NEW MASSACHUSETTS DEPARTMENT OF DEVELOPMENTAL SERVICES (DDS) ELIGIBILITY STANDARDS

Prepared by the Mental Health Legal Advisors Committee

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The Massachusetts Department of Developmental Services (DDS) has issued emergency regulations changing its eligibility requirements. DDS made these changes in response to a 2012 Massachusetts Appeals Court decision on DDS eligibility, *Tartarini v. Department of Mental Retardation* (July 23, 2012).

In *Tartarini*, the Appeals Court considered the DDS practice of requiring an IQ of 70 or below as one of its criteria for eligibility. The Appeals Court held that the definition of mental retardation that DDS had been using to determine eligibility for its services was inconsistent with the state statute authorizing the creation of DDS. The Court further held that the definition of mental retardation in the DDS regulations must be based upon "clinical authorities." The decision noted that the DSM IV-TR includes, as mentally retarded, individuals with IQs of between 70 and 75 who have significant functional impairments. The complete decision of the Court is available at http://law.justia.com/cases/massachusetts/court-of-appeals/2012/11-p-1009.html.

In response to this decision, DDS issued emergency regulations. These regulations took effect on October 12, 2012. The regulations, which modify 115 CMR 1.02, 2.01, and 6.02, are available at http://www.mass.gov/eohhs/gov/laws-regs/dds/emergency-eligibility-regs.html. (A hearing on the regulations will be held on November 15, 2012, after which time, DDS may adopt a revised version of the emergency regulations taking into account relevant comments and any other practical alternatives that come to the Department's attention.)

Under the emergency regulations, DDS defines someone as being eligible for its services if that person is 18 years of age, is domiciled in the Commonwealth, and is a person with an intellectual disability as defined in 115 CMR 2.01. The new regulations define **intellectual disability** as:

- **significantly sub-average intellectual functioning;**
- that is related to and exists at the same time as **significant limitations in adaptive functioning**.

DDS now defines **significantly sub-average intellectual functioning** as someone who has an intelligence test score (IQ) of *approximately* 70 or below.

DDS now defines **significant limitations in adaptive functioning** as someone with an overall composite adaptive functioning limitation that is *approximately* two standard deviations below the mean or *approximately* two standard deviations below the mean in one of the three domains

DDS looks at. The three domains are: 1) independent living/practical skills; 2) cognitive, communication and academic/conceptual skills; and 3) social competence/social skills.

The new definitions differ from the old by the addition of the word “approximately” and by the requirement that, in the adaptive functioning definition, the deviation from the norm be 2 standard deviations (instead of 1.5 standard deviations).

Advocates question whether these emergency regulations adequately address the problems that the Appeals Court identified in *Tartarini*. However, for the time being, these are the standards that DDS will apply in eligibility determinations. Individuals who have IQ scores just about 70, including those who have applied in the past and been denied, could consider applying under the new standards. Others may want to wait and see if the DDS regulations are further modified.

Anyone who does reapply should clearly reserve the argument at hearing on appeal that the emergency regulations are invalid and remain inconsistent with the requirements of clinical authority in the DDS enabling statute and in the *Tartarini* decision.