IN THE

Supreme Court of New Jersey

No. 58,913

T.H.,

Plaintiff-Petitioner,

v.

DIVISION OF DEVELOPMENTAL DISABILITIES,

Defendant-Respondent.

ON CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (NO. A-006109-03T5) (STERN, P.J.A.D., COBURN, P.J.A.D., AND WECKER, J.A.D.).

BRIEF OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY

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Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155. The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27EE-57. The statute defines "the public interest" broadly, as an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27EE-12.

The law establishes the Division of Advocacy for the Developmentally Disabled within the Department of the Public Advocate. N.J.S.A. 52:27EE-38(a). This Division is responsible for "promot[ing], advocat[ing], and ensur[ing] the adequacy of the care received, and the quality of life experienced, by persons with developmental disabilities . . . . In determining what elements are essential to ensure adequate care and quality of life, the division shall consider the unique medical, social, and economic needs and problems of persons with developmental disabilities as patients, residents, and clients of facilities and as citizens and community members." N.J.S.A. 52:27EE-39(a).

This case involves the determination of eligibility for services, in many ways the most critical factor for ensuring adequate care and quality of life. It is the judgment of the Public Advocate that this case falls within the objectives and duties of the Division of Advocacy for the Developmentally Disabled. Unless individuals with developmental disabilities are appropriately identified as eligible and offered mandated services, they will not have the support necessary to allow them the opportunity to "live independently, exert control and choice over their own lives, and fully participate in and contribute to their communities through full integration and inclusion in the economic, political, social, cultural and educational mainstream of United States society." N.J.S.A. 30:1AA-1.1(a).

PRELIMINARY STATEMENT

T.H. is a fifty-five-year-old man who has Asperger Syndrome, a condition officially recognized by the American medical community in 1994 and now generally recognized as a developmental disability. People with Asperger Syndrome show marked limitations in social interactions and effective communication. They often have obsessive routines and engrossing preoccupations that impede them in learning basic skills. Those with Asperger Syndrome typically have normal and even superior intelligence, and many exhibit exceptional skill or talent in one or more subjects of intense interest to them.

The public in general, and the medical community in particular, long failed to understand that this constellation of characteristics and behaviors was the result of a developmental disability.

Although the Division of Developmental Disabilities (“Division” or “Agency”) acknowledges that T.H. has had Asperger Syndrome since he was a child, and further agrees that he had substantial functional limitations in one area of major life activity before the age twenty-two, it has refused to provide him statutorily mandated services pursuant to the Developmental Disability Rights Act, P.L. 1977, c. 82 (N.J.S.A. 30:6D-1 to -12), and the Division of Developmental Disabilities Act, P.L. 1985, c. 145 (N.J.S.A. 30:6D-23 to -32). The Division based this refusal on a requirement, not in the statute, that at least three substantial functional limitations associated with a disability must have manifested in the applicant before the age of twenty-two. The Division added this extra eligibility requirement in 1995, altering the statutory definition only in this one respect. The Division’s addition to the statute is contrary to both the Legislature’s plain language and its intent. Thus, Amicus Public Advocate argues that as a matter of law the Division overreached, impermissibly narrowing the Legislature’s definition of developmental disability.

Moreover, the administrative fact-finding process in this case was flawed. The administrative law judge ("ALJ"), whose decision was wholly adopted by the Division, imposed an improper evidentiary standard in contravention of legislative intent and based its decision on misconceptions about Asperger Syndrome. The Division found the lack of documentation from T.H. concerning his functional limitations before age twenty-two to be "the most salient factor" in the denial, even though medical and educational professionals were unaware of Asperger Syndrome or its associated functional limitations until T.H. was in his forties. The Division also rejected the testimony of his family. The ALJ's findings that T.H. merely had "peculiar quirks" and a "predilection to . . . avoid social interactions," and thus did not have functional limitations within the meaning of the Act, reflect exactly the type of misunderstandings that have caused those with Asperger Syndrome to go undiagnosed and unsupported for decades.

To provide the Court with a full understanding of the nature and history of Asperger Syndrome, amicus describes T.H.'s individual background, outlines the clinical contours of Asperger Syndrome, and explains why the ALJ's fact-finding process must be corrected, lest it lead to wholesale exclusion of individuals with Asperger Syndrome from the supports and services to which they are entitled by law.

STATEMENT OF THE CASE[1]

T.H. is a fifty-five-year-old man with Asperger Syndrome. See T.H. v. Div. of Developmental Disabilities, 381 N.J. Super. 366, 370 (App. Div. 2005); (Pa10a). He has had Asperger Syndrome since he was a child, T.H., supra, 381 N.J. Super. at 370, and was cared for by his parents until they passed away six years ago. Id.; (Pa10). On the day of his mother's death (just months after his father's), T.H. tried to commit suicide and sustained a traumatic brain injury as a result. Id. Without his parents to care for him, T.H. applied to the Division for assistance. (Pa25a.) The Division denied him benefits (Pa35a), and the Superior Court, Appellate Division, upheld the denial. T.H., supra, 381 N.J. Super. 366.

Based on the observations of experts and those who knew him when he was young, a picture has emerged of T.H. and the limitations he faces as a result of his Asperger Syndrome. The limitations discussed below have been apparent since T.H.'s youth and have been compounded by a lack of services.

As a result of Asperger Syndrome, T.H. has always been severely impaired with regard to social interactions. T.H.'s only close relationships were with his parents; he and his siblings have had minimal interaction with one another.

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[1] Amicus Public Advocate has combined the Procedural History with the Statement of Facts because they are interconnected.

(Pa144a.) He usually did not attend family gatherings but, if he did, he would retreat almost immediately, “grab[bing] a piece of cake and return[ing] to his room.” (Pa144a.) While T.H. has sometimes demonstrated a desire for interaction, the negative reactions of others to his limitations have deterred him from further attempts. For instance, when he was approximately nineteen years old, he asked a woman out and she rejected him. (Pa144a-145a.) He still talks about this incident thirty-five years later, and he has never approached another woman romantically again. (Pa12a, 144a-145a.) At school, he was often the target of bullying and teasing. (Pa12a.) He avoided all events that were social in nature both in school and at work, going so far as to take the day off from work when he knew they were scheduled. (Pa12a, 13a.) He has had no close personal connections except for his relationship with his parents and with one boy when he was a child. (Pa12a, 144a.)

T.H.’s social isolation has been exacerbated by Asperger Syndrome’s impact on his ability to communicate effectively and his all-absorbing focus on particular topics. His conversations generally have been limited to one of his preoccupations, which currently include: advanced astronomy, an interest he has pursued with rigorous technical precision since he was a teenager; his rejection by a woman when he was nineteen years old; and, more recently, the Jehovah’s Witnesses’ belief in the end of the world. (Pa12a, 14a, 41a, 141a.) He continues to interject these topics spontaneously into all conversations and speaks in obsessive and repetitive monologues, unable to determine other people’s interest or understanding. (Pa12a, 14a, 41a, 141a.) While he is capable of reciprocal conversations – the give and take common to effective communication – on these topics, he has not been able to reciprocate with regard to other topics. (Pa12a, 41a, Pa141a.) In addition, T.H. has always avoided eye contact during any interaction with another person. (Pa12a, 14a, 23a, 39a, 144a.)

T.H.’s limitations resulting from Asperger Syndrome have not prevented his success in all areas. He has proved able to undertake activities that involve precision and routine, so long as they do not also involve social contact. (Pa12a, 13a, 154a.) Thus, he has been a devoted, though solitary, amateur astronomer and a perfectly competent timekeeper and scheduler, expediter, and inventory control clerk at the jobs his parents obtained for him. (Pa12a, 13a, 145a-46a, 154a.) T.H.’s all-absorbing focus has helped him succeed in these areas while hampering his success in others. Prior to the suicide attempt, he could drive safely but did so only to those locations familiar to him, such as work and an area where he practiced astronomy. (Pa13a, 146a, 147a.) And, while he did oversee the maintenance of his car, he always brought it to the same mechanic, where he spent money “excessively” and “compulsively,” without regard to the impact on his financial resources. (Pa146a, 154a.) Likewise, he has also spent an exorbitant amount of money on his preoccupation with astronomy, without any awareness of whether he could afford it. (Pa146a.) He has never prepared his own food, cleaned up around the house, shopped for food or clothes, or otherwise handled money. (Pa146a.) His parents took care of those matters. (Pa144a, 146a.)

In another reflection of his Asperger Syndrome, T.H. has maintained strict adherence to routines. Nearly any deviation has resulted in an extreme response that has made it difficult for him to function. (Pa11a, 13a, 66a-67a, 144a.) He reluctantly practiced basic hygiene on a clearly defined schedule throughout his childhood, so long as he was reminded. (Pa11a, 146a, 148a.) When T.H. was younger, his family ate dinner at the same diner every night where he ordered the same meal that included a drink with no ice; he became upset if that routine changed; and he continues to eat a very limited number of foods. (Pa11a, 144a.) As a result of his preoccupation with time, he compulsively synchronized all clocks with the atomic clock (Pa11a, 145a) and clocked in and out of work at the exact same minute every day (Pa150a). Although he graduated from and did well in high school (Pa12a, 39a, 153a), he had a very difficult time socially (Pa12a). He initially expressed such extreme distress about going to school that his parents took him to a psychologist, who suggested that they either institutionalize[2] him or "give [him] a great deal of attention." (Pa11a, 144a.)

In the daily care of his parents throughout his life (Pa145a, 146a), T.H. never sought the support of the Division until after their deaths (Pa25a, 140a). The brain injury he suffered as a result of his suicide attempt significantly reduced both his mobility and his long- and short-term memory. (Pa10a.) He now also suffers from seizures and emotional instability. (Pa10a.) After the suicide attempt, a doctor who had worked with the Division diagnosed T.H. with Asperger Syndrome and suggested he apply to the Division for services. (Pa141a.) The Division rejected his request. (Pa35a.) T.H. appealed to the Office of Administration Law. (Pa138a.) The Division adopted the recommendations of the ALJ and issued a final decision denying T.H.'s application for services on the ground that he did not meet the eligibility criteria. (Pa171a.)

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[2] In her testimony before the administrative law judge, T.H.'s sister, J.S., used the term "group home" (Pa144a), but group homes did not exist in the 1950's. The deinstitutionalization and community integration movement did not begin until the 1970's, and, thus, the only out-of-home residential care services available during T.H.'s childhood were institutions. See David Goode, "And Now Let's Build a Better World": The Story of the Association for the Help of Retarded Children [AHRC], NYC, 1948-1998 9-12, 77-92 (1998), http://www.ahrcnyc.org (follow "Publications," then follow "History of AHRC").

The Appellate Division affirmed. T.H., supra, 381 N.J. Super. 366.

BACKGROUND

I. ASPERGER SYNDROME

"When you look normal, people expect you to be normal." Kathleen O'Brien, Different for Decades: Adults with Asperger Syndrome Strive to Fit In, The Star Ledger, Nov. 14, 2004 at 1, available at http://www.aspennj.org/ArticleDifferentForDecades.html (last visited November 7, 2006). The American medical community did not formally acknowledge Asperger Syndrome until 1994 when it was included in the Diagnostic and Statistical Manual of Mental Disorders. See Ami Klin & Fred R. Volkmar, Asperger's Syndrome: Guidelines for Assessment and Diagnosis, ("Introduction"),[3] (Learning Disabilities Association of America 1995), http://www.med.yale.edu/chldstdy/autism/asdiagnosis.pdf. According to the American Psychiatric Association, Asperger Syndrome is characterized by a "severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities . . . [and results in] significant impairment in social, occupational, or other important areas of functioning." See American Psychiatric Association, Diagnostic and Statistical Manual of

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[3] Certain internet articles do not have page numbers. Where possible, we include in parentheses the title of the section where the citation can be found.

Mental Disorders (Text Revision) ("DSM-IV-TR") § 299.80, at 80 (4th ed. 2000).

In the past ten years, there has been a marked increase in the number of people diagnosed with Asperger Syndrome. See Ernst O. VanBergeijk & Oren Shtayermman, Asperger's Syndrome: An Enigma for Social Work, 12 Journal of Human Behavior in The Social Environment 23, 24 (2005). While the onset of Asperger Syndrome occurs at a young age, many have not received a diagnosis until their middle age. O'Brien, supra. Others have not yet been diagnosed. See Anitha Naidu, Ian James, Elizabeta Mukatoeva-Ladinska and Ruth Briel, Diagnosis of Asperger Syndrome in a 66-year-old male presenting with depression, 18 International Psychogeriatrics 171, 172 (2006).

Although the medical community has made progress in identifying the characteristics of Asperger Syndrome, understanding remains limited. See Patricia Howlin & Anna Asgharian, The Diagnosis of Autism and Asperger Syndrome: Findings from a Survey of 770 Families ("Diagnosis"), 41 Developmental Medicine & Child Neurology 834, 836 (1999), available at http://journals.cambridge.org (study demonstrated doctors failed, during initial consultations, to diagnose more than thirty percent of children who were later diagnosed with Asperger Syndrome). People often react to individuals with Asperger Syndrome as if they are merely "quirky" or not trying hard enough. See Peter F. Gerhardt, Asperger's Syndrome in Adolescence and Adulthood: Considerations for Support and Intervention, New Jersey Psychologist Magazine, Fall 2000, http://www.aspennj.org/ArticlesNJPsychFall2000.html. In fact, however, "[t]he disorder is . . . a serious and debilitating developmental syndrome impairing the person's capacity for socialization and not a transient or mild condition." Klin et al., supra ("Assessment").

Features of Asperger Syndrome generally become apparent in children between three and five years old. See DSM-IV-TR § 299.80, supra, at 80, 81; Stephen Bauer, Asperger Syndrome ("The preschool child") (1996), http://www.aspennj.org/bauer.html; National Institute of Neurological Disorders and Stroke (NINDS), Asperger Syndrome Fact Sheet ("What is Asperger Syndrome?"), http://www.ninds.nih.gov/disorders/asperger/detail_asperger.htm (last updated July 17, 2006). Though children with Asperger Syndrome are generally diagnosed between six and ten years old, see VanBergeijk et al., supra, at 24, parents usually notice impairments and begin to seek services much earlier, see Howlin et al., Diagnosis, supra, at 836 (parents usually first sought diagnosis at an average age of 3.5 years old but did not receive a diagnosis until 11 years old); see also DSM-IV-TR § 299.80, supra, at 81 (parents not concerned until preschool or exposure to other same-age children).

Early intervention is critical for individuals with Asperger Syndrome. See VanBergeijk et al., supra, at 32; NINDS, supra ("Are there treatments available?"); O'Brien, supra. Without it, people with Asperger Syndrome generally do not get the education and support they need to live independently. See Howlin et al., Diagnosis, supra, at 838-839. Prior to 1994, little of the Syndrome was known to the medical community or families seeking assistance, see Klin et al., supra ("Introduction"), and early intervention was therefore not an option for those who grew up before that time.

One of the classic features of the Syndrome is an "obsessive" interest in or "encompassing preoccupation" with particular subjects. See VanBergeijk et al., supra, at 26; DSM-IV-TR § 299.80, supra, at 80; Klin at al., supra ("Restrictive, Repetitive, and Stereotyped Patterns of Behavior, Interests, and Activities"); NINDS, supra ("What is Asperger Syndrome?"). As a result of the intense focus dedicated to these areas, individuals have significant difficulty acquiring basic skills and successfully participating in other activities. See DSM-IV-TR § 299.80, supra, at 83; NINDS, supra ("What is Asperger Syndrome?"). Similarly, individuals with Asperger Syndrome often feel compelled to adhere strictly to repetitive routines or rituals. See VanBergeijk et al., supra, at 29; DSM-IV-TR § 299.80, supra, at 83; NINDS, supra ("What is Asperger

Syndrome?”). These routines are thought to provide them with comfort. See DSM-IV-TR § 299.80, at supra, 83.

Individuals with Asperger Syndrome often experience extreme social isolation. See VanBergeijk et al., supra, at 26. The disability generally restricts their communication through means that others take for granted: they may have impaired nonverbal communication, including an inability to make eye contact and inappropriate or limited facial expression; unusual speech and language patterns, such as literal understanding of figures of speech and monotone speech; and an inability to participate in reciprocal conversations. See VanBergeijk et al., supra, at 27; DSM-IV-TR § 299.80, supra, at 80; Bauer, supra (“Clinical Features”). Individuals with Asperger Syndrome also commonly exhibit an inability to understand or react to emotions, coupled with a desire to fit in and interact with others. See Bauer, supra (“Clinical Features”); see also Klin et al., supra (“Qualitative Impairments in Reciprocal Social Interaction”). Together, these combine to sabotage effective interaction. See VanBergeijk et al., supra, at 26; Bauer, supra (“Clinical Features”). As a result, individuals with Asperger Syndrome are often a target of bullying and teasing. See Bauer, supra (“The upper grades”). Sibling interactions are “an important window into the level of social functioning of an individual with [Asperger Syndrome].” VanBergeijk et al., supra, at 31. The social limitations associated with Asperger Syndrome can have a “significant impact on self-sufficiency or on occupational or other important areas of functioning.” DSM-IV-TR § 299.80, supra, at 80.

Asperger Syndrome can be distinguished from other developmental disabilities by an individual’s lack of speech delay and average or above average, sometimes superior, intelligence. See VanBergeijk et al., supra, at 27; DSM-IV-TR § 299.80, supra, at 81, 84; Bauer, supra (“Introduction”). It is not unusual for someone with Asperger Syndrome to do well academically, graduate from high school, and even go on to post-secondary education. See generally, Elizabeth F. Farrell, Asperger’s Confounds Colleges: A Surge of Students Diagnosed with an Autism-related Disorder Poses New Challenges, Chronicle of Higher Education, October 8, 2004 at A35, available at http://www.grasp.org/media/chr.edu.pdf. Such achievement, however, does not negate their substantial need for services. See id.

It is axiomatic that people with physical and mental disabilities of varying degrees are capable of employment and full participation in our communities. This proposition is the underpinning of numerous federal and state disability and anti-discrimination laws and the foundation of decades-old national disability policy. See 42 U.S.C.A. 12112(a) (Americans with Disabilities Act); 42 U.S.C.A. 15001 (Developmental Disabilities

Assistance and Bill of Rights Act); N.J.S.A. 30:6D-2 (Developmentally Disabled Rights Act); N.J.S.A. 30:1AA-1.1 (Developmentally Disabled Council Act). Like many with developmental disabilities, individuals with Asperger Syndrome are capable of having a job and performing it competently, while still qualifying for services from the Division.

Whatever their successes or talents, individuals with Asperger Syndrome often must "rely heavily on the support of their families" as a result of their limitations. Patricia Howlin, Outcome in Adult Life for More Able Individuals with Autism or Asperger Syndrome, 4 Autism 63, 79 (2000). Family members are therefore "a viable and extremely important source of information" when assessing individuals with Asperger Syndrome. See VanBergeijk et al., supra, at 30-31. As parents have struggled to understand a disability that was unknown for decades and remains unfamiliar to many, they have received both criticism and praise, both based on misconceptions – blamed for their child's limitations because of their perceived over-protectiveness or emotional removal, or commended for their hard work supposedly reflected in their child's academic successes. See O'Brien, supra; see also Luana Olivas, Note, Helping Them Rest in Peace: Confronting the Hidden Crisis Facing Aging Parents of Disabled Children, 10 Elder L.J. 393, 411 (2002).

Individuals with Asperger Syndrome have substantial functional limitations because: their engrossing preoccupations and inflexible adherence to routine limit their ability to care for themselves and live independently; their unusual speech and language patterns result in difficulties in communicating with others; and their inability to use and understand nonverbal signals to handle social interactions prevents them from participating in reciprocal social relationships and results in social isolation. See DSM-IV-TR § 299.80, supra, at 80.

II. THE AGING AND DEATH OF CAREGIVERS

A number of older individuals with disabilities are left with no way to care for themselves after aging caregivers have passed away or become incapacitated, and across the country they are abruptly entering social service systems. See Olivas, supra, at 395. Considered a crisis by some, this trend is defined not only by the severity of the experience for those to whom it happens but also by the increasing rate at which it is happening. It results from a combination of factors including: (1) the aging of the United States population; (2) the increased longevity of individuals with disabilities; and (3) the role of parents as primary caretakers for most people with disabilities. See id. at 394, 395. This issue has been of such national concern that, in 1998, the United States Senate Special Committee on Aging held a hearing entitled Can We Rest in Peace?

Anxiety of Elderly Parents Caring for Disabled Baby Boomers. See id. at 395.

In 1996, 60% of the 3.17 million people with developmental disabilities in the United States lived with their parents. Id. at 397. In 1998, half a million people lived at home with caregivers who were 60 or older. Id. at 398. Given the high percentage of individuals with developmental disabilities cared for by their families and their increased life expectancy, this number will continue to rise. Id.

The New Jersey Legislature has found that approximately 2% of the New Jersey population has developmental disabilities. N.J.S.A. 30:1AA-10. It has also found that 88% of people with developmental disabilities live with their families or in their own homes, and “many service delivery systems and communities are not prepared to meet the impending needs of the adults with developmental disabilities who are living at home with parents who are 60 years of age or older and serve as the primary caregivers of these adults.” N.J.S.A. 30:1AA-1.1(h). The Legislature has noted with concern that many individuals with developmental disabilities are unconnected to services. N.J.S.A. 30:1AA-1.1(d). In 2004, 22,734 people with mental retardation or developmental disabilities were estimated to be living with aging caregivers (60 years and older) in New Jersey. David Braddock et al., The State of the States in Developmental

Disabilities 2005 60 (University of Colorado, Department of Psychiatry, Coleman Institute for Cognitive Disabilities 2005).

Older individuals with developmental disabilities have had a very different life from those who were born in the last two decades. Individuals now in middle age did not receive the benefits of relatively recent legislation that has improved diagnoses and funded educational and other support programs. See Olivas, supra, at 405. When they were not placed in institutions — the only options available fifty years ago and notorious even then for their deplorable conditions — people with developmental disabilities stayed at home, hidden. See id. at 406. In addition, only a fraction of older caregivers use formal services despite the increased availability of non-institutional settings. See id. at 407. The numbers of those without prior connection to the Division who face the possible loss of their caregivers is uncertain, but estimates are high. Compare Braddock et al., supra, (22,743 people with mental retardation or developmental disabilities) with E-mail from Dr. Deborah Spitalnik, Executive Director of the Elizabeth M. Boggs Center on Developmental Disabilities (October 18, 2006, 15:59 EST) (on file with author) (approximately 3900 individuals registered with the Division are living at home with caretaker over the age of 60).

Older individuals with Asperger Syndrome are particularly likely to be cared for by their parents and to be unconnected to the social service system because of the nature and history of their disability. The recent acknowledgement of Asperger Syndrome, and the medical and lay communities' limited understanding, continue to result in missed diagnoses and misconceptions about the reasons for the behaviors of people with Asperger Syndrome. See Howlin et al., Diagnosis, supra, at 836; Klin et al., supra ("Qualitative Impairments in Reciprocal Social Interaction"). Moreover, educators often have difficulty identifying children with Asperger Syndrome even today. This seems to be the combined result of the academic ability of children with Asperger Syndrome, educators' lack of awareness of these children's social limitations, and educators' misconception that they are merely willful or stubborn. See DSM-IV-TR §299.80, supra at 82. And of course, neither educators nor health care professionals could identify children with Asperger Syndrome before the Syndrome was even recognized. See Klin et al., supra ("Introduction"). Thus, documentation of older individuals' history of Asperger Syndrome is simply unavailable. Yet their need for services when they lose their caregivers is real and pressing. Some find "alarming" the increasing number of adults with Asperger Syndrome living at home with parents because of both the financial and emotional burden that it poses to the parents and the impending loss of care for those who have the disability. See Lynda L. Geller, Ph.D., and John M. Cavanagh, M.A., Falling Through the Cracks: Services for "Higher-Functioning" Adults on the Autism Spectrum 6, http://www.aspfi.org/documents/FallingThroughtheCracks.pdf (last visited November 7, 2006).

LEGAL ARGUMENT

I. THE APPELLATE DIVISION ERRED WHEN IT UPHELD THE AGENCY'S REGULATION DEFINING "DEVELOPMENTAL DISABILITY."

The Division's regulation defining "developmental disability," N.J.A.C. 10:46-1.3, is ultra vires because it adds an eligibility standard and, as a result, narrows the group of people eligible for services. Thus, the Appellate Division erred in upholding the regulation.

The statute defines "developmental disability" as indicated below, except that the Division added the words in **bold** when it revised the regulation in 1995, leaving the remainder of the section exactly as the Legislature wrote it:

> "Developmental disability" means a severe, chronic disability of an individual which:
>
> 1. Is attributable to a mental or physical impairment or combination of mental or physical impairments;
> 2. Is manifest before age 22;
> 3. Is likely to continue indefinitely;
> 4. Results in substantial functional limitations **before the age of 22** in three or more of the following areas of major life activity:
>   i. Self-care;
>   ii. Receptive and expressive language;

> iii. Learning;
> iv. Mobility;
> v. Self-direction; and/or
> vi. Capacity for independent living or economic self-sufficiency; and
>
> 5. Reflects the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and are individually planned and coordinated.
> 6. Developmental disability includes, but is not limited to, severe disabilities attributable to mental retardation, autism, cerebral palsy, epilepsy, spina bifida and other neurological impairments where the above criteria are met.

Compare N.J.A.C 10:46-1.3 with N.J.S.A. 30:6D-25(b).[4]

In assessing the Division's addition of an age qualification to the fourth element of the statute, this Court must independently judge whether the Legislature intended such a limitation. The deference generally given to an agency's interpretation and implementation of rules is based on the recognition of agencies' "specialized expertise" to assess complex technical issues. See In re Freshwater Wetlands Prot. Act, 180 N.J. 478, 489 (2004)(quoting N.J. State League of Municipalities. v. Dep't. of Cmty. Affairs, 158 N.J. 211, 222 (1999)). The courts, however, are "in no way bound by the agency's interpretation of a statute or its determination of a

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[4] The definition of "developmental disability" is the same in both the Developmentally Disabled Rights Act, N.J.S.A. 30:6D-3(a), and the Division of Developmental Disabilities Act, N.J.S.A. 30:6D-25(b). In this brief, the Public Advocate will cite to N.J.S.A. 30:6D-25(b).

strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973). If a regulation is "plainly at odds with the statute, [the court] must set it aside." In re Freshwater, supra, 180 N.J. at 489. This Court has repeatedly stated that the judicial role is to ensure that an agency's action does not violate express and implied legislative policies and intent and thereby circumvent the Legislature. E.g., In re Freshwater, supra, 180 N.J. at 489; N.J. Tpk. Auth. v. AFSCME Council 73, 150 N.J. 331, 351-52 (1997); In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 and 10:85-4.1, 117 N.J. 311, 325 (1989).

When "determining the proper interpretation of a statute, the basic rule is that the statutory language should be given its ordinary meaning absent specific intent to the contrary." Mortimer v. Bd. of Review, 99 N.J. 393, 398 (1985); accord In re Freshwater, supra, 180 N.J. at 491 ("primary principle of statutory construction is to look at the plain language"); Kimmelman v. Henckles & McCoy, Inc., 108 N.J. 123, 128 (1987) ("first consider [the statute's] plain language"). Beyond the plain language of the statute, the Court may also "consider any history which may be of aid" in ascertaining legislative intent. See State v. Madden, 61 N.J. 377, 389 (1972). There is, however, no need to look to "extrinsic evidence" if the language is "clear and unambiguous." In re Freshwater, supra, 180 N.J. at 493. In this case, both the statute's language and its legislative history preclude the Division's regulatory restriction of eligibility.

A. The Ordinary Meaning Of The Statute Demonstrates That The Agency's Interpretation Is Beyond Its Scope.

When the Legislature specifically includes a requirement in one subsection of a statute but not in another, this Court "need not strain to import that requirement where it is not." In re Freshwater, supra, at 492. The ordinary meaning of the relevant sections of N.J.S.A. 30:6D-25(b) is that a developmental disability is a severe, chronic disability that manifests prior to the age of twenty-two and results in substantial functional limitations in at least three areas of major life activity at some point in time. See N.J.S.A. 30:6D-25(b).

The Division has claimed that its additional wording was an attempt "to clarify ambiguous language in the statute." 27 N.J.R. 3606(a). According to the Division, "severe" actually means displaying "substantial functional limitations in three or more . . . areas of major life activity," because the Legislature intended its definition to deal with the functional capabilities of individuals, not just their diagnoses. (Opp. Cert. at 15-16 ("Oc15-16").) As a "severe, chronic disability" must manifest before the age of twenty-two, the argument goes, "substantial functional limitations" in at least three of six areas must also manifest prior to that time. (Oc15-16.) But that is not what the statute says.

An agency is not permitted to narrow the scope of a statutory definition by grafting on additional standards. See N.J. Tpk. Auth., supra, 150 N.J. at 352, 355-356 (agency not authorized to restrict managerial exception by defining a manager as an employee who possesses and exercises authority and judgment “sufficient to affect” an organization’s purposes or implementation of those purposes). In In re Freshwater, supra, this Court considered whether the New Jersey Department of Environmental Protection’s (D.E.P.) adoption of certain rules exceeded its authority under the Freshwater Wetlands Protection Act. 180 N.J. 478. Because the Legislature had specifically included a requirement for an adverse environmental impact analysis in one subsection but not another, the Court concluded that the D.E.P. could not add that same requirement to the very subsection from which the Legislature had excluded it: “[I]f the Legislature intended to [include this requirement in both subsections], it would have done so explicitly.” In re Freshwater, supra, 180 N.J. at 491-492. Similarly, in this case, if the Legislature had wanted to include the requirement that substantial functional limitations must exist before the age of twenty-two, it would have added the phrase “before the age of twenty-two” to N.J.S.A. 30:6D-25(b)(4) and not just to N.J.S.A. 30:6D-25(b)(2). It did not.

Moreover, the addition of such a requirement would lead to an absurd result. The functional limitations enumerated in the statute include “self-direction and capacity for independent living or economic self-sufficiency.” N.J.S.A. 30:6D-25(b)(4). “Self-direction and capacity for independent living” rarely manifest, even in a person without a disability, before age twenty-two; “economic self-sufficiency,” almost never. Thus, the agency grafts an eligibility requirement into a section of the statute that cannot logically support it. And what of a child whose functional limitations do not yet fit three of the six statutory criteria? Under the regulation, the child would be denied services. This result contravenes the legislative intent to promote the earliest possible intervention so that people with developmental disabilities may “live independently, exert control and choice over their own lives, and fully participate in and contribute to their communities through full integration and inclusion in the economic, political, social, cultural and educational mainstream of United States society.” N.J.S.A. 30:1AA-1.1(a).[5]

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[5] The Division cites a comment made by the Department of the Public Advocate during the 1990 notice period and argues that it supports the reading that three substantial functional limitations must be apparent prior to the age of twenty-two.

The Appellate Division has twice considered and rejected other attempts by the Division to narrow the reach of the definition of developmental disability in the statute at issue here. T.L. v. Division of Developmental Disabilities, 243 N.J. Super. 476 (App. Div. 1990), concerned a man who had multiple functional limitations (although the ALJ acknowledged only one), but whose impairments appeared to arise from behavioral or emotional problems. Id. at 479-86. The Division denied him services, primarily on the ground that behavioral problems did not rise to the level of a "mental or physical impairment" or "severe . . . disability" within the meaning of the statute. Id. at 488, 478 (quoting N.J.S.A. 30:6D-25(b)). After reviewing the history of the statute, and expressing a "disquieting sense" that the Division had not entirely shed its past practice of "'using eligibility criteria to deny services,'" id. at 494 (citation omitted), the Appellate Division reversed: "We cannot . . . find support for DDD's rejection of T.L.'s application

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(Oc16, n.11.) The Division is mistaken. At the time, the Public Advocate was merely suggesting that the Division should either define the terms "severe" and "chronic" or delete them from the regulation because the presence of the terms without further clarification was causing confusion among administrative law judges and people with disabilities. See 22 N.J.R. 3033. The Public Advocate explained that the elements of the definition could be said to speak to severity and chronicity, not that they were themselves definitions of those terms. The Public Advocate never recommended reading requirements into sections where they were not.

based upon medical descriptions of his impairment, lack of DDD facilities (or their purported presence in another department), or social/emotional impairment causation, given his acknowledged impairment and lack of function in critical areas of major life activity," id. at 497. In essence, the court held that the statute provided no basis for the Division's decision to disqualify applicants whose functional limitations resulted from emotional or behavioral problems.

Again, in D.D. v. Division of Developmental Disabilities, 351 N.J. Super. 308 (App. Div. 2002), the Appellate Division overturned the Agency's "too cramped . . . view" of the definition of "developmental disability," id. at 315. The Agency had denied coverage to a man whose I.Q. was just over the line that the regulations established for diagnosing mental retardation. The court rejected the Agency's conclusion that, "absent proof of a neurological injury, D.D. could only be eligible for services if his severe disability was caused by mental retardation as defined by N.J.A.C. 10:46-2.1(e). This constricted view is contrary to the statutory definition." Id. at 316. Adhering to the elementary proposition that, "[i]f D.D.'s condition meets the requirements of a developmental disability, D.D. is eligible for services," id., the court remanded for reconsideration under the statutory definition, rather than under the Agency’s narrowing interpretation of that definition.

A federal court considering a case under the federal statute upon which our law is based followed a similar path. At issue in Tennessee Protection & Advocacy, Inc. v. Wells, 371 F.3d 342 (6th Cir. 2004), was whether Martin Bentley qualified for services under the federal statute providing assistance for people with developmental disabilities, which contains a definition virtually identical to the one in the New Jersey statute. Compare 42 U.S.C. 15002(8)(a) with N.J.S.A. 30:6D-25(b). Mr. Bentley had been in a trucking accident at age twenty and suffered a traumatic brain injury. When he sought representation from an organization established by law to represent people with developmental disabilities, the conservator of his estate and the nursing home where he lived refused to turn over documents on the ground that he did not meet the statutory definition of developmental disability: he did not gradually acquire his condition; it did not satisfy the medical definition of chronic; and it did not manifest itself over time. See Tenn. Prot. & Advocacy, Inc., 371 F.3d at 347. The trial court agreed, but the court of appeals reversed, finding the defendants’ reading of the statutory definition too restrictive. “[A]lthough it may not be intuitive to think of a brain injury that results from a vehicle accident when the victim is 20 years old as a ‘developmental disability,’” the court held, “we must do so because Bentley’s condition fits the definition that is provided in the statute.” Id. at 346.

These cases sound a common theme: the statutory definition of developmental disability must prevail over competing definitions that would exclude applicants based on limitations absent from the statutory language. If the Agency may not deny services to a particular individual based on a stingy reading of the statute, T.L., supra 243 N.J. Super. 476; D.D., supra, 351 N.J. Super. 308, and potential targets of litigation may not withhold information from a complainant on the ground that he does not “really” have a developmental disability, Tenn. Prot. & Advocacy, 371 F.3d 342, then a fortiori the Agency may not deny coverage to a class of people through a narrowing regulation. Under the statute, the Division must cover all of those applicants, like T.H., whose severe disabilities manifested by age twenty-two, as evidenced by functional limitations before that age, even if those limitations were fewer than three or did not then fit neatly into the defined categories. The agency simply has no authority to place on them the additional burden of proving that three or more specified functional limitations manifested during their youth. See D.D., 351 N.J. Super. at 316.

B. The Legislative History Of The Statute Demonstrates That The Agency's Interpretation Undermines Its Express And Implied Intent.

The legislative history of the Division of Developmental Disabilities Act, N.J.S.A 30:6D-23 to -32, further demonstrates that the Legislature did not intend to condition eligibility on an applicant's manifestation of at least three substantial functional limitations before the age of twenty-two. In adding that evidentiary burden, the Division precludes people from receiving services in contravention of the legislative intent.

The sources for the state law definition of "developmental disability" contain no age limitation regarding substantial functional limitations. In drafting N.J.S.A. 30:6D-23 to -32, the Legislature relied on federal legislation, the Developmental Disabilities Assistance and Bill of Rights Act ("D.D.A."), 42 U.S.C.A. 15001-15083, and a report from the New Jersey State Developmental Disabilities Council entitled Redirection of the Division of Mental Retardation to a Division of Developmental Disabilities (1982) ("Council Report") (Pa70a-114a). The judiciary has looked to these sources when reviewing the statute because of the role they played in the creation of the law. See T.H., supra, 381 N.J. Super. at 274; T.L., supra, 243 N.J. Super. at 490, 492. There is no requirement in the D.D.A., the relevant federal regulations, or the Council Report that an individual demonstrate that his or her disability resulted in substantial functional limitations in at least three major areas of life activity prior to age twenty-two.

Moreover, the definition derived from the federal law appears in all relevant New Jersey statutes and regulations except one. Compare N.J.S.A. 30:6D-3(a) (Developmentally Disabled Rights Act) and N.J.S.A. 30:6D-25(b) (Division of Developmental Disabilities Act) and N.J.S.A 30:1AA-2 (Developmental Disabilities Council Act) and N.J.A.C. 10:10-1.3 (Community Mental Health and Developmental Disability Services Investment) with N.J.A.C. 10:46-1.3 (Determination of Eligibility and Contribution to Care and Maintenance Requirements). The only definition of “developmental disability” that includes an additional eligibility criterion is the one the Division uses to determine coverage. N.J.A.C. 10:46-1.3. It is not clear why the Division’s additional language would be necessary in this particular regulation, though the Division warns that the removal of the requirement could jeopardize its financial ability to provide services. (Oc19.)

A comparable fiscal compromise seems to have generated the underlying statutory limitation on eligibility to those whose disabilities (as distinct from at least three specific functional limitations) manifest by age twenty-two. In its analysis of the federal D.D.A., the United States Court of

Appeals for the Sixth Circuit found that “the eligibility age of 22 represents the limitation that Congress determined would provide the optimal balance between a general commitment to helping the disabled and funding realities.” Tenn. Prot. & Advocacy, Inc., 371 F.3d at 349. Given that the New Jersey Legislature based its definition of “developmental disability” on the federal definition, it appears to have adopted the federal compromise.

While such fiscal considerations are perfectly appropriate for the Legislature, the Agency is not free to restrict eligibility further for the purpose of saving money. When the statute mandates coverage, the Agency must provide services. “We are mindful of the fiscal constraints confronting DDD and of its goal of achieving the greatest good for the greatest number of its clients. An administrative agency’s commitment to collective justice, however, cannot relieve the agency of statutory obligations to the individuals it was created to serve.” P.F. v. Div. of Developmental Disabilities, 139 N.J. 522, 531 (1995).

The Legislature intended that eligibility be mandatory for all individuals within the statutory definition. When the Legislature meant to allow the Division to exercise its discretion to restrict eligibility, it explicitly so stated. N.J.S.A. 30:6D-31 gives the Division the discretion to extend eligibility to those whose disability manifests after the age of twenty-two but before the age of fifty-five. N.J.S.A. 30:6D-31.[6] The Legislature extended no such discretion to the Division with regard to those whose disability manifests prior to age twenty-two. See N.J.S.A. 30:6D-25(b).

As the Division states, the definition of "developmental disability" is meant to be functional rather than categorical (based on specific diagnoses). (Oc15.) This, however, does not support the Division's argument that the Legislature meant the age requirement to apply to the onset of at least three specific substantial functional limitations. Rather, the reasoning, as explained in the Council Report, was that regardless of the specific diagnosis, a developmental disability "most often implies multiple functional limitations requiring special and similar services through childhood and adult life." (Pa83.) And the "common special needs" of individuals with developmental disabilities involve "more than average difficulty in acquiring the skills necessary for functioning as an independent adult in

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[6] The Appellate Division found that this section explicitly addressed T.H.'s circumstances. T.H., supra, 381 N.J. Super. at 375, n.5. It was mistaken. T.H. fits squarely within N.J.S.A. 30:6D-25(b) because his disability manifested prior to age twenty-two. Indeed, Asperger Syndrome, which the Division acknowledges that T.H. has (Pa66a, 143a), almost always becomes apparent during early childhood, see DSM-IV-TR § 299.80, supra, at 80, 81; Bauer, supra, ("The preschool child"); NINDS, supra, ("What is Asperger Syndrome?"),as was the case with T.H., T.H., supra, 381 N.J. Super. at 370, 380.

society.” (Pa83.) The Council Report also reveals that a driving force behind the legislation was the “continued need for programs for non-mentally retarded developmentally disabled adults.” (Pa85a.) T.H. fits well within the bounds of these legislative purposes – he is an adult with a developmental disability other than mental retardation, and he has had lifelong functional limitations that impeded his progress toward independence. He and others like him were the very subjects of the Legislature’s concern, and the Legislature nowhere indicated that their eligibility should depend on whether they evidenced a specified number of substantial functional limitations before the age of twenty-two.

The Division argues, finally, that its regulation must be consistent with legislative intent because the Legislature has taken no steps to correct it since it took effect in 1995. (Oc19-20.) The Division points to Malone v. Fender, which held that the consistency of an agency’s interpretation over a period of years had “great weight” in considering whether that interpretation comported with legislative intent. 80 N.J. 129, 137 (1979). In Malone, the agency’s interpretation had held steady for approximately seventy years, and the statute was silent on the issue in question. See 80 N.J. 129. That is not the case here; N.J.S.A. 30:6D-25(b) is not silent. The very structure of the statute explicitly distinguishes between the requirement that the disability itself be manifest or apparent before age twenty-two and the requirement that the individual have substantial functional limitations in at least three areas of major life activity.

The Division's regulation contravenes the legislative intent as evidenced by the ordinary meaning of the statutory language and its legislative history. If the Legislature had intended to restrict eligibility to those whose substantial functional limitations manifested prior to the age of twenty-two, it would have explicitly so stated. The Division ignored the plain meaning and legislative history of the statute when it inserted an additional eligibility requirement.

II. EVEN IF THE REGULATION IS VALID, THE APPELLATE DIVISION ERRED IN AFFIRMING THE AGENCY'S DECISION WHICH IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE.

This Court should correct the Appellate Division's error and reverse the Agency's decision excluding T.H. from services. The Agency used an inappropriate evidentiary standard and thus contravened legislative policy. In addition, the Division based its decision on stereotypes and misconceptions that do not qualify as substantial credible evidence and that illustrate the Division's failure to make an individualized decision about T.H.'s circumstances.[7]

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[7] Although the Division notes that T.H. failed to raise this issue in his petition for certification (Oc11, n.9), the issue

While deference is generally given to an agency's decision because of its expertise or superior knowledge within a field, a court will not uphold a decision where an agency is arbitrary, capricious, or unreasonable or where there is not substantial credible evidence in the record to support its decision. See In re Taylor, 158 N.J. 644, 657 (1999); P.F., supra, 139 N.J. at 529-30; Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). "[S]ometimes phrased in terms of a search for arbitrary or unreasonable agency action," the judicial analysis rests on three inquiries, including "whether in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors" and "whether there is substantial evidence in the record to support the findings on which the agency based its action." In re Rulemaking, supra, 117 N.J. at 325; accord Brady v. Bd. of Review, 152 N.J. 197, 210-211 (1997); T.L., supra, 243 N.J. Super. at 487.

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is nonetheless preserved. In State Farm v. Zurich Am. Ins. Co., 62 N.J. 155, 165 (1973), this Court found that an issue not raised in the petition for certification may be considered when it was raised below and review is warranted for "the fair resolution of the entire case." See Sylvia B. Pressler, Current N.J. Court Rules, Comment R. 2:12-11, at 647 (Gann 2006). Here, T.H. objected below to the Division's conclusion that he has no qualifying developmental disability under the statute and regulation (Pb7-10, 12-15), and the Appellate Division ruled on this issue, T.H., supra, 381 N.J. Super 366. Moreover, fairness to T.H. demands that this Court consider his eligibility. Thus, the issue is properly preserved.

A. The Agency Failed To Apply The Appropriate Legislative Policies To Its Review Of The Available Evidence In T.H.'S Case.

The Appellate Division deferred to the Agency's conclusion that T.H. did not have adequate evidence of substantial functional limitations prior to the age of twenty-two but ignored the Agency's failure to apply the proper legislative policies to the relevant facts. The Legislature made coverage mandatory for anyone whose disability manifests before age twenty-two. Even assuming, arguendo, that the statutory language implies that at least three substantial functional limitations must also become evident by that age, the legislation does not countenance an evidentiary standard that stymies an applicant in making that showing. <u>See</u> <u>D.D.</u>, 51 <u>N.J. Super.</u> at 317 (court reversed agency decision where the showing of "mental impairment" required by the Division was more restrictive than the one intended by the statute). The Appellate Division acknowledged that "where an adult seeks [developmental disability] services after the death of parents who took care of him in their home for his entire life, some flexibility is appropriate in considering the available evidence of the individual's early years." <u>T.H.</u>, <u>supra</u>, 381 <u>N.J. Super.</u> at 378, n.9. If the Division had been flexible in its consideration of evidence, it would not have counted the lack of documentation available to T.H. against him, and it would not have disparaged the testimony of T.H.’s expert, which was based on those who knew T.H. when he was young.

The Division required T.H. to provide documentation of the existence of substantial functional limitations before age twenty-two, twenty-five years before the official recognition of the existence of Asperger Syndrome and thirty years before T.H.’s diagnosis. The Division argues that satisfying its standard is “not impossible” because substantial functional limitations would not “escape the notice” of family, educators, and doctors. (Oc9-10.) However, the medical and educational professionals who came into contact with T.H. before he turned twenty-two would not have had any reason to create a record of T.H.’s limitations. Asperger Syndrome was not an available diagnosis until 1994. Prior to that time the particular features of Asperger Syndrome were not recognized as medically significant. <u>See</u> Klin et al., <u>supra</u> (“Introduction”). Further, the Division claims that if T.H.’s impairment had been substantially limiting, he would have been offered special education services even forty years ago. (Oc10.) This strains credulity. T.H. graduated from high school in the late 1960’s. A quarter century before any official recognition of Asperger Syndrome, or of the constellation of impairments associated with it, teachers would have viewed T.H. as academically fit, though rigid, strange, and awkward — a highly unlikely candidate for any of the limited special education services then available, mainly for those who could not succeed in a standard classroom. Thus, it would be virtually impossible for T.H. (or others like him) to provide medical or educational documentation of his substantial functional limitations before age twenty-two.

Neither the statute nor the regulation requires documentation to demonstrate substantial functional limitations prior to age twenty-two. See N.J.S.A. 30:6D-23 to -32; N.J.A.C. 10:46-1.1 to -6.1. T.H. provided the kind of “medical information” actually required;[8] he produced reports from licensed practitioners, including one from his expert Dr. Linda Petti. (Pa10a-17a.) Yet the Division found T.H.’s lack of documentary evidence to be “the most salient factor” in denying him coverage.

T.H.’s substantial functional limitations prior to the age of twenty-two did not escape the notice of his family. (Cf. Oc10 (identifying family members as an important source of information on this topic).) The loss of his parents, however, both precipitated T.H.’s need for services and eliminated his best source of information. This loss forced T.H. to rely on the statements of his siblings and others who knew him when he

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[8] “‘Medical information’ means reports that have been provided by licensed practitioners which demonstrate the existence of a developmental disability as well as the individual’s current physical condition and significant medical history.” N.J.A.C. 10:46-1.3.

was young, but who did not have a close relationship with him because of his disability. The Division, however, dismissed the statements of the individuals to whom Dr. Petti spoke, including T.H's older sister J.S., as "anecdotal commentary at best." (Pa154a.) It is not clear how the observations of family and neighbors could be anything but anecdotal or why that would prevent such evidence from being used to demonstrate that T.H., or others in his position, had substantial functional limitations before age twenty-two.

The Division's findings also reflect inconsistencies in evaluating J.S.'s direct testimony. The Division found that T.H. was substantially functionally limited in at least one area prior to the age of twenty-two. See T.H., supra, 381 N.J. Super. at 380. Because there was no more documentation for one functional limitation than for three, the only source of information for this finding had to have been the testimony that the ALJ considered "anecdotal commentary." If the Division were reasonable in its assessment, it could not claim, on the one hand, that the statements of those who knew T.H. were "anecdotal" or not credible and, on the other hand, rely on it for its findings. Such inconsistencies in the Division's review of the facts appear arbitrary.

Burdening T.H. further, the Division found that his suicide attempt made it impossible to assess his prior impairment.

(Pa141a, 155a.) This finding is flawed for two reasons. First, the Division agreed that T.H. had Asperger Syndrome prior to the age of twenty-two. (Pa 143.) His obsessive focus on limited topics, inability to interact effectively with others, and inability to care for himself have been apparent since his childhood and adolescence. And his suicide attempt affected areas of his life different from those affected by Asperger Syndrome. See T.H., supra, 381 N.J. Super. at 370; (Pa10a). Second, if the Division's inquiry is into his substantial functional limitations prior to the age of twenty-two, the answer cannot be found in the substantial functional limitations T.H. had at the age of fifty, suicide attempt or not. The Division's focus on the suicide attempt just distracts the Court from the issues at hand.

The Division's handling of this case did not allow any "flexibility . . . in considering the available evidence," T.H., supra, 381 N.J. Super. at 378, n.9, and its approach threatens to disqualify the significant number of other adults in T.H.'s circumstances, see N.J.S.A. 30:1AA-1.1(d), (h) (noting the impending needs of the many adults with developmental disabilities living with aging parents). The Division insisted on documentation unavailable to T.H. and then discounted the only evidence he could produce about his younger years. The Division thus failed to apply the appropriate policies to the facts in this case. If it had, it could not reasonably have come to the conclusion that T.H. did not have substantial functional limitations prior to age twenty-two.

B. The Agency Improperly Based Its Decision On Stereotypes Of Individuals With Asperger Syndrome And Developmental Disabilities.

The Appellate Division should not have deferred to the Agency’s findings and conclusions because they rested on stereotypes of people with Asperger Syndrome and other developmental disabilities. Both the courts and Legislature have found that stereotypes cannot form the basis of an adverse action against an individual with developmental disabilities.

The United States Supreme Court and New Jersey courts do not tolerate reliance on stereotypes in place of evidence in agency determinations regarding people with developmental disabilities, holding instead that each person must be evaluated as an individual. “Such an inquiry is essential if [the Rehabilitation Act of 1973] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear.” School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273, 287 (1987); see also City of Newark v. J.S., 279 N.J. Super. 178, 200 (App. Div. 1993) (“ADA is designed to avoid the risk of stereotyping, bigotry and prejudice by demanding an individualized determination before any adverse action is taken against a person with any disability.”)

Like the courts, the Legislature has found that “individuals with developmental disabilities often encounter discrimination in the provision of critical services.” N.J.S.A. 30:1AA-1.1(c). It has mandated that the State provide individuals with developmental disabilities the information, opportunities, skills, and support necessary to live their lives “free of abuse, neglect, financial and sexual exploitation, and violations of their legal and human rights.” N.J.S.A. 30:1AA-1.1(l). It has also required that services be offered in a way that respects their “dignity, individuality and constitutional, civil and legal rights.” N.J.S.A. 30:6D-2. Given the Legislature’s concern about discrimination, especially in relation to the provision of services, it would not endorse a denial of services based on stereotypes and misconceptions.

In the present case, the ALJ did precisely what the courts and the Legislature condemn. The Division acknowledged that T.H. suffered from Asperger Syndrome before the age of twenty-two, T.H., supra, 381 N.J. Super. at 370, but relied on stereotypes and misconceptions about Asperger Syndrome to conclude that T.H. was ineligible.

The Division took T.H.’s ability to drive and to maintain a job as evidence that he could not have had severe limitations related to his Asperger Syndrome. (Pa153a, Pa154a.) Yet numerous federal and state disability and anti-discrimination laws recognize that people with physical and mental disabilities of varying degrees are capable of full employment and participation in their communities. See 42 U.S.C.A. 12112(a) (Americans with Disabilities Act); 42 U.S.C.A. 15001 (Developmental Disabilities Assistance and Bill of Rights Act); N.J.S.A. 30:6D-2(Developmentally Disabled Rights Act); N.J.S.A. 30:1AA-1.1(Developmentally Disabled Council Act). These capabilities are not inconsistent with the presence of substantial functional limitations. Indeed, the Appellate Division has before rejected an inference of ineligibility from such achievements. In T.L., supra, the ALJ denied disability services in part because he found the applicant's "absence of functional disability to have been evidenced by his level of proficiency at vocational school, landscaping and maintenance work and by having obtained a driver's license." 243 N.J. Super. at 486. The Appellate Division held that this conclusion "does not accord with the findings of any expert . . . [and] is not supported in the record." Id. at 487-88.

Similarly, T.H.'s academic achievement, graduation from high school, and completion of a post-secondary draftsmanship course (Pa153a, 154a) do not indicate that he had no early functional limitations. Asperger Syndrome does not typically result in intellectual impairment. See VanBergeijk et al., supra, at 27; Bauer, supra ("Introduction"). People with the Syndrome may therefore be able complete high school and participate in postsecondary education, while still having substantial functional limitations. See generally, Farrell, supra, at A35.

The ALJ then examined the evidence of T.H.'s substantial functional limitations, but dismissed each piece, denying any connection to his disability. For example, like many individuals with Asperger Syndrome, T.H. has all-absorbing preoccupations that have foiled his effective participation in other activities throughout his life; however, the ALJ viewed T.H.'s obsession with astronomy as a reflection of "a highly-focused individual with sufficient talent to maintain himself over time" (Pa154a). Besides ignoring a classic feature of Asperger Syndrome, the ALJ's finding defies common sense — there is nothing to indicate that obsessive focus helps an individual to "maintain himself over time." The ALJ also viewed T.H.'s behavior as noncompliant and defiant: "T.H. apparently did want [sic] he wanted to do when he wanted to do it and rejected what he did not want to do at other times." (Pa154a.) The ALJ incorrectly interpreted T.H's rigidity as a matter of choice rather than as a compulsion to adhere strictly to routine and an inability to focus on areas beyond his preoccupations. See

VanBergeijk et al., supra, at 29; NINDS, supra ("What are some common signs or symptoms?"); DSM-IV-TR § 299.80, supra, at 80.

Classic features of Asperger Syndrome also include the inability to interact successfully with others, a severely restricted ability to communicate effectively, and other socially and emotionally inappropriate behaviors. See VanBergeijk et al., supra, at 26, 27; Bauer, supra ("Clinical Features"); Klin et al., supra ("Qualitative Impairments in Reciprocal Social Interaction" and "Qualitative Impairments in Communication"); NINDS, supra ("What are some common signs or symptoms?"). In this case, the ALJ catalogued T.H.'s expressive limitations, including that the only topics he can discuss are his preoccupations; that he interjects these topics spontaneously into all conversations; that he is incapable of the give and take common to effective communication except during conversations on these topics; that he speaks in obsessive and repetitive monologues; and that he never makes eye contact. (Pa141a, 144a, 145a.) Despite discussing these prototypical Asperger Syndrome symptoms, the ALJ discounted T.H.'s behaviors as merely "peculiar quirks and characteristics" that did not result in any substantial functional limitations or interfere with his success. (Pa153a.)

Severe social isolation is also common to individuals with Asperger Syndrome. See VanBergeijk et al., supra, at 26. The

ALJ acknowledged the evidence of this impairment: minimal interaction with his siblings (Pa144a), limited participation in family gatherings (Pa144a), and no personal relationships, except for his parents and a boy in childhood (Pa144a). Rather than recognizing a common substantial functional limitation of Asperger Syndrome, however, the ALJ dismissed it as a "predilection to . . . avoid social interactions." (Pa153a.)

Finally, the ALJ fell into the common trap of blaming the parents. See O'Brien, supra; Olivas, supra, 10 Elder L.J. at 411. Until they passed away, T.H.'s parents provided him with the basic necessities of life and allowed him to pursue the intense preoccupations and rigid routines in which he found comfort. (Pa145a, 146a.) Without his parents' care and commitment, T.H. would have had to enter the system at a far earlier age. The ALJ, however, held T.H.'s parents responsible for his limitations, finding that T.H. "was for the most part sheltered and/or cloistered by his parents." (Pa154a.) The ALJ could not allow the fact that "T.H.'s parents were highly and perhaps excessively protective of their child over time . . . to serve as an exception to the requirements which are mandated under the regulations." (Pa155a.) Thus, the ALJ significantly minimized T.H.'s need for support and his parents' dedication to filling that need.

The ALJ’s findings are based in part on the testimony of the Division’s expert, Dr. Arthur Bernstein, who “closely scrutinized the current statutory regulatory requirements and criteria in an effort to analyze eligibility of T.H.” (Pa155a.) The ALJ’s substantial reliance on Dr. Bernstein for a determination of eligibility is contrary to law. In <u>In re Commitment of D.M.</u>, 313 <u>N.J. Super.</u> 449, 454, 456 (App. Div. 1998), the court held that an expert is not permitted to testify as to whether a particular condition meets statutory criteria. <u>See</u> Richard J. Biunno, <u>Current N.J. Rules of Evidence</u>, Comment 1 to N.J.R.E.702, at 844 (Gann 2006). The ALJ is responsible for making the eligibility determination and may not abdicate that responsibility to an expert who has “closely scrutinized” the law. <u>See</u> <u>D.M.</u>, <u>supra</u>, 313 <u>N.J. Super.</u> at 456. Such reliance is especially misplaced here because Dr. Bernstein’s testimony indicated that he had not closely scrutinized the statute and regulations. He stated that the definition of “developmental disability” requires that an individual has a cognitive impairment, which means an I.Q. below 70. (Pa140a.) This is simply not true. Only those applying for services as a result of “mental retardation” must make such a showing according to the regulations. <u>See</u> <u>N.J.A.C.</u> 10:46-2.1(h).[9] T.H. made no claim of mental retardation.

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[9] The Public Advocate is aware of the current debate regarding

The Division’s final decision was based on stereotypes and its own lack of understanding of Asperger Syndrome. These are inadequate grounds on which to base a denial of services. If the Division had applied the appropriate legislative policies related to individual dignity and anti-discrimination to the facts before it, it could not have reasonably come to its conclusion. Instead, it would have recognized T.H. had early, persistent, substantial functional limitations and was qualified for services under the law.

CONCLUSION

For the reasons stated here, the judgment of the Appellate Division should be reversed and the case should be remanded for proceedings consistent with this Court’s opinion.

November 9, 2006.

Respectfully submitted,

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By: ________________________________
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the appropriate standard by which to measure mental retardation and takes no position here on any particular definition.

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