2010-8

The Commonwealth of Massachusetts

Executive Office of Health & Human Services

Department of Developmental Services

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Elin M. Howe
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, 2010

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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
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. 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
	Mother of the Appellant
	Educational Advocate
James Bergeron, Esq.	Counsel for DDS
Frederick V. Johnson, Psy. D.	Licensed Psychologist

The Fair Hearing proceeded under the informal rules concerning evidence with approximately three hours of testimony presented. The Appellant's evidence consists of six exhibits along with sworn oral testimony from [redacted], the Appellant's mother, and [redacted], the Appellant's Educational Advocate. The evidence presented on behalf of the Department consists of seventeen exhibits and sworn oral testimony from Dr. Frederick V. Johnson, DDS's Licensed Psychologist.

At the close of the fair hearing, the Department requested and was granted an additional two weeks time to submit a closing argument to the Hearing Officer. The document was received 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, Mr. [redacted], is an eighteen year old male who lives with his mother, his stepfather, and his two brothers in their home in [redacted], Massachusetts. The Appellant is not under legal guardianship.

The Appellant received special education services with an Individual Education Plan (IEP) beginning at the pre-first grade level. The Appellant currently attends [redacted] High School in a special education setting where he receives speech-language services and reportedly has generally earned C's and B's on recent past report cards.

The Appellant reportedly was treated pharmacologically for ADHD at age six years and for depression at age seven to eight years. He has a history of physical abuse as a child by his biological father and has been diagnosed with a Posttraumatic Stress Disorder for which he is treated with psychotherapy and medications. The Appellant also uses hearing aids to help screen out background noise so as to help him concentrate. The record indicates that in August 2009, the Appellant was taking the following medications : Adderall, Wellbutrin, Zoloft and Abilify.

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 the Appellant's ineligibility ruling was upheld. The Appellant appealed that decision and a Fair Hearing was held on [redacted] 2010. The Appellant was present at the hearing along with his mother and Educational Advocate; both served as the Appellant's authorized representative.

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], dated [redacted] 2008.

DDS Exhibit #5

Department's Eligibility Report denying eligibility to [redacted], signed by Dr. Frederick V. Johnson, Psy.D., dated [redacted] 2009.

DDS Exhibit #6

Letter to [redacted], mother of [redacted], dated [redacted] 2009, from Ms. Beth Moran Liuzzo, Regional Eligibility Manager, notifying Ms. [redacted] of the Department's eligibility decision and the right to appeal that decision.

DDS Exhibit #7

Letter to Mr. Richard J. O'Meara, Southeast Regional Director, from [redacted], mother of [redacted], dated [redacted] 2009, requesting an appeal of the Department's 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 Manager, dated [redacted] 2009.

DDS Exhibit #10

Letter to Mr. Richard J. O'Meara, Southeast Regional Director, from [redacted] mother of [redacted], dated [redacted] 2009, appealing the decision of non-eligibility and requesting a Fair Hearing.

DDS Exhibit #11

DDS Notice of Receipt of Fair Hearing Request, dated [redacted] 2009, sent from Elisabete Wolfgang, Hearing Administrator, to [redacted] and [redacted].

DDS Exhibit #12

DDS's Fair Hearing Schedule Notice, dated [redacted] 2009, sent from Elisabete Wolfgang, Hearing Administrator, to [redacted] and [redacted].

DDS Exhibit #13

The [redacted] Public School Psychological Report for the Appellant at the Appellant's age of 9 years, [redacted], with the results of a WISC-III and other evaluations, conducted by [redacted], C.A.G.S.,N.C.S.P., dated [redacted] 2000.

DDS Exhibit #14

Psycho-Educational Assessment of the Appellant at the Appellant's age of 12 years, with the results of a WISC-III and other evaluations, conducted by [redacted] Psy.D., dated [redacted] 2003.

DDS Exhibit #15

Psychological Examination Report by [redacted], Ed.D., with results of a WISC-IV and other evaluations, administered on [redacted] 2005 at the Appellants age of 14 years, [redacted].

DDS Exhibit #16

Psychological Evaluation Report by [redacted], Ph.D., with results of a WAIS-IV and other evaluations, administered on [redacted] 2008 at the Appellants age of 17 years, [redacted].

DDS Exhibit #17

The Vineland-II Survey Interview Report conducted on [redacted] 2009 by [redacted], L.E., with the Appellant's mother, Ms. [redacted] as the respondent.

The Appellant presented a total of six documents as evidence, several of which had recently been obtained and therefore not yet reviewed by the Department. The Department objected to allowing the new documents into evidence; the objection was overruled and the hearing was halted to allow the Department adequate time to review the new evidence. The hearing resumed, and the following six exhibits were accepted into evidence:

Appellant Exhibit #1

Letter from Dr. [redacted], Ph.D., dated [redacted] 2009, regarding his assessment of the Appellant's level of functioning.

Appellant Exhibit #2

Psychological evaluation of the Appellant, with results of a WAIS-III, conducted on [redacted] 2009 by Dr. [redacted], Ph.D., at the Appellant's age of 18 years, [redacted].

Appellant Exhibit #3

Letter in support of the Appellant's appeal for DDS services, from [redacted], LCMHC, BCPC, dated [redacted] 2009, detailing [redacted]'s knowledge of the Appellant's deficits, level of practical functioning, and need for services.

Appellant Exhibit #4

Letter in support of the Appellant's appeal for DDS services, from [redacted], CNS, dated [redacted] 2009, listing the Appellants diagnoses and need for services.

Appellant Exhibit #5

Letter in support of the Appellant's appeal for DDS services from [redacted] M.D., the Appellant's current primary care physician, dated [redacted] 2009, detailing the Appellant's history with the Pediatric [redacted] where the Appellant has received medical care since birth.

Appellant Exhibit #6

Letter signed by two practitioners from Psychiatric [redacted], [redacted], RN and [redacted], MD, dated [redacted] 2003, detailing the Appellant's past treatment and diagnoses .

OPENING STATEMENTS:

Appellant's Opening Statement:
The Appellant's mother, Ms. [redacted], spoke on behalf of her son. Ms. [redacted] testified that her son's developmental delays were noted early and that he has received special education supports throughout all of his schooling.

Ms. [redacted] stated that her son needs DDS services as he is not able to care for himself without the constant reminders and support that she must offer on a daily basis. He is not able to mange money, does not remember to takes his medications, and will not perform routine ADL's unless reminded step by step what to do. Ms. [redacted] stated that her son is unaware of social cues; he does not realize when someone is making fun of him. Her son loves animals but is unable to care for them unless he is told step by step what must be done. Ms. [redacted] stated that since her son was a child she has been told by doctors and therapists that he is not up to par. When in school teachers must constantly redirect him; he is very slow and has been described as borderline all through his life. Ms. [redacted] stated that her son is having difficulty in school and may not be able to pass the MCAS, and probably will graduate only with a certificate. Ms. [redacted] stated that her son does not have many friends and has high anxiety about many things. He wants to go to college but is afraid about the need to walk from building to building. His anxiety can become extreme to the point where he simply curls up his body and will not function.

DDS's Opening Statement:
Attorney James Bergeron represented DDS stating that, in accordance with salutatory authority, the Department has set the standards by which individuals are determined eligible; the issue on appeal is whether the Department's determination of the Appellant's ineligibility for supports is consistent with those standards and whether the Department properly followed the procedures established in the Department's eligibility regulations.

Attorney Bergeron stated that the record will show procedure was followed and that the finding of ineligibility is consistent with the Department's regulations. The Appellant has the burden of proof in this matter and must show by a preponderance of the evidence that he meets the Department's definition of Mental Retardation, that he 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 the Appellant has experienced hardships in his life; the evidence in this matter supports a history of psychiatric and emotional difficulties and the need for support in many areas. However, the Department's regulations have a three prong eligibility requirement where all three prongs must be present for eligibility: the first prong is a domicile requirement; the second prong is a cognitive deficit requirement; and the third prong is a functional deficit requirement in adaptive skills. Attorney Bergeron stated that there is no dispute as to the Appellant's domicile nor as to the Appellant's deficiencies in the adaptive skill areas; however, the cognitive prong of sub-average intellectual functioning has not been met. 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. The Appellant has had great fluctuation in his cognitive test scores indicating cognitive performance that exceeds the criteria required for a diagnosis of Mental Retardation as mandated by Department eligibility regulations. Upon a review of all the evidence it was determined that the Appellant was not eligible for Department services as he did not meet all requirements for eligibility.

TESTIMONY:

Ms. [redacted] - testimony on behalf of the Appellant:
Ms. [redacted] testified about her long standing relationship with the Appellant and her knowledge about the Appellant's many functional and intellectual deficits.

Ms. [redacted] recalled the explanation that was given by DDS in denying services to the Appellant; the issue presented by DDS was the fluctuation in the Appellant's IQ test results. Ms. [redacted] testified that she and the Appellant's mother disagreed with DDS's finding and asked for the right to obtain further testing. They requested and received the names of psychologists who DDS agreed would be qualified to conduct such testing and subsequently obtained an evaluation from Dr. [redacted], Ph.D.(Appellant Exhibit #2). Dr. [redacted] was also presented with the Appellant's prior assessments and asked to give his professional opinion as to whether the Appellant is Mentally Retarded. (Appellant Exhibit #1) Ms. [redacted] testified that Dr. [redacted] reviewed all the reports and came to a determination in support of a diagnosis of Mental Retardation; Ms. [redacted] quoted Dr. Howland's response which is documented in a letter addressed to Ms. [redacted] (Appellant Exhibit #1) as follows:

> "...it appears that his overall score was within the Mentally Retarded Range on five out of the seven reports you brought, when his test results were calculated using a standard deviation of ±5, in order to establish acceptable reliability."

Dr. [redacted]'s letter to Ms. [redacted] (Appellant exhibit #1) further states as follows:

> "His scores on a scale of his adaptive abilities with you and his special education teacher as the separate informants indicated that his adaptive abilities are within the Mentally Retarded Range from both the home and school point of view. Consequently, both by IQ test and by his adaptive functioning, his results indicate that his functioning is within the level of Mild Mental Retardation."

And with respect to the concern that the Appellant's scores were negatively impacted by his Posttraumatic Stress Disorder and high anxiety, Dr. [redacted] states as follows:

> "The fact that a person has a Posttraumatic Stress Disorder or high anxiety may have some influence on his scores. However, it is notable that on the subtest most vulnerable to attention and concentration problems, his scores were very consistent with his overall score, suggesting that his treatment is appropriate and would tend to raise rather than lower his IQ score. I hope this letter clarifies my position as to his level of functioning."

Ms. [redacted] testified that in the latest cognitive evaluation that was conducted by Dr. [redacted] (Appellant Exhibit #2), Dr. [redacted] speaks about the Appellant's low GAC Adaptive Behavior score of 42 on the ABAS II and states as follows:

> "His skills in the areas of communication, functional academics and self-direction were far below expectations. He received a similar score on the Social composite (55) where his general social skills and ability to use leisure time fell near the bottom of the scale."

Ms. [redacted] explained that Dr. [redacted] used the WAIS-III rather than the WAIS IV evaluation because there are time requirements that must be followed between the use of the same cognitive instrument in order for the results to be valid and it would have been too soon to retest using the same cognitive test. Ms. [redacted] quoted the following results from the WAIS-III administered by Dr. [redacted] (Appellant Exhibit #2):

> "On the WAIS III, an individually administered intelligence test for adults, [redacted] received a Full Scale IQ of 68, which indicates that his present level of overall intellectual functioning is within the Mentally Retarded Range. This Full Scale score consists of a Verbal IQ of 73, in the Borderline Range and a Performance IQ of 68, in the Mentally Retarded Range. As these scores are quite consistent with those that he has received over the years, they are judged to be valid."

Ms. [redacted] also quoted part of Dr. [redacted]'s summary where it states:

> "His test results indicate that his overall level of cognitive functioning is within the range of Mild Mental Retardation. As described by his mother, his social/adaptive skills are very poor, within the range of Moderate Mental Retardation. Based on these results, it appears that he would be eligible for services from the Department of Developmental Services."

Ms. [redacted] then testified regarding the four letters submitted in support of the Appellant's eligibility for DDS services. (Exhibits, #3, #4, #5, & #6) Ms. [redacted] pointed out the details of the Appellant's multiple adaptive deficits which are documented within these exhibits and stated that the Department does not know the Appellant as well as these people, and although the Appellant has fluctuation in IQ testing, he functions in the Mentally Retarded range. Ms. [redacted] stressed the importance of Dr. [redacted]'s professional opinion and argued that the Appellant should be eligible for services from the Department of Developmental Service.

Ms. [redacted] – On Cross Exam:
Ms. [redacted] confirmed that Appellant Exhibits #1, #2, #3, #4, &#5 were all obtained for the purpose of this Fair Hearing and confirmed that the Department did not instruct the Appellant to get further IQ testing. Ms. [redacted] explained that Dr. [redacted]'s evaluation was done because they (Ms. [redacted] and Ms. [redacted]) felt strongly that the Appellant's documents did support a finding of Mental Retardation. Ms. [redacted] acknowledged that she and Ms. [redacted] are not experts in this area, so they wanted to get a person who was qualified to look at the information and give an opinion that would either agree or disagree with the Department's finding.

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 evaluation of cognitive testing and evaluation of adaptive behavior testing, and also as to his expertise in 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 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 and existing concurrently and related to significant limitations in adaptive functioning. The specific regulations and definitions 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 deficits related to the cognitive deficit; the adaptive deficits must be determined by adaptive scores at 70 or below on approved adaptive behavior assessments used by the Department. Dr. Johnson testified that when making a determination regarding Mental Retardation, the Department must also rule out whether psychiatric illness or some other reason may account for a low cognitive functioning or low adaptive functioning.

Dr. Johnson also testified that in order to be diagnosed with Mental Retardation and in order to meet the criteria for adult eligibility by the Department, the Mental Retardation must manifest during the developmental period, before age 18. Dr. Johnson testified that for most people, Mental Retardation is manifested very early, if not from birth, but the Department's diagnosis also allows for any untoward events that may cause a person to lose

his or her intellectual functioning prior to the age of eighteen; however, the onset of psychiatric illness is not one of those events. Dr. Johnson offered a hypothetical example of such an event by describing a situation where an individual suffers a head trauma at age 17 that results in significant cognitive deficiencies, stating that this person could be diagnosed with Mental Retardation and could be found eligible for services from the Department. On the other hand, if the same incident happened when the person was over age 18, that person could not be found eligible. Dr. Johnson stated that in most cases Mental Retardation is a life long condition.

Dr. Johnson testified that there are some slight differences between his job as a psychologist and that of a diagnostician in the field but for the most part they are the same. Dr. Johnson testified that he must look at the Department's regulatory requirements and primarily uses documents to make a determination regarding eligibility; he looks primarily at comprehensive tests of intellectual functioning, as many as possible, along with adaptive behavior assessment results. Dr. Johnson also looks at documents related to psychiatric information that could mitigate his opinion about the score results. In addition, Dr. Johnson looks at achievement scores to see if they are consistent with the person's presentation in terms of the person's intellectual functioning on IQ tests.

Dr. Johnson testified regarding his knowledge of the Appellant's request for DDS services; he reviewed the steps of the eligibility process reflected in DDS Exhibits #4 through #12 indicating that the protocol was followed as required by Department policy. He summarized the component parts of the process he follows to determine eligibility, testifying that there are several steps: he must look for intellectual deficits with a Full Scale IQ of 70 or below; he must look at whether the intellectual deficits manifested during the developmental period prior to age 18; he must look for adaptive behavior deficits related to cognitive deficits; and finally he must look at whether the cognitive or adaptive behavior deficits are due to psychiatric illness or other causes unrelated to Mental Retardation.

Dr. Johnson testified that his determination of ineligibility for the Appellant was due to the fact that the Appellant had a pattern of IQ testing that demonstrated the capacity to function outside the range of intellectual functioning necessary for a diagnosis of Mental Retardation. There were four IQ tests submitted as part of the application. The first at the Appellant's age of 9 years [redacted] when he received a Verbal Score of 81, a Performance Score of 80 and a Full Scale Score of 78 (DDS Exhibit #13); the second was at age 12 years where there was a significant difference with a Verbal Comprehension Score of 63, a Perceptual Organization Score of 75, a Freedom from Distractibility Score of 69, a Processing Speed Score of 58 and a Full Scale Score of 62 (DDS Exhibit #14); the third was at the age of 14 years, [redacted] where his scores were up again with a Verbal Comprehension Score of 73, a Perceptual Reasoning Score of 79, a Working Memory Score of 94, a Processing Speed Score of 78 and a Full Scale Score of 75 (DDS Exhibit #15); and the fourth was at the age of 17 years [redacted] where his scores were down again with a Verbal Comprehension Score of 80, a Perceptual Reasoning Score of 69, a Working Memory Score of 71, a Processing Speed Score of 71 and a Full Scale Score of 68. (DDS Exhibit #16)

Dr. Johnson testified that the Appellant's adaptive functioning test score from the Vineland II survey report (DDS Exhibit #17) resulted in an overall Adaptive Behavior Composite Score of 64; a score that did not rule him out of DDS eligibility as it was within the regulatory criteria for DDS eligibility. Dr. Johnson testified that an Adaptive Behavior Composite Score of 64 is consistent with someone who has psychiatric difficulties, Mental Retardation or both. Dr. Johnson testified that in his clinical opinion, the Appellant was

someone who was not Mentally Retarded, but someone who suffered from a persistent psychiatric illness that was affecting his performance.

Dr. Johnson testified that in his opinion, as a professional trained in the interpretation of intelligence tests, the variability of the Appellant's performance in IQ test results was not surprising given that the Appellant's initial diagnoses were Attention Deficit Disorder and Posttraumatic Stress Disorder which are disorders causing difficulties with maintaining attention. Dr. Johnson stated that in addition to the Appellant's past diagnosis of attention related disorders, there are recent reports of auditory hallucinations which may be suggestive of a psychosis disorder. On page 1 of Appellant Exhibit #2, under the section titled "Mental Status" the Appellant reports that he hears voices that are "like demons" that tell him to do bad things but that he does not pay attention to these voices. Dr. Johnson acknowledged that he cannot diagnosis the Appellant without knowing him; however, this information regarding the Appellant's mental status was considered by Dr. Johnson in making his assessment concerning the Appellant' cognitive capacity as it relates to these test results.

Dr. Johnson testified that variability in IQ test scores is not typical of someone with Mental Retardation and testified that a person cannot score out of the range of Mental Retardation if he or she does not have the capacity to do so. Dr. Johnson explained that a person must give the proper information or perform the requested task in order to obtain the IQ score, and a person cannot give information that he or she does not know. In contrast, a person can score lower for a variety of reasons for example: psychiatric difficulties, attention difficulties, fatigue, environmental distractions, poor motivation, poor rapport with the examiner, problems with medication, and any other situation that would impact on the person's ability to perform. Dr. Johnson referenced the [redacted] Public School Psychological Report which suggests that the Appellant has exhibited psychiatric systems. (DDS Exhibit #13) This report states as follows: "[redacted] also reported that he thinks that he has a problem "in his head" that says "don't work," and interferes with his effort to learn." This report also documents that the Appellant's behavior improved with medication. Dr. Johnson opined that the Appellant's performance is indicative of a person with a psychiatric disorder; he is someone who demonstrated the ability to function above the level of Mental Retardation in the Borderline Range of intelligence and as his psychiatric illness progressed, he was not able to perform to his cognitive capacity.

Dr. Johnson testified that the WISC is the most widely used comprehensive test of intelligence. It is updated on a regular basis and it has been around for a long period of time. All IQ tests have a mean of 100 and a standard deviation; the WISC IQ tests have a standard deviation of 15 which means that each increase or decrease of 15 points from the mean of 100 will equal one standard deviation. The standard deviations are used to classify people into groups or levels of intelligence, both for superior intelligence for those above the mean of 100, and for sub-average intelligence for those falling below the mean of 100. One essential requirement for a diagnosis of Mental Retardation is a cognitive capacity of two standard deviations below the mean, or a Full Scale IQ Score of 70 or below.

Dr. Johnson discussed the [redacted] 2000 Psychological Report (DDS Exhibit # 13) conducted on the Appellant at the age of 9 years, [redacted]. He stated that a WISC-III was administered with the following results: Verbal Score of 81, a Performance Score of 80 and a Full Scale score of 78 which is classified as Borderline Range of intelligence. Dr. Johnson testified that this score is outside the range of intellectual functioning necessary for a diagnosis of Mental Retardation.

Dr. Johnson discussed the [redacted] 2003 Psycho-Educational Assessment (DDS Exhibit #14) conducted at the Appellant's age of 12 years, [redacted]. He stated that a WISC-III was administered with the following results: Verbal Score of 60, a Performance Score of 69 and a Full Scale score of 62, which represents a significant drop from the results of the previous test. Dr. Johnson stated that this cognitive evaluation reported that the Appellant "appeared to have some difficulty understanding instructions", and that the Appellant appeared "to need very specific instructions in order to understand what is being communicated to him." The evaluation also reported that the Appellant "tended to begin his responses by remaining on task but eventually lost his focus and completed his conversation somewhat off task"(DDS Exhibit #14- Behavioral Observations) These reports of the Appellant's behavior led Dr. Johnson to opine that although the test results were judged by the testing psychologist to be an accurate reflection of the Appellant's level of intellectual *functioning* at that time, it was Dr. Johnson's opinion that it was not an accurate reflection of the Appellant's cognitive *abilities*, as this level of decline, when compared to the previous test results, is beyond any Standard of Error. Since Dr. Johnson did not see evidence of anything that occurred after the Appellant's previous cognitive testing, like a very high fever or significant head trauma, that may contribute to a deterioration in cognitive functioning, it is Dr. Johnson's opinion that these scores represent the fact that the Appellant was not doing well that day and, therefore, indicative of how the Appellant was *functioning* on that particular day. Dr. Johnson testified that the most likely explanation for an IQ drop of over 10 points in the absences of any other explanation is that the Appellant's psychiatric involvement was causing a deterioration of his cognitive functioning.

Dr. Johnson discussed the [redacted] 2005 Psychological Examination (DDS Exhibit #15) conducted at the Appellant's age of 14 years, [redacted]. He stated that a WISC-IV was administered with the following results: Verbal Comprehension Score of 73; Perceptual Reasoning Score of 79; Working Memory Score of 94; Processing Speed Score of 78; and a Full Scale score of 75. This evaluation reports that the Appellant presented with evidence of some difficulty in the area of anger management and unresolved feelings about some past negative social experiences. However, unlike the previous evaluation, this evaluation reports that the Appellant was completely cooperative and appeared to be well focused and capable of giving his best effort during testing, although he did struggle with answering a number of questions. The evaluation reported that the Appellant's overall performance on both intellectual and achievement testing reflected a wide range of scatter but that his overall intellectual functioning, was measured within the Borderline Range of ability. Dr. Johnson testified that these results demonstrate that when the Appellant receives testing at a time when he is doing well psychologically, he is able to demonstrate that he has cognitive capacities outside the range of cognitive functioning necessary for a diagnosis of Mental Retardation and stated that, in his clinical opinion, the Appellant's psychiatric difficulties mitigate his performance on intellectual tests.

Dr. Johnson explained the concept of a Standard Error of Measurement as it relates to the interpretation of test results, testifying that a Standard Error of Measurement theoretically allows one to measure the capacity of the test itself to accurately reflect a person's true IQ score. A Standard Error of Measurement refers to the capacity of the test (not the capacity of the individual) to assess what it is purporting to assess, and calculates the error that it may make when coming up with the IQ score. Dr. Johnson testified that in the older tests, the Standard Error of Measurement was always ± 5, but in the newer tests, charts are used that more accurately determine the Standard Error of Measurement based also on other factors such as the person's age. There are statistical charts that consider the person's age and

determine the probability that the IQ score result on a particular test is a true measurement of that person's IQ. In the case of the Appellant's November 2005 WISC-IV evaluation (Exhibit #15), the Appellant received a Full Scale IQ (FSIQ) Score of 75; the evaluation report states that with a FSIQ of 75 the Appellant's general cognitive ability is within the Borderline Range of intellectual functioning with a 95% confidence interval that the true IQ score is between 71 and 81. Thus in this particular test, at the Appellant's age on the date of testing, the Standard Error of Measurement is not ±5, but more accurately calculated as +6 to – 4.

Dr. Johnson discussed the [redacted] 2008 Psychological Examination (DDS Exhibit #16) conducted at the Appellant's age of 17 years, [redacted]. This psychological examination was requested by the Appellant's psychiatric therapist to evaluate his overall functioning and included the administration of several additional psychological tests. Dr. Johnson stated that a WAIS-IV was used for the cognitive testing portion of the evaluation and resulted in the following scores: Verbal Comprehension Score of 80; Perceptual Reasoning Score of 69; Working Memory Score of 71; Processing Speed Score of 71; and a Full Scale score of 68. Dr. Johnson testified that these results must be evaluated with consideration as to how the Appellant was doing on that particular day and quoted from the report which states as follows:

> "the Full Scale IQ (FSIQ) score is derived from a combination of ten subtest scores and is considered the most representative estimate of global intellectual functioning. [redacted]'s FSIQ score falls within the Deficient Range. However, given his poor ability to attend and concentrate, it is possible that his current score represents an underestimate of his "true" abilities. In other works, his poor attention might have led to his not working up to his full potential during the administration of the WAIS-IV. For this reason, one is cautioned not to accept his current results as being a definitive view of his intellectual abilities."

Dr. Johnson pointed out that the Appellant's scores on the Wide Range Achievement Test (WRAT) which was taken on the same day as the IQ assessment, were also inconsistent with a diagnosis of Mental Retardation; the Appellant tested in the low average range in both Word Reading and Spelling. The WRAT does not assess IQ but does evaluate achievement in these areas, and this level of achievement is beyond what is typical of a person with a diagnosis of Mental Retardation. Dr. Johnson also pointed out that although the Appellant's Full Scale IQ Score on the WAIS IV was a 68, Dr. [redacted], the testing psychologist, stated that he did not suspect Mild Mental Retardation and concluded with a diagnosis of Borderline Intellectual Functioning, not Mental Retardation.

Dr. Johnson discussed the latest Psychological Examination (Appellant Exhibit #2) conducted at the Appellant's age of 18 years, [redacted] by Dr. [redacted], Ph.D., using a WAIT-III. This psychological examination was requested by the Appellant's family and included a request for Dr. [redacted] to offer an opinion as to the Appellant's level of intellectual functioning (Appellant Exhibit #1). Dr. Johnson stated he did not have this evaluation at the time that he made a determination of ineligibility and has reviewed it for the first time today; after doing so, Dr. Johnson has not changed his opinion about eligibility.

Dr. [redacted]'s Evaluation (Appellant Exhibit #2) reports the following scores: Verbal IQ of 73; Performance IQ of 68; and a Full Scale score of 68. Dr. [redacted] determined the Appellant's overall intellectual functioning to be within the Mentally Retarded Range. Dr. Johnson testified that this report also notes that the Appellant sometimes hears voices that

are "like demons" that tell him to do bad things but he does not pay attention to them. Dr. Johnson stated that this can sometimes be a symptom of a psychosis; however, it is also consistent with posttraumatic stress disorder. Dr. Johnson testified that he did not agree with Dr. [redacted]'s findings and specifically disagreed with Dr. [redacted]'s statement that the Appellant's scores were "quite consistent with those that he has received over the years" and therefore "are judged to be valid"(Appellant Exhibit #2, page 2). Dr. Johnson testified that these scores were not consistent with past scores and stated that it is unfortunate that Dr. [redacted] does not refer to the previous test scores that he is speaking about. Dr. Johnson stated that in his clinical opinion, one cannot call these scores consistent with scores that have over a 10 point difference; one may be able to make an argument that the scores are within a Standard Error of Measurement, but they are not consistent with past scores. Dr. Johnson stated that he disagreed with Dr. [redacted]'s opinion in this matter but could not determine from the report whether Dr. [redacted] had reviewed all the cognitive test scores that he (Dr. Johnson) had reviewed.

Dr. Johnson testified that he does not agree with Dr. [redacted]'s statement that the Appellant's "overall score was within the Mentally Retarded Range on five out of the seven reports" .... "when his test results were calculated using a Standard Deviation of ±5, in order to establish acceptable reliability." (Appellant Exhibit #1) Dr. Johnson testified that there is not a Standard Deviation of ±5, and opined that Dr. [redacted] must have meant the Standard Error of Measurement. Notwithstanding this distinction, the point score difference when comparing past tests is greater than 10 and out of the range of a Standard Error of Measurement. Dr. Johnson stated that he respected Dr. [redacted]'s opinion but did not agree with it; Dr. Johnson stated that while Dr. [redacted]'s statement (Appellant Exhibit #2) may be true about posttraumatic stress and anxiety not appearing to impact the most recent IQ test, it is not a true statement for overall testing. Dr. Johnson pointed out that Dr. [redacted] spoke of "level of functioning" and not level of *intellectual* functioning or *intellectual abilities*; there is a distinction between *functioning* and *ability*. Dr. Johnson acknowledged that the Appellant's adaptive functioning is within the range of a Mentally Retarded person; he does not agree that the Appellant's cognitive ability is in the Mental Retardation range.

Dr. Johnson testified that the range of scores across the Appellant's cognitive test results was way beyond the amount that anybody could talk about in terms of a Standard Error of Measurement; a Standard Error of Measurement is a small amount and the differences in scores ranged over 10 points. The Appellant's scores on his first cognitive evaluation (DDS Exhibit #13) and his third cognitive evaluation (DDS Exhibit #15) were out of the range of Mental Retardation. The score on the second cognitive evaluation (DDS #14) was within the range of Mental Retardation but testing was administered on a day when the Appellant was having difficulty, and although the score on the fourth evaluation was within the range of Mental Retardation, the testing psychologist did not diagnosis Mental Retardation based on his assessment that the Appellant had the ability above the level of Mental Retardation. Dr. Johnson testified that after hearing all the testimony and evidence presented today and after meeting the Appellant, he feels confident in his assessment that the Appellant does not have sub-average intellectual functioning.

Dr. Frederick Johnson – On Cross Exam:
Dr. Johnson confirmed that Dr. [redacted] is a licensed psychologist and as such is assumed to be knowledgeable and competent. Nonetheless, Dr. Johnson found some of Dr. [redacted]'s statements to be inaccurate. Dr. Johnson could not determine which documents Dr. [redacted] was referring to in his statement regarding his opinion of the Appellant's cognitive level of functioning since Dr. [redacted] does not make reference to specific tests or dates. Ms. [redacted] established that Dr. [redacted] was given the same documents that were given to DDS as part of the Appellant's application. Even so, Dr. Johnson could not be certain which cognitive tests were being referenced in Appellant Exhibit #1 when Dr. [redacted] speaks of "five of seven reports".

Dr. Johnson testified that he spent a total of perhaps one-half hour speaking with the Appellant in general discussion while at the Informal Hearing and has had an opportunity to speak with the Appellant again today. Dr. Johnson testified that in his opinion, the level of detail with which the Appellant answered questions was not consistent with someone who would meet the criteria for significant sub average intelligence.

Dr. Johnson testified that after spending this time with the Appellant, he did not change the opinion that he had made regarding ineligibility based on the record review that he had conducted. Dr. Johnson acknowledged that the Appellant does have deficits and that he could benefit from services but stated that in his clinical opinion the Appellant does not meet the criteria for service eligibility from the Department.

Dr. Johnson acknowledged that Dr. [redacted] spent more time with the Appellant than he (Dr. Johnson) had but pointed out that he (Dr. Johnson) made his determination based on the record of scores that the Appellant got on valid testing instruments and not based on an interview.

Dr. Johnson stated that he was not making a diagnosis of psychosis for the Appellant, testifying that he was concerned about the possibility and that a possibility of a psychosis would need to be explored by a professional who is treating the Appellant.

Dr. Johnson explained that the Appellant's cognitive test results were examples of the Appellant's capacity to use what he knows and show what he can do. On the two occasions when the Appellant was not doing well, he was unable to show it as well as on the occasions when he was more relaxed, and on those occasions, he was able to perform out of the range that is necessary for a diagnosis of Mental Retardation. Dr. Johnson testified that adaptive behavior scores are separate from cognitive test results; first an intellectual deficit of an IQ of 70 or below must be diagnosed and then the second consideration is whether the intellectual deficit is the cause of a significant adaptive behavioral deficit. The adaptive behavior must be tied to intellectual functioning, and in this case there is reason to believe that the Appellant's psychiatric difficulties contribute to his adaptive behavioral deficits.

Dr. Johnson explained the difference between the Borderline range of intellectual functioning and Mild Mental Retardation testifying that Borderline range is below Average but above the level necessary for a diagnosis of Mental Retardation. A person must be at or below the level of Mild Mental Retardation to be diagnosed with Mental Retardation; the Moderate Range and the Severe Range of Mental Retardation fall below the level of Mild Mental Retardation.

Dr. Frederick Johnson – On Redirect:
Dr. Johnson testified that thirty minutes is not sufficient to provide a diagnosis and that he does not make a diagnosis based on his observations; his diagnosis is made by a review of valid cognitive and adaptive test results and other documents that are submitted when the person applies for DDS adult services. Dr. Johnson testified that although thirty minutes is not sufficient time to make a diagnosis, it is helpful to see the person at an Informal Hearing; it allows for a second chance. Dr. Johnson stated that the Informal Hearing is a time to consider all the facts again, and he will reverse his finding if he obtains new information and determines that he has misjudged eligibility.

Dr. Johnson testified that there is a difference between stating that a person functions in the Mentally Deficient range and that a person's intellectual functioning (or capacity) is in the Mentally Deficient range. Dr. Johnson pointed out that the use of the word *function* does not necessarily mean *intellectual* function; *function* is not the same as *capacity*.

Dr. Frederick Johnson – On Re Cross :
Dr. Johnson testified that he is the only psychologist covering eligibility in the Southeast Region.

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 (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."

FINDINGS and 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 us used and defined by the Department of Developmental Services.

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

- The presence of significant limitations in adaptive functioning is not in question as the Department has acknowledged that the Appellant has limitations in adaptive functioning; the Appellant's adaptive functioning test score from the Vineland II survey report (DDS Exhibit #17) resulted in an overall Adaptive Behavior Composite Score of 64, a score within the regulatory criteria for DDS eligibility. This finding is supported by the evidence presented in Appellant Exhibits #1 through #6 along with oral testimony of the Appellant's mother, [redacted], and the Appellant's Educational Advocate, [redacted].

- The qualifications of the professionals who conducted the five cognitive tests in evidence are not in question, and the IQ tests used were valid tests, administered properly in accordance with professional standards.

- The time of onset within the developmental period is also not in question; the Appellant is currently 18 years of age with cognitive testing conducted during his developmental period.

- The question before us is the level of the Appellant's cognitive deficit, specifically if the Appellant is diagnosed with Mild Mental Retardation which must be established by FSIQ at or below 70 that is not the result of psychiatric illness or other causes unrelated to Mental Retardation.

- The following five cognitive assessments are in evidence:

EXHIBIT	DATE	AGE	TEST	FULL SCALE IQ	IQ CLASSIFICATION
DDS#13	2000	9	WISC-III	78	Borderline
DDS#14	2003	12	WISC-III	62	Mentally Deficient
DDS#15	2005	14	WISC-IV	75	Borderline
DDS#16	2008	17	WAIS-IV	68	Borderline
APP# 2	2009	18	WAIS-III	68	Mild Mental Retardation

- Given that the Appellant has been diagnosed with two disorders that can cause difficulties with maintaining attention, ADHD and Posttraumatic Stress Disorder, more weight was given to DDS Exhibits #13 and #15, the cognitive evaluations conducted at a time when the Appellant was reported to have been cooperative and focused. In both instances the licensed psychologist conducting the tests reported that the Appellant was cooperative and the results were thought to be a reliable indicator of the Appellant's intellectual functioning at the time of the testing. In both instances the FSIQ Scores were above 70 and the Appellant was classified as functioning in the Borderline Range of Intelligence, above the range required for DDS eligibility.

- Less weight was given to DDS Exhibit #14, as the Appellant reportedly had difficulty maintaining focus on the day of the evaluation. The licensed psychologist conducting the tests reported that the Appellant appeared to have some difficulty understanding instructions and that he tended to begin his responses by remaining on task but eventually lost focus and completed his conversations somewhat off task. Although the Appellant was classified as functioning in the Mentally Deficient Range of Intelligence in DDS Exhibit #14 with a FSIQ Score of 62, the weight of this diagnosis must be measured in light of the Appellant's reported difficulties with attending to task on the day of the evaluation. The negative impact of the Appellant's attention difficulties on the FSIQ score of Exhibit #14 is supported by the fact that the FSIQ score result represents a 16 point drop from the previous FSIQ, an amount that is beyond what would typically be found from one IQ test to the next.

- Little weight in making my recommended decision was given to the FSIQ score result of 68 noted in DDS Exhibit #16 and more weight was given to the testing psychologist's professional opinion that the Appellant was functioning in the Borderline Range of Intelligence. The Appellant received a FSIQ Score of 68 in DDS Exhibit #16; however, the licensed psychologist conducting the tests questioned the reliability of this cognitive ability test result. He cautioned that, because the Appellant struggled to attend to task, and although the FSIQ score fell within the Deficient Range, it was possible that the FSIQ score represented an underestimate of the Appellant's "true" abilities. As a result, the testing psychologist classified the Appellant in the Borderline Range of Intelligence, and *not* in the range of Mild Mental Retardation which would have been the expected classification for a FSIQ of 68.

- Consideration was given to the last cognitive evaluation in evidence, Appellant Exhibit #2, where a FSIQ of 68 was reported. While this evaluation resulted in a diagnosis of Mild Mental Retardation, the report also notes that the Appellant sometimes hears voices that are "like demons" that tell him to do bad things, but that he does not pay attention to them. Therefore, the possibility that the Appellant's FSIQ score was negatively impacted by his psychological problems was considered when factoring in the results of this evaluation.

- The following two professional opinions as to the Appellant's overall level of cognitive functioning are in evidence:

PSYCHOLOGIST	EVIDENCE	IQ CLASSIFICATION
Dr. Frederick Johnson	Oral Testimony & DDS Exhibit #5	Borderline
Dr. [redacted]	Appellant Exhibit #1	Mild Mental Retardation

- Both Dr. Frederick Johnson and Dr. [redacted] are qualified by education, licensure, and experience to make a diagnosis regarding the overall cognitive functioning of the Appellant. Dr. Frederick Johnson has additional experience and expertise in the interpretation of DDS regulations as they pertain to DDS eligibility for services.

- Dr. Frederick Johnson made his determination as to the overall cognitive functioning of the Appellant after reviewing four cognitive evaluations (DDS Exhibit #14 through DDS #16) and other documents submitted with the Appellant's application; he did not change his initial determination after meeting the Appellant and reviewing the latest cognitive evaluation (Appellant Exhibit #2) and other exhibits that were submitted into evidence at the Fair Hearing (Appellant Exhibits #3, #4, &#5). Dr. [redacted] made his determination as to the overall cognitive functioning of the Appellant after administering a WAIS-III cognitive evaluation to the Appellant and after reviewing seven reports presented to him for review by the Appellant's mother. (see Appellant Exhibit #1)

- Little weight in making my recommended decision was given to Dr. [redacted]'s overall assessment of the Appellant's cognitive function for the following reasons:

  1. Appellant Exhibit #1 is not a comprehensive report ; Dr. [redacted]'s written opinion (Appellant Exhibit #1) does not adequately discuss the reports that he reviewed in making his determination as to a diagnosis of Mild Mental Retardation. Dr. [redacted] states in Appellant Exhibit #1:

     "As you brought in his prior test results, it appears that his overall score was within the Mentally Retarded Range on five out of the seven reports you brought, when his test results were calculated using a standard deviation of ± 5, in order to establish acceptable reliability."

     The lack of detail in Dr. [redacted]'s written opinion is problematic in that it is not clear which five documents he considered and which two documents were not part of his assessment. Although Ms. [redacted] has testified that the documents given to Dr. [redacted] were the same documents submitted to DDS for eligibility, it remains unclear as to which cognitive test results Dr. [redacted] is referring because he refers to five of seven "reports" in his statement and does not otherwise identify those reports. There were initially four cognitive test results submitted to DDS, and when counting Dr. [redacted]'s most recent cognitive evaluation, there are a total of five cognitive tests results to be considered when making a determination as to the Appellant's overall IQ. Dr. [redacted] does not make clear if he has considered all five cognitive evaluations

in making his statement regarding the Mentally Retarded Range.

2. In evaluating Dr. [redacted]'s statement, assuming that Dr. [redacted] did consider all five cognitive evaluations as would be required to make a proper diagnosis, his assessment is incorrect when he states "the overall score was within the Mentally Retarded Range.....when .... test results were calculated using a standard deviation of ± 5, in order to establish acceptable reliability." The first cognitive evaluation conducted when the Appellant was nine years old, DDS Exhibit #13, resulted in a FSIQ score of 78, greater than 5 points above 70 and therefore not within the Mentally Retarded Range even when allowing 5 additional points as suggested by Dr. [redacted]. And the third cognitive evaluation conducted when the Appellant was fourteen years old, DDS Exhibit #15, resulted in a FSIQ score of 75 with the testing psychologist reporting that this score represented a 95% confidence interval that the Appellant's true IQ score is between 71 and 81. Dr. [redacted] is incorrect to state that the FSIQ score in this particular test should be assessed for reliability by using ±5; the testing psychologist correctly referenced the proper confidence interval for a Standard Error of Measurement calculated as +6 to – 4 for this test. Even when allowing for the lowest score noted within this confidence interval for a Standard Error of Measurement, the score is above the range necessary for a diagnosis of Mentally Retardation. Therefore, two of the five cognitive tests conducted on the Appellant are outside the range of Mental Retardation even when allowing for a Standard Error of Measurement as suggested by Dr. [redacted].

3. Dr. [redacted]'s statement regarding the probable lack of impact of the Appellant's Posttraumatic Stress Disorder and high anxiety on the IQ score of the cognitive test he (Dr. [redacted]) recently administered to the Appellant (Appellant Exhibit #2), while possibly true for that particular IQ result, cannot be assumed true for all the other cognitive tests administered to the Appellant. Dr. [redacted] does not address the fact that, at least in one instance, according to the testing psychologist (DDS Exhibit #16), the Appellant's disorders that cause him to lose focus, did most likely impact his scores, and, as a result, the testing psychologist made a diagnosis of Borderline cognitive function rather than Mental Retardation, even thought the FSIQ score of this evaluation was determined to be a FSIQ of 68, a score that falls within the range of Mental Retardation.

- Dr. Frederick Johnson's assessment of the Appellant's overall cognitive functioning was found to be, more likely than not, the true assessment of the Appellant's level of intelligence for the following reasons:

1. A person cannot score out of the range of Mental Retardation on approved cognitive tests if that person does not have the capacity to do so; a person must give the proper information or perform the requested task in order to obtain credit on cognitive tests. A person may perform poorer on a test due to multiple reasons, but cannot perform better than his or her ability. The Appellant scored in the Borderline Range of cognition, above the level required for a diagnosis of Mental Retardation, on two of the IQ tests in evidence. (DDS Exhibit #13 &#15)

2. The significant discrepancy of 16 points between cognitive assessment results reported with the FSIQ of 78 from the first WISC-III administered (DDS Exhibits #13) and the FSIQ of 62 on the second WISC-III administered (DDS Exhibits #14), is not typical of someone with Mental Retardation. The variability in IQ test score results with the third cognitive assessment (DDS Exhibit #15) presenting up again by 13 points to a FSIQ of 75 and then back down by 7 points on the fourth and fifth cognitive assessments (DDS Exhibits #15 &#16), is atypical of Mental Retardation which characteristically manifests with a more consistent score pattern. With this type of variability, other causative factors that could possible mitigate the test results must be carefully considered.

3. There exists adequate evidence to determine that the Appellant's psychiatric disorders, more likely than not, did negatively impact the FSIQ result of the second cognitive test, DDS Exhibit #14, and the fourth cognitive test, DDS Exhibit #16. The licensed psychologist conducting the second cognitive test (DDS Exhibit #14) which resulted in a FSIQ of 62, in the Mentally Deficient range, reported that the Appellant had difficulty understanding instructions and with maintaining focus. Similarly, the licensed psychologist conducting the fourth cognitive test (DDS Exhibit #16) which resulted in a FSIQ of 68, reported that the Appellant struggled to attend to task at the time of testing and cautioned that the FSIQ score possibly represented an underestimate of the Appellant's "true" abilities. This testing psychologist questioned the reliability of the FSIQ results and did not diagnose Mild Mental Retardation as would be expected with a FSIQ of 68; in his professional judgment, after considering both cognitive and achievement test results, the testing psychologist diagnosed the Appellant with Borderline Intellectual Functioning.

4. The Appellant's achievement scores in the Word Reading and Spelling sections of the Wide Range Achievement Test (DDS Exhibit #16), which was conducted as part of the Appellant's 2008 Psychological Assessment, fell in the low Average range. These test results are not consistent with the level of achievement typically seen in a person diagnosed with Mental Retardation.

5. Although the fifth cognitive test (Appellant Exhibit #2) resulted in a diagnosis of Mild Mental Retardation, the report notes that the Appellant sometimes hears voices that are "like demons" that tell him to do bad things. Dr. Johnson, a psychologist who is qualified in this area, has testified that this can sometimes be a symptom of a psychosis but that it is also consistent with posttraumatic stress disorder. In either case, it is logical to assume that the Appellant's ability to perform could be mitigated by his underlying psychiatric or attention deficit disorder and given that the results in this cognitive evaluation test were not consistent with past test results, less weight was afforded to this finding.

In summary, upon a comprehensive review of the oral testimony and documentary evidence submitted in this matter, I find that the preponderance of the evidence points to the Department's interpretation of the Appellant's overall cognitive ability falling outside the range required for eligibility of DDS services. The Appellant's significant deficit in adaptive function is not in and of itself, indicative of the presence of Mental Retardation as the Department eligibility regulations require that Mental Retardation exists concurrently with significant limitations in adaptive function and that the significant limitations in adaptive functioning are related to a diagnosis of Mental Retardation. The Department has interpreted their regulation to mean that the first requirement for eligibility is a diagnosis of Mental Retardation and a second requirement is significant limitations in adaptive functioning related to the Mental Retardation. Thus, a finding of DDS eligibility cannot be made without an overall cognitive ability in the range indicated by a valid FSIQ score of 70 or below. As the Appellant has not met the burden of proof in this matter, I cannot find for the Appellant. I further find that the evidence presented by DDS supports a finding that DDS followed established standards and procedures in considering the Appellant's eligibility. Therefore, DDS's determination of ineligibly 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