

The Commonwealth of Massachusetts
 Executive Office of Health & Human Services
 Department of Developmental Services
 500 Harrison Avenue
 Boston, MA 02118-2439

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

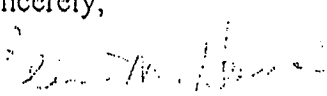
Dear :

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

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

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

Sincerely,


 Elin M. Howe
 Commissioner

EMH/ecw

cc: Jeanne Adamo, Hearing Officer
 Richard O'Meara, Regional Director
 Marianne Meacham, General Counsel
 Elizabeth Duffy, 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. 30A. A fair hearing was held on [REDACTED] 2010 at the Department’s [REDACTED] in [REDACTED], Massachusetts.

Those present at the hearing were:

[REDACTED]	Appellant
Scott Ferland	Father of the Appellant
[REDACTED]	[REDACTED] Advocate
[REDACTED], Ph. D., B.C.B.A.	DCF Case Worker
Elizabeth Duffy, Esq.	[REDACTED] Case Manager
Frederick V. Johnson, Psy. D.	[REDACTED] Psychologist
	Counsel for DDS
	DDS Licensed Psychologist

The Fair Hearing proceeded under the informal rules concerning evidence with approximately one hour of testimony presented. The Appellant’s evidence consists of one exhibit along with sworn oral testimony from Ms. [REDACTED], [REDACTED] Advocate, Dr. [REDACTED], [REDACTED] Psychologist, and Mr. Scott Ferland, DCF Case Worker. The evidence presented on behalf of the Department consists of twenty-nine exhibits and sworn oral testimony from Dr. Frederick V. Johnson, DDS’s Licensed Psychologist.

ISSUE PRESENTED:

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

BACKGROUND:

The Appellant, Mr. [REDACTED], is a twenty-one year old male who has been under the care of the Massachusetts Department of Children and Families (formerly known as the Department of Social Services) since being removed from his home at the age of twelve. The Appellant has gone through a series of residential placements since that time including out-of-state residential placements in New Hampshire, South Carolina, and Pennsylvania. He was placed with [REDACTED] in [REDACTED] 2006 and currently resides in one of the [REDACTED] group homes. The Department of Children and Families (DCF) is responsible for the Appellant's care up to his twenty-second birthday. He is applying for DDS services as part of the 688 process.

The Appellant's parents are divorced. The Appellant's father, Mr. [REDACTED], is the Appellant's legal guardian and the primary parental figure in his life. The Appellant has had minimal to no contact with his mother since age twelve or thirteen when he disclosed that he had, in the prior year, sexually molested his then five year old half-sister.

The Appellant was reportedly born not breathing and without a heartbeat. He also reportedly had a broken clavicle and a distended diaphragm. He was moved to the Neonatal Intensive Care Unit where a CT scan revealed a "brain bleed". The Appellant experienced seizures for two days after birth without any seizure activity reported since that time. He has been involved in Special Education since the third grade but by the seventh grade was reportedly described as the smartest child in the SPED classes.

The Appellant has a long history of a severe behavior disorder, which includes aggressive, health dangerous, destructive, disruptive, noncompliant and sexually inappropriate behaviors. At the age of nine or ten, the Appellant reportedly began engaging in a pattern of inappropriate sexual contact with both older and younger male and female peers. He has been involved in the juvenile justice system in Massachusetts and in all of the out-of-state residential placements. Some of the alleged offenses occurring out of state have been of a very serious nature but all were eventually dismissed, in one instance because the Appellant was found incompetent to stand trial and in other instances authorities reportedly did not want to pursue a process that might complicate and or lengthen his stay in their state. A 2008 forensic consultation report concludes that the Appellant is a very seriously disturbed young man who is dangerously violent and in need of supervision and structure at the highest possible level.

The Appellant applied for DDS adult services on [REDACTED] 2007 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] 2008, at which time the Appellant's ineligibility ruling was upheld. The Appellant appealed that decision and a Fair Hearing was scheduled to be held on [REDACTED] 2010 but continued for good and sufficient cause and subsequently held on [REDACTED] 2010. The Appellant was present at the hearing along with his father and witnesses from [REDACTED] and DCF. The Appellant's father, Mr. [REDACTED], served as the Appellant's authorized representative.

SUMMARY OF THE EVIDENCE PRESENTED:**EXHIBITS:**

The following exhibits were accepted into evidence:

DDS Exhibit #1

Decree of Permanent Guardianship, dated [REDACTED] 2006

DDS Exhibit #2

Appellant's placement history, dated [REDACTED] 2008

DDS Exhibit #3

Psychological Evaluation dated [REDACTED] 1999

DDS Exhibit #4

Psychological Test Report administered by [REDACTED], Ph.D., dated [REDACTED] 2001

DDS Exhibit #5

Neuropsychological Screen conducted by [REDACTED], Ed. D., dated [REDACTED], 2001

DDS Exhibit #6

Comprehensive Biopsychosocial Evaluation administered by [REDACTED], Ph. D., Clinical Neuropsychologist on [REDACTED] 2005

DDS Exhibit #7

Forensic Consultation Report by [REDACTED], Ph. D. and [REDACTED], LICSW, dated on [REDACTED] 2008

DDS Exhibit #8

ICAP Computer Scoring Report, dated [REDACTED] 2008

DDS Exhibit #9

ABAS-II Report, dated [REDACTED] 2008

DDS Exhibit #10

Application for DDS Eligibility, dated [REDACTED] 2007

DDS Exhibit #11

Correspondence to the Appellant from Dan O'Rourke, DDS Eligibility Specialist, dated [REDACTED] 2008

DDS Exhibit #12

Permission letter signed by Scott Ferland, DCF's [REDACTED] Area Office, with an attached summary report and the Appellant's 2007-2008 [REDACTED] Report Card

DDS Exhibit #13

DDS's Adult Intake Form, dated [REDACTED] 2008

DDS Exhibit #14

DDS's Eligibility Report, dated [REDACTED] 2008

DDS Exhibit #15

Ineligibility Notification Letter sent to the Appellant, dated [REDACTED] 2008

DDS Exhibit #16

Appeal letter sent to Richard J. O'Meara, Regional Director, from the Appellant's father, Mr. [REDACTED], dated [REDACTED] 2008

DDS Exhibit #17

Informal Conference confirmation letter and attachments sent to the Appellant's father, Mr. [REDACTED], dated [REDACTED], 2008

DDS Exhibit #18

Attendance sheet for the Informal Conference held on [REDACTED], 2008

DDS Exhibit #19

Informal conference result notification letter sent to the Appellant's father, Mr. [REDACTED], dated [REDACTED], 2008

DDS Exhibit #20

An undated Fair Hearing request letter from the Appellant's father, Mr. [REDACTED], sent to DDS Commissioner Howe, date stamped as received on [REDACTED], 2008

DDS Exhibit #21

Notice sent by DDS to the Appellant's father, Mr. [REDACTED], concerning receipt of a Fair Hearing request, dated [REDACTED] 2008

DDS Exhibit #22

Eligibility Appeal Information Sheet request, dated [REDACTED] 2008

DDS Exhibit #23

Request for Client Record, dated [REDACTED] 2008

DDS Exhibit #24a

Copy of the Appellant's Mass Health card

DDS Exhibit #24b

Copy of the Appellant's Birth Certificate

DDS Exhibit #24c

Copy of the Appellant's Social Security card

DDS Exhibit #25

The Appellant's 2007-2008 Individualized Education Program (IEP)

DDS Exhibit #26

The Commonwealth of Massachusetts DSS (now DCF) Service Plan agreement between the Appellant's family and the Department of Social Services (currently the Department of Children and Families) and a copy of a Bureau of Transitional Services Chapter 688 Student Referral Form.

DDS Exhibit #27

Curriculum Vita of Frederick V. Johnson, Psy. D.

DDS Exhibit #28

115 CMR 6.00 Department of Developmental Services

DDS Exhibit #29

115 CMR 2.01 Definitions

Appellant Exhibit #1

A copy of the Appellant's Proposed Amended Behavior Modification Treatment Plan submitted to the Commonwealth of Massachusetts, Probate and Family Court Department, dated [REDACTED] 2009

OPENING STATEMENTS:**Appellant's Opening Statement:**

The Appellant's father, Mr. [REDACTED] served as the Appellant's authorized representative at the Fair Hearing. Mr. [REDACTED] stated that he and his son and the [REDACTED] staff were at the Fair Hearing because DCF currently provides for 24 hour supervision through a program at [REDACTED], and DCF will not be responsible for his son after he turns 22 which is about to occur in two days. He stated that his son needs services and someone must provide those services.

DDS's Opening Statement:

Attorney Elizabeth Duffy represented DDS, stating that the Appellant was denied eligibility based on the Department's 115 CMR eligibility regulations. Attorney Duffy stated that the Appellant does not meet the criteria for Mental Retardation as defined by these regulations. The Department does not dispute that the Appellant has significant behavioral problems; however, DDS regulations are clear. To be eligible for adult services from the Department, an individual must meet the regulatory guidelines for IQ and adaptive behavior. The Appellant has never met the regulatory guidelines for IQ in particular. Therefore his denial is appropriate, and the Department will present evidence to substantiate the finding of ineligibility for DDS adult services.

FINDING OF FACTS:

The following findings are made as a result of a careful assessment of all exhibits entered into evidence and sworn testimony presented during the Fair Hearing.

1. The Appellant was born in [REDACTED], Massachusetts and is currently domiciled in Massachusetts. (DDS Exhibits 24a, 24b, 24c & Testimony of Scott Ferland)
2. The Appellant reportedly experienced difficulty at birth; he was born not breathing, without a heartbeat and also had a broken clavicle and a distended diaphragm. He was moved to a Neonatal Intensive Care Unit where a CT scan revealed a "brain bleed". He experienced seizures for the first two days of his life but none since. (DDS Exhibit 7)
3. The Appellant has been under the care of the Department of Children and Families (DCF) previously called the Department of Social Services (DSS), continuously since he was removed from his home at the age of 12 years. (DDS Exhibit 7)
4. The Appellant is currently placed at [REDACTED] where he has resided since [REDACTED] 2006. [REDACTED] assisted the Appellant's father, Mr. [REDACTED], in obtaining legal guardianship of his son. A voluntary placement agreement is in effect. (DDS Exhibit 7 & DDS Exhibit 26)
5. The Appellant has a history of severe physical aggressive behavior, sexually assaultive behavior, and destructive behavior (DDS Exhibit 25)
6. The Appellant was placed in special education classes due to behavior problems in the 3rd and 4th grade. He was suspended in the 5th grade for fighting with and hitting another student. In [REDACTED] 2000, the Appellant was asked to leave summer day camp due to an allegation of inappropriate touching of a younger male child; but no charges were pursued. In the 7th grade he was viewed as the "smartest child in the SPED classes". (DDS Exhibit 7)
7. At age twelve, the Appellant began spending time after school under his mother's supervision, and it was during this time that the Appellant later divulged that he sexually molested one of his female half-siblings. (DDS Exhibit 7)
8. At age twelve, the Appellant was arraigned on a charge of Assault and Battery with a Dangerous Weapon (shod foot) when he allegedly kicked another student in school because the student fell on him. (DDS Exhibit 7)
9. The Appellant was psychiatrically hospitalized in [REDACTED] 2000 due to suicidal ideation. He has carried many diagnoses historically including: Sexual Abuse of a Child as a Perpetrator, Rule Out Sexual Abuse as a Child as a Victim; Attention Deficit Hyperactivity Disorder- Combined Type; Impulse Control Disorder- Not Otherwise Specified; Mood Disorder- Not Otherwise Specified, Rule out Organic Mood Disorder Secondary to Brain Injury at Birth; Sexual Disorder- Not Otherwise Specified; Oppositional Defiant Disorder; Posttraumatic Stress Disorder; Cognitive Disorder; Pervasive Developmental Disorder; Rule out Conduct Disorder; Rule Out Learning Disability; Paraphilia-Not Otherwise Specified; Adjustment Disorder with Mixed Anxiety and Depressed Mood; Bipolar Disorder; and Depressive Disorder-

Not Otherwise Specified. However, as of [REDACTED] 2009, the most current diagnoses thought to be appropriate are: Mood Disorder- Not Otherwise Specified and Sexual Disorder- Not Otherwise Specified. (Appellant Exhibit 1 & DDS Exhibit 7)

10. A Psychological Evaluation conducted by [REDACTED] PhD, on [REDACTED] 2001 revealed intelligence testing results in the Low Average range but thought to be possibly below his actual abilities due to differential effort. A Wechsler Intelligence Scale for Children- Third Edition (WISC-III) was administered resulting in a Verbal Score of 82, a Performance Score of 91 and a Full Scale Score of 85. (DDS Exhibit 4 & DDS Exhibit 7)
11. Prior to the Appellant's placement at [REDACTED] in 2006, the Appellant had gone through a long series of unsuccessful placements. Aggressive behavior and serious incidents causing injury to staff resulted in his involvement with the Massachusetts juvenile system. This behavior ultimately resulted in dismissals from Massachusetts programs until no program in Massachusetts would accept him. He was then placed in a series of out-of-state residential programs with placements in New Hampshire, South Carolina, and Pennsylvania; all of the out-of-state programs were similarly unsuccessful. He was charged with juvenile offenses in all of those states related to alleged physical and sexually assaultive behavior in programs. (DDS Exhibit 7)
12. Although most of the alleged offenses have been of a very serious nature, all were eventually dismissed. In one instance, a New Hampshire Judge found the Appellant to be incompetent to stand trial. Allegedly, in other instances in South Carolina and Pennsylvania, authorities ultimately did not want to pursue a process that might complicate and/or lengthen the Appellant's stay in their state. (DDS Exhibit 7)
13. The three placements prior to the most current [REDACTED] placement were sex offender-specific juvenile residential placements. (DDS Exhibit 7)
14. The Appellant currently receives supervision 24 hours a day from educational and residential staff. His [REDACTED] program is supervised by a clinician and closely monitored by a case manager. All staff are trained in physical crisis management procedures (Violent Behavior Control) so they may be call in an emergency situation. (DDS Exhibit 25)
15. The Appellant is in a [REDACTED] program where [REDACTED] staff employ court authorized Level III behavior modification interventions [REDACTED] to treat the Appellant's major problematic behaviors. (DDS Exhibit 7 & Appellant Exhibit 1)
16. Appellant is easily distracted and exhibits a low frustration tolerance level (DDS Exhibit 25)
17. The most recent cognitive evaluation was conducted by [REDACTED], Ph. D. on [REDACTED] 2005. (DDS Exhibit 6) Dr. [REDACTED] reports that the Appellant was seemingly proud about being restrained and was described as showing a "startling lack of remorse". A Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) was administered; the cognitive testing outcomes fell in the Borderline Range of intelligence with a Verbal Scale IQ of 77, a Performance Scale IQ of 78 and a Full Scale IQ of 76. Dr. [REDACTED] reported that these results were thought to be an

underestimation of the Appellant's abilities based on limited and poor effort. (DDS Exhibit 6 & DDS Exhibit 7)

18. A Forensic Consultation report was conducted by [REDACTED], Ph.D. and [REDACTED], LICSW in [REDACTED] 2008. This report states under Conclusions and Recommendations as follows:

“Diagnostically, [REDACTED]’s presentation is complex. The available data strongly indicates that he does suffer from significant neurological compromise dating back to his birth and the first few days of his life. Some features of his clinical presentation, such as his history of extreme impulsivity, hyperactivity, serious problems in regulating affect, and magnitude of difficulty controlling himself even when he might want to, are all consistent with a longstanding neurological injury. Formal testing through the years also has been consistent in confirming significant neurological deficits, which should not be confused with any suggestion that [REDACTED] is of low intelligence. He appears quite bright, and even savvy, in some regards.” (DDS Exhibit 7)
19. Dr. [REDACTED] Licensed Psychologist, testified regarding the Appellant’s level of cognitive ability, stating that she did not find him to be a person with Mental Retardation. (Testimony)
20. Ms. [REDACTED], the Appellant’s assigned [REDACTED] Advocate, also testified regarding her experience with the Appellant and her impression of the Appellant’s cognitive ability, stating that she did not believe him to be a person with Mental Retardation. (Testimony)
21. Mr. Scott Ferland, the Appellant’s assigned DCF Case Worker, testified regarding his opinion of the Appellant’s cognitive ability, stating that he did not find the Appellant to be a person with Mental Retardation. (Testimony)
22. Dr. Frederick Johnson, DDS Licensed Psychologist (DDS Exhibit 27) who has expertise in Department regulations relating to eligibility for services and expertise in evaluating cognitive and adaptive behavior assessment results, stated that in order to be eligible for DDS adult services, Department regulations first require a person to be domiciled in Massachusetts, and once domicile in Massachusetts has been determined, to have significantly sub-average intellectual functioning manifesting before age 18. Dr. Johnson testified that the Appellant meets the domicile requirement, but does not meet the criteria necessary for a diagnosis of Mental Retardation; the Appellant’s IQ scores in the two cognitive evaluations conducted during his developmental period (DDS Exhibit 4 & DDS Exhibit 6) fall above the range required for a diagnosis of Mental Retardation. Dr. Johnson also testified regarding his knowledge of the Appellant’s request for DDS services indicating that the protocol was followed as required by Department policy. (DDS Exhibits 10 through 24 & Testimony)

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 he meets the DDS eligibility criteria. I find that the weight of the evidence shows that the Appellant does not meet the Department's definition of Mental Retardation and therefore is not mentally retarded as that term is used in statute and regulation for the determination of DDS supports as defined in 115 CMR 2.01. My reasons are as follows:

REGULATORY REQUIREMENTS:

Massachusetts General Law c. 123B, section 1, defines a mentally retarded person as "a person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the Department, is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." In accordance with statutory and regulatory authority, the Department has promulgated regulations both defining Mental Retardation (DDS Exhibit 29) and setting regulatory standards by which an individual may be determined eligible for DDS services (DDS Exhibit 28).

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 his burden of proving by a preponderance of the evidence that he is a person with Mental Retardation as that term is used and defined by the Department of Developmental Services.
- The question before us is the level of the Appellant’s cognitive deficit, specifically if the Appellant is diagnosed with Mental Retardation which must be established by FSIQ at or below 70 along with an overall composite adaptive functioning score of 70 or below or a score of 77 or below in two of the three adaptive functioning domains.

- The following cognitive assessments are in evidence:

<u>EXHIBIT</u>	<u>DATE</u>	<u>AGE</u>	<u>TEST</u>	<u>Verbal, Performance, Full Scale IQ</u>
DDS#4	██████01	12	WISC-III	V 82 P 91 Full Scale 85
DDS#6	██████05	17	WAIS-III	V 77 P 78 Full Scale 76

- The following adaptive behavior assessment is in evidence:

<u>EXHIBIT</u>	<u>DATE</u>	<u>AGE</u>	<u>TEST</u>	<u>Conceptual, Social, Practical, GAC</u>
DDS# 9	██████08	20	ABAS-II	C 84 S 72 P 88 GAC 82

- Both the IQ evaluation administered to the Appellant during childhood and the IQ evaluation administered during adolescence resulted in IQ scores that are significantly out of the range of cognitive functioning necessary for a diagnosis of Mental Retardation. Moreover, the Appellant’s adaptive behavior scores in the ABAS conducted on ████████ 2008, place him out of the range of adaptive functioning necessary for a diagnosis of Mental Retardation.

- Furthermore, there is no evidence that the Appellant has ever been diagnosed with Mental Retardation. While documentary evidence presented substantiates the presence of significant behavioral problems, no documentary evidence has been presented to indicate the presence of a cognitive deficiency within the range required for a diagnosis of Mental Retardation. Additionally, testimony presented is contrary to such a diagnosis; [REDACTED] & DCF staff have indicated their belief that the Appellant is not Mentally Retarded. More significantly, Dr. Frederick Johnson, DDS Licensed Psychologist, who has expertise in Department regulations relating to eligibility for services and expertise in evaluating cognitive and adaptive behavior assessment results, has testified that the Appellant does not meet the criteria necessary for a diagnosis of Mental Retardation. [REDACTED]'s licensed psychologist, Dr. [REDACTED], who is qualified by education and licensure to make a diagnosis regarding cognitive functioning, has also testified that the Appellant is not Mentally Retarded.

- After considering the oral testimony and documentary evidence submitted in this matter, I find that the Appellant is not eligible for DDS adult services. I further find that the evidence presented by DDS supports a finding that DDS followed established standards and procedures in considering the Appellant's eligibility. Therefore, DDS's determination that the Appellant is not eligible for DDS adult services 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 [115 CMR 6.34(5)]

Date: _____

Jeanne Adamo
Hearing Officer