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# DISABILITY AND THE LAW—PERSON V. PAPER: WHY CONNECTICUT'S IQ CUTOFF SCORE IS A BARRICADE TO SELF-BETTERMENT

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DISABILITY AND THE LAW—PERSON V. PAPER: WHY CONNECTICUT’S IQ CUTOFF SCORE IS A BARRICADE TO SELF-BETTERMENT

ABSTRACT

*State-based supports and services are essential to improving the quality of life of many individuals with intellectual disabilities. However, access to vital assistance is often reserved for those who satisfy the state’s definition of “intellectual disability.” On a national scale, Connecticut employs the most restrictive definition of intellectual disability, denying services to individuals with intensive needs simply because they have an IQ score above 69. Effectively, Connecticut quantifies the quality of life of individuals with intellectual disabilities.*

*This Note argues that Connecticut’s eligibility criteria is inconsistent with the best practices set forth by the American Association on Intellectual and Developmental Disabilities (AAIDD). In assessing intellectual disability, the AAIDD dispels of strict IQ cutoff scores and instead engages in a holistic inquiry emphasizing the individual’s overall well-being. This Note calls upon the Connecticut legislature to enact a statutory amendment that will modernize Connecticut’s eligibility practices, and ensure that Connecticut is meeting its imperative of providing assistance to those most in need.*

INTRODUCTION

Michael’s mother considered her son one of the “lucky” ones.<sup>1</sup> She looked on as Michael flourished in his accomplishments, quietly celebrating the richness of her son’s life. Michael’s commitments were both dynamic and diverse; with the help of a job coach, Michael worked part-time at the local library,<sup>2</sup> and through the guidance of a mentor, he

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1. *An Act Concerning Expansion of the Pilot Program for Persons with Autism Spectrum Disorders: Hearing on Substitute for H.B. 5666 (2008)* (statement of Cathy A.) [hereinafter Statement of Cathy A.], available at <http://www.cga.ct.gov/2008/PHdata/Tmy/2008HB-05666-R000312-Cathy%20Adamczyk-TMY.PDF>.

2. *An Act Concerning Expansion of the Pilot Program for Persons with Autism Spectrum Disorders: Hearing on Substitute for H.B. 5666 (2008)* (statement of Michael A.), available at <http://www.cga.ct.gov/2008/PHdata/Tmy/2008HB-05666-R000312-Michael%20Adamczyk-TMY.PDF>.

developed an enviable social life.<sup>3</sup> He frequently swam at the YMCA preparing for the Special Olympics, ultimately winning two gold medals in the 2011 Summer Games.<sup>4</sup> He also shone as a leader amongst his peers, serving as a youth advocate for individuals with disabilities.<sup>5</sup> His outstanding community service was recognized by the Commissioner of the Department of Developmental Services (DDS), who awarded Michael the first ever DDS scholarship at the Governor's Coalition for Youth with Disabilities Scholarships.<sup>6</sup>

Although Michael has an intellectual disability,<sup>7</sup> which is characterized by deficits in intellectual functioning and difficulty meeting social expectations,<sup>8</sup> he has overcome many challenges and achieved countless successes through the help of DDS. This same level of achievement would not have been possible without DDS's intercession.<sup>9</sup>

And so Michael was lucky, because having garnered IQ scores of 64 and 69 during his youth,<sup>10</sup> he satisfied DDS's IQ cutoff score of 69 and remained eligible to receive supports and services.<sup>11</sup> Unlike other

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3. *Id.*

4. *See 2011 News and Events: Adamczyk Shines in the Pool*, UCONN HEALTH CENTER (Aug. 17, 2011), [http://www.uconnuccdd.org/news\\_events/2011/adamczyk.html](http://www.uconnuccdd.org/news_events/2011/adamczyk.html).

5. *See The Connecticut Youth Leadership Project Welcomes Kids as Self-Advocates*, YOUTH LEADERSHIP TODAY (Connecticut Youth Leadership Project) Mar. 2007, at 5, available at [http://www.ctylp.org/files/YLP\\_Newsletter\\_03.07.pdf](http://www.ctylp.org/files/YLP_Newsletter_03.07.pdf).

6. Letter from Terrence W. Macy, Comm'r of Dep't of Developmental Servs. (June 2, 2011), available at <http://www.ct.gov/dds/cwp/view.asp?A=4171&Q=508574>.

7. *See* Statement of Cathy A., *supra* note 1 (using the term "mental retardation" rather than "intellectual disability"). Michael also has "classical autism," a developmental disorder that causes "abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests." *Id.* *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION: DSM-IV-TR, 70 (4th ed. 2000). All mental disorders aside from intellectual disability are beyond the scope of this Note.

8. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 5 (11th ed. 2010). The definition also requires the disability to occur before age 18. The age of onset requirement is beyond the scope of this Note. *Id.* *See also* CONN. GEN. STAT. § 1-1g (2011) (defining intellectual disability as "a significant limitation in intellectual functioning and deficits in adaptive behavior that originated during the developmental period before eighteen years of age").

9. Michael's mother attributed his success to DDS's assistance, recognizing that her own ability to support Michael was limited by her parental duties to her other three children as well as personal health issues. *See* Statement of Cathy A., *supra* note 1.

10. At age nine Michael's IQ was 64, and at ages twelve and fifteen it was 69. Transcript of Hearing at 21, *Dep't of Developmental Servs. v. Michael A.* (June 17, 2011) (unpublished transcript from administrative hearing) (on file with author).

11. *See* CONN. GEN. STAT. § 1-1g (2011); *Individual and Family Fact Sheet: Eligibility for Services from the Department of Developmental Services* [hereinafter *Fact Sheet*], DEP'T

individuals with intellectual disabilities who wither in the face of similar obstacles, Michael's IQ score qualified him for vital assistance that helped him thrive.<sup>12</sup>

Yet despite his success, Michael's mother worried that one day her son, whose IQ skimmed along the cutoff score for DDS services, might test slightly above it.<sup>13</sup> Fearing his proximity to that “magical 70’ number”—the number with disqualifying force—she asked, “[i]f his IQ goes up one point to 70, does that mean that he no longer needs assistance in life?”<sup>14</sup> Her fears were realized one year later when Michael received an IQ score of 83.<sup>15</sup> Soon thereafter, DDS found him ineligible for services.<sup>16</sup>

The turn in Michael's story is not unique within Connecticut.<sup>17</sup> Connecticut's eligibility statute, section 1-1g, is satisfied by an IQ of 69 or below and demonstrated difficulty with activities of daily living.<sup>18</sup> Yet despite these dual requirements, a higher IQ score is dispositive, disqualifying individuals regardless of their ability to cope with daily life.<sup>19</sup> Effectively, individuals with intensive needs are denied services and supports based upon quantitative data rather than qualitative needs.<sup>20</sup>

This Note argues that DDS's use of a rigid IQ cutoff score to determine eligibility for supports and services creates an overly narrow

OF DEVELOPMENTAL SERVS. <http://www.ct.gov/dds/cwp/view.asp?a=2050&q=382310> (last updated Nov. 19, 2007).

12. See *infra* Part IV.B (portraying the difficulties encountered by individuals with intellectual disabilities who are denied necessary supports and services).

13. See Statement of Cathy A., *supra* note 1.

14. *Id.*

15. *Dep't of Developmental Servs. v. Michael A.* (Conn. Dep't of Developmental Servs. July 11, 2011) (Proposed Decision) (on file with author).

16. *Id.* Michael appealed DDS's finding of ineligibility, and upon review an administrative hearing officer found that Michael was eligible for continued services. *Id.* Although the DDS Commissioner affirmed this decision, he found that Michael did not satisfy section 1-1g. Rather, he found that because Michael was a lifelong client of DDS, it would be inequitable to revoke his services. Thus, if the Commissioner strictly considered whether Michael was eligible for services under DDS's eligibility statute, Michael would have been found ineligible.

17. There are several cases wherein DDS applicants demonstrate adaptive needs, but are denied services due to an IQ score above 69. See, e.g., *Christopher R. v. Comm'r of Mental Retardation*, 893 A.2d 431 (Conn. 2006); *Costello v. Comm'r of Developmental Servs.*, 16 A.3d 811 (Conn. App. Ct. 2011); *Allan G. v. O'Meara*, No. CV105014972S, 2011 WL 3211281 (Conn. Super. Ct. June 29, 2011); *Malcolm v. O'Meara*, No. CV040527349S, 2005 WL 1083794 (Conn. Super. Ct. Mar. 30, 2005); *Martinez v. O'Meara*, No. CV 00499604, 2001 WL 527505 (Conn. Super. Ct. Apr. 30, 2001).

18. See CONN. GEN. STAT. § 1-1g (2011); *Fact Sheet*, *supra* note 11.

19. See *infra* Parts III, IV.

20. See *infra* Part IV.

definition of intellectual disability that is inconsistent with best practices.<sup>21</sup> Consequently, individuals with intellectual disabilities are denied assistance integral to their quality of life.<sup>22</sup>

The best practices for the assessment of intellectual disability are set forth in the 2010 manual published by the American Association on Intellectual and Developmental Disabilities (AAIDD).<sup>23</sup> This manual rejects the use of IQ cutoff scores, instead utilizing a broader assessment method that considers the individual's overall well-being.<sup>24</sup> Thus, to ensure that Connecticut residents with intellectual disabilities are assessed fairly and accurately, the legislature must require DDS to abandon IQ cutoff scores and promulgate regulations consistent with the 2010 AAIDD manual.<sup>25</sup>

Part I of this Note discusses DDS's statutory responsibility to provide services and supports to Connecticut residents with intellectual disabilities. In light of DDS's important role, Part II examines whether Connecticut's eligibility criteria comports with best practices by presenting a historical overview of the social meaning of intellectual disability and the assessment methods used leading up to the 2010 AAIDD manual. Subsequently, Part III discusses the Connecticut Supreme Court's interpretation of DDS's eligibility criteria through the seminal case of *Christopher R. v. Commissioner of Mental Retardation*.<sup>26</sup> Finally, Part IV argues that DDS misses the watermark for best practices in eligibility determinations and urges the legislature to amend DDS's enabling act to require compliance with the 2010 AAIDD definition.

DDS's eligibility determinations are confined to the *paper*—the four corners of an IQ test. These practices fail to consider the *person*—the individual's overall level of need. By modernizing DDS's

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21. See *infra* Part IV.

22. See *infra* Parts III, IV.

23. See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8. The definition of intellectual disability set forth by the AAIDD and the American Psychiatric Association (APA) "are currently considered the 'gold standard' with regard to definition and classification." Barbara Tylenda et al., *Assessing Mental Retardation Using Standardized Intelligence Tests*, in 34 HANDBOOK OF ASSESSMENT IN PERSONS WITH INTELLECTUAL DISABILITY 29 (Johnny L. Matson, ed. 2007). This Note focuses primarily upon the AAIDD definition because Connecticut's eligibility statute was based upon the definition of intellectual disability set forth by the AAIDD in its 1977 manual. See *An Act Concerning the Definition of Mental Retardation: Hearing Before the H.R.*, Vol. 25, Part 2 at 407, 410 (Conn. 1982).

24. See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 14, 35; *infra* Part II.B.

25. See *infra* Part IV.

26. 893 A.2d 431 (Conn. 2006).

regulations, eligibility determinations would be based upon a holistic understanding of the individual rather than IQ alone, effectively putting the person before the paper.<sup>27</sup> Under the proposed amendment, Connecticut would meet the needs of all residents who have intellectual disabilities, and not just those who happen to be so “lucky.”<sup>28</sup>

## I. THE ROLE AND RESPONSIBILITIES OF THE CONNECTICUT DDS

DDS plays a vital role in improving the quality of life of individuals with intellectual disabilities.<sup>29</sup> As Connecticut’s most comprehensive resource for individuals with intellectual disabilities, DDS arguably has both a statutory and ethical responsibility to serve this population.<sup>30</sup>

### A. *The Origins of DDS and the Supports and Services it Provides*

DDS is a beacon for individuals with intellectual disabilities, providing assistance that spans from birth until death.<sup>31</sup> DDS was created in 1975, pursuant to Connecticut General Statutes section 17a-210, which states that DDS is “responsible for the planning, development and administration of complete, comprehensive and integrated state-wide services for persons with intellectual disability . . . .”<sup>32</sup> In 1990, the legislature required DDS to promulgate regulations for determining who is eligible for these services.<sup>33</sup> Consequently, DDS

27. *See infra* Part IV.

28. Statement of Cathy A., *supra* note 1.

29. *See Mission Statement*, DEP’T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=3&q=330182> (setting forth DDS’s mission to improve the well-being of individuals with intellectual disabilities) (last updated Oct. 4, 2012).

30. *See* CONN. GEN. STAT. § 17a-210 (2011); CONN. GEN. STAT. § 17a-212 (2011) (providing DDS’s statutory obligations).

31. DDS offers a “Birth to Three” program for individuals who exhibit developmental delays early on. *See* Connecticut Birth to Three System, *A Family Handbook: Guide 1: Referral and Eligibility Evaluation*, DEP’T OF DEVELOPMENTAL SERVS. 3 (2010), <http://www.birth23.org/families/FamilyHandbookI.pdf>. However, individuals must satisfy section 1-1g of the Connecticut General Statutes to receive services when they have aged out of this program. *Id.* On the other end of the spectrum, DDS offers aging services to help facilitate the aging process. *About Aging Services*, DEP’T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=3424&q=412318> (last updated Dec. 31, 2012).

32. CONN. GEN. STAT. § 17a-210 (2011). *See also* CONN. GEN. STAT. § 17a-212 (2011) (requiring DDS to “establish[] (1) criteria for (A) determining eligibility for services provided by the department . . .”).

33. *See* CONN. GEN. STAT. § 17a-212 (2011) (providing that “[o]n or before September 30, 1991, the Commissioner of Developmental Services shall adopt regulations . . . establishing (1) criteria for (A) determining eligibility for services provided by the department”). *See also* CONN. GENERAL ASSEMBLY, LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE, MANAGEMENT AUDIT (Jan. 1990) (requiring DDS to establish

incorporated Connecticut General Statutes section 1-1g into its regulations, providing that anyone who has an intellectual disability, as defined by section 1-1g, is eligible for services.<sup>34</sup>

DDS offers an array of services and supports<sup>35</sup> tailored to individual needs and implemented to improve quality of life.<sup>36</sup> For instance, DDS provides services that fulfill housing,<sup>37</sup> healthcare,<sup>38</sup> and employment needs.<sup>39</sup> Additionally, DDS offers educational, behavioral, and emotional supports to facilitate the development of social and communication skills.<sup>40</sup> DDS's services also benefit the family members of individuals with intellectual disabilities; in-home supports for families who act as caregivers<sup>41</sup> bestow an intangible benefit: "peace of mind" that their loved one will be taken care of when they are no longer capable of providing this care themselves.<sup>42</sup>

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clear eligibility criteria).

34. See CONN. AGENCIES REGS. § 17a-212-2(b)(2) (2001) & § 17a-212-1(10) (2001) (providing, respectively, that "[a] person is eligible for services of the department if he . . . has mental retardation" "as defined in section 1-1g . . .").

35. See *generally Supports & Services Topics A-Z*, DEP'T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=3&q=457532> (listing the supports and services that DDS offers) (last updated Dec. 12, 2012).

36. When an individual is deemed eligible, DDS determines the individual's "level of need" to identify the most beneficial services and supports. See *Assessing Level of Need for Supports*, DEP'T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=2042&q=394074> (last visited May 13, 2013).

37. DDS provides a selection of living arrangements that vary depending upon the individual's level of functioning. For instance, DDS offers supported living options for individuals in need of constant care and attention, as well as community living options for those who wish to live independently. See *Community Living Services*, DEP'T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=2042&q=390162> (last updated Feb. 25, 2008).

38. See *Health and Clinical Services*, DEP'T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=2042&q=386604> (last updated Dec. 14, 2011).

39. DDS offers employment assistance by providing transportation and job coaches to promote success in the workplace. See *Employment and Day Services*, DEP'T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=2042&q=390170> (last updated Apr. 26, 2011); *Transportation*, DEP'T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=2653&q=429550> (last updated Jan. 6, 2011).

40. See *Individual and Family Resource Teams*, DEP'T OF DEVELOPMENTAL SERVS., <http://www.ct.gov/dds/cwp/view.asp?a=2042&q=391120> (last updated July 15, 2009).

41. *Id.*

42. See e.g., *Thoughts on the Safety Net*, HARCTODAY LITE (Sept. 2011) (quoting a parent of an individual receiving supports and services who said "[o]ur entire family, our family life, happiness and peace of mind have all been enriched. The benefits are incalculable. I hate to think what our lives would be like without these services which we depend on.").

B. *Connecticut General Statutes Section 1-1g: The “Single Point of Entry”*<sup>43</sup> *for DDS Eligibility Determinations*

DDS’s comprehensive services are only available to individuals who satisfy the requirements of section 1-1g.<sup>44</sup> Section 1-1g defines intellectual disability as a “significant limitation in intellectual functioning and deficit in adaptive behavior that originated during the developmental period before eighteen years of age.”<sup>45</sup> “[S]ignificant limitation in intellectual functioning” is measured by an IQ score of 69 or below.<sup>46</sup> “[A]daptive behavior” refers to “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual’s age and cultural group . . . .”<sup>47</sup> This definition utilizes the “dual-criterion” approach, which considers the dual factors of general intelligence and adaptive behavior in assessing intellectual disability.<sup>48</sup>

In June 2012, the Connecticut legislature amended section 1-1g in an effort to comport with the most modern understanding of intellectual disability.<sup>49</sup> However, this amendment left the IQ cutoff score of 69

43. *Five-Year Plan 2007-2012*, STATE OF CONN. DEP’T OF MENTAL RETARDATION, 14 (2007), [http://www.ct.gov/dds/lib/dds/commissioner/final\\_plan\\_2007.pdf](http://www.ct.gov/dds/lib/dds/commissioner/final_plan_2007.pdf) (internal formatting omitted).

44. See CONN. AGENCIES REGS. § 17a-212-2(b)(2) (2001) & § 17a-212-1(10) (2001) (providing, respectively, that “[a] person is eligible for services of the department if he . . . has mental retardation” “as defined in section 1-1g . . .”).

45. See CONN. GEN. STAT. § 1-1g (2011).

46. “[S]ignificant limitation in intellectual functioning” means an intelligence quotient more than two standard deviations below the mean as measured by tests of general intellectual functioning that are individualized, standardized and clinically and culturally appropriate to the individual.” CONN. GEN. STAT. § 1-1g (2011). Whereas the average IQ score is 100, two standard deviations below the average is an IQ score of 69. See Ulrich Neisser et al., *Intelligence: Knowns and Unknowns*, 51 AM. PSYCHOLOGIST 77, 78 (1996); *Fact Sheet*, *supra* note 11.

47. See CONN. GEN. STAT. § 1-1g (2011).

48. The dual-criterion approach is the predominant method for assessing intellectual disability, utilized by the AAIDD, World Health Organization (WHO), and the American Psychiatric Association (APA). This assessment method is discussed in greater detail *infra* Part II. See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 8-9; WORLD HEALTH ORG., *Definition: Intellectual Disability* (last updated 2013), <http://www.euro.who.int/en/what-we-do/health-topics/noncommunicable-diseases/mental-health/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability> (stating that the disability “begins before adulthood”). See also Barbara Tylenda et al., *supra* note 23, at 29.

49. H.R. & Sen. 5437, 2012 Gen. Assemb., Reg. Sess. (Conn. June 2012) (effective Oct. 1, 2012). The amendment to section 1-1g aims to serve three principal goals. First, it modernizes the statutory language to promote respect for individuals with intellectual disabilities by replacing “significantly *subaverage* general intellectual functioning” with “significant *limitation* in intellectual functioning.” Compare CONN. GEN. STAT. § 1-1g (2011)



unscathed.<sup>50</sup> The legislative history from an earlier version of section 1-1g, along with the 2012 amendment, demonstrate that budgetary concerns influenced the legislature's failure to modernize the statute's IQ requirement.

When section 1-1g was originally passed, the legislature defended the bright-line cutoff score of 69 on fiscal grounds, stating,

[T]he numbers of [intellectually disabled] clients in the state has [sic] risen dramatically. There is no possibility of providing the treatment that is necessary for all of them to the extent that special groups would like provided. There are infinite needs with limited resources, and I think that the reason that the bill is before us [is]

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(effective through Sept. 30, 2011), with CONN. GEN. STAT. § 1-1g (effective Oct. 2012). See *An Act Concerning the Definition of Mental Retardation and Intellectual Disability: Hearing on H.B. 5437 Before the Pub. Health Comm.*, 2012 Gen. Assemb., Reg. Sess. (Conn. June 2012) (statement of James D. McGaughey, Executive Director of the Conn. Office of Protection & Advocacy for Persons with Disabilities) [hereinafter Statement of James McGaughey], available at <http://www.cga.ct.gov/2012/PHdata/Tmy/2012HB-05437-R000316James%20D.%20McGaughey,%20Executive%20Director,%20Office%20of%20Protection%20and%20Advocacy%20for%20Persons%20with%20Disabilities-TMY.PDF>. Second, the amendment places equal emphasis on intellectual functioning and adaptive behavior. Prior to the amendment, the phrasing of the statute made the intelligence requirement appear more important, as it was listed first and was isolated from the adaptive behavior criterion. Effectively, it seemed as if adaptive behavior was a secondary criterion, relevant only if the intelligence criterion was satisfied. Compare CONN. GEN. STAT. § 1-1g (2011) (effective through Sept. 30, 2011), with CONN. GEN. STAT. § 1-1g (effective Oct. 2012) (stating that “intellectual functioning exist[s] concurrently with deficits in adaptive behavior”). The current version aims to place equal emphasis on intellectual functioning and adaptive behavior by joining the criteria with a conjunction so that they appear to bear equal weight. See CONN. GEN. STAT. § 1-1g (2011) (intellectual disability means “a significant limitation in intellectual functioning and deficits in adaptive behavior . . .”) (emphasis added). See also *An Act Concerning the Definition of Mental Retardation and Intellectual Disability: Hearing on H.B. 5437 Before the Pub. Health Comm.*, 2012 Gen. Assemb., Reg. Sess. (Conn. June 2012) (statement of Sandra Trionfini, attorney with Conn. Legal Servs.) [hereinafter Statement of Sandra Trionfini], available at <http://www.cga.ct.gov/2012/PHdata/Tmy/2012HB-05437-R000316-Sandra%20Trionfini,%20Attorney,%20CT%20Legal%20Services-TMY.PDF>. This change aims to serve the proponents' third goal—to “enable clinicians to use current tools of diagnosis, testing and clinical evaluation . . .” See Statement of Sandra Trionfini, *supra*; *An Act Concerning the Definition of Mental Retardation and Intellectual Disability: Hearing on H.B. 5437 Before the Pub. Health Comm.*, 2012 Gen. Assemb., Reg. Sess. (Conn. Oct. 2012) (statement of Leslie Simoes, Director of Advocacy at the ARC Conn.) [hereinafter Statement of Leslie Simoes], available at <http://www.cga.ct.gov/2012/PHdata/Tmy/2012HB-05437-R000316Leslie%20Simoes,%20Director%20of%20Avocacy,%20The%20ARC%20Connecticut-TMY.PDF>. By clarifying the definitional criteria, the bill's proponents hope that clinicians will be able to more accurately assess the service needs of individuals deemed eligible. See Statement of Sandra Trionfini, *supra*; statement of Leslie Simoes, *supra*.

50. See CONN. GEN. STAT. § 1-1g (2011) (providing that intellectual disability is characterized by an IQ score two standard deviations below the norm).

[sic] to try to define more accurately those most in need.<sup>51</sup>

Accordingly, 69 functions as a bright-line cutoff score intended to foreclose individuals with borderline intelligence<sup>52</sup> from accessing supports and services reserved for “those most in need.”<sup>53</sup> Undoubtedly, raising the IQ cutoff score, or eliminating it altogether, would increase eligibility for services, which in turn would increase costs to the state. Thus, by precluding individuals with IQs above 69 from DDS eligibility, Connecticut limited its financial responsibility for individuals with intellectual disabilities.

Similarly, in its February 2012 session, the legislature demonstrated an unwillingness to amend section 1-1g in a manner that might increase the state’s fiscal obligations.<sup>54</sup> The fiscal analysis accompanying the proposed bill stated, “[t]here is no fiscal impact to the state or municipalities from updating the definition of ‘mental retardation’ in the bill. The revised definition does not change eligibility for services . . . .”<sup>55</sup> Several of the bill’s proponents further emphasized that the bill did not bear financial burdens.<sup>56</sup> Moreover, just moments before voting on

51. *An Act Concerning the Definition of Mental Retardation: Hearing Before the H.R.*, Vol. 25, Part 2, at 414 (Conn. 1982).

52. “Borderline intelligence” refers to individuals with IQ scores above 69, but below the average level of intellectual functioning. Thus, individuals with “borderline intelligence” have IQ scores bordering on average intelligence. See AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION DSM-IV-TR, 48 (4th ed. 2000). However, this categorization is being phased out as increased emphasis is placed upon the individual’s abilities as determined by contextual factors, and not IQ alone. See *Borderline Intellectual Functioning*, MENTALHELP.NET (May 18, 2011), [http://www.mentalhelp.net/poc/view\\_doc.php?type=doc&id=10351&cn=208](http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=10351&cn=208).

53. *An Act Concerning the Definition of Mental Retardation: Hearing Before the H.R.*, Vol. 25, Part 2, at 414 (Conn. 1982).

54. See *An Act Concerning the Definition of Mental Retardation and Intellectual Disability: Hearing on H.B. 5437 Before the Pub. Health Comm.*, 2012 Gen. Assemb., Reg. Sess. (Conn. Oct. 2012) (containing statements from two Representatives assuring the House that the bill would not have a fiscal impact).

55. H.B. 5437, 2012 Gen. Assemb., Reg. Sess. (Conn. June 2012) (Fiscal Note), available at <http://www.cga.ct.gov/2012/FN/2012HB-05437-R000298-FN.htm>.

56. See Statement of James McGaughy, *supra* note 49 (“DDS has been clear that it does not believe the language of this Bill changes its criteria for eligibility.”); Statement of Sandra Trionfini, *supra* note 49 (“THIS PROPOSAL DOES NOT CREATE AN ENTITLEMENT TO SERVICES. ACCESS TO SERVICES WILL REMAIN SUBJECT TO AVAILABILITY AND FUNDING. THE INTENT OF THE NEW DEFINITION IS NOT TO BRING MORE PEOPLE INTO THE SYSTEM FOR SERVICES BUT TO DIRECT MORE TARGETED SERVICES TO THOSE WHO ARE ELIGIBLE.”) (emphasis in original); *An Act Concerning the Definition of Mental Retardation and Intellectual Disability: Hearing on H.B. 5437 Before the Pub. Health Comm.*, 2012 Gen. Assemb., Reg. Sess. (Conn. Oct. 2012) (statement of Terrence Macy, Comm’r of DDS), available at [http://www.cga.ct.gov/2012/PHdata/Tmy/2012HB-05437-R000316Terrance%20Macy,%20PhD;%20Commissioner,%20Department%20of%20Developmental%20Services%20\(DDS\)-TMY.PDF](http://www.cga.ct.gov/2012/PHdata/Tmy/2012HB-05437-R000316Terrance%20Macy,%20PhD;%20Commissioner,%20Department%20of%20Developmental%20Services%20(DDS)-TMY.PDF) (“While DDS was amenable to updating the language in the section 1-1g

the bill's passage, one Representative stated, "I'd also like to point out that this legislation does not in any way bring any more people into the system for services . . . ."<sup>57</sup>

Regardless of whether Connecticut's failure to abandon a rigid IQ cutoff score was fiscally motivated, Connecticut's antiquated practices profoundly impact the quality of life of individuals with intellectual disabilities. Because section 1-1g has not evolved along with the social construct and assessment methods of intellectual disability, Connecticut continues to deprive countless individuals of imperative aid.

## II. THE EVOLVING CONSTRUCT OF INTELLECTUAL DISABILITY AND ITS ASSESSMENT METHODS

The social construct of intellectual disability has travelled a long course.<sup>58</sup> Along the beaten path lay stigmatizing characterizations and abandoned identifiers, such as idiot, imbecile, moron, feeble-minded, and most recently, mentally retarded.<sup>59</sup> These identifiers abide within a dark corner of history, which first defined intellectual disability as social "degeneracy."<sup>60</sup> This definition led to widespread institutionalization

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definition, we needed to work through potential concerns that if the language was not carefully thought out, there could be implications on expanding eligibility for DDS supports and services and thus creating an unfunded liability for the state. This was clearly not the intent of DDS or the advocates.").

57. See *An Act Concerning the Definition of Mental Retardation and Intellectual Disability: Hearing on H.B. 5437 Before the Pub. Health Comm.*, 2012 Gen. Assemb., Reg. Sess. (Conn. Oct. 2012) (statement of Representative Lyddy). Additionally, due to budgetary limitations, even those individuals who satisfy DDS's eligibility criteria may not receive services. DDS services are not an entitlement, meaning that eligible individuals will not receive services and supports if there are inadequate resources. See *Fact Sheet*, *supra* note 11. As of June 2011, there were 549 eligible individuals on the waiting list to receive residential services, demonstrating DDS's limited resources as compared to the needs of eligible individuals. *Five-Year Plan 2007-2012*, *supra* note 43, at 6. Additionally, DDS planned to reduce its 2012 budget by \$47 million. Letter from Comm'r Terrence W. Macy to State of Conn. Dep't of Developmental Servs. Staff (July 15, 2011), available at [http://www.ct.gov/dds/lib/dds/budget/letter\\_from\\_commissioner\\_macy\\_july\\_15\\_2011.pdf](http://www.ct.gov/dds/lib/dds/budget/letter_from_commissioner_macy_july_15_2011.pdf).

58. See MARK RAPLEY, *THE SOCIAL CONSTRUCTION OF INTELLECTUAL DISABILITY*, 30-42 (2004) (discussing the historical progression of intellectual disability as a social construct).

59. *Id.*; see also Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 *INTELL. & DEVELOPMENTAL DISABILITIES* 116, 117 (2007), available at <https://arcmass.org/Portals/0/renamingMRIDDApril2007.pdf>. In January 2010, Congress passed "Rosa's Law," replacing the term "mental retardation" with "intellectual disability" throughout the statutes at large. Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010). Connecticut enacted a similar statute in 2011. See *CONN. GEN. STAT. § 17a-210d* (2011).

60. See Stephen R. Schroeder & R. Matthew Reese, *Historical Overview of Assessment in Intellectual Disability*, in 34 *HANDBOOK OF ASSESSMENT IN PERSONS WITH INTELLECTUAL DISABILITY: INTERNATIONAL REVIEW OF RESEARCH IN MENTAL*

first aimed at rehabilitation,<sup>61</sup> and later, eradication through eugenic tactics.<sup>62</sup>

Yet as the social perception of intellectual disability changed, so morphed classification and assessment methods.<sup>63</sup> The creation of general intelligence tests “redefined feeble-mindedness in new psychological terms.”<sup>64</sup> Currently, general intelligence is measured on a standardized scale normed on the general population.<sup>65</sup> On this point scale, average intelligence is indicated by an IQ score of approximately 100.<sup>66</sup> This score, known as a full-scale IQ, is comprised of several sub-test scores that measure various aspects of intelligence.<sup>67</sup>

Eventually, the utility of intelligence tests was viewed as rather limited, revealing an individual’s academic aptitude and little else.<sup>68</sup> Thus, in 1959, the AAIDD added an additional criterion that focuses on

RETARDATION 1, 4 (Johnny L. Matson ed., 2007).

61. With hopes of rehabilitating “feeble-minded” individuals, institutional doctors utilized the clinical approach—a medical model that identified the symptoms of intellectual disability and explored possible cures. See LEILA ZENDERLAND, MEASURING MINDS: HENRY HERBERT GODDARD AND THE ORIGINS OF AMERICAN INTELLIGENCE TESTING 74 (Mitchell G. Ash & William R. Woodward eds., 1998). Ultimately, the doctors concluded that “feeble-minded” individuals could not be successfully “normalized.” Catherine K. Harbour & Pallab K. Maulik, INTERNATIONAL ENCYCLOPEDIA OF REHABILITATION, *History of Intellectual Disability* 2, [http://cirrie.buffalo.edu/encyclopedia/en/pdf/history\\_of\\_intellectual\\_disability.pdf](http://cirrie.buffalo.edu/encyclopedia/en/pdf/history_of_intellectual_disability.pdf) (last visited May 13, 2013).

62. Harbour & Maulik, *supra* note 61, at 2. The United States Supreme Court gave its imprimatur to sterilizations in the 1927 case, *Buck v. Bell*, 274 U.S. 200, 208 (1927). In his opinion, Justice Oliver Wendell Holmes infamously stated, “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough.” *Id.* at 207.

63. See Harbour & Maulik, *supra* note 61, at 1 (stating that “the whole concept of [intellectual disability] and how to define or categorize people with [intellectual disability] . . . has been affected by how people in different cultures and in different periods of time have defined it and understood it”). See also Stephen R. Schroeder & R. Matthew Reese, *supra* note 60, at 1 (providing that “[t]he history of the assessment of people with intellectual disabilities . . . goes back to the roots of modern day research and practice as well as to the roots of many social policies”).

64. ZENDERLAND, *supra* note 61, at 102.

65. See Kirk A. Becker, *History of Stanford-Binet Intelligence Scales: Content & Psychometrics*, STANFORD-BINET INTELLIGENCE SCALES, FIFTH EDITION ASSESSMENT SERVICE BULLETIN NUMBER 1, 2-4 (2003), <http://www.assess.nelson.com/pdf/sb5-asb1.pdf>; Neisser et al., *supra* note 46, at 78.

66. See Neisser et al., *supra* note 46, at 77, 78.

67. *Id.* Today, the Stanford-Binet and Wechsler Intelligence Scales are the most popular general intelligence tests. See Wayne Silverman et al., *Stanford-Binet and WAIS IQ Differences and Their Implications for Adults with Intellectual Disability (aka Mental Retardation)*, 38 INTELLIGENCE 242, 242 (2010).

68. See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 43-44.

the individual's adaptive behavior.<sup>69</sup> The 2010 AAIDD manual defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."<sup>70</sup> For example, an individual with adaptive deficits may have difficulty with customary activities "such as handling money, cooking, dressing, grooming, and [carrying out] social activities and relationships."<sup>71</sup> Like general intelligence, adaptive behavior is measured utilizing standardized tests.<sup>72</sup>

General intelligence and adaptive behavior remain at the heart of the definition of intellectual disability, comprising the "dual-criterion" approach.<sup>73</sup>

The 2010 AAIDD manual defines intellectual disability as "significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."<sup>74</sup> This definition arose after centuries of defining and re-defining intellectual disability.<sup>75</sup> Although the dual-criterion approach has been utilized since 1959, the AAIDD has continuously modified the cutoff scores for both general intelligence and adaptive behavior.<sup>76</sup> Particularly, changes to IQ cutoff scores strongly impact who is diagnosed as having an intellectual disability, and who is not.<sup>77</sup>

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69. *See id.* at 44. Adaptive behavior refers to one's ability to perform various activities of daily living. *See id.* at 43.

70. *Id.* "Conceptual skills" include "language; reading and writing; and money, time, and number concepts"; "Social skills" include "interpersonal skills, social responsibility, self-esteem, gullibility, naivete (i.e. wariness), follows rules/obeys laws, avoids being victimized, and social problem solving"; "Practical skills" include "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." *Id.* at 44.

71. *See Fact Sheet, supra* note 11.

72. *See* CONN. GEN. STAT. § 1-1g(c) (2011); THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 47.

73. *See* CONN. GEN. STAT. § 1-1g(c) (2011); THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 6. The dual-criterion approach is the prevailing standard for defining intellectual disability. *See* Barbara Tylenda et al., *supra* note 23, at 29 (identifying the APA and AAIDD (formerly AAMR) as setting forth the "gold standard" definitions of intellectual disability which are "internationally recognized and widely adopted").

74. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 5.

75. *See id.* at 5-6.

76. *See* AM. ASS'N ON MENTAL RETARDATION, WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 3-27 [hereinafter WHAT IS MENTAL RETARDATION?] (Harvey N. Switzky & Stephen Greenspan eds. 2006).

77. *Id.*

A. *The Role of IQ in Assessing Intellectual Disability*

IQ cutoff scores carry serious implications, making “someone eligible or ineligible for services.”<sup>78</sup> From 1961 to 2010, the AAIDD has continuously modified the cutoff scores for the general intelligence component of intellectual disability.<sup>79</sup> The 1961 AAIDD manual established an IQ cutoff “score of 84 or less.”<sup>80</sup> However, clinicians believed that this cutoff score was overinclusive, mislabeling individuals with “borderline intelligence” as having intellectual disabilities.<sup>81</sup> As a result, the revised 1973 and 1977 manuals implemented a more stringent cutoff score of 70 or below.<sup>82</sup> Section 1-1g continues to utilize the IQ cutoff score of 69 or below, a lower ceiling than that set forth in the 1977 AAIDD manual.<sup>83</sup>

Every edition following the 1977 AAIDD manual created a more lenient standard for IQ cutoff scores.<sup>84</sup> Notably, the 1992 manual constituted a major paradigm shift that was meant “to reduce heavy reliance on IQ scores” and to increase the emphasis placed on “support needs.”<sup>85</sup> The AAIDD raised the IQ cutoff score to “approximately 70 to 75 or below” to promote a more comprehensive assessment process.<sup>86</sup>

In 1992, intellectual disability was newly understood as the relationship “between the person’s capacities and the context in which the person is to function.”<sup>87</sup> More illustratively put,

78. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 5.

79. WHAT IS MENTAL RETARDATION?, *supra* note 76, at 3-28; THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at xiii-xiv.

80. WHAT IS MENTAL RETARDATION?, *supra* note 76, at 5-6.

81. *Id.* at 8-9. “Borderline intellectual functioning describes an IQ range that is higher than that for Mental Retardation.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION: DSM-IV-TR, 48 (4th ed. 2000) (citations omitted). However, the AAIDD and forthcoming Diagnostic and Statistical Manual no longer utilize this categorization. See *Borderline Intellectual Functioning*, MENTALHELP.NET (May 18, 2011), [http://www.mentalhelp.net/poc/view\\_doc.php?type=doc&id=10351&cn=208](http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=10351&cn=208). The Connecticut legislature echoed concerns of overinclusivity when it passed section 1-1g, stating that the “definition[] would be helpful in clarifying the distinction between [intellectual disability] and what is called borderline intelligence.” *An Act Concerning the Definition of Mental Retardation: Hearing Before the H.R.*, Vol. 25, Part 2, at 408 (Conn. 1982).

82. Due to differences in testing “metrics,” the cutoff score on the Stanford-Binet test was 68. See WHAT IS MENTAL RETARDATION?, *supra* note 76, at 9-11.

83. See *id.*; *Fact Sheet*, *supra* note 11.

84. See WHAT IS MENTAL RETARDATION?, *supra* note 76, at 11-27.

85. *Id.* at 18.

86. *Id.* at 17; AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 35-36 (9th ed. 1992).

87. WHAT IS MENTAL RETARDATION?, *supra* note 76, at 13. Prior to 1992, being

[intellectual disability] . . . is not something you have, like blue eyes or a bad heart. Nor is it something you are, like being short or thin. It is not a medical disorder, although it may be coded in a medical classification of diseases . . . . Nor is it a mental disorder, although it may be coded in a classification of psychiatric disorders. [*Intellectual disability*] refers to a particular state of functioning that begins in childhood and in which limitations in intelligence coexist with related limitations in adaptive skills.<sup>88</sup>

Based upon this new understanding, the classification process is a means toward identifying the supports and services that will increase the individual's overall well-being.<sup>89</sup> The 2010 definition built upon these definitional changes.<sup>90</sup>

### B. *Intellectual Disability and the 2010 AAIDD Manual*

The 2010 AAIDD manual frames intellectual disability within the context of the human experience.<sup>91</sup> Intellectual disability is but one aspect of the individual that is influenced by the elements of life.<sup>92</sup> The AAIDD conceptualizes these elements within a multi-dimensional framework of human functioning, including: (1) intellectual abilities, (2) adaptive behavior, (3) health, (4) participation, and (5) context.<sup>93</sup>

Within this framework, intellectual abilities and adaptive behavior remain central to the diagnostic process.<sup>94</sup> However, clinicians must also consider the individual's health, recognizing that there is a direct correlation between "physical, mental, and social well-being" and level

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classified as intellectually disabled was similar to being diagnosed with a non-treatable condition. AM. ASS'N ON MENTAL DEFICIENCY, MANUAL ON TERMINOLOGY & CLASSIFICATION IN MENTAL RETARDATION 19 (rev. ed. 1977). Individuals were categorized into different levels of functioning based upon their IQ. *Id.* Those with IQ scores of 69-55 were considered "mildly retarded;" 54-50 as "moderately retarded;" 39-25 as "severely retarded;" and 25 or below as "profoundly retarded." *Id.* (based on the Wechsler standard deviation). According to this system, each category was indicative of the individual's functional capabilities. *Id.* at 17-19. Thus, intellectual disability was construed as an immutable characteristic, and the diagnostic process was treated as an end in itself. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at xiii-xiv.

88. AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 9 (9th ed. 1992).

89. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 13-19.

90. *Id.* at xiv.

91. *See id.* at 14.

92. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 13.

93. *See id.* at 14.

94. THE AAIDD EMPLOYS THE DUAL-CRITERION APPROACH. *See id.* at 1.

of functioning.<sup>95</sup> Contextual factors such as gender, age, race, and upbringing, as well as environmental factors, like living and work conditions, also help develop a fully-textured understanding of the individual.<sup>96</sup> Ultimately, the multidimensional approach to intellectual disability infuses the diagnostic process with a clear objective—to improve the individual’s quality of life with appropriate supports and services.<sup>97</sup>

Furthermore, the 2010 AAIDD manual rejects bright-line IQ cutoff scores.<sup>98</sup> The dual-criterion approach places equal emphasis on general intelligence and adaptive behavior.<sup>99</sup> However, the AAIDD expressed concern that rigid IQ cutoff scores overshadow adaptive behavior, effectively reducing the diagnostic process to a single-criterion approach.<sup>100</sup> Consequently, rigid cutoff scores render an individual *automatically* ineligible for services without any clinical analysis.<sup>101</sup> The AAIDD stated,

[t]he intent of this definition is not to specify a hard and fast cutoff point/score . . . . Rather, one needs to use clinical judgment in interpreting the obtained score in reference to the test’s standard error of measurement, the assessment instrument’s strengths and limitations, and other factors . . . .<sup>102</sup>

Hence, the most current definition interprets IQ scores in light of the standard error of measurement and the fallibility of intelligence tests.<sup>103</sup>

### 1. The Standard Error of Measurement

The standard error of measurement accounts for potential testing errors that could alter an individual’s reported IQ score<sup>104</sup> by providing a

95. *See id.* at 16. Level of functioning is further ascertained by participation in various social settings, such as within one’s family, at school, or in the greater community. *See id.* at 16-17.

96. *See id.* at 17.

97. *See* THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 19 (“Intellectual disability refers to a particular state of functioning that begins in childhood, is multidimensional, and is affected positively by individualized supports.”).

98. *See id.* at 35.

99. *See id.* at 28.

100. *See* WHAT IS MENTAL RETARDATION?, *supra* note 76, at 17.

101. *See* THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 35.

102. *Id.*

103. *See id.* at 35-42.

104. *See id.* at 36.



window of five points above and below the reported score in which the individual's true IQ may fall.<sup>105</sup> Thus, an IQ score of 70 has a standard error of measurement of 65 to 75.<sup>106</sup> Determining where an individual's true IQ falls within this range is a matter of clinical judgment.<sup>107</sup> The standard error of measurement is a time-tested standard that is universally utilized by leading authorities such as the AAIDD and the APA.<sup>108</sup> However, simply because the standard error of measurement is universally accepted does not mean that it is universally applied by various state service providers.<sup>109</sup>

Indeed, the inclusion of the standard error of measurement in the modern AAIDD definition "reflected, undoubtedly, frustration over the continuing tendency of professionals and agencies to apply the 70 IQ ceiling inflexibly, without taking into account either standard error or adaptive functioning level."<sup>110</sup> For example, although every leading authority uses the standard error of measurement in assessing intellectual disability, the standard error of measurement is unaccounted for in section 1-1g.<sup>111</sup>

## 2. Additional Factors Affecting the Reliability of IQ Scores

There are several factors that may falsely impact IQ scores.<sup>112</sup> First, the Flynn Effect is the theory that each year an IQ test is utilized, IQ scores increase by 0.33 points.<sup>113</sup> For example, when the Wechsler IQ test for adults (WAIS) was normed in 1995, the mean score was 100.<sup>114</sup> Nine years later, the mean score was 103.<sup>115</sup> Thus, an individual who scored 69 on the WAIS test in 1995 may score a 72 on the same test in 2004. While this artificial increase of three points may appear

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105. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION: DSM-IV-TR, 41 (4th ed. 2000)

106. *Id.*

107. *Id.* at 42.

108. See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 36.

109. See WHAT IS MENTAL RETARDATION?, *supra* note 76.

110. See *Id.*, at 17.

111. AM. ASS'N ON MENTAL DEFICIENCY, *supra* note 87, at 12 (stating that "[f]or several reasons these upper IQ limits are proposed as only guidelines rather than rigid limits. The assessment of intelligence is subject to some variation because of such factors as test construction, circumstances of administration, and measurement errors").

112. See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 35 (listing ten "challenges" that may affect the credibility of IQ scores).

113. See *id.* at 37.

114. See *id.*

115. While no one has ever fully accounted for this phenomenon, experts surmise that social and cultural changes account for this gradual increase in scores. See *id.*

inconsequential, it can mean the difference between DDS eligibility and ineligibility. Therefore, diagnosticians must be wary of the year in which intelligence tests are normed to ensure that scores are not inflated by the Flynn Effect.<sup>116</sup>

Additionally, IQ scores may vary depending upon which IQ test an individual takes, raising further reliability concerns.<sup>117</sup> In particular, there is a documented gap in scores between the WAIS and Stanford-Binet tests<sup>118</sup>—the two tests that DDS recommends for eligibility determinations.<sup>119</sup> In a 2004 study, seventy-four adults previously diagnosed with intellectual disabilities took both the WAIS and Stanford-Binet general intelligence tests.<sup>120</sup> In comparing the results of the two tests, there was a ten-point difference between the full-scale IQs for approximately 85% of the group, and a difference of more than twenty points for approximately 24% of the group.<sup>121</sup> In terms of eligibility for Social Security benefits, the Stanford-Binet results would qualify 95% of the individuals, while only 61% would qualify based on their WAIS results.<sup>122</sup> Evidently, the choice of test can make or break an individual's chances of eligibility for aid.

Over the years, the definition of intellectual disability has undergone several significant changes.<sup>123</sup> The most modern definition rejects the use of rigid IQ cutoff scores, utilizing the standard error of measurement and accounting for the fallibility of IQ tests.<sup>124</sup> Nevertheless, DDS continues to utilize a rigid IQ cutoff score.<sup>125</sup> The leading case, *Christopher R. v. Commissioner of Mental Retardation*, demonstrates how Connecticut's bright-line IQ cutoff score denies services to individuals who would otherwise be found eligible under a modern approach.<sup>126</sup>

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116. See *id.* (indicating that “best practices require recognition of a potential Flynn Effect when older editions of an intelligence test . . . are used in the assessment or interpretation of an IQ score”).

117. See *id.* at 38.

118. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 38.

119. See *Fact Sheet*, *supra* note 11.

120. Silverman et al., *supra* note 67, at 243-44.

121. *Id.* at 244.

122. *Id.*

123. See *supra* Part II.A.

124. See *supra* Part II.B.1.

125. See CONN. GEN. STAT. § 1-1g (2011); *Fact Sheet*, *supra* note 11.

126. See *Christopher R. v. Comm’r of Mental Retardation*, 893 A.2d 431 (Conn. 2006).

### III. *CHRISTOPHER R.* & THE CONNECTICUT SUPREME COURT'S INTERPRETATION OF SECTION 1-1G

In 2006, the Connecticut Supreme Court decided *Christopher R.*, the seminal case interpreting section 1-1g.<sup>127</sup> This case is the Connecticut Supreme Court's only word on DDS's authority to determine eligibility for supports and services.<sup>128</sup> Although the dual-criterion approach places equal emphasis on intellectual functioning and adaptive behavior, *Christopher R.* demonstrates how a rigid IQ cutoff score negates the presence of adaptive deficits, making an individual ineligible based upon IQ alone.<sup>129</sup>

Christopher was fifteen years old when he was denied eligibility for DDS supports and services for failure to satisfy section 1-1g.<sup>130</sup> DDS stipulated that Christopher satisfied the statute's adaptive behavior prong, finding that "[Christopher] had numerous support needs."<sup>131</sup> Nevertheless, he was denied eligibility based on the finding that he did not satisfy the statute's general intelligence requirements.<sup>132</sup>

Christopher argued that DDS's decision exceeded the bounds of its authority on three grounds.<sup>133</sup> First, DDS wrongfully considered the results of multiple intelligence tests where Christopher had one IQ score that satisfied section 1-1g.<sup>134</sup> Second, DDS overstepped its authority by analyzing the component parts of various IQ tests, as opposed to restricting its focus to Christopher's full-scale IQ scores.<sup>135</sup> Third, DDS erred when it concluded that Christopher's full-scale IQ was artificially depressed by the other psychological diagnoses rather than an intellectual disability.<sup>136</sup>

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 433, 434.

131. *Id.* at 435.

132. *See id.*

133. *Roos ex rel. Roos v. O'Meara*, 37 Conn. L. Rptr. 560, 560 (Conn. Super. Ct. 2004) *rev'd sub nom. Christopher R. v. Comm'r of Mental Retardation*, 893 A.2d 431 (Conn. 2006).

134. *Id.*

135. *Id.*

136. *Id.*

A. *The Meaning of “One or More”<sup>137</sup> within Section 1-1g*

Based on his IQ scores of 66 and 73, Christopher believed that he satisfied the general intelligence prong of section 1-1g.<sup>138</sup> Prior to the 2012 amendment, the plain language of section 1-1g provided that “general intellectual functioning means the results obtained by assessment with *one or more* of the individually administered general intelligence tests . . . .”<sup>139</sup> Christopher argued that this language meant an applicant must have *at least one* general intelligence test with a score of 69 or below<sup>140</sup> and that DDS overstepped its authority by requiring applicants to provide “*all Cognitive/Intellectual Testing available*” with “[s]cores . . . lower than 70 points.”<sup>141</sup> Affirming Christopher’s argument, the lower court found that he was eligible for services based upon his full-scale score of 66.<sup>142</sup>

The Connecticut Supreme Court overturned the lower court’s decision, holding that section 1-1g permitted DDS to consider the results of more than one general intelligence test.<sup>143</sup> The court reasoned that the

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137. CONN. GEN. STAT. § 1-1g (2011) (current version at CONN. GEN. STAT. § 1-1g (2012)). Notably, the 2012 amendment to section 1-1g removed the “one or more” language from the statute. The amended version provides that IQ is “measured by *tests* of general intellectual functioning,” which can be reasonably understood to mean one or more tests. *See id.* (emphasis added). Thus, although the “one or more” language no longer appears on the statute’s face, reviewing courts examining DDS’s consideration of multiple IQ tests will likely apply the same substantive standard set forth in *Christopher R.*

138. *Christopher R.*, 893 A.2d at 441.

139. CONN. GEN. STAT. § 1-1g(c) (2011) (emphasis added) (internal quotation marks omitted) (current version at CONN. GEN. STAT. § 1-1g(c) (2012)).

140. *See Christopher R.*, 893 A.2d at 437; Brief of Plaintiff-Appellee at 13, *Christopher R. v. Comm’r of Mental Retardation*, 893 A.2d 431 (Conn. 2006).

141. *Attachment C: Required Information Needed For Eligibility*, DEPARTMENT OF MENTAL RETARDATION (Mar. 27, 2001) (emphasis added).

142. In support of its holding, the lower court found that DDS’s practices essentially require “a child’s score on all parts of all tests ever administered [to] be under 70 IQ points. Nothing in the statutory definition of [intellectual disability] sets such a rigid or comprehensive standard.” *Roos ex rel. Roos v. O’Meara*, 37 Conn. L. Rptr. 560, 561 (Conn. Super. Ct. July 23, 2004) *rev’d sub nom. Christopher R. v. Comm’r of Mental Retardation*, 893 A.2d 431 (Conn. 2006).

143. *Christopher R.*, 893 A.2d at 441. The Connecticut Supreme Court determined that the lower court misinterpreted the language of section 1-1g. *Id.* As a matter of statutory interpretation, it is presumed that each word carries essential meaning. *Id.* at 440. Therefore, to focus on only one test when the statute states that the applicant must have an IQ of 69 as determined by “*one or more*” tests, would render the “or more” language superfluous. CONN. GEN. STAT. § 1-1g(c) (2011) (emphasis added) (current version at CONN. GEN. STAT. § 1-1g(c) (2012)). *See Christopher R.*, 893 A.2d at 440 (reasoning that to adopt the lower court’s interpretation, the court “essentially would have to read the phrase as if it stated ‘at least one’ general intelligence test, instead of ‘one or more’ intelligence tests”). As such, the lower court erred in finding that DDS unlawfully considered the results of multiple IQ tests in assessing Christopher’s eligibility. *See id.* at 441.

legislature intended to narrow the definition of section 1-1g so that individuals “with borderline normal intelligence” did not fall within the statute.<sup>144</sup> It further held that by considering multiple tests, DDS could best ensure that eligible individuals did in fact have an intellectual disability, rather than borderline intelligence.<sup>145</sup> Consequently, Christopher was found ineligible for services because one of his two IQ scores was above the ceiling of 69.<sup>146</sup>

B. *The Authority to Consider Component Parts of IQ Tests*

The Connecticut Supreme Court further held that when faced with more than two full-scale IQ scores, DDS is authorized to consider the component parts of the IQ tests to glean the most accurate understanding of the individual’s level of “general intellectual functioning.”<sup>147</sup> Thus, DDS was authorized to consider the sub-tests comprising Christopher’s full-scale score of 67 to determine whether the score was artificially depressed by other factors.<sup>148</sup> The court’s holding was supported by the American Psychiatric Association, stating that,

[w]hen there is a significant scatter in the subtest scores, the profile strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person’s learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.<sup>149</sup>

Thus, although Christopher’s IQ score of 66 satisfied section 1-1g, DDS was authorized to dissect the sub-parts of the test to determine whether the score was artificially depressed.

According to the administering school psychologist, several factors falsely impacted Christopher’s full-scale IQ score of 66.<sup>150</sup> For instance, Christopher’s low performance score of 57 was attributable to the

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144. *Christopher R.*, 893 A.2d. at 441.

145. *Id.*

146. *Id.*

147. *Id.* at 442.

148. *Id.* The court notes that it “do[es] not consider whether, in a case in which all IQ tests available for the department’s consideration have full scale scores below seventy, the defendant nevertheless properly may consider the test component scores separately . . . .” *Id.* at 439 n.13. Therefore, the court left open the possibility that DDS may not be authorized to consider sub-test scores where all of the applicant’s full-scale IQ scores are 69 or below.

149. *Id.* at 443-44 (quoting AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION: DSM-IV-TR, 42 (4th ed. 2000)).

150. *Christopher R.*, 893 A.2d at 443.

“excessive amount of time” it took Christopher to accomplish tasks.<sup>151</sup> Therefore, the score was not truly reflective of his overall performance ability, but simply of his ability to perform within time constraints.<sup>152</sup> Moreover, the psychologist concluded that Christopher’s verbal score of 80 more accurately reflected his general intellectual functioning.<sup>153</sup> Consequently, the court held that Christopher’s actual IQ did not satisfy the intelligence criterion of section 1-1g.<sup>154</sup>

Additionally, the court granted a high degree of deference to DDS, stating “we generally defer to an agency with expertise in matters requiring such a technical, case-by-case determination.”<sup>155</sup> It further recognized that “[t]he legislature . . . delegated to [DDS] a gatekeeping function through [its] authority to determine eligibility.”<sup>156</sup> This wide range of deference has impacted the role of reviewing courts in subsequent cases challenging DDS’s authority under section 1-1g.

### C. *The Consideration of Multiple Diagnoses in Analyzing IQ Tests*

Lastly, DDS determined that Christopher’s IQ score of 67 was falsely depressed by other psychological diagnoses.<sup>157</sup> The psychologist who administered the test found that Christopher’s full-scale IQ score was affected by his diagnosis of “pervasive developmental disorder.”<sup>158</sup> DDS substantiated its findings by considering multiple standardized tests previously administered for special education evaluations.<sup>159</sup> None of these evaluations diagnosed Christopher with an intellectual disability, thus leading DDS to conclude that his low IQ score was attributed to other psychological factors aside from intellectual disability.<sup>160</sup>

*Christopher R.* demonstrates how DDS’s bright-line IQ cutoff score imposes a more restrictive standard than the modern definition of intellectual disability. The court’s inquiry was limited to whether

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 442.

156. *Id.* at 445.

157. *Id.* at 441.

158. *Id.* at 443.

159. *Id.* at 443-44.

160. *Id.* at 444. However, this finding was overruled by CONN. GEN. STAT. § 17a-210b, providing that “[t]he absence of a diagnosis of, or reference to, mental retardation, intellectual disability or developmental disability within an individual’s school records or medical records shall not preclude the Department of Developmental Services from making a finding of intellectual disability, as defined in section 1-1g.”

Christopher's IQ fell above or below 69. It failed to consider the standard error of measurement, the fallibility of IQ tests, and other contextual factors such as Christopher's demonstrated adaptive needs. The 2010 AAIDD definition would have significantly increased Christopher's chances of accessing state services and supports.

#### IV. MODERNIZING CONNECTICUT'S DEFINITION OF INTELLECTUAL DISABILITY TO REFLECT BEST PRACTICES

Connecticut's definition of intellectual disability strays far from the best practices set forth in the 2010 AAIDD manual.<sup>161</sup> The "gold standard"<sup>162</sup> definition of intellectual disability is "significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."<sup>163</sup> On its face, the definition is concise and straightforward. Yet in operation, the diagnostic process is a multidimensional analysis requiring clinical expertise.<sup>164</sup>

DDS's practices reduce this dynamic approach to a basic calculus—an IQ of 69 or below.<sup>165</sup> Though DDS purports to consider adaptive behavior, an IQ above 69 precludes eligibility even in the face of adaptive deficits.<sup>166</sup> Consequently, individuals with intensive needs are denied access to vital supports and services.<sup>167</sup> The rigid definition set forth in section 1-1g is based upon an antiquated understanding of intellectual disability that no longer garners the support of psychologists.<sup>168</sup> In fact, the AAIDD has expressly rejected the use of IQ cutoff scores, the cornerstone of DDS's eligibility determinations.<sup>169</sup>

161. See generally THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 1. See *supra* Part II.B.

162. Tylenda et al., *supra* note 23, at 29.

163. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 1.

164. See *id.* at 13-19; *supra* Part II.

165. See CONN. GEN. STAT. § 1-1g (2011); *Fact Sheet*, *supra* note 11.

166. See CONN. GEN. STAT. § 1-1g (2011); Christopher R. v. Comm'r of Mental Retardation, 893 A.2d 431 (Conn. 2006); Costello v. Comm'r of Developmental Services, 16 A.3d 811 (Conn. App. Ct. 2011); Allan G. v. O'Meara, No. CV105014972S, 2011 WL 3211281, at \*2 (Conn. Super. Ct. June 29, 2011); Malcolm v. O'Meara, No. CV040527349S, 2005 WL 1083794 (Conn. Super. Ct. Mar. 30, 2005); Martinez v. O'Meara, No. CV 00499604, 2001 WL 527505 (Conn. Super. Ct. Apr. 30, 2001).

167. See *supra* Introduction & *supra* Part III.

168. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 39-49 ("Although a fixed cutoff for diagnosing an individual as having [intellectual disability] is not intended, and cannot be justified psychometrically, it has become operational in some states.") (internal citations omitted).

169. *Id.* at 40 ("It is clear from this significant limitations criterion used in this *Manual*

Connecticut must modernize its definition of intellectual disability so that DDS more fairly and accurately determines who is eligible for supports and services. In order to employ best practices, the legislature must require DDS to implement the 2010 AAIDD definition of intellectual disability. The AAIDD definition does not impose strict IQ cutoff scores, and accounts for the fallibility of general intelligence tests.<sup>170</sup> Moreover, it envisions intellectual disability as a holistic inquiry that emphasizes the individual's level of need.<sup>171</sup> Ultimately, the AAIDD definition disposes of DDS's basic "IQ calculus," freeing eligibility determinations from the four corners of the IQ test.<sup>172</sup>

A. *Amending the DDS Enabling Act to Include the 2010 AAIDD Definition Is the Best Way to Ensure Best Practices*

As Connecticut's most comprehensive resource for services and supports, DDS has an important role in ensuring that eligibility determinations are based upon best practices.<sup>173</sup> The most intuitive way to comport with best practices is through amending section 1-1g to reflect the 2010 AAIDD definition of intellectual disability. Although a statutory amendment would alter DDS's eligibility criteria, this is only true to the extent that DDS's regulations incorporate section 1-1g. If DDS were to remove section 1-1g from its regulations, then a statutory amendment would not affect DDS's eligibility determinations.<sup>174</sup>

An agency's regulations are invalid if they "are inconsistent with the authorizing statute."<sup>175</sup> However, because there is no statute

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that AAIDD (just as the American Psychiatric Association, 2000) *does not* intend for a fixed cutoff point to be established for making the diagnosis of [intellectual disability]."); *Id.* at 35 ("The intent of this definition is not to specify a hard and fast cutoff point/score for meeting the significant limitations in intellectual functioning criterion of [intellectual disability].").

170. *Id.* at 35-42.

171. *Id.* at 13-19; *see supra* Part II.

172. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 13-19.

173. *See Assessing Level of Need for Supports, supra* note 36.

174. Rules promulgated by administrative agencies are entitled to a large degree of deference, and are only overturned if they contravene a governing law. *See Wheelabrator Lisbon, Inc. v. Dep't of Pub. Util. Control*, 931 A.2d 159, 168-69 (Conn. 2007); *Giglio v. Am. Econ. Ins. Co.*, 900 A.2d 27, 35 (Conn. 2006).

175. *See Wheelabrator*, 931 A.2d at 168-69 (holding that an agency "cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power") (internal quotations omitted); *Giglio*, 900 A.2d at 35 ("[I]t is well established that an administrative agency's regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute.") (internal quotation marks omitted). *See also* CONN. GEN. STAT. § 4-166 (2011) (providing that an agency's regulatory powers apply to "the amendment or repeal of a prior regulation").



requiring DDS to define intellectual disability in accordance with section 1-1g, DDS may remove section 1-1g from its regulations without contravening existing law.<sup>176</sup> DDS *voluntarily* incorporated section 1-1g into its regulations pursuant to a broad legislative directive.<sup>177</sup> As such, there is no legislative authority that would estop DDS from removing section 1-1g from its regulations.<sup>178</sup> This precise issue arose in Massachusetts when the Commonwealth's Department of Developmental Services (Department) modified its regulations to create a narrower eligibility standard.

### 1. A Lesson from Massachusetts: Why a Statutory Amendment May Not Be Binding upon DDS

The aftermath of the Massachusetts case *Melican v. Morrissey* aptly illustrates that an agency is free to amend its regulations within the parameters established by the legislature.<sup>179</sup> In *Melican*, the court held that Susan Melican was eligible for state supports and services based upon an IQ score of 75 and demonstrated adaptive deficits.<sup>180</sup> The court

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176. The enabling act does not impose any restrictions on DDS's discretion over the promulgation of regulations for eligibility determinations. *See* CONN. GEN. STAT. § 17a-210 (2011) (stating that “[t]he commissioner shall be responsible for establishing standards, providing technical assistance and exercising the requisite supervision of all state-supported residential, day and program support services for persons with [intellectual disability] . . .”); CONN. GEN. STAT. § 17a-212 (2011) (requiring DDS to “establish[] (1) criteria for (A) determining eligibility for services provided by the department . . .”).

177. *See* CONN. GEN. STAT. § 17a-212 (2011) (stating that “[o]n or before September 30, 1991, the Commissioner of Developmental Services shall adopt regulations . . . establishing (1) criteria for (A) determining eligibility for services provided by the department”); CONN. AGENCIES REGS. § 17a-212-2(b)(2) (2001) & § 17a-212-1(10) (2001) (providing, respectively, that “[a] person is eligible for services of the department if he . . . has mental retardation” “as defined in section 1-1g . . .”); *Christopher R. v. Comm’r of Mental Retardation*, 893 A.2d 431, 439 (Conn. 2006) (finding that “although the defendant was not mandated statutorily to determine eligibility in accordance with § 1-1g, the defendant necessarily assumed such an obligation by adopting a regulation that incorporated the statutory definition of mental retardation”).

178. This is only true to the extent that the amendment is not made “unreasonably, arbitrarily, illegally or in abuse of its discretion . . . .” *Christopher R.*, 893 A.2d at 437 (internal quotation marks omitted).

179. *See Tartarini v. Mass. Dep’t of Developmental Servs.*, No. 09-02278-F, 2011 WL 4528185, at n.5 (Mass. Super. Ct. Mar. 7, 2011) (finding that the Department lawfully amended its regulations following the *Melican* decision because to hold otherwise, “the Department would be effectively precluded from ever updating its regulations once the. [sic] meaning of those regulations had been litigated in court”), *rev’d*, *Tartarini v. Dep’t of Mental Retardation*, 972 N.E.2d 33 (Mass. App. Ct. 2012); *Melican v. Morrissey*, No. 041368B, 2006 WL 1075465, at \*7 (Mass. Super. Ct. Mar. 13, 2006).

180. *See Melican*, 2006 WL 1075465, at \*7 (holding that “[a]n interpretation of the 115 CMR 2.01 and the AAMR definitions of mental retardation that allows for an IQ score of 75, taking into account the standard error of measurement, as well as a host of other factors

found that a governing statute required the Department to determine eligibility by using “clinical authorities” identified in its regulations.<sup>181</sup> Accordingly, the Department incorporated the 1992 AAIDD definition of intellectual disability into its eligibility criteria as a clinical authority.<sup>182</sup> Considering the standard error of measurement<sup>183</sup> set forth in the 1992 AAIDD manual, the court found that the hearing officer properly determined that Melican’s IQ score of 75 satisfied the definition. This holding reflected a broad interpretation of the Department’s eligibility criteria, finding that an IQ score at the upper limits of the standard error of measurement satisfied the eligibility requirements.<sup>184</sup>

The Department argued for a narrower construction of its regulations, stating that Melican would only qualify for services with IQ scores below 70.<sup>185</sup> However, the court noted that neither the governing statute nor the Department’s regulations imposed an IQ cutoff score—the court even suggested that an IQ score above 75 might satisfy the criteria.<sup>186</sup> Undoubtedly, the “contextual and multidimensional approach” asserted in *Melican* would have increased the number of future applicants deemed eligible for services.<sup>187</sup>

On the heels of *Melican*, the Department amended its regulations to avoid the sweeping implications of the court’s holding,<sup>188</sup> the

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indicating significant subaverage intellectual functioning and limitations in adaptive skill areas, is reasonable and consistent with the law”).

181. See MASS. GEN. LAWS ch. 123B, § 1 (2010) (amended by St. 2012, c. 433, eff. April 8, 2013) (defining an individual with an intellectual disability 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 the person’s ability to learn or adapt, as judged by established standards available for the evaluation of a person’s ability to function in the community . . . .”) (emphasis added); *Melican*, 2006 WL 1075465, at \*4.

182. See *Melican*, 2006 WL 1075465, at \*7.

183. *Id.*

184. *Id.* at \*2.

185. See *id.*

186. See *id.* at \*6 (“This Court notes that nowhere in G.L.c. 123B, the Department’s regulations, or the AAMR’s definition of mental retardation does it say that a score over 75 automatically and permanently disqualifies an applicant from consideration for Department eligibility. In fact, IQ scores are neither mentioned in G.L.c. 123B nor any Department regulation found in the Record.”).

187. *Id.* at \*7.

188. See 115 MASS. CODE REGS. § 2.01 (2009) (amended 2013) (imposing cutoff score of 70 and deleting reference to 1992 AAIDD definition). See also Brief of Plaintiff-Appellant, at 28, *Tartarini v. Mass. Dep’t of Developmental Servs.*, No. 09-02278-F, 2011 WL 4528185 (Mass. Super. Ct. Mar. 7, 2011) (stating “[t]he 2006 revision was profound, unmooring the regulation from any ‘established standard’ and instead adopting a bright-line test contemplated nowhere in the statute”).

Department removed the 1992 AAIDD definition, and established a strict IQ cutoff score of 70.<sup>189</sup> This amendment was challenged in the 2011 case of *Tartarini v. Massachusetts Department of Developmental Services* on the grounds that the Department “promulgated the regulation with the intent of nullifying *Melican*, under which a greater number of people would qualify for . . . services.”<sup>190</sup> Specifically, Tartarini argued that the new regulation violated the governing statute because it no longer identified “clinical authorities” as required by the statute.<sup>191</sup>

Reversing the lower court, the Massachusetts Appeals Court held that the Department exceeded its statutory authority by removing reference to the 1992 AAIDD definition and implementing a strict IQ cutoff score that was “untethered to the statutory mandate.”<sup>192</sup> It remanded the case to the Department for resolution under a regulatory framework that identified clinical authorities as required by the governing statute.<sup>193</sup> The Department responded by creating a definition reflecting the 2010 AAIDD standard.<sup>194</sup>

Additionally, the legislature responded to *Tartarini* by amending

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189. See *Tartarini*, 2011 WL 4528185, at \*7 n.5.

190. Brief of Plaintiff-Appellant, at 35 *Tartarini v. Mass. Dep’t of Developmental Servs.*, No. 09-02278-F, 2011 WL 4528185 (Mass. Super. Ct. Mar. 7, 2011). See generally *Tartarini*, 2011 WL 4528185 (alteration in original). The Department found Tartarini ineligible for services and supports in light of IQ scores of 69 and 71, and virtual dependence upon her mother. *Id.*

191. See *Tartarini*, 2011 WL 4528185, at \*5-6 (arguing that “this earlier, broader definition of mental retardation was more consistent with the statutory requirement that mental retardation be judged by ‘established standards’”). See also Brief of Plaintiff-Appellant, at 29 *Tartarini v. Mass. Dep’t of Developmental Servs.*, No. 09-02278-F, 2011 WL 4528185 (Mass. Super. Ct. Mar. 7, 2011) (arguing that “[t]he abandonment of the generally accepted AAMR/AAIDD definition, which was accomplished solely by regulatory fiat, was beyond statutory authority”).

192. *Tartarini v. Dep’t of Mental Retardation*, 972 N.E.2d 33, 37 (Mass. App. Ct. 2012).

193. *Id.* at 39.

194. The Department amended its regulations to define intellectual disability as: consistent with the standard contained in the 11th edition of the *American Association of Intellectual Disabilities: Definition, Classification, and Systems of Supports* (2010), significantly sub-average intellectual functioning existing concurrently with and related to significant limitations in adaptive functioning. Intellectual Disability originates before age 18. . . . The determination of the presence or absence of intellectual disability requires that exercise of clinical judgment.

115 MASS. CODE REGS. § 2.01 (2009) (amended 2013). Additionally, the Department amended its regulations to define significantly sub-average intellectual functioning as “an intelligence test score that is indicated by a score of approximately 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.” *Id.*

the governing statute, removing the ambiguous reference to “clinical authorities” altogether, and defining intellectual disability using the 2010 AAIDD manual.<sup>195</sup> The amended statute not only defines intellectual disability in a manner “consistent with the most recent definition provided by the American Association on Intellectual and Developmental Disabilities,” but it also lists the five multi-dimensional factors used by AAIDD as essential to accurate assessment.<sup>196</sup>

This statutory amendment is highly analogous to the proposed amendment to the DDS enabling act, advocated by this Note. The Connecticut legislature must learn from the lessons of *Melican* and *Tartarini* and amend the DDS enabling act to incorporate the 2010 AAIDD assessment methods. Because DDS’s regulations must comply with the enabling act,<sup>197</sup> the proposed amendment will ensure that eligibility determinations align with best practices.

## 2. The Benefits of Amending DDS’s Enabling Act

DDS can achieve best practices in eligibility determinations by incorporating the AAIDD standards into the enabling act as set forth herein:

[T]he Commissioner of Developmental Services shall adopt regulations . . . establishing (1) criteria *consistent with best practices for assessing intellectual disability, as set forth by the American Association for Individuals with Intellectual and Developmental Disabilities [AAIDD]* for (A) determining eligibility for services provided by the department . . . .<sup>198</sup>

This proposed amendment unambiguously ensures that DDS will implement the most modern definition of intellectual disability. The enabling act’s direct reference to the AAIDD aligns DDS’s practices with those utilized by the leading authority in assessing intellectual disability.<sup>199</sup> Unlike the ambiguous reference to “clinical authorities” within the Massachusetts statute, this proposed amendment establishes clear guidelines for both DDS and reviewing courts.<sup>200</sup> Moreover, it

195. See MASS. GEN. LAWS ch. 123B, § 1 (2010) (amended by St. 2012, c. 433, eff. April 8, 2013).

196. *Id.*

197. See *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 931 A.2d 159, 168-69 (Conn. 2007) (holding that an agency “cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power”) (internal quotations omitted).

198. See CONN. GEN. STAT. § 17a-212 (2011) (emphasis added).

199. Tylenda et al., *supra* note 23, at 29; see also *supra* Part III.

200. See MASS. GEN. LAWS ch. 123B, § 1 (2010) (amended by St. 2012, c. 433, eff.

sufficiently protects individuals with intellectual disabilities—if DDS fails to implement best practices, the court has the authority to determine that DDS’s regulations unlawfully contravene the enabling act.<sup>201</sup>

There are several advantages to amending the enabling act to expressly require best practices. First, the proposed amendment overcomes the issue of blanket deference given to DDS’s eligibility determinations. Though DDS receives deference as the expert body serving individuals with intellectual disabilities, there must be some degree of judicial oversight to ensure that its practices are both lawful and fair.<sup>202</sup> Connecticut case law demonstrates the courts’ hesitancy to overturn *any* of DDS’s eligibility determinations, rendering judicial review virtually meaningless.<sup>203</sup>

*Christopher R.* set a strong precedent solidifying DDS’s broad power.<sup>204</sup> There, the court vested DDS with an arsenal of authority in analyzing an applicant’s general intelligence, including the ability to consider (1) more than one test;<sup>205</sup> (2) the subparts of each test;<sup>206</sup> (3) other psychological diagnoses;<sup>207</sup> (4) all other tests, regardless of whether they measure general intelligence;<sup>208</sup> (5) the applicant’s educational profile;<sup>209</sup> and (6) the absence of formal diagnosis of

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April 8, 2013) (defining an individual with an intellectual disability 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 the person’s ability to learn or adapt, as judged by established standards available for the evaluation of a person’s ability to function in the community”) (emphasis added); *Melican v. Morrissey*, No. 041368B, 2006 WL 1075465, at \*4 (Mass. Super. Ct. Mar. 13, 2006).

201. See *Wheelabrator*, 931 A.2d at 168-69; *Giglio v. Am. Econ. Ins. Co.*, 900 A.2d 27, 35 (Conn. 2006).

202. See *Christopher R. v. Comm’r of Mental Retardation*, 893 A.2d 431, 442 (Conn. 2006) (noting that the court “generally defer[s] to an agency with expertise in matters requiring such a technical, case-by-case determination”).

203. See *e.g.*, *id.* at 431; *Costello v. Comm’r of Developmental Servs.*, 16 A.3d 811 (Conn. App. Ct. 2011); *Allan G. v. O’Meara*, No. CV105014972S, 2011 WL 3211281, at \*2 (Conn. Super. Ct. June 29, 2011); *Malcolm v. O’Meara*, No. CV040527349S, 2005 WL 1083794 (Conn. Super. Ct. Mar. 30, 2005); *Martinez v. O’Meara*, No. CV 00499604, 2001 WL 527505 (Conn. Super. Ct. Apr. 30, 2001).

204. See *e.g.*, *Costello*, 16 A.3d at 816 (resolving a battle of the experts in favor of DDS, finding that the plaintiffs did not overcome the deferential standard established in *Christopher R.*); *Allan G.*, 2011 WL 3211281, at \*2 (denial of eligibility where the court quotes the “gatekeeping function” language from *Christopher R.*).

205. *Christopher R.*, 893 A.2d at 442.

206. *Id.* at 432.

207. *Id.* at 444.

208. *Id.* at 443.

209. *Id.* at 444. However, as previously noted, this finding was overruled by CONN. GEN. STAT. § 17a-210b, providing that “[t]he absence of a diagnosis of, or reference to, mental retardation, intellectual disability or developmental disability within an individual’s

intellectual disability.<sup>210</sup> This broad grant of authority gives DDS ample opportunities to make eligibility determinations based upon IQ alone.<sup>211</sup>

In effort to reign in DDS's unfettered discretion, the proposed amendment not only requires DDS to look beyond intellectual functioning in its eligibility determinations, but it also gives courts a clear legislative standard against which to review such determinations.<sup>212</sup> In accord with the 2010 AAIDD manual, the regulations place equal emphasis on general intelligence and adaptive behavior, as well as factor in the standard error of measurement and any other pertinent considerations.<sup>213</sup> Absent this amendment, there is no authority compelling DDS to implement best practices.

Additionally, this amendment enables DDS to timely amend its regulations so that its practices reflect the evolving understanding of intellectual disability. The social construct of intellectual disability and assessment methods have progressed significantly over time.<sup>214</sup> Correspondingly, the AAIDD has published eleven manuals reflecting these changes.<sup>215</sup> Certainly the most recent definition of intellectual disability will not be the last.<sup>216</sup> Thus, it is important that DDS be able

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school records or medical records shall not preclude the Department of Developmental Services from making a finding of intellectual disability, as defined in section 1-1g.”

210. *Christopher R.*, 893 A.2d at 444.

211. Additionally, several lower courts have relied upon the Connecticut Supreme Court's recognition that the legislature vested DDS with a “gatekeeping function,” resulting in denials of eligibility in the majority of the cases. *Id.* at 445. *See e.g., Costello*, 16 A.3d at 816 (resolving a battle of the experts in favor of DDS, finding that the plaintiffs did not overcome the deferential standard established in *Christopher R.*); *Allan G.*, 2011 WL 3211281, at \*2 (denial of eligibility where the court quotes the “gatekeeping function” language from *Christopher R.*).

212. For example, in *Melican* the court considered the definition of intellectual disability set forth in the 1994 AAIDD, pursuant to a statute requiring reliance on “clinical authorities,” to find the applicant eligible for services and supports. *See Melican*, 2006 WL 1075465, at \*4.

213. *See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION*, *supra* note 8, at 28-29.

214. *See id.* at xiii-xiv (discussing the historical changes to the definition of intellectual disability throughout the AAIDD's manuals); *supra* Part II.

215. *See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION*, *supra* note 8, at xiii-xiv (discussing the historical changes to the definition of intellectual disability throughout the AAIDD's manuals); *supra* Part II.

216. For example, while intelligence is currently understood as a single trait, there is increasing support for the notion that intelligence is multi-layered. The concept of “multiple intelligences” contemplates several areas of intelligence, including “linguistic, logical-mathematical, spatial, musical, bodily kinesthetic, interpersonal, and intrapersonal.” THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 33. The most current manual suggests that when assessment methods for “multiple intelligences” have more scientific support, methods for measuring intellectual functioning may shift, replacing the IQ test as we know it. *Id.* at 34 (stating that “until such measures of multiple intelligence

to efficiently alter its regulations to comply with these changes. Because state agencies are better situated than the legislature to make expeditious amendments,<sup>217</sup> requiring DDS to promulgate regulations that adhere to best practices is the most effective way to ensure that individuals with intellectual disabilities are assessed in the most modern light.

Moreover, during discussions regarding the 2012 amendment to section 1-1g, the legislature contemplated an amendment almost identical to that proposed herein.<sup>218</sup> The legislature inquired into whether it should refer to the definition of intellectual disability in the forthcoming DSM “rather than insert[ing that] language as definition” in section 1-1g.”<sup>219</sup> One Representative expressed specific concern that legislators, most of whom lack any medical background, are ill-equipped to define intellectual disability.<sup>220</sup> He stated,

I’m much more comfortable with a professional body making these . . . definitions then [sic] us because what it does is simply politicize these issues. I would rather they be professionalized . . . . I’m wondering if, you know, from 50,000 feet, we’re going down the wrong path by frequently redefining the statute what is already defined by a professional body.<sup>221</sup>

This legislator’s concerns underscore the importance of incorporating the AAIDD definition in the enabling act to ensure an ongoing commitment to best practices.

DDS might further argue that amending the enabling act would impose an undue administrative burden because DDS would be required to modify its regulations each time the AAIDD revealed new developments in the assessment of intellectual disability. However, while requiring DDS to consistently modify its assessment methods might be financially burdensome, these concerns are outweighed by the needs of individuals with intellectual disabilities.

Though preservation of financial resources is important, one must consider the incidental price inherent in such conservatism—there is a *human cost* in the failure to implement modern practices. In the face of

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can be assessed reliably and validly, it is the position of AAIDD that intellectual functioning . . . is best conceptualized and captured by a general factor of intelligence”).

217. See generally CONN. GEN. STAT. §§ 4-166-176 (2011) (providing procedures for the promulgation of regulations).

218. See *An Act Concerning the Definition of Mental Retardation and Intellectual Disability: Hearing on H.B. 5437 Before the Pub. Health Comm.*, 2012 Gen. Assemb., Reg. Sess. (Conn. Oct. 2012) (statement of Representative Perillo).

219. *Id.*

220. *Id.*

221. *Id.*

the evolving understanding of intellectual disability, DDS cannot escape the modernization of its practices by waving fiscal flags. If the financial burden becomes too high, then this must be brought to the legislature's attention. It is DDS's statutory responsibility to comply with best practices, no matter the financial cost, in order to avoid paying a human price.

B. *The 2010 AAIDD Definition of Intellectual Disability Considers the Person – Not the Paper*

By amending the enabling act, DDS will be forced to abandon strict IQ cutoff scores and give equal emphasis to general intelligence and adaptive behavior. As a result, individuals with IQ scores within the standard error of measurement (70-75), and even above it—where scores are inflated by other extrinsic factors—will not be summarily found ineligible for services. Ultimately, many of those turned away under section 1-1g would be properly classified as having an intellectual disability, and thereby gain access to supports and services otherwise foreclosed.

1. Need by Numbers

Under the current eligibility scheme, DDS denies services and supports to individuals who would undoubtedly benefit from them. In nearly every eligibility determination case, DDS stipulates that the individual struggles with activities of daily living and is virtually dependent on family and friends.<sup>222</sup> Individuals with adaptive deficits make up one side of the eligibility ledger, demonstrating significant needs in their activities of daily living. On the other side of the ledger, DDS offers supports and services to improve daily living skills.<sup>223</sup> Considering both sides of the ledger, common sense dictates that DDS

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222. *Costello v. Comm'r of Developmental Servs.*, 16 A.3d 811, 817 (Conn. App. Ct. 2011) (finding that “the plaintiff has demonstrated deficits in her adaptive behavior and that she needs special education accommodations. Nonetheless, the record furnishes a reasonable factual basis for the administrative finding that the plaintiff did not qualify for the *department's* services because her test scores on several intelligence tests did not establish subaverage general intellectual ability and therefore did not satisfy the eligibility requirement contained in § 1-1g”); *Allan G. v. O’Meara*, No. CV105014972S, 2011 WL 3211281, at \*3 (Conn. Super. Ct. June 29, 2011) (the hearing officer found that Allan “exhibit[ed] deficits in his adaptive behavior during the developmental period. But in order to qualify for services Allan G. must have both subaverage intellectual functioning and deficits in adaptive behavior. Therefore he is not eligible for services.”).

223. Eligible individuals undergo a “supports intensity scale” screening to identify services best tailored to their personal needs.



provides services to those individuals who are in need.

In reality, IQ cutoff scores eviscerate the common sense approach. Even when an individual would benefit from supports and services, DDS denies eligibility on the basis of IQ. For example, in *Christopher R.*, Christopher's father "testified regarding [Christopher's] lack of self-direction and offered evidence regarding [Christopher's] day-to-day dependence on family and school professionals."<sup>224</sup> Although DDS recognized Christopher's "numerous support needs," it nevertheless found him ineligible.<sup>225</sup> Similarly, in *Allan G.*, Allan was deemed ineligible despite evidence that his mother had to remind him how to "eat, bathe, and dress," and that he was "incapable of functioning without support in any situation."<sup>226</sup>

Nevertheless, DDS consistently asserts that supports and services are reserved for those "*most in need*."<sup>227</sup> DDS's pervasive recognition that its denied applicants are in need of "a lot of help"<sup>228</sup> is unnerving, considering the very thing that these individuals need most, services and supports, is the very thing they are denied. An individual who DDS recognizes "needs a lot of help," has a "lack of self-direction," and who is wholly dependent on "family and school professionals," is simply not in need *enough*.<sup>229</sup> DDS does not serve those most in need. Rather, IQ is the beginning and the end of the diagnostic process.

## 2. Doing Something About Individuals with Intellectual Disabilities Who Are "Doing Nothing"<sup>230</sup>

While all individuals with intellectual disabilities benefit from supports and services, the nature of these services varies widely depending on the individual's level of functioning. For instance, individuals with lower IQ scores often rely upon supports to help them

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224. *Christopher R. v. Comm'r of Mental Retardation*, 893 A.2d 431, 445 (Conn. 2006)

225. *Id.*

226. *Allan G.*, 2011 WL 3211281, at \*2.

227. *Christopher R.*, 893 A.2d at 441 (emphasis added). In *Dep't of Developmental Servs. v. Michael A.*, DDS argued that "[b]ecause of our limited funding, we need to make sure that the people who receive the funding are those who have deficits, that are [intellectually disabled]," meaning that they have an IQ of 69 or below. Transcript of Hearing, *Dep't of Developmental Servs. v. Michael A.*, (June 17, 2011) (unpublished transcript from administrative hearing) (on file with author).

228. *Christopher R.*, 893 A.2d at 435.

229. *Id.*

230. See generally Julie Lounds Taylor & Robert M. Hodapp, *Doing Nothing: Adults With Disabilities With No Daily Activities and Their Siblings*, 117 AM. J. ON INTELL. & DEVELOPMENTAL DISABILITIES 67 (2012) (presenting a recent study showing that many individuals with intellectual and developmental disabilities are without daily activities).

perform basic activities of daily living.<sup>231</sup> Comparatively, those with higher IQ scores (falling within or slightly above the standard error of measurement of 70-75) often depend on more dynamic services to help them gain greater independence. In reference to individuals with higher IQs, the AAIDD notes that “the gap between their capabilities and the demands from their environments grows as they leave school, as society becomes more complex, and as the standards for successful adulthood climb.”<sup>232</sup> Thus, those with higher IQs are uniquely vulnerable because their efforts to engage in the community are often met with high societal pressures and expectations.<sup>233</sup> Without the proper supports and services, these higher functioning individuals either struggle to be a part of the community, or their participation is precluded altogether. Historically, individuals with higher IQs have fallen through the cracks of the formal supports system, becoming members of “the forgotten generation.”<sup>234</sup>

By failing to recognize the adaptive needs of individuals with higher IQ scores, many of DDS’s denied applicants join the “forgotten generation.”<sup>235</sup> Because DDS offers the most comprehensive services and supports within Connecticut, denied applicants do not have a comparable alternative source of assistance.<sup>236</sup> Thus, the burden of care often falls upon family members who must balance the demands of their own careers, goals, and other personal responsibilities.<sup>237</sup> More often than not, this is an impossible balance to strike.

Additionally, like most people, individuals with intellectual disabilities have goals and dreams that they wish to achieve.<sup>238</sup> While

231. *See Fact Sheet, supra* note 11.

232. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 152. *See also id.* at 153 (identifying several challenges faced by individuals with higher IQs).

233. Unlike lower functioning individuals who are not as actively engaged in “normal” community life. *Id.* at 151-52.

234. The “forgotten generation” is comprised “of people with [intellectual disability] with higher IQ scores and people without [intellectual disability] but with lower IQ scores, whose IQ scores are just beyond the [intellectual disability] range.” *Id.* at 153.

235. *Id.*

236. *See Assessing Level of Need for Supports, supra* note 36.

237. For example, Michael’s mother emphasized the importance of DDS services, considering her health concerns and responsibilities in caring for her other children. *See* Statement of Cathy A., *supra* note 1; *supra* Introduction; *see also Tartarini*, 2011 WL 4528185, at \*2 (discussing Tartarini’s virtual dependence upon her mother).

238. Michael A. stated, “[m]y goals for the future is graduate high school, go to college, buy a house, marry a woman, and have kids.” *An Act Concerning Expansion of the Pilot Program for Persons with Autism Spectrum Disorders: Hearing on Substitute for H.B. 5666* (2008) (statement of Michael A.). *See also Taylor & Hodapp, supra* note 230, at 67. (stating that “[l]ike adults in the general population, individuals with intellectual and developmental disabilities require activities and stimulation to feel fulfilled”).

everyone has obstacles to overcome in this regard, individuals with intellectual disabilities face an additional hurdle. IQ is frequently the barricade to self-betterment. Strict IQ cutoff scores deny individuals the opportunity to reach their fullest potential. A recent study shows that many individuals with intellectual disabilities literally do nothing throughout the day.<sup>239</sup> Of the 796 study participants with intellectual or developmental disabilities, 13% led sedentary lifestyles.<sup>240</sup>

Moreover, those sedentary individuals had three times more unmet service needs than their active counterparts,<sup>241</sup> and were “more likely to show higher levels of behavioral, health, and functional problems.”<sup>242</sup> Presumably, these individuals would be more engaged in the community and would enjoy greater overall health if their service needs were met. As it stands, individuals who are denied services despite adaptive needs may never achieve their goals—or for that matter, anything at all.

The incorporation of the 2010 AAIDD definition into the enabling act will permanently seal the cracks of the formal supports system. This definition views intellectual disability as a state of being that can be improved through proper supports and services.<sup>243</sup> A co-author of the 2010 AAIDD manual stated,

[t]he level of human functioning, of any of us, is directly related to the supports that we receive. And so consequently, taking it away from just the focus upon the defect that the individual has, and looking at what is the potential of that person in regards to human functioning with appropriate supports, then you really have a complete system.<sup>244</sup>

This supports-oriented model would require DDS to analyze IQ scores with greater flexibility; an IQ score above 69 may fall within the standard error of measurement, or may be artificially inflated by extrinsic factors. Ultimately, this is a question of clinical judgment that cannot be made within the vacuum of IQ.<sup>245</sup> Therefore, DDS’s implementation of best practices would likely extend services to individuals otherwise found ineligible. For example, *Christopher R.* could have

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239. Lounds Taylor & Hodapp, *supra* note 230, at 67.

240. *Id.* at 69, 72.

241. *Id.* at 76.

242. *Id.*

243. See THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, at 13-19.

244. AAIDD books, *Classification & Intellectual Disability CC*, YOUTUBE (April 26, 2010), <http://www.youtube.com/watch?v=80rc4ZAtQ0I>.

245. THE AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *supra* note 8, 39-40.

been resolved in favor of Christopher under the 2010 AAIDD definition. There, the two competing IQ scores were 66 and 73.<sup>246</sup> According to best practices, both scores might satisfy the definition of intellectual disability. Though DDS argued that the score of 73 fell beyond the range of intellectual disability, it is within the standard error of measurement. Although the standard error of measurement may also make Christopher's IQ score 78, the discrepancy over Christopher's true IQ would be resolved through clinical judgment. Considering Christopher's utter dependence upon family and school employees, his "numerous supports needs," and another IQ test where he scored 66, it seems more likely that Christopher's true IQ is below 73, rather than above it.<sup>247</sup> Under this analysis, Christopher would have been deemed eligible for services.

Similarly, Michael would have benefitted from the AAIDD definition. In *Department of Developmental Services v. Michael*, Michael scored consistently within the intellectually disabled range with IQs of 64, 69, and 69.<sup>248</sup> When he received an IQ score of 81, it came as a surprise to both the psychologist who administered the test and DDS.<sup>249</sup> At the hearing, the administering psychologist postulated several testing errors that may have inflated Michael's score,<sup>250</sup> arguing that Michael's strong memory skills may have artificially increased subtest scores measuring comprehension.<sup>251</sup> He surmised that while Michael's responses seemingly demonstrated comprehension of the questions asked, his answers might actually have been the product of his rote memory skills.<sup>252</sup> Additionally, the psychologist argued that the

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246. *Christopher R. v. Comm'r of Mental Retardation*, 893 A.2d 431, 441 (Conn. 2006).

247. *Id.* at 435.

248. Transcript of Hearing at 21, *Dep't of Developmental Servs. v. Michael A.* (June 17, 2011) (unpublished transcript from administrative hearing) (on file with author).

249. The administering psychologist stated that Michael's "huge spike in the test results" was something he had "never seen . . . before in any of the children [he] tested." *Id.* at 33. Also, DDS's psychologist stated, "I certainly found the result—the WAIS Three result [of 81] that was reported 2009 [sic]—to be surprising," and that it was "a staggering, kind of, unusual result." *Id.* at 55.

250. *Id.* at 29-33.

251. *Id.*

252. For example, Michael knew who the President was during the Civil War, but when asked when the Civil War was, he answered, "two weeks ago." Also, Michael identified Cleopatra as the Queen of the Nile, but when asked what a queen was, he said, "Queen. A queen is a queen." The administering psychologist concluded that Michael's responses were generated through rote memory skills rather than substantive comprehension. *Id.* at 29-31 (internal quotation marks omitted).

Flynn Effect may have resulted in a higher IQ score.<sup>253</sup> Under the AAIDD, these factors would have been given additional weight in the contextual determination of intellectual disability.

Instead of treating the assessment process as a *means* to providing necessary assistance, DDS's continued emphasis on IQ cutoff scores clings to the relic of the pre-1992 classification system by connoting higher IQ scores with higher levels of functioning.<sup>254</sup> A modernized definition of intellectual disability is the key to opening up a world of supports and services to individuals with IQ scores above 69.

C. *How Other States Define Intellectual Disability for Supports and Services*<sup>255</sup>

On a national scale, Connecticut utilizes the most restrictive definition of intellectual disability for eligibility determinations.<sup>256</sup> Connecticut and New Jersey are the only states that continue to implement an IQ cutoff score of 69 or below for eligibility services.<sup>257</sup> Additionally, thirteen other states, including Massachusetts, Rhode Island, and Vermont, all impose IQ cutoff scores of 70 or below.<sup>258</sup>

There are eight states that incorporate the standard error of measurement, utilizing the word "approximately" within their definitions or establishing 75 as the maximum IQ score.<sup>259</sup> Moreover, three states expressly incorporate the AAIDD definition into their eligibility

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253. *Id.* at 31-32 (stating that Michael's score may have been inflated given the changes to standardized testing that took place between the publication of the WAIS-III test, which was being phased out and replaced by the WAIS-IV test at the time it was administered to Michael). See *supra* Part II.B.2 for a discussion of the Flynn Effect.

254. The pre-1992 definition conceptualized intellectual disability as an immutable characteristic that could not be improved through supportive measures. AM. ASS'N ON MENTAL RETARDATION, *supra* note 86, at 19 (based on the Wechsler standard deviation). See *supra* Part II.

255. The information provided in this section was compiled by Erin Hehn, a law student at Villanova University School of Law, while working as a Summer Fellow at the Massachusetts Disability Law Center (<http://www.dlc-ma.org>). I am grateful to Erin, as well as Attorney Richard Glassman, for sharing this information with me.

256. See CONN. GEN. STAT. § 1-1g (2012); Erin Hehn, *Eligibility Requirements for Developmental Disabilities* (Nov. 2011), available at [http://www.dlc-ma.org/Resources/Intellectual\\_and\\_or\\_Developmental/chart\\_of\\_state\\_laws\\_defining\\_int.htm](http://www.dlc-ma.org/Resources/Intellectual_and_or_Developmental/chart_of_state_laws_defining_int.htm) (fifty-state survey of eligibility criteria for services for individuals with intellectual and developmental disabilities).

257. See CONN. GEN. STAT. § 1-1g (2012); N.J. STAT. ANN. § 30:4-25.1; Hehn, *supra* note 256.

258. See Hehn, *supra* note 256.

259. *Id.*

criteria.<sup>260</sup> On the other end of the spectrum, twenty-four states do not impose any IQ cutoff scores at all.<sup>261</sup> These states either utilize a broader definition of intellectual disability, or they provide services for individuals with developmental disabilities.<sup>262</sup> Connecticut must follow the example set by these states to eliminate the “forgotten generation.”

While this fifty-state survey demonstrates the modernized practices utilized by many states, it also reveals that Connecticut is not alone in its need to implement best practices. Yet, the fact that many states utilize bright-line IQ cutoff scores does not justify this practice—it merely demonstrates that although the definition of intellectual disability has undergone several paradigmatic changes, many states have been slow to follow.

The dark history of intellectual disability teaches that failing to modernize assessment methods may have devastating consequences, such as institutionalization or sterilization. Thus, it is imperative that legislation follow the ebb and flow of the social and psychological tides.

#### D. *The Genius of IQ Cutoff Scores*

No other population of individuals has its quality of life dictated solely by IQ.<sup>263</sup> For the majority of the population, IQ is something that is barely talked about, by and large because it is irrelevant to daily life. Individuals who are considered “clever” and “intelligent” earn these labels based upon the personal impressions of their peers, and not based upon their IQ scores. Yet one must wonder whether society would benefit from categorical regulation based on intellectual functioning.

Imagine the opportunities that could be reserved to those with higher intellectual functioning. There could be IQ cutoff scores for college admissions or job promotions. And certainly the President of the

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260. *Id.*

261. *Id.*

262. *Id.* In addition to modernizing the definition of intellectual disability, Connecticut should ultimately aim to provide services to all individuals in Connecticut with developmental disabilities. “Developmental Disabilities” is an umbrella term referring to disorders that impair development in areas such as “reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests, and activities.” AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION DSM-IV-TR 69 (4th ed. 2000). Intellectual disability is a type of developmental disorder. *Id.*

263. James Harris, a member of the APA working on the DSM-V revision of the definition of intellectual disability stated, “There is only one diagnosis that’s based on a test . . . All the other diagnoses are based on people. We want to focus on the person, not the number.” Michelle Diamant, *DSM Committee Takes Heat Over ‘Mental Retardation’ Update*, DISABILITY SCOOP (May 29, 2012), <http://www.disabilityscoop.com/2012/05/29/dsm-mental-retardation-update/15718/>.

United States should have an above-average, if not genius, IQ. Maybe overcrowded hospitals should join the plot, administering care to those “most in need”—just as DDS defines “most in need” on the basis of IQ and not on *actual adaptive needs*, so too could hospitals prioritize care through IQ cutoff scores rather than *actual medical needs*. This would promote overall social welfare by ensuring that individuals with the highest IQs are able to continue leading society.

Such a world, where IQ cutoff scores open (and close) doors of opportunity, is clearly a work of fiction. There are no IQ cutoff scores for college admissions, job promotions, or even the Presidency. And the idea of prioritizing healthcare on the basis of IQ screams eugenics and would never make it to the negotiation table. Yet if IQ is so indicative of individual capabilities, then why don't we widely impose cutoff scores?

There is a fundamental discomfort with quantifying the opportunities available to the average and above average individual. Shouldn't we question, then, why we are so comfortable quantifying the quality of life of individuals of lesser intelligence? The impulse to resist an IQ-regulated society at large, while still utilizing IQ cutoff scores for individuals of lesser intelligence, is indicative of an underlying prejudice—or at least apathy—to the plight of individuals with intellectual disabilities.

#### CONCLUSION

The Connecticut DDS plays a critical role in the lives of Connecticut residents with intellectual disabilities. Through the eligibility determination process, DDS determines who is eligible for services and supports that improve the individual's quality of life. In many ways, these services function as a lifeline to individuals with intellectual disabilities, elevating them from a state of mere survival to one of health and happiness.

DDS's use of a bright-line IQ cutoff score denies services to individuals in need. Although the current statute requires DDS to place equal emphasis on IQ and adaptive behavior, the IQ cutoff score is dispositive, overlooking clinical judgment and thereby denying eligibility based upon IQ alone. Effectively, DDS deems individuals ineligible without ever looking up from the paper to see the person.

The AAIDD's definition of intellectual disability rejects the use of IQ cutoff scores. It emphasizes the important role of clinical judgment in interpreting IQ scores, considering the standard error of measurement and other testing errors. Most importantly, the AAIDD places the

individual's overall well-being at the center of the diagnostic process. The Connecticut legislature must amend DDS's enabling statute to require compliance with the AAIDD definition. Without this amendment, Connecticut will continue to neglect the needs of individuals with intellectual disabilities who have nowhere else to turn.

*Kathleen D. Tetreault\**

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\* J.D., Western New England University School of Law, 2013; Note Editor. For my Uncle Danny, whose message is beyond words.