2010-9

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

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: Elizabeth Silver, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Patricia Oney, Assistant General Counsel
Damien Arthur, Regional Eligibility Manager
Bradley Crenshaw, Psychologist
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF DEVELOPMENTAL SERVICES

In Re: Appeal of [redacted]

This decision is issued pursuant to MGL Chapter 30A and the regulations promulgated thereto, 1·15 CMR 6.00 *et. seq.* A fair hearing was held on [redacted] 2010, at the DDS[1] [redacted] in [redacted], MA.

Those present and participating at the hearing:

[redacted]	Appellant
[redacted]	Father of Appellant
[redacted]	Foster Mother of Appellant
[redacted]	Case Manager, [redacted]
[redacted]	Clinician, [redacted]
Bryant Cortés	Social Worker, DCF
[redacted]	Counselor, [redacted] School Counselor
Bradley Crenshaw	Psychologist for DDS
Patricia Oney	Attorney for DDS

At the hearing, the Department submitted Exhibits 1-13 and the Appellant submitted Exhibit 14. The hearing lasted approximately two and a half hours. [redacted]., [redacted], [redacted], Bryant Cortés, and [redacted] testified on behalf of the Appellant, who also added some testimony, and Dr. Crenshaw testified on behalf of the Department.

ISSUE PRESENTED:

The issue for this hearing is whether the Appellant, [redacted]. meets the Department's definition of mental retardation and is thereby eligible for DDS services.

SUMMARY OF THE EVIDENCE

Exhibit 1. Package of correspondence between the Department and the Appellant's family, including Department's [redacted], 2009 Notice of Receipt of Fair Hearing Request; Department's [redacted] 2009 letter post-Informal Conference denying eligibility; [redacted] 2009 Informal Conference sign-in; Department's [redacted] 2009 notice of Informal Conference; correspondence dated [redacted], 2009 and [redacted] 2009 regarding who can initiate an appeal; [redacted] 2009 appeal of Department's denial; and Department's [redacted] 2009 letter denying DDS eligibility.

Exhibit 2. Curriculum Vitae of Brad Crenshaw.

Exhibit 3. Appellant's [redacted] 2008 Application for DMR Eligibility.

Exhibit 4. Eligibility Report prepared by Dr. Bradley Crenshaw. Dr. Crenshaw reviewed the evaluations in the record and noted the split between the Appellant's verbal performances, which were consistently and substantially impaired, and his Visual-Spatial organization and planning, which scores were mostly in the Low Average range and higher than the verbal scores. Dr. Crenshaw indicated the split in scores was consistent with a profound Verbal Learning Disability with a co-morbid ADHD. Based on these

[1] On June 30, 2009, the Department changed its name from the Department of Mental Retardation (DMR) to the Department of Developmental Services. I will refer to the Department's new name in this decision.

determinations, Dr. Crenshaw recommended that the Appellant did not meet the Department's criteria for eligibility.

Exhibit 5. [redacted] 2005 Psychological Evaluation done by [redacted], M.Ed., School Psychology Intern, and [redacted], Ed.D., School Psychologist, Educational Psychologist. The Appellant was 16 years [redacted] at the time, and in an ungraded class at the [redacted] Program, [redacted], in [redacted], MA. He had been referred for his three-year evaluation.

During the evaluation the Appellant showed frustration with the tasks by complaining that the examiner was "deep frying his brain." However, the examiner noted that this frustration was momentary and the Appellant was cooperative and attentive throughout the evaluation.

The examiners administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) which yielded a Full Scale IQ score of 50 (Extremely Low range), and Index scores as follows: Verbal Comprehension (VCI) 57 (Extremely Low range), Perceptual Reasoning (PRI) 59 (Extremely Low range), Working Memory (WMI) 56 (Extremely Low range) and Processing Speed (PSI) 65 (Extremely Low range). In summary, the examiners stated that the Appellant's general cognitive ability was in the Extremely Low range, and that the educational diagnosis was consistent with Cognitive Deficiency.

Exhibit 6. Psychological Evaluation done on [redacted] and [redacted] 2008 when the Appellant was 19 years [redacted] old and in the 12th grade [redacted], School Psychology Practicum Student, and [redacted], Ed.D., LMHC, Licensed School Psychologist, Licensed Educational Psychologist, and Licensed Mental Health Counselor, evaluated the Appellant to determine his eligibility for special education and for transition planning.

The examiners reported on some of the Appellant's background and prior test scores. At his birth on [redacted] 1989, he required an emergency caesarian section. He had somewhat delayed developmental milestones. He began receiving special education services in 1998 when he was in the second grade.[2] At that time he was given a WISC-III on which he had a Verbal IQ score of 65 (1st percentile) a Performance IQ score of 80 (9th percentile), and a Working Memory score of 64 (1st percentile). In 2000 he was diagnosed with Attention Deficit Hyperactive Disorder (ADHD). In 2001 he was reevaluated and again given the WISC-III, which yielded a VIQ of 63, a PIQ of 82, an FDI of 69, and a PSI of 67. The 2005 WISC-IV evaluation and scores were also noted.

In the 2008 evaluation the examiners administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). During testing the Appellant was attentive and cooperative so test results were considered to have been a valid representation of the Appellant's abilities. Test scores were Verbal IQ 70 (low end borderline range), Performance IQ 79 (borderline), and Full Scale IQ 72 (borderline). Index scores were Verbal Comprehension 74, Perceptual Organization 86, Working Memory 69, and Processing Speed 69.

The examiners also administered the Adaptive Behavior Assessment System, Second Edition Adult Form and Teacher Form (ABAS-II). The results of the Caregiver form were Global Adaptive Composite (GAC) 93, Conceptual 86, Social 98, and Practical 94. The scores from the Teacher form were GAC 83, Conceptual 87, Social 78, and Practical 83. These scores all fell in the average to low-average range except Social on the teacher form, which was borderline. Both the caregiver and teacher ratings were higher than what would have been expected given the Appellant's cognitive functioning.

In summary, the examiners concluded that cognitive testing consistently placed the Appellant in the cognitive deficient range of ability, and that these results were consistent with prior evaluations.

[2] A later report indicted that the Appellant began receiving special education in pre-school. See, Exhibit 14.

Exhibits 7, 9-12. These are reports are related to the Appellant's education. Exhibit 7 is a Progress Report on the Appellant's [redacted]08 – [redacted]09 IEP. Exhibit 9 is the IEP itself. Among other things it reports the results of the Kaufman Test of Educational Achievement II from [redacted], 2008 (see Exhibit 13, *infra*, for details). This exhibit also notes that the Appellant was hindered by difficulties with organizational skills and attention deficits, and that the Appellant understood things better when they were read orally to him. Exhibit 10 is a [redacted] 2008 Individual Service Plan from the [redacted] that includes a then-current diagnosis on Axis II of Moderate Mental Retardation and an Axis I diagnosis of ADHD, predominantly Hyperactive-Impulsive. Exhibit 11 is an [redacted] 2008 Medical Interim Health Report from [redacted]. This report includes the same diagnoses as noted in Exhibit 11 (Moderate Mental Retardation). Exhibit 12, also dated [redacted], 2008, provides the Appellant's Current Treatment Goals.

Exhibit 8. Vineland-II Parent/Caregiver Rating Form Report dated [redacted] 2008 when the Appellant was 19 years [redacted]. The Appellant's scores on the Vineland-II were Communication 66 (low), Daily Living Skills 63 (low), Socialization 71 (moderately low), and Adaptive Behavior Composite 64 (low).

Exhibit 13. Kaufman Test of Educational Achievement, Second Edition (KTEA-II) administered to the Appellant when he was 19 years [redacted] and in the 11th grade. His Comprehensive Achievement Composite score was 73 (below average). Other scores were as follows:

Reading Composite	76 (Below average)		
Letter and Word Recognition	87 (Average)	AE	14.0
Reading Comprehension	70 (Below average)	AE	10.8
Math Composite	60 (Lower extreme)		
Math Concepts/Applications	58 (Lower extreme)	AE	8.0
Math Computation	56 (Lower extreme)	AE	7.9
Written Language Composite	83 (Below average)		
Written Expression	85 (Average)	AE	12.8
Spelling	84 (Below average)	AE	12.0
Oral language Composite	85 (Average)		
Listening Comprehension	96 (Average)	AE	15.4
Oral Expression	79 (Below average)	AE	11.4

Exhibit 14. [redacted] and [redacted] 2010 Psychological Evaluation administered by [redacted], MA, Licensed School Psychologist, when the Appellant was in 12th grade at [redacted] School. He was 20 years [redacted] at the time of testing. Ms. [redacted] provided more details regarding the Appellant's family and developmental history as well as his educational background.

As a young child the Appellant lived with his parents and his younger brother, [redacted], who died at the age of five from leukemia. The Appellant had been a bone marrow transplant donor for [redacted] who improved somewhat after the transplant but later died. The Appellant's parents divorced in [redacted] and the Appellant lived with his father. His father remarried but again divorced in [redacted]. In [redacted] Mr. [redacted] married a woman with two children and there were two more children born to that marriage. When he was about 16, the Appellant exhibited inappropriate sexual behavior with his six-year old step-brother. Thereafter the Appellant was placed in a residential setting at the [redacted] School in the 11th grade. He began attending [redacted] in [redacted] 2009, and began living with his foster mother the following month.

This report says the Appellant began receiving special education services in pre-school. He had multiple educational placements and marked cognitive and social deficits throughout his education and he performed significantly below grade average. In [redacted] 2010, the Appellant was identified as having mild intellectual disabilities as characterized by general delays in cognitive functioning, academic performance, attention, short-term memory and social skills. He was not able to complete any academic tasks independently.

A report of the Appellant's psychiatric history includes diagnoses provided by [redacted], Licensed Mental Health Counselor at the [redacted] These include Sexual Abuse of a Child, ADHD predominately Hyperactive-Impulsive, Rule Out Tourette's Disorder, R/O Expressive Language Disorder and Mild mental retardation. It was also noted that the Appellant's psychiatric history was complicated by his brother's death.

Ms. [redacted] administered the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV). She reported that at the start of testing the Appellant appeared nervous. He worked steadily and completed all of the tasks. During cognitive testing he encountered significant difficulty while completing the Digit Span, and he had trouble focusing. Overall the Appellant appeared to make good efforts so the results appeared to be an accurate representation of his cognitive and adaptive functioning.

The WAIS-IV yielded a Full Scale score of 70 (Borderline). Index scores were VCI 70 (Borderline), PRI 81 (Low Average), WMI 66 (Extremely Low), and PSI 81 (Low Average). These scores showed significant cognitive variability.

Ms. [redacted] also administered the Vineland Adaptive Behavior Scale Second Edition (VABS II) to the Appellant's foster parent, which yielded an Adaptive Composite Score of 60 placing him in the Low range of adaptive functioning. Overall the Appellant was functioning in the mild deficit range of adaptive functioning and was developmentally delayed in the domains of communication, daily living skills, living in the community and social skills. Ms. [redacted] noted that these findings were inconsistent with his cognitive functioning, but they substantiated the Appellant's inability to live independently.

In her Impressions, Ms. [redacted] noted that the results showed the Appellant to be demonstrating a range of Low Average to developmentally delayed intellectual functioning. He also demonstrated a profile of significant cognitive variability that is often found in individuals with specific learning disabilities. His Full Scale IQ placed the Appellant in the bottom of the Borderline range, and he had marked deficits in overall adaptive functioning. Cognitive findings also confirmed marked deficits in sustaining attention, which significantly reduced the Appellant's ability to take in, store, process and utilize information in an efficient and orderly manner.

TESTIMONY

Exhibits 1-14 were entered into the record. [redacted] agreed to be the spokesperson for the Appellant. Opening statements were waived.

Mr. [redacted] testified on behalf of his son. He said the Appellant's birth was difficult and he was born by emergency c-section. He was without oxygen for an extended period of time and his heart rate was very low. His milestones, including language, were late. Mr. [redacted] said he began to notice delays when the Appellant's brother, who was three years younger, surpassed the Appellant in verbal skills. The Appellant was late in reading, talking, and toileting. He was held back in pre-school and started receiving special education around that time. When the Appellant began first grade he was in a separate classroom and although the schools apparently tried mainstreaming occasionally, the Appellant mostly was separated with individualized instruction throughout his schooling. For high school the Appellant attended [redacted] program, a vocational school.

When Mr. [redacted] remarried, he saw differences between the Appellant's functioning and that of his step-children. He realized that the Appellant wasn't able to deal with any change in rules or routine. He would manage if the routine was fixed and unchanging, but had no ability to adjust to anything different. An example of this involved a strict rule that if the Appellant rode his bike he had to put it back or he'd be grounded for a week. One day he rode into a bush with a bee's nest and was getting stung, but didn't run

away because he knew he had to bring the bike back and put it away. Mr. [redacted] said the Appellant still doesn't understand time – he thinks 1:00 in the afternoon is earlier than 11:00 because it's a lower number. Mr. [redacted] likened the Appellant's functioning to a computer that isn't working but inside it has some functional abilities.

[redacted] has been the Appellant's foster mother since [redacted] 2009. She said it has been hard getting the Appellant to do things at a steady pace and he needs a constant reminder for everything including picking up his room and brushing his teeth. She posted a chart on the refrigerator that lists the Appellant's chores so he can see what he needs to do. She said the Appellant needs constant cueing. In the last couple of weeks, he has started getting laundry done in less than five hours. It's a question of keeping him focused. She is trying to teach the Appellant about money and getting change. He would not be able to figure out whether the amount of change is accurate. She said he cannot cook. She said he is just getting to the point of thinking about other people besides himself.

The Appellant answered a few questions from the hearing officer. He said he is currently in school at [redacted] in [redacted] and takes classes in banking, math, science and history. His foster mother had to cue him to answer the question. He didn't answer which class he liked the most, but said he disliked history the most. He said he was not working. When asked if he had friends he said there were two people on the bus with whom he was friendly. He said when school is done he wants to work.

[redacted] works for the [redacted], the agency for foster care. She has a master's of arts degree in psychology. Ms. [redacted] is the Appellant's clinician and has worked with the Appellant for about a year. She said the Appellant has individual therapy once a week for an hour and group therapy once a week for an hour and a half. She testified that the Appellant's diagnoses include ADHD, R/O Tourette's Disorder and R/O Expressive Language Disorder.

Ms. [redacted] testified that the Appellant's adaptive functioning is low. She works with him constantly on basic skills such as brushing his teeth, showering, setting the table for dinner, saying please and thank you, and wearing appropriate clothes. Ms. [redacted] said the Appellant's short-term memory is limited and he needs to be cued constantly. She said he would bring in one grocery bag and then go to his room and forget about the other bags.

Ms. [redacted] also testified that the Appellant has limited social skills. He will make inappropriate comments at times because he doesn't understand the social situation. She said he had a female friend a while ago and struggled with boundary issues. Apparently he called her too often and talked to her too much. He did not understand that it was inappropriate to be on phone with her constantly. The Appellant's father said this woman was living with another man.

Ms. [redacted] echoed what Ms. [redacted] said regarding the Appellant's lack of boundaries. She also said he really doesn't have friends and never does anything with other people.

Bryant Cortés, a social worker in the [redacted] Department of Children and Families office, testified that he had worked with the Appellant for almost three years. Most of their interactions had been limited to review meetings with collateral providers. Mr. Cortés also meets with the Appellant individually and with his caseworker to get updated. When they meet individually the Appellant is calmer and able to engage, although he is still uncertain about what to say. Mr. Cortés said that the Appellant was anxious in group settings. He said one of the Appellant's main interests in cars and he seems to have a vast knowledge of them.

[redacted], a Licensed Mental Health Counselor, is employed by [redacted] and has worked as a School Counselor at [redacted] School since [redacted] 2009. Previously she worked in the foster care unit at [redacted] and was the supervisor on the Appellant's case when

he came to their agency in [redacted] 2009 for foster care. She has a master's degree in science and focused her education on working with clients with developmental disabilities. She interned at the [redacted] for a year and continued to work there as a fee for service clinician.

Ms. [redacted] aid she works with students in the Appellant's Life Skills classroom a few times each day. There are eight students in the separated class ranging from 17 to 20 years old, plus two teachers, an aide, and a one-on-one assistant. The students run a breakfast bar, a school store, and do laundry for the basketball team. Ms. [redacted] said the Appellant is "the quiet one." He needs a lot of prompting to do tasks and he needs guidance with simple step instructions. She said it is hard for the Appellant to work independently.

Ms. [redacted] reviewed the most recent psychological evaluation (Exh 14) in which the Appellant's Working Memory score was in the extremely low range. She also noted that the Perceptual Reasoning and Processing Speed scores were lower average and the Full Scale IQ score of 70 was in the low end of the borderline range.

Ms. [redacted] also reviewed the Appellant's adaptive functioning results of the Vineland, which was rated by Ms. [redacted]. The Appellant had a composite score of 60, which was in the lower range of adaptive functioning. She reviewed the examiner's comments that the Appellant's adaptive functioning was inconsistent with his cognitive functioning given the 10-point difference in scores. Ms. [redacted] said that adaptively the Appellant was functioning in the mild deficit range and that he's delayed in the domains of communication, receptive expression and written language, daily living skills, and living in the community and social skills, and these adaptive functioning results substantiate that the Appellant was not capable of independently caring for himself in social, academic, home, and community settings.

Dr. Bradley Crenshaw testified on behalf of the Department. He was qualified as an expert witness. After first reviewing the Department's regulatory criteria, he reviewed his Eligibility Report which included the scores of several cognitive tests. Dr. Crenshaw said the two factors that centrally measure intellect are the Verbal Comprehension Index and the Perceptual Reasoning Index. In the Appellant's case, his test scores show a consistent pattern of compromised verbal skills. His Verbal scores across tests were: 65 (WISC-III 1998); 63 (WISC-III 2001); 57 (WISC-IV 2005); 74 (WAIS-III 2008); and 70 (2010 WAIS-IV). The other part of the Appellant's intellectual pattern was processing skills. His scores, which were in the low average range, were 80 (WISC-III 1998); 82 (WISC-III 2001); 59 (WISC-IV 2005); 86 (WAIS-III 2008); and 79 (2010 WAIS-IV).

Dr. Crenshaw explained that these results show variable intellectual skills. He said when there is a split between intellectual factors, averaging the scores doesn't describe what's really going on intellectually but instead disguises particular areas of impairment as well as particular areas of strength.

Dr. Crenshaw also noted that if an individual's cognitive functioning were the only issue, the behavioral and cognitive scores would correlate since these are standardized measures. But where the behavioral and cognitive test scores don't correlate, as in the Appellant's case, it signifies something non-cognitive compromising his behavior. Because of this split in scores, from the Department's perspective the Full Scale scores don't pertain.

The latest Working Memory score of 66 showed that the Appellant's attention span is very fragile, which is what everyone was talking about when they said they could not get him to focus.

Dr. Crenshaw reviewed testing from [redacted] 2008 (Exh 6) including the prior testing reported in this evaluation. In 1998 on the WISC-III the Appellant's scores were Verbal 65 (1st percentile), Performance 80 (9th percentile, low-average), and Working Memory 64 (1st percentile). The examiner did not report a Full Scale IQ or the Processing Speed score. In 2000 the Appellant was diagnosed with ADHD. Dr. Crenshaw

said the Appellant still has this diagnosis and it continues to influence his performance because of his distractibility. In 2001 on the WISC-III the Appellant's scores were Verbal 63, Performance 82, Freedom from Distractibility (FDI) 69 (2nd percentile), Processing Speed (PSI) 67 (1st percentile). The 2001 and 1998 testing results were comparable. In 2005 results on the WISC-IV were Verbal Comprehension (VCI) 57, Perceptual Reasoning (PRI) 59, Working Memory (WMI) 56, Processing Speed (PSI) 65, and Full Scale 50. Dr. Crenshaw said this test was an outlier.

Dr. Crenshaw reviewed the [redacted] 2008 testing in which the Appellant was administered the WAIS-III. His IQ scores were Verbal 70, Performance 79, and Full Scale 72. The factor scores were Verbal Comprehension 74, Perceptual Organization 86, Working Memory 69, and Processing Speed 69. Dr. Crenshaw said the nine point difference between the Verbal and Performance scores statistically was not a significant difference, but it was important to look at the factor scores, which are the pure scores. The Verbal IQ combines the Working Memory (69) with Verbal Comprehension (74). Thus the Verbal IQ score factors in attentional data, which is why the Appellant's Verbal score is 70 as opposed to 74. It's the same with Performance – when the Appellant's speed (PSI 69) was factored in with performance (POI 86), the score was 79. The best read on intellect is the factors scores.

Dr. Crenshaw reviewed the Appellant's most recent evaluation from [redacted] 2010 (Exh 14). He noted that the Appellant's verbal skills were lower than in prior testing, and that this was a major area of the Appellant's deficit. He said the Appellant's scores fluctuate because he doesn't have secure cognitive control over his verbal skills, which is part of his disorder. In his nonverbal scores, the Appellant had low average skills, which was consistent with prior testing.

Dr. Crenshaw also reviewed the behavioral assessments in the record. There were two Vinelands and an ABAS-II. The ABAS-II (Exh 6) was rated by the Appellant's father and a teacher. As rated by his father, the Appellant's Global Adaptive Composite score was 93, which is average. The other scores were Conceptual 86, Social 98, and Practical 94, all average numbers. The teacher ratings yielded a GAC of 83, Conceptual 87, Social 78, and Practical 83. Dr. Crenshaw noted that the adaptive scores were higher than the cognitive scores so the two were not congruent.

In conclusion, Dr. Crenshaw said he did not think the Appellant met DDS eligibility criteria because looking at the factor scores, he has residual skills above the Department's threshold.

FINDINGS AND CONCLUSIONS

The Law

M.G.L c. 123B §1 defines a mentally retarded person as follows:

[A] person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community.

A mentally retarded person may be considered mentally ill provided that no mentally retarded person shall be considered mentally ill solely by virtue of his mental retardation.

115 CMR 6.04 sets forth the general eligibility requirements for DDS services. In relevant part these provide:

> (1) Persons who are 18 years of age or older are eligible for supports provided, purchased, or arranged by the Department if the person:

(a) is domiciled in the Commonwealth; and
(b) is a person with mental retardation as defined in 115 CMR 2.01. . . .

115 CMR 2.01 provides the following definitions:

Mental Retardation

Mental Retardation means significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. A person with mental retardation may be considered to be mentally ill as defined in 104 CMR (Department of Mental Health), provided that no person with mental retardation shall be considered to be mentally ill solely by reason of his or her mental retardation.

Significantly Sub-average Intellectual Functioning

Significantly Sub-average Intellectual Functioning means an intelligence test score that is indicated by a score of 70 or below as determined from the findings of assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners.

Significant Limitations in Adaptive Functioning

An overall composite adaptive functioning limitation that is two standard deviations below the mean or adaptive functioning limitations in two out of three domains at 1.5 standard deviations below the mean of the appropriate norming sample determined from the findings of assessment using a comprehensive, standardized measure of adaptive behavior, interpreted by a qualified practitioner. The domains of adaptive functioning that are assessed shall be:
(a) areas of independent living/practical skills;
(b) cognitive, communication and academic/conceptual skills; and
(c) social competence/social skills.

115 CMR 6.34 sets the standard and burden of proof. In relevant part these provide:

(1) - Standard of Proof. The standard of proof on all issues shall be a preponderance of the evidence.
(2) - Burden of Proof. The burden of proof shall be on the appellant . . . .

Findings of Fact and Conclusions of Law

The issue in this case is whether the Appellant meets the Department's definition of mental retardation. He applied for DDS services on [redacted] 2008. Born [redacted] 1989, the Appellant is now 20 years old. He meets the domicile requirement of the Department. For the reasons set forth below, I find that the Appellant does not meet the Department's definition of mental retardation.

The Appellant's birth was notable for an emergency caesarean section and oxygen deprivation for some period of time. His father noted developmental delays in the Appellant's speech, toileting, and reading. In his early years, the Appellant's three-year younger brother [redacted] was seriously ill and then died at the age of five. The Appellant's father was preoccupied with [redacted]'s illness and didn't notice the Appellant's delays until he was somewhat older. The Appellant was held back in pre-school, and it was around that time he began receiving the special education services that would continue throughout his education. Other than some occasional unsuccessful attempts at mainstreaming, the Appellant was placed in separate classrooms with individualized instruction.

The Appellant had several educational placements. In the 9th grade he attended [redacted], an alternative special education school, in [redacted], MA. In 2008 while in the 11th grade the Appellant was placed at [redacted] School for specialized treatment for at-risk youth. Since [redacted] 2009 the Appellant has been attending the [redacted] School in [redacted] MA in the [redacted] classroom.

Since [redacted] 2009 the Appellant has been living with his foster mother. He had previously lived with his father but after the Appellant exhibited inappropriate sexual behavior towards his six year old step-brother, the Appellant was placed first in residential placement and then in specialized foster care.

The Appellant carries the following diagnoses: Attention Deficit Hyperactivity Disorder predominately Hyperactive-Impulsive, which was diagnosed in 2000. He also has diagnoses of Sexual Abuse of a Child, R/O Tourette's Disorder, R/O Expressive Language Disorder, and Mild Mental Retardation. He currently receives group and individual therapy weekly.

Adaptive Functioning

With respect to adaptive functioning, several of the witnesses testified to the Appellant's limitations in adaptive functioning in different domains. [redacted], who has been the Appellant's foster mother since [redacted] 2009, credibly testified that the Appellant needs constant cueing for everything ranging from cleaning his room to brushing his teeth, to doing the laundry. They are working on his ability to complete the laundry in five hours. He cannot cook, he basically does not understand money, and he does not have friends. She said he does not have boundaries and does not understand that he should not call a girl every 15 minutes.

[redacted], the Appellant's clinician, also discussed the Appellant's lack of basic skills and the work they are doing to get him to brush his teeth, shower, say please and thank you, and dress appropriately. She concurred with Ms. [redacted] that the Appellant needed constant cueing and that the Appellant has limited social skills. She said the Appellant would make inappropriate comments at times because he doesn't understand the social situation and he struggles with boundary issues.

Ms[redacted], the Licensed School Psychologist who administered the Vineland-II in 2010, said the results placed the Appellant in the mild deficit range of adaptive functioning and that he was developmentally delayed in the domains of communication, daily living skills, living in the community and social skills. Ms. [redacted] noted that these findings were inconsistent with his cognitive functioning, but substantiated the Appellant's inability to live independently.

The Appellant's witnesses all agreed that the Appellant was incapable of living independently and caring for himself.

There are a number of adaptive functioning assessments in the record as follows:

Year	Test	Exh #	GAC	Conceptual	Social	Practical
1. 2008	ABAS-II (father)	6	93	86	98	94
	(teacher)		83	87	78	83
			ABC	Communication	Socialization	Daily Living Skills
2. 2008	Vineland-II	8	64	66	71	63
3. 2010	Vineland-II	14	60			

While there is a great deal of variation in the adaptive assessment scores, even from one month to the next in the case of the 2008 ABAS and Vineland, I am persuaded that the Appellant has significant limitations in his adaptive functioning as contemplated by the Department's regulatory definition. Taken together, the results from both Vinelands and the testimony of the Appellant's witnesses reveal a young man who has little ability to manage his day-to-day affairs. He is not capable of managing money, he cannot do basic math, and he does not understand economic transactions. To attend to even the most basic personal living skills, such as brushing his teeth, the Appellant must be constantly cued. He needs to be prompted to care for his own hygiene. He is not able to generalize cueing from one day to the next. Because he cannot perform any tasks without constant cueing, his foster-mother has created a chart for him that they keep on the refrigerator. He has significantly limited social skills. He has no friends with whom he spends any time, and he does not understand boundaries in relationships. Based on the evidence, I am convinced that the Appellant has significant limitations of adaptive functioning and that he is not, and will not, be able to live independently. He will need significant supports throughout his life.

Given the Appellant's significant adaptive limitations, the next question is whether those adaptive limitations are related to and exist concurrently with significant sub-average intellectual functioning. This question has two components, the first of which is whether the Appellant has significant sub-average intellectual functioning. If so, the examination then turns to whether his intellectual and adaptive functioning are related.

Cognitive Functioning

We have the benefit of a number of cognitive tests that provide the following results from the time the Appellant was about 9 years old through 20 years [redacted].[3]

Year/age	Test	Exh#	VIQ	PIQ	FSIQ	VCI	POI	FDI	PSI	PRI	WMI
1. 1998 (~9)	WISC-III	6	65	80							64
2. 2001 (~12)	WISC-III	6	63	82				69	67		
3. 2005 (16[redacted])	WISC-IV	5			50	57			65	59	56
4. 2008 (19[redacted])	WAIS-III	6	70	79	72	74	86		69		69
5. 2010 (20[redacted])	WAIS-IV	14			70	70			81	81	66

The Appellant's test results are variable. While his full scale IQ scores fall at, near, or below 70, the Department's regulatory threshold for defining significantly sub-average intellectual functioning, these scores do not adequately provide the full measure of the Appellant's cognitive functioning. When there is the kind of split between verbal and performance scores as seen in the Appellant's test results, the averaged full scale score does not provide the better assessment of intellectual functioning. As noted by Dr.

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[3] In addition to cognitive functioning tests, there are also educational achievement test results in the record. While these are not necessarily reflective of cognitive functioning, they do provide some information regarding the Appellant's academic performance. At the age of 19 years [redacted] and in the 11th grade, the Appellant had the following Composite scores on the Kaufman Test of Educational Achievement -II (Exh 13):

Comprehensive Achievement Composite	73 (below average)
Reading Composite	76 (Below average)
Math Composite	60 (Lower extreme)
Written Language Composite	83 (Below average)
Oral language Composite	85 (Average)

Age equivalents for component parts ranged from 7.9 in Math Computation to 15.4 in Listening Comprehension. See details in description of Exhibit 13, *supra.*

Crenshaw, averaging scores disguises particular areas of impairment as well as particular areas of strength. Instead, it is more important to look at the factor scores, which provide a more meaningful view of intellectual functioning. In looking at the Appellant's verbal scores of 65, 63, 57, 74, and 70, we see scores in the extremely low to low end of borderline range. On the other hand, the Appellant's performance scores of 80, 82, 59, 86, and 79, are generally in the low average range. Thus, the Appellant demonstrates at least some cognitive functioning outside the range of mental retardation.

Also significant in this analysis is the fact that the Appellant's cognitive functioning scores were 10 points higher than his adaptive functioning scores in the 2010 testing. Generally, if an individual's cognitive functioning were the only issue it would be unusual to see this difference in score. According to Dr. Crenshaw, this discrepancy in adaptive/cognitive scores signifies the existence of something other than cognitive functioning that is compromising the Appellant's behavior.[4] As Ms. [redacted] noted in her report with regard to the variation in test scores: "[The Appellant] demonstrates a profile of significant cognitive variability that is often found in individuals with specific learning disabilities." [5]

It is clear that the Appellant has some significant cognitive limitations, particularly in the verbal area. But the question for this hearing is whether he has sub-average intellectual functioning within the meaning of the Department regulations. Based on his performance scores, the variability between the verbal and performance scores, and the testimony of the Department's psychologist, I cannot find that the Appellant has demonstrated that he has sub-average intellectual functioning. Other than the outlier testing from 2005, the Appellant's performance scores were generally in the low average range, which is significantly above the Department's eligibility level. The usual profile of someone with mental retardation would be that of someone with similar scores across all testing, including in the adaptive arena. Inasmuch as the Appellant has varying scores, some of which are consistently in the low average range and thus above the Department's eligibility level, I find that the Appellant has not shown he has sub-average intellectual functioning.[6]

CONCLUSION

Based on my determination that the Appellant has not shown that he has sub-average intellectual functioning, he has not been able to show by a preponderance of the evidence that he meets the Department's definition of mental retardation. Therefore, I conclude he is not eligible for DDS services.

APPEAL RIGHTS

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L c. 30A and 115 CMR 6.34(5).

Date: _____

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Elizabeth A. Silver

[4] Part of the explanation may involve the Appellant's short attention span and limited short-term memory. The Working Memory scores of 64, 56, 69, and 66, as well as his diagnosis of ADHD, document that the Appellant's attention span is very limited and can be a compromising factor.

[5] Of course this does not explain the opposite results in the 2008 testing where the Appellant's GAC scores of 93 (parent) and 83 (teacher) on the ABAS-II were 21 and 11 points higher, respectively, than his full scale IQ score of 72 on the WAIS-III. Ultimately, it would appear as though the discrepancy in scores is what signals the fact that something other than, or in addition to, pure cognitive functioning is affecting the Appellant's test results.

[6] Because I find that the Appellant does not have sub-average intellectual functioning, I do not reach the question whether his intellectual and adaptive functioning are concurrent and related.

Hearing Officer