also rule out other factors that may be accounting for the low adaptive or low intellectual functioning.

Dr. Johnson gave an overview of his involvement with and knowledge of the Appellant's request for DDS services, testifying that he made the determination that the Appellant did not meet the Department's requirements for eligibility. Dr. Johnson testified that the primary documents used to make a determination regarding eligibility are IQ scores, preferable more than one, along with adaptive behavior assessment results. When people have other disorders that may or may not impact their intellectual functioning and, or, adaptive functioning, the Department will ask for other documents such as medical reports and discharge summaries for people who have been hospitalized.

Dr. Johnson testified that in making his determination regarding eligibility he must adhere to the Department's regulations and specific requirements for a determination of Mental Retardation. In the Appellant's case, Dr. Johnson reviewed the cognitive assessment marked as DDS Exhibit #15, the cognitive assessment marked as DDS Exhibit #14, and also had documents that referenced other cognitive test results. The cognitive assessment marked as

DDS Exhibit #16 was not available at the time the determination of ineligibility was made and therefore not considered at that time. Dr. Johnson also looked at the Appellant's adaptive functioning but explained that an individual must first meet the cognitive requirement of an IQ of 70 or below before adaptive functioning is considered in making a determination regarding a diagnosis of mental retardation. Dr. Johnson stated that the Appellant's adaptive functioning results were extremely low, lower than what one would expect given the Appellant's IQ test results. This suggests to him that there are other reasons for the low adaptive functioning. In addition, the variability in the Appellant's cognitive assessment scores from age 15 (DDS Exhibit #13) to age 16 (DDS Exhibit #14) suggest a changeability as to how the Appellant performs on tests. Psychiatric disorders and attention deficit disorders can impact on test scores, and the Appellant has been diagnosed with both. The variable scoring that is present in the Appellant's cognitive testing is not typical for a person with Mental Retardation; Mental Retardation typically has a flat score profile without significant variability.

Dr. Johnson testified that it is very unlikely that a person can score above their cognitive capacity, and in instances where the individual has underlying psychiatric or attention deficit disorders, it is more likely that the person will score lower in some tested areas. For example, some parts of cognitive assessments are timed tests; when an individual is highly distracted due to internal stimuli typical of some psychiatric disorders, or due to the inability to focus which is a problem with attention deficit disorders, the final test score will be less than it would be if the individual had been able to focus. These disorders (psychiatric disorders and attention deficit disorders) tend to impact less on the portion of cognitive assessments that measure verbal capacity as these tests do not require as much focus and attention as do the performance section of cognitive testing. The performance section of cognitive testing includes tasks that are novel to the individual, tasks such as putting puzzles together, replicating designs, following sequences of spiral graphical pictures, all of which require concentration and are sensitive to anxiety. Conversely, the verbal portion of the cognitive assessment includes testing where the individual is asked for information that is not novel and therefore likely to be less impacted by a lack of concentration.

Dr. Johnson testified that he reviewed the cognitive material submitted for consideration by the Appellant and found a problem regarding the cognitive testing conducted at the [redacted] school reportedly using a Wassermann II IQ test (DDS Exhibit # 13). Dr. Johnson stated that he had not ever heard of this IQ test and after researching the professional literature, could not find any reference to a Wassermann II IQ assessment. He then attempted to contact [redacted], Ph.D, the person whose name was listed as the author of the document that reported the Appellant's Wassermann IQ results. Dr. Johnson found that the typewritten spelling of the author's name was different than the hand signature. He then determined that the proper spelling was [redacted] and was able to find Dr. [redacted] listed as a licensed professional in Rhode Island. Dr. Johnson contacted Dr. [redacted], and without indentifying the Appellant name, asked her where he could find information about a Wassermann IQ test. Dr. [redacted] reportedly said that she was not aware of any such test and asked for more information, specifically the Appellant's name, so that she could further investigate. Dr. Johnson testified that since he did not have authorization to release that information, he was not able to disclose the Appellant's name to Dr. [redacted]. Dr. Johnson stated that since he did not have knowledge of a Wassermann IQ test and since the author of the letter also did not have knowledge of a Wassermann IQ test, without further clarification regarding what IQ testing was conducted and without a copy of the IQ assessment, these IQ test scores can not be considered in making a determination regarding a diagnosis of Mental Retardation.

Dr. Johnson discussed the [redacted] 2004 Psychological Evaluation (DDS Exhibit # 14) conducted on the Appellant at the age of 16 years, [redacted]. He stated that a WISC-IV was conducted with the following results: Verbal Comprehension Index of 102, which is in the Average Range; a Perceptual Reasoning Index of 57, which is in the Extremely Low Range; a Working Memory Index of 71, which is in the Borderline Range; and, a Processing Speed Index of 59, which is in the Extremely Low Range. This evaluation also referenced a previous cognitive evaluation conducted by the [redacted] County Special Education Department in [redacted] 2002 using a WISC III with results reported as: Verbal IQ 107 and a Performance IQ 86; a Full Scale IQ was not given. Dr. Johnson testified that in his opinion, a Full Scale IQ was not given in either the WISC-IV performed on [redacted] 2004 or on the WISC III reportedly administered in 2002 because of the great discrepancy between the Appellant's Verbal and Performance sections; when this occurs, a Full Scale Score is not a valid indictor of the individual's cognitive ability. Dr. Johnson testified that this data suggest that the Appellant is a person who functions in the Average Range of Verbal intelligence, and as a person with attention deficit problems, the Appellant is a person who performs less well in the Performance sections of IQ tests.

Dr. Johnson discussed the [redacted] 2007 Psychological Evaluation (DDS Exhibit # 15) conducted on the Appellant at the age of 18 years [redacted], testifying that a WAIS-III was conducted with the following results: Verbal Scale of 93, which is in the Low Average Range of General Intelligence ; a Performance scale IQ of 76, which is in the Lower Limits of the Borderline Range of General Intelligence; and, a Full Scale IQ of 85, which places the Appellant significantly above the IQ range required for a diagnosis of Mental Retardation. Dr. Johnson pointed out that Dr. [redacted], the licensed psychologist who conducted this cognitive test, stated in his report:

> "The claimant had an extremely fast work tempo and was impulsive. This negatively impacted the Performance Scale IQ. Under more optimal conditions she is capable of functioning within an Average Range of General Intelligence."

Dr. Johnson testified that although he has not spent enough time with the Appellant to either confirm or deny that she is capable of functioning within an Average Range of General Intelligence, he had enough information to determine that the Appellant's performance tended to be mitigated by her attention difficulties and impulsivity. Dr. Johnson stated that although, at the time of the initial eligibility determination, this cognitive assessment provided the only cognitive assessment reporting a full scale IQ, other cognitive information consistent with this assessment was present. Dr. Johnson stated that in his opinion, the evidence shows the Appellant to be a person who can score out of the Mental Retardation Range in both the Verbal and Performance areas.

Dr. Johnson discussed the [redacted] 2008 Psychological Evaluation (DDS Exhibit #16) conducted on the Appellant at the age of 20 years, [redacted], testifying that a WAIS-III was conducted with the following results: Verbal Scale of 84, which is in the Low Average Range of General Intelligence; a Performance scale IQ of 72, which is in the Lower Limits of the Borderline Range of General Intelligence; and, a Full Scale IQ of 76, which places the Appellant above the IQ range required for a diagnosis of Mental Retardation . Dr. Johnson testified that this assessment confirms past cognitive findings with results that show higher scores in Verbal and lower scores in Performance. Dr. Johnson spoke about the term "splinter skill" stating that the term splinter skill is a term most commonly used by people working in rehabilitation or education where the focus is to work with the individual to

improve the level of functioning by developing those splinter skills. Dr. Johnson testified that, in his professional opinion, the Appellant's Performance scores were not a true indication of her ability in this area since the evidence indicates that the Appellant's Performance scores were impacted by her psychiatric difficulties. Dr. Johnson testified that a Performance Score is calculated without using any verbal subtest scores. A Performance IQ score of 70 or below would be needed to indicate that an individual was functioning in the Mental Retardation range for that particular area. Dr. Johnson pointed out that, even if the Appellant's Performance scores had represented true deficits, these scores are above 70 which is the level required for a diagnosis of Mental Retardation.

Dr. Johnson testified that, in his clinical opinion, the Appellant is a person who has been diagnosed with many psychiatric disorders in the past and who clearly has a lot of difficulties, but, whose intellectual functioning is not close to being considered as that of a person who is Mentally Retarded.

Dr. Johnson testified that the cognitive information that was submitted by the Appellant to the Department was adequate to determine eligibility, and that number 2 of page 8 in the Guidelines for Intellectual Assessment (Appellant Exhibit #26) was not applicable in this case.

Dr. Johnson testified that new regulations have been promulgated since *Melican* [1]. One significant change is a clarification regarding the standard measurement of error. By clinical training a qualified psychologist always considers the standard measurement of error and that is why it is very helpful to have multiple assessments. The previous regulations were not clear regarding that interpretation; the new regulations are clear. An IQ must be at 70 or below.

Dr. Frederick Johnson - On Cross Exam:

Dr. Johnson testified that the standard measurement of error refers to many things including for example, sampling error. Tests are designed to determine ability using a sampling of a broad representation of what a person should know, but it is possible that, by chance, a person would or would not know a particular piece of information that had been chosen as the sample. Sampling error takes into consideration the possibility that an individual may know something due to the specifics of that person's life and not due to a superior intellectual range.

Dr. Johnson testified that there could be a circumstance where an individual has a reported IQ of 75 and, based on sampling error, was found eligible for DDS services. Dr. Johnson described a hypothetical scenario where this could occur stating that an individual with no known psychiatric or attention difficulties, who has cognitive testing every two years as is done in some school systems, and who attains Full Scale IQ scores of for example 68, 72, 70, 70, 67, 75, 67, could be assessed to have an IQ within the Mental Retardation range when one considers the concept of Regression Towards the Mean. Regression Towards the Mean requires a large sampling and is based on the theory that the more sampling you have, the more likely that you are getting a true picture. If there is one score, in this case 75, that is much higher than all the others, and if all other data points to Mental Retardation, the

[1] Melican v. Morrisey, 20 Mass. L. Reptr. 723 (2006).

person could be found to be eligible for DDS services.

Dr. Johnson testified that in his experience cognitive testing takes from 15 minutes to 90 minutes but it does vary. Dr. Johnson stated that often, in the case of mentally retarded people, it can be very, very, quick, and could be as little as 15 minutes because the testing stops once the person gets a certain number of items wrong and the clinician proceeds to the next section of the test. Dr. Johnson testified that he would be surprised to find that the total time to complete all of the assessments listed in DDS Exhibit #15 was only 40 minutes.

Mr. [redacted] - Re-Direct:
Mr. [redacted] testified that the [redacted] 2007 IQ assessment (Exhibit #15) which included several evaluation procedures, was completed, as he recalls, in only 40 minutes. He stated that he was aware of the time because he had another appointment after the evaluation.

Mr. [redacted] - Re-Cross:
Mr. [redacted] testified that he recalled arriving a little early for the assessment on [redacted], 2007, perhaps 15 minutes. Attorney Bergeron pointed out that the second page of the [redacted] 2007 report documents that he and the Appellant arrived 25 minutes early.

Dr. Frederick Johnson - On Cross Exam continued:
Dr. Johnson agreed that it is difficult to determine if a person does poorly on a test due to mental illness or due to a cognitive inability, but added that even if he were wrong about the lower Performance scores being impacted by the Appellant's psychiatric disabilities, the Appellant's Performance scores are higher than required for the Mental Retardation Range.

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:

FINDING OF FACTS:

- The Appellant is a twenty-one year old female who resides with her parents in [redacted] Massachusetts; her domicile in the Commonwealth is not disputed. (Testimony and Exhibits #3 through #12)

- The Appellant received special education services through the Rhode Island public school system and at age 15, continued her education at the [redacted] School in [redacted], Rhode Island where she received highly structured classroom instruction. (Testimony, Exhibit #10)

- The Appellant has carried a variety of diagnoses throughout the years including: Tourette's Syndrome, Autism Spectrum Disorder, Generalized Anxiety Disorder, Mathematics Disorder, Communication Disorder NOS, Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, Depression, Mood Disorder NOS, Obsessive Compulsive Disorder, Bipolar Disorder and Asperger's Disorder. (Exhibits #10, #14, #15, #16, #19a, #19b, #19c, #19d, #19e, #19f, #20, #23, and #24)

- The Appellant's medical history includes medication trials with the following medications: Prozac, Paxil, Ritalin, Dexedrine, Depakote, Abilify Zoloft, Trazodone, Trileptal, Risperidone, Clonidine, Diazepam, Ambien, Klonopin, Lamictal, Seroquel, Celexa, Lithium, and Ativan. (Exhibits #10, #14, #19a, #19b, #19c, #19d, #19e, #19f, and #23)

- The Appellant receives regularly scheduled outpatient psychiatric care and medication management from her psychiatrist, Dr. [redacted], who has revised her opinion as to the Appellant's current diagnosis, changing a diagnosis of Asperger's Disorder to Pervasive Development Disorder. (Testimony, Exhibit #24))

- The Appellant has a history of disruptive and aggressive behavior requiring 911 police intervention on multiple occasions. (Testimony and Exhibit #22)

- The Appellant has a history of psychiatric hospitalizations that include six psychiatric admissions between [redacted] 2001 and [redacted] 2004. (Exhibits #19a, #19b, #19c, #19d, #19e, #19f, and #23)

- A Temporary Decree of Guardianship of the Person was obtained on [redacted] 2008 naming the Appellant's father, Mr. [redacted], as guardian for the Appellant. The guardianship was granted by reason of mental illness. (Exhibit #18)

- Adaptive behavior test results from a Vineland II administered in [redacted] 2008 indicate significant deficits in the Appellant's adaptive behavior. (Exhibit #17)

- The cognitive information submitted by the Appellant to the Department is adequate to determine eligibility; Page 8, section 2, of the Guidelines for Intellectual Assessment (Appellant Exhibit #26) is not applicable.

- There are three cognitive assessment documents in evidence. (DDS Exhibits #14, #15 & #16)

- A diagnosis of Mental Retardation is not reported on any of the three cognitive assessments in evidence (DDS Exhibits #14, #15 & #16)

- The evidence also includes reference to IQ assessments reportedly conducted by the [redacted] County Special Education department using a WISC-III cognitive evaluation at the Appellant's age of 13 years [redacted] (Exhibit # 14), and reference to IQ testing reportedly conducted by the [redacted] School in Rhode Island using the Wassermann-II IQ test on two occasions, at the Appellant's age of 15 years, [redacted] and again at 15 years, [redacted].(Exhibit #13 and Testimony).

- The Appellant's mother, Ms. [redacted] recalls the first cognitive assessment for her daughter to have occurred at the [redacted] School when her daughter was 15 years old (DDS Exhibit #13). Ms. [redacted] does not recall the cognitive testing that is referenced in Exhibit #14 or any other cognitive assessments for her daughter prior to the Wassermann IQ test that was conducted at the Appellant's age of 15 years at the [redacted] School and referenced in DDS Exhibit #13. Ms. [redacted] has attempted to obtain records of all cognitive assessments and has not been successful in her attempts to obtain the Wassermann IQ assessment or any other possible earlier cognitive assessments. (Testimony)

- Dr. Frederick Johnson has not ever heard of a Wassermann IQ assessment, his professional reference books do not acknowledge any such IQ assessment, and Dr. [redacted], the licensed psychologist whose name and signature appear on the document (DDS Exhibit #13) reporting the results of the Wassermann IQ test, has reportedly informed Dr. Johnson that she has not ever heard of a Wassermann IQ assessment. (Testimony)

- Counsel for the Appellant, requested and was granted additional time to obtain clarification regarding the issue of the Wassermann IQ test referenced in the [redacted] School Six Month Evaluation. On [redacted] 2009, Attorney [redacted] notified the Hearing Officer via facsimile (Hearing Officer Exhibit # 27) that she had received notice from [redacted], Associate General Counsel for the [redacted] School, indicating that the letter in question (DDS Exhibit # 13) was not part of the Appellant's student record at [redacted] and was not authored by Dr. [redacted].

- Counsel for the Appellant has argued that the Appellant has "splinter skills", a situation where she does very well in Verbal tests but extremely poor in all Performance tests, and due to this situation a Full Scale IQ is not indicative of the Appellant's cognitive abilities.

- Counsel for the Appellant has argued that because a Full Scale IQ does not represent the Appellant's level of cognition, a more "totality of circumstances" approach must be taken in assessing her IQ. Counsel suggests that while a test score of 70 or below is one measure, it is just one aspect in determining if a person is mentally retarded and refers to the finding of *Melican* [2] to support her arguments.(Appellant Exhibit #25)

- Counsel for the Appellant has argued that since the Appellant does not have a valid IQ score, the Department's guidelines as published in the Department's "Adult Intake Form" (Appellant Exhibit #26) is applicable which states as follows:

  "If a valid IQ is not possible, significantly sub-average intellectual capabilities means a level of performance that is less than that observed in the vast majority (approximately 97%) of persons of comparable background."

- Counsel for the Appellant has argued that the Appellant should be found to meet the definition of Mental Retardation because she functions as a mentally retarded person and further references Dr. [redacted]'s finding (DDS Exhibit #16) where he states as follows:

  " It is important to note that her scores are distorted by two clear splinter skill areas (both in the High Average Range) on the Vocabulary and Information subtest areas (which measure language skills and basic acquired information , respectively). All of her other subtest scores were in the Extremely Low range. Thus, were it not for those two splinter skill areas, her intelligence would likely fall in the Mild MR. Range."

  Counsel points to the finding of *Melican* [3] (Appellant Exhibit #25) where the plaintiff in that matter did not have one Full Scale IQ score under 70 but functioned as a mentally retarded person, and argues, that, since the plaintiff's position in *Melican*[4] was upheld by the Massachusetts Superior Court, the Appellant similarly should be found to meet the definition of Mental Retardation.

- Counsel for the Appellant has argued that there is no mandate in the regulations that a test score over 70 automatically and permanently precludes an individual from eligibility for DDS services referring to *Melican v. Morrisey*[5] (Appellant Exhibit #25).

- Counsel for the Appellant has argued that the [redacted] 2007 IQ which the Department relied heavily upon (Exhibit #15) should be given less weight than the other IQ testing done at the [redacted] School and [redacted] Hospital because the [redacted] 2007 IQ testing along with the other assessments listed in that report were

[2] Melican v. Morrisey 20 Mass. L. Reptr 723 (2006).
[3] Melican v. Morrisey 20 Mass. L. Reptr 723 (2006).
[4] Melican v. Morrisey 20 Mass. L. Reptr 723 (2006).
[5] Melican v. Morrisey 20 Mass. L. Reptr 723 (2006).

accomplished in only 40 minutes, and therefore not as in-depth an assessment as the [redacted] and [redacted] assessments.

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 #3) and setting regulatory standards by which an individual may be determined eligible for DDS services (Exhibit #2).

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:

- The Appellant has met the domicile requirement for eligibility. The issue in question 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 us used and defined by the Department of Developmental Services.

- Appellant Exhibit # 25, *Melican v. Morrisey*,[6] has been reference by the Appellant to promote several arguments regarding the use of a totality of circumstances approach and an argument that an IQ test results over 70 does not automatically preclude an individual from eligibility. *Melican v. Morrisey* [7] is not applicable to this appeal as the Department regulations have changed subsequent to *Melican v. Morrisey*[8]. The current regulations prevail in this case and are clear regarding the criterion for DDS eligibility; while the assessment of an individual's cognition requires the evaluation of many factors, a valid IQ of 70 or below is one of the decisive factors for a finding of eligibility. (DDS Exhibits #2 & #3)

- Counsel for the Appellant has argued that a standard measure of error should be considered when assessing all IQ scores, and as a result, an IQ of above 70 could be indicative of a person with Mental Retardation. While the Hearing Officer must weigh evidence admitted at the hearing, consideration of the psychometric properties of test instrument, such as stand measure of error, falls exclusively within the purview of qualified practitioners who are trained to consider these properties. In accordance with Department regulations, such interpretation is explicitly the job of the qualified practitioner. Consideration for a standard measure of error is not noted in the cognitive evaluations in evidence and therefore will not be considered in the instant case.

- The Department has stipulated to the Appellant's significant limitations in adaptive functioning and the Appellant has argued that these significant limitations in adaptive functioning indicated Mental Retardation. Department eligibility regulations require that Mental Retardation exists concurrently and is related to significant limitations in adaptive functioning. The Department has interpreted their regulation to mean that the first

[6] Melican v. Morrisey 20 Mass. L. Reptr 723 (2006).
[7] Melican v. Morrisey 20 Mass. L. Reptr 723 (2006).
[8] Melican v. Morrisey 20 Mass. L. Reptr 723 (2006).

requirement for eligibility is a diagnosis of Mental Retardation and a second requirement is significant limitations in adaptive functioning related to the Mental Retardation. The regulations of administrative agencies are presumptively valid and entitled to deference. [9] The Department points out that a significant limitation in adaptive functioning cannot be related to Mental Retardation if Mental Retardation does not exist. Thus the second requirement of significant limitations in adaptive functioning is not looked at by the Department when making a determination of eligibility until it has been established that Mental Retardation is present. This is the Department's practice since significant limitations in adaptive functioning can be the result of conditions other than Mental Retardation. Significant limitations in adaptive functioning can be caused by mental illness, significant psychological problems, medical problems and other ailments that impeded upon an individuals ability to function. Thus a finding of significant limitation in adaptive functioning is not in and of itself justification for a diagnosis of Mental Retardation; it is considered only when and if an individual as been determined to be mentally retarded.

- Dr. Johnson, a psychologist who is qualified by education, licensure, and experience as an expert in the field of Mental Retardation, has testified that in instances where an individual has underlying psychiatric or attention deficit disorders, it is more likely that the individual will score lower in some tested areas, especially the cognitive assessments that are timed tests and the cognitive assessments that include novel tasks, as is the case with several Performance IQ subtests. It is logical to presume that the Appellant's psychiatric disorder, which has been treated with a variety of psychiatric medications over the years has, more likely than not, compromised the results of some timed tests and some tests that required the ability to focus. Dr. Johnson has also testified that is very unlikely that a person can score above their cognitive capacity.

- The following three cognitive evaluation assessment reports are in evidence:

EXHIBIT	DATE	AGE	TEST	VERBAL IQ	PERFORMANCE IQ	FULL SCALE IQ
#14	2004	16	WISC-IV	(Index subtest Only- Verbal 102; Perceptual 57; Memory 71; Processing 59)*		
#15	2007	18	WAIS-III	93	76	85**
#16	2008	20	WASS-III	84	72	76 ***

*Full Scale not considered due to the notable difference in verbal and nonverbal skills
**A highly significant difference noted between Verbal & Performance Scale IQ's
***A distortion of scores due to two splinter skills on the Vocabulary and Information subtest areas was noted

There are two references to other cognitive assessments in evidence. The first was made in the 2004 [redacted] School Assessment (DDS Exhibit #14) where mention was made of a previous cognitive evaluation conducted by the [redacted] County Special Education Department in [redacted] 2002 using a WISC III with results reported as:

EXHIBIT	DATE	AGE	TEST	VERBAL IQ	PERFORMANCE IQ	FULL SCALE IQ
#14 Reference only	2002	13	WISC-III	107	86	Not Given

Little weight was afforded to the [redacted] County Special Education Department's

[9] Molly A. v. commissioner of the Department of Mental Retardation, 69 Mass App Ct 267, 867 NE ed 350 (2007)

evaluation as it was not possible to ascertain the credentials of the person administering the test, the conditions under which the assessment took place, or the clinician's evaluation as to the validity of the results.

The second reference to other cognitive assessments was made in the [redacted] School-[redacted] Six Month Evaluation Report for the Appellant, dated [redacted] 2003 (DDS Exhibit # 13) with results reported as:

EXHIBIT	DATE	AGE	TEST	VERBAL & PERFORMANCE IQ	FULL SCALE IQ
#13	2003	15yrs. [redacted]	Wassermann II IQ	Not Given	68
#13	2003	15yrs. [redacted]	Wassermann II IQ	Not Given	68

No weight was given to the Wassermann test results noted or any of the information contained in DDS Exhibit #13 as the clinician whose name appears on the document has disavowed any knowledge of the document, and the [redacted] School's Assistant General Counsel has stated that no such IQ is part of the Appellant's [redacted] School record (Fair Hearing Officer Exhibit # 27).

All three cognitive evaluations in evidence (DDS Exhibits # 14, #15, &#16) were conducted using approved cognitive tests and interpreted by professionals who are qualified by education and licensure to do so. The concern raised by the Appellant regarding alleged inadequate time for the 2007cognitive assessment (DDS Exhibit #15) has not been substantiated to a degree that would challenge the validity of the assessment, which appears to be a detailed, comprehensive assessment.

Two of the three cognitive evaluations, DDS Exhibit #14 and DDS Exhibit #15, were given slightly more weight as they were conducted during the Appellant's developmental years, thus allowing a determination about the Appellant's cognition prior to age 18 years. The third evaluation (DDS Exhibit #16), conducted two years past the Appellant's developmental period, was given slightly less weight.

Given the wide variation between the Verbal related index scores and Performance related index scores, a Full Scale IQ Score was not calculated in the first cognitive evaluation (Exhibit # 14); and although a Full Scale IQ Score was calculated in the second and third cognitive evaluations, (DDS Exhibits #15 & #16) these Full Scale calculations were noted to have been calculated with significant differences between Verbal Scale IQ and Performance scale IQ. Counsel for the Appellant is correct to argue that a Full Scale IQ may not be indicative of the Appellant's cognitive abilities given the splinter skills exhibited where the Appellant did very well in Verbal tests but extremely poor in all Performance tests. A careful analysis of Verbal and Performance scores along with each subtest score is required to properly assess IQ and the possibility of a diagnosis of Mental Retardation; that analysis is performed by the qualified clinician administering the test, and consideration as to the impact of significant differences in Verbal Scale IQ and Performance Scale IQ is reflected in the clinicians' diagnostic impressions.

After completing the Appellant's cognitive evaluation, none of the qualified professionals who conducted the cognitive testing made a diagnosis of Mental

Retardation. In the Cognitive Assessment identified as DDS Exhibit # 14, Dr. [redacted], Licensed Psychologist, concluded that the Appellant's assessment indicated average verbal comprehension skills with significantly less developed nonverbal reasoning, processing speed and working memory skills, adding also that the extent of this difference is atypical and found in only .2% of children; Dr. [redacted] did not suggest nor diagnose Mental Retardation.

In the Cognitive Assessment identified as DDS Exhibit # 15, Dr. [redacted], Licensed Psychologist, noted that the Appellant had an extremely fast work tempo and was impulsive, that her fast pace and impulsivity negatively impacted the Performance Scale IQ, and that under more optimal conditions the Appellant is capable of functioning within an Average Range of General Intelligence. Dr. [redacted]' diagnostic impressions included Asperger's Disorder, Bipolar Disorder NOS, Obsessive Compulsive Disorder in partial remission, and Tourette's Disorder in partial remission; Dr. [redacted] did not diagnosis Mental Retardation.

In the Cognitive Assessment identified as DDS Exhibit # 16, Dr. [redacted], Licensed Psychologist, noted that the Appellant's scores are distorted by two clear splinter skill areas in Vocabulary subtests and Information subtests, which are both in the High Average Range of General Intelligence, and also noted that all other subtest scores are in the Extremely Low Range of General Intelligence. Dr. [redacted] concluded that, were it not for those two splinter skill areas, the Appellant's intelligence would likely fall in the Mild Mental Retardation Range. However, Dr. [redacted]'s did not make a diagnosis of Mental Retardation; instead his diagnostic impressions listed Asperger's Disorder and Bipolar Disorder.

Dr. Johnson who is well qualified in assessing cognitive evaluations has testified that a score above 70 in Verbal IQ and Performance IQ indicates that the individual's cognition in those areas is above the level required for a diagnosis of Mental Retardation. While it is appropriate to question the validity of the Full Scale IQ scores noted in DDS Exhibits #15, & 16 due to the significant variability between the Appellant's reported Verbal IQ and Performance IQ, none of the scores listed fall below 70. Although the Full Scale IQ's in DDS Exhibits #15 & #16 are not informative of the Appellant's level of cognition, the Verbal and Performance IQ's are indicative of a person whose cognition is above the level of significantly sub-averaged intellectual functioning which is required for DDS eligibility.

In summary, I find that the Appellant's argument for a finding of Mental Retardation to be contrary to the definition of Mental Retardation established by expert clinical authorities; a finding of significant deficits in adaptive function is not a valid indicator of the presence of Mental Retardation as deficits in adaptive functioning can be caused by many other factors. Most importantly, the Appellant's IQ scores are significantly outside the range required for a diagnosis of Mental Retardation or DDS eligibility and as a result, render the Appellant ineligible for DDS supports. I therefore find that the Appellant has not met her burden of proving by a preponderance of the evidence that she is a person with Mental Retardation as defined in 115 CMR 2.01 and is not eligible for DDS adult services in accordance with 115CMR 6.04. As the Appellant has not met the burden of proof in this matter, I can not, and do not, find for the Appellant. 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