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Executive Office of Health & Human Services
Department of Mental Retardation
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January 30, 2009

Deborah Filler
Senior Staff Attorney
Greater Boston Legal Services
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Legal Services Office
60 Gore Street, Suite 203
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Re: Appeal of [redacted] - Final Decision

Dear Attorney Filler:

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your client's eligibility determination.

The hearing officer made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DMR regulations. Your appeal is therefore denied.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with Massachusetts General Laws, Chapter 30A. The regulations governing the appeal process are 115 CMR 6.30-6.34 and 801 CMR 1.01-1.04.

Sincerely,

Elin M. Howe
Commissioner

Enclosure:
cc: Marcia Hudgins, Hearing Officer
Gail Gillespie, Regional Director
Marianne Meacham, General Counsel
Kim Ladue, Assistant General Counsel
Roberta Lewonis, Regional Eligibility Manager
Randine Parry, Psychologist
[redacted]
File [redacted]

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of [redacted]

This decision is issued pursuant to the regulations of the Department of Mental Retardation (DMR) (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on June 25, 2008 and continued on September 23, 2008 at DMR's Fernald Center in Waltham, Massachusetts. Those present for all or part of the proceedings were:

[redacted]	Appellant's mother
James Leffert, Ed.D.	Psychologist and expert witness for Appellant
Deborah Filler	Attorney for the Appellant
Laura Openshaw	Legal Intern – Cambridge & Somerville Legal Services
Elizabeth Grimm	Legal Intern – Cambridge & Somerville Legal Services
Radine Parry, PhD.	DMR Psychologist
Kim LaDue	Attorney for DMR

The evidence consists of documents submitted by the Appellant numbered Appellant's A-R, documents submitted by DMR numbered DMR's 1-20 and approximately eight hours of testimony.

The Appellant and DMR each submitted a written Legal Memorandum.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DMR supports by reason of mental retardation as set out in 115 CMR 6.04(1). The parties stipulated that the sole issue to be determined is whether or not the Appellant has significant sub-average intellectual functioning. There is no dispute that he has significant adaptive behavior deficits.

SUMMARY OF THE EVIDENCE CONSIDERED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services. (DMR 4, 5)

2. The Appellant is a 20-year old man who currently resides in Cambridge, Massachusetts. (DMR 2, 3)

The following documents were entered into evidence:

3. Three evaluations of the Appellant's intellectual functioning before the age of 18 (Appellant Q, R & DMR 7)

[redacted]

4. One evaluation of the Appellant's intellectual functioning after the age of 18 (Appellant D, DMR 12)

5. A psychiatric consultation and a psychiatric admission evaluation (DMR 6, 11)

6. A diagnostic summary report from the Center for Anxiety and Related Disorder at Boston University (DMR 8)

7. A Pre-Admission Screening Summary from the Pathway School (DMR 10)

8. A document labeled "Additional Comments-[redacted]" dated June 19, 2006 authored by Rosemary Beier, a licensed social worker (DMR 13)

9. A Review of Psychological Testing Evaluations authored by James Leffert, Ed.D. (Appellant A)

10. An undated summary letter from Penny Prather, Ph.D. and Peter Hunt, Ph.D. (Appellant B)

11. A number of articles relative to the Flynn Effect (Appellant E-L & N-P)

12. A document entitled "User's Guide: Mental Retardation" developed by the American Association on Intellectual and Developmental Disabilities (AAIDD) (Appellant M)

13. A document entitled, "Technical Report – Response to Flynn" authored by Lawrence G. Weiss, Ph.D., Vice President, Clinical Product Development, Psych Corp. (DMR 19)

14. Two documents relative to the Appellant's educational program. (DMR15 & 16)

15. The Curriculum Vitae of James Leffert, Ed.D. (Appellant B)

16. The Curriculum Vitae of Radine E. Parry, Ph.D. (DMR 20)

17. In April 1999 when the Appellant was 11 years of age, he was evaluated by Robert Sedgwick, Ed.D. The stated purpose for the evaluation was to assist the Appellant's parents in placing him in an appropriate school. On that occasion, the Appellant was tested using the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). The results of the WISC-III were a Verbal IQ score of 88, a Performance IQ score of 99 and a Full Scale IQ score of 92. Dr. Sedgwick stated that the Full Scale score of 92 was in the average range. The tester noted that he thought that the results were a valid sample of the Appellant's skills at that time. He also noted that the Appellant had difficulty with tasks that required a high level of planning and organization and remarked that these skills are associated with frontal lobe functioning. He also stated that the Appellant was perceptive and intelligent so that he recognized when his planning efforts

were not working and became frustrated when this occurred. Dr. Sedgwick stated that his testing confirmed that the Appellant has very significant learning difficulties as well as Attention-Deficit/Hyperactivity Disorder (ADHD). He also stated that he thought that the Appellant should be viewed as mildly depressed and suggested that he be tried on an antidepressant medication. He did not question the validity of the test results and did not offer a diagnosis of mental retardation. (DMR 7)

18. In October 2001 when the Appellant was 13 years of age he was evaluated by Penny Prather, Ph.D. This evaluation was requested by the Appellant's mother. The tester noted that the Appellant attended the Landmark School for grades 4 and 5, but that toward the end of the 5th grade he was more unstable, seemed more insecure and depressed. She also raised the question of an attachment disorder. Dr. Prather went on to explain that the Appellant attended a language-based program at the Brown Middle School in Newton, but that shortly after this evaluation was completed he had transferred to the LAAB program. She also pointed out that he had a history of a severe language-based learning disability. On this occasion, the Appellant was tested using the WISC-III. The tester noted that the Appellant was cooperative, but that there was a sense of his being compliant but of not connecting interpersonally. She also pointed out that his range of affect was reduced, and expression generally flat with interspersed brief laughter or groaning. The results on this administration of the WISC-III were a Verbal IQ score of 71, a Performance IQ score of 71 and a Full Scale IQ score of 72. The tester noted that the Appellant's overall cognitive abilities were below average in contrast to his most recent prior neuropsychological evaluation in 1999. She felt that the findings were both dramatic and concerning and strongly recommended that the Appellant undergo a neurological consultation to rule out any medical etiology to this decline. She opined that the most likely explanation for the decline was an interaction of social/emotional concerns (including depression) and long-standing language based difficulties. She went on to say that such difficulties are likely to contribute to difficulty with sequencing, reduced attention to subtle detail and appreciation of non-literal language. She did not question the validity of the test results and did not offer a diagnosis of mental retardation. (Appellant Q)

19. In May 2003 when the Appellant was 15 years of age he was re-evaluated by Dr. Prather. On this occasion, he was again given the WISC-III. Dr. Prather pointed out that the Appellant had left the LABB School in Lexington and was now attending the Pathways Program at McLean's Hospital. She noted that the Appellant's strengths continue to be in athletics and concerns continue to be apparent in reduced social comfort and engagement particularly in unstructured and unfamiliar settings. Dr. Prather pointed out that while there was never an impression that he was disconnected or withdrawn, he continued to show atypical, idiosyncratic social mannerisms. She also pointed out that the Appellant's affect was generally constricted and difficult to judge, with a tendency to maintain a neutral facial expression and flat tone of voice. The results of this administration of the WAIS-III were a Verbal IQ score of 83, a Performance IQ score of 75 and a Full Scale IQ score of 77. Dr. Prather stated that the Appellant' overall cognitive abilities continue to be below average. She noted that the Appellant's performance on measures of abstract verbal and visual reasoning was in the average

range for his age, and reflected a relative strength in deductive, analytic reasoning. She pointed out that he seemed to have great difficulty with holding and working on information and with verbal retrieval and formulation which according to Dr. Prather impacts on the acquisition of verbal knowledge. Dr. Prather also noted that the Appellant was better able to reason about everyday social dilemmas than during prior testing. This suggested to her that the prior decline in performance on this task was very likely related to the degree of emotional stress that he was experiencing at the time. She reported that during the testing the Appellant generally maintained alertness, although he was susceptible to restlessness as well as to losing focus. Dr. Prather stated that consistent with impressions from the prior neuropsychological evaluation, current findings continue to highlight a neurointegrative disorder with some gains in goal directed problem solving but marked decline in ability to manage processing "load" that contributes to increases susceptibility to disorganization, misinterpretation, and withdrawal as well as atypical behaviors and increased emotional distress when presented with novel information to process. She recommended an academic program that addresses his significant language-based learning disability. She did not question the validity of the test results and did not offer a diagnosis of mental retardation. (Appellant R)

20. In May 2006 when the Appellant was 18 years 3 months of age, he was again evaluated by Penny Prather, Ph.D. Peter Hunt, Ph.D. also participated in this evaluation. On this occasion the Appellant was given the Wechsler Adult Intelligence-Third Edition (WAIS-III). Dr. Prather pointed out that the Appellant offered concerns that some of the medications administered recently made him feel "spacey" and "lazy". He stated that the medications made him feel tired during the day, which he believed interfered with his ability to focus and learn. She noted that his approach to the testing was patient, diligent and intent highlighting his strong achievement motivation. The results of this test were a Verbal IQ score of 74, a Performance IQ score of 75 and a Full Scale IQ score of 72. Dr. Prather stated that the findings on this test marked (and relative to prior testing, increased) susceptibility to getting overwhelmed and disorganized by complex information. She also noted that the Appellant's performance was age appropriate on measures of abstract reasoning and as well as on challenging goal-directed problem solving tasks. She went on to say that while he was susceptible to losing set and being inefficient on problem solving tasks she had no concerns relative to his ability to infer or generate problem solutions or to work flexibly towards a task goal. She stated that the Appellant continues to be significantly impaired in accessing and understanding content material, particularly novel material. Dr. Prather administered some tests relative to the Appellant's emotional functioning and interviewed both the Appellant and his mother. She reported that the Appellant does better in low stimulus situations and with calm, reasoned responses with those around him. She also stated that there was considerable evidence of depression in the Appellant's responses, and those situations that evoke sad feelings or contain aggressive content lead him to a significant decrease in his ability to function. She did not question the validity of the test results and did not offer a diagnosis of mental retardation. (Appellant D, DMR 12)

21. In February of 1999, Peter Schuntermann, M.D., a Child and Adolescent Psychiatrist reported his impressions of a psychiatric consultation performed relative to

the Appellant. At this time the Appellant was nearly 11 years of age. Dr. Schuntermann stated that the Appellant presented for a 2nd opinion consultation at the request of the Appellant's adoptive parents. Dr. Schuntermann concluded that the most striking feature in the Appellant's overall development and behavior centered around his difficulties with separation. He also found that the Appellant had a language disorder and diagnosed him with a developmental disorder with involves several domains. These appear to include regulation of affect, consistent impairments in social behavior and episodic difficulty in thinking within the context of realistic judgment and possible confusion between realty and fantasy life. Dr. Schuntermann stated that this constellation has been described in the literature as "Multiple Complex Developmental Disorder", but is not a diagnosis listed in the DSM-IV. (DMR 6)

22. In July of 2004 when the Appellant was 16 years of age, he was psychiatrically evaluated by Kevin Hornberger, M.D., a Board Certified Child and Adolescent Psychiatrist as part of his admission to the Pathway School. He noted that the Appellant had been previously diagnosed with attention deficit disorder as well as pervasive developmental disorder. Additionally Dr. Hornberger noted that the Appellant had been diagnosed with a severe language based learning disability as well as a possible attachment disorder. Dr. Hornberger stated that the Appellant would enter the structured residential treatment at Pathway and opined that he would likely respond to programming that can address his social, emotional and language difficulties. He recommended group and family therapy. (DMR 11)

23. In March of 2005 when the Appellant was 12 years 3 months of age he was referred to and assessed by Emily C. Hoffman, M.A. and Sara G. Mattis, Ph.D. at the Center for Anxiety and Related Disorders at Boston University. At that time the Appellant was enrolled in a special needs program for children with language-based difficulties. The report of this assessment states that the Appellant appeared to have difficulty processing the evaluator's questions and was often unable to produce a response. His difficulties with word retrieval were evident, and he often failed to grasp the point of the evaluator's question. The evaluator stated that the Appellant seemed interested in responding to the evaluator, but appeared to have difficulty engaging in the discussion and processing verbal information. On the Revised Children's Manifest Anxiety Scale (RCMAS), the Appellant's score was above the average range for children of his age, suggesting that he experiences markedly high levels of general anxiety, worry and tension. His score on the Children's Depression Inventory (DCI) fell below the clinical range of depression suggesting that he was not experiencing a significant degree of depressive symptomology. In the Diagnostic Summary and Recommendations portion of the report, a principal diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS) was assigned to account for the Appellant' difficulty connecting with others, social awkwardness and overall developmental delay. An additional diagnosis of Specific Phobia – Natural Environmental Type (Water) was also assigned. (DMR 8)

24. In May of 2004 when the Appellant was 16 years of age, he was seen at the Pathway School to determine the appropriateness of his residential placement. The Pre-

Admission Screening Summary states the Appellant is testing in the borderline range of intelligence. It was noted that according to the Appellant's mother, the Appellant's areas of need include: low self esteem, short attention span, excessive anxiety, occasional aggression, leaving program area, difficulty expressing feelings, coping with issues of loss, overreaction to criticism and impulsivity. During education testing the Appellant was willing to try items even as they became more difficult. His math skills tested at a 5th grade equivalent and his reading comprehension at a 2nd grade equivalent for passages and at a 4th grade equivalent for words. (DMR 10)

25. In June of 2006 when the Appellant was 18 years of age, Rosemarie Barr, L.C.S.W. authored a document entitled "Additional Comments – [redacted]". She stated that in February of 2006, the Appellant began to display a series of odd behaviors at Pathway. As a result of these behaviors, he was admitted to the Adolescent Assessment Unit at Somerville Hospital on March 7, 2006. According to Ms. Barr, the Appellant's behavior stabilized during his hospitalization and he was discharged from the hospital on March 20, 2006. She also noted that although his mood and behavior stabilized in mid-May, at the end of May Pathways staff began to report the reoccurrence of certain odd behaviors such as inappropriate laughing, hand clapping, rocking, pacing, etc. (DMR 13)

26. In a document dated November 18, 2007 entitled Review of Psychological Testing Evaluations, Dr. James Leffert, Ed.D. reviewed the Appellant's psychological test results from tests conducted in 1999, 2001, 2003 and 2006. Dr. Leffert noted that the Appellant performed in the average range of intellectual functioning in 1999 when he was 11 years of age. He also noted that subsequent to 1999, the Appellant experienced a marked decline in intellectual functioning and has functioned in the impaired range of intellectual functioning since age 13. Dr. Leffert goes on to state that although the Appellant scores in 2001- Full Scale IQ Score of 72, 2003 - Full Scale IQ score of 77 and 2006 - Full Scale IQ score of 72 are slightly above 70, when the Flynn Effect and the standard error of measurement are applied to the Appellant's scores, there is a strong likelihood that his true IQ score falls within the significantly sub-average range. By applying the Flynn Effect, which states that there is tendency of the population at large to do better on IQ tests from year to year, Dr. Leffert believes that the Appellant's scores should be adjusted so that his Full Scale IQ score in 2003 would be 70, his Full Scale IQ score in 2003 would be 74 and his full scale IQ score in 2006 would be 69. Dr. Leffert also pointed out that the 1992 and 2002 AAMR (American Association of Mental Retardation) definitions of mental retardation require that a standard error of measurement be taken into account in determining whether an individual has significantly sub-average intellectual functioning and noted that the 1992 AAMR definition set a criterion of IQ of approximately 70 to 75. (Appellant A)

27. In an undated letter addressed to Ellen Kilicarsian, DMR Regional Eligibility Manager – Metro Region from Penny Prather, Ph.D., Dr. Prather attempts to clarify the diagnosis formulated based on the prior neuropsychological evaluations that she completed with the Appellant when his was 13 (10/2001) and 15 (8/2003) as well as the most recent cognitive and social/emotional evaluation completed collaboratively with Dr.

Peter Hunt. Dr. Prather summarizes the relevant history stating that the Appellant was born in Peru and adopted at age 3 ½ months and that his adoptive father passed away when the Appellant was 11 years of age. She states that he has a significant language disability and atypical social communication skills. She explains that a diagnosis of PDD was consistently under consideration but not consistently agreed upon. Until about age 10 or 11 differential diagnoses included an attention deficit disorder, a significant language disability; and a question of possible social communication/PDD disorder. She noted a period of regression at age 11 prior to his father's death and again at age 13. She also pointed out that there had been reports of a decline in his behavior as well as poor performance in his academic placement. She reviewed the prior test scores and stated that when taking the confidence levels into account, the Appellant's cognitive abilities were within the mentally retarded range when seen at age 13 and 18 and within 2 points of that range when seen at age 15. She concludes that based on findings from cognitive, neuropsychological, and adaptive behavior evaluations, she and Dr. Hunt feel that the Appellant meets the criteria for a diagnosis of mild to moderate mental retardation according to DSM-IV. (Appellant C)

28. A number of articles on the Flynn Effect were presented by the Appellant. According to the articles, there is evidence that IQ test scores rise as norms age causing the population at large to score higher on IQ tests that were many years ago. Several courts, including courts ruling in death penalty cases, have accepted the argument that the Flynn Effect should be considered in determining whether a party has mental retardation. According to at least one article, IQ scores in the United States have increased approximately 0.311 points per year. (Appellant E-L & N-P)

29. A document entitled "Technical Report" published relative to the WAIS-III speaks to the Flynn Effect. After reviewing Dr. Flynn's findings, the report states that adjusting data to fit theory is an inappropriate scientific method, regardless of how well supported the theory may have been in previous studies. This statement is in response to Dr. Flynn's assertion that the WAIS-III standardization sample is substandard and that a 2.34 point adjustment to the FSIQ (Full Scale IQ) score is required in post conviction capital murder cases. The report states that the only evidence Dr. Flynn provides for this statement is that the WAIS-III scores do not fit expectations made on the basis of the Flynn Effect. The report concludes that as the publisher of the Wechsler series of tests, Harcourt Assessment does not endorse the recommendation made by Dr. Flynn to adjust WAIS-III scores. The document does not speak to other Wechsler tests such as the WISC-III. (DMR 19)

30. James Leffert, Ed.D. was qualified as an expert witness in the field of Mental Retardation and testified for the Appellant. Dr. Leffert testified that based on his review of the Appellant's test scores, it was his belief that the Appellant met the DMR definition of mental retardation in that he had significant sub-average intellectual and adaptive functioning and that this level of functioning was present prior to age 18. He went on to explain the Flynn Effect and stated that it should be taken into consideration when determining IQ scores. He noted that a publication of the American Association of Intellectual and Developmental Disabilities (AAIDD) recognizes the Flynn Effect and

says that it should be applied. He stated that there is no controversy about the Flynn Effect; however there is controversy about how to apply it. He testified that he is not aware of anyone who disputes the Flynn Effect and referenced two legal cases that have been upheld. He stated that based on the age of the IQ tests taken by the Appellant, there is a greater than 50% chance that his IQ score is 70 or below. He explained that one of the Appellant's diagnoses, PDD often overlaps with mental retardation. Dr. Leffert reviewed the test taken by the Appellant in 1999 when he was 11 years of age and stated that his score of Full Scale IQ score of 92 would not support a diagnosis of mental retardation. He explained that the Appellant regressed intellectually after age 11 and opined that such regression may have been caused by genetic factors, congenital factors or environmental factors. He pointed out that the Appellant was sexually abused around the age of 11 and that his father died when the Appellant was 11. Dr. Leffert noted that the Appellant was adopted and the he may have had a pre-existing vulnerability. He suggested that the Appellant's regression is ongoing and that the interaction of traumatic events and pre-existing vulnerabilities may have contributed to the regression. He noted that nothing in the Appellant's profile is inconsistent with mental retardation. (Appellant B & M, DMH 7)

Dr. Leffert testified that he met with the Appellant and that based nothing had altered his opinion about the Appellant's level of intellectual functioning. He noted that the Appellant was very concrete and had difficulty with abstract reasoning.

Dr. Leffert testified that if the Appellant were given a newer IQ test, its results would be more accurate. He also explained that the American Association Mental Retardation had changed its name within the last two years to the American Association of Intellectual and Developmental Disabilities and suggested that was because mental retardation is a pejorative term. He stated that DMR may also be changing its name. [1] He pointed out that often mentally retarded children are not labeled. They are given special education services but not a specific label. He went on to say that in over thirty years of looking at clinical reports, it has been his experience that there is a disinclination to use the term mental retardation.

Dr. Leffert testified that after reviewing the Appellant's psychological evaluations and meeting him face to face, he believes that the Appellant has a global pattern of deficits and that mental retardation is the most appropriate diagnosis. He stated that the Appellant's Individual Service Plan from the Pathway School and his Individualized Education Program from the Cambridge Public Schools corroborate this diagnosis. (DMR 15 &16)

Dr. Leffert explained that the standard error of measurement refers to the margin of error that exits within IQ test scores. He stated that IQ scores can only be interpreted as a

[1] After the hearing, the Appellant's submitted a page from the Summer 2008 edition of the "Federation for Children with Special Needs Newsline" which states that DMR has agreed to change its name to the Department of Developmental Services (DDS). There was no objection raised by DMR to this submission.

possible range. The range is plus or minus 5 points. He then applied both the Flynn effect and the standard error of measurement to the Appellants scores from 2001, 2003 and 2006. He stated that the Appellant's score on the 2001 test would be in the range of 66-74, the score on the 2003 test would be in the range of 70-78 and the score on the 2006 test would be in the range of 65-73. He stated that there is a more than 50% chance that the Appellant's true IQ score is within 2 standard deviations below the mean. (Appellant D, Q & R, DMR 12)

On cross-examination, Dr. Leffert stated that he had administered approximately 200 IQ tests over a period of 25 years. Dr. Leffert agreed that psychiatric issues could have an effect on a person's IQ score. He stated that such issues would not have an effect on the score if the scores were consistent over time and if the individual applied himself when taking the IQ test. Even if the person were anxious or irritable, his score would not be affected if he put forth good effort. He testified that even though the Appellant had stated at the onset of one testing session that his medications made him feel lazy and spacey, the fact that the tester observed that the Appellant put forth good effort means that the IQ score on that test was likely not diminished. (Appellant D, DMR 12)

Dr. Leffert testified that despite the Appellant's history of anxiety and depression that his declining IQ scores were not the result of such conditions. He also testified that the Appellant's IQ scores on IQ tests taken after age 11 should be adjusted downward to account for the Flynn Effect.

31. Radine Parry, Ph.D. was qualified as an expert in the field of mental retardation. She testified as an expert witness for DMR. She stated that that she had administered hundreds of IQ tests and interpreted thousands during the over 30 years she has been a psychologist. She currently reviews over 900 applications for DMR services each year. (DMR 20)

Dr. Parry stated that the current DMR regulations state that an individual must have a valid IQ score of 70 or below as well as adaptive limitations in order to be eligible for DMR services. She stated that emotional factors could negatively impact an individual's performance on an IQ test. She stated that the Flynn Effect should not be applied in the way that was suggested by Dr. Leffert and pointed to the WAIS manual and stated that the publisher of the WAIS-III does not endorse the recommendation by Dr. Flynn to adjust WAIS-III scores. (DMR 19)

Dr. Parry opined that the Appellant's low scores on arithmetic are the result of attention difficulties. She testified that the Appellant since age 13 has been diagnosed with a language based learning disability. She stated that his IQ score in 1999 when he was 11 years of age was not consistent with subsequent IQ scores and noted that the regression took place around the time of his father's death when he was age 13. She noted that in 1996, the Appellant underwent a psychiatric consultation due to issues he was having in school. She noted that he was seen the Center for Anxiety and Related Disorders at Boston University due to fear and anxiety. She pointed out that Dr. Prather noted the Appellant's decline when she tested him in 2001 and 2003 and had suggested

neurological and psychiatric consultations be sought. (Appellant Q & R, DMR 7))

In reviewing the Appellant's subtest scores on the WAIS-III administered by Dr. Prather in 2006, Dr. Parry pointed out the subtest scatter with a low score of 3 and a high score of 10. She stated the Appellant's Full Scale IQ score of 72 placed him in the borderline range and that there was no diagnosis of mental retardation. She testified that she did not believe that the Appellant was mentally retarded but that psychiatric and behavioral issues affected his performance on IQ testing. She also pointed out that the Appellant's Psychiatric Evaluation conducted in 2004 did not contain a diagnosis of mental retardation. (Appellant D, DMR 11 & 12)

Dr. Parry testified that Dr. Flynn thought the norms on the IQ tests were substandard, but pointed out that the newer tests do not show a .3 differential per year because of newly constructed subtests. She pointed out again that the WAIS Manual states that there was no reason for Dr. Flynn to adjust his data relative to the WAIS-III. (DMR 19)

On cross-examination, Dr. Parry stated that the Appellant does not meet the DMR criteria for eligibility. She stated that there will be a change in DMR's name as a result of advocacy groups that were offended by the term "mental retardation." This change will take place in 2009. She stated that the term "mental retardation is a diagnostic term. Dr. Parry agreed that the 2002 "User's Guide :Mental Retardation" developed by the AAIDD states that the clinician needs to take into consideration the Flynn Effect as well as the standard error of measurement when estimating an individual's true IQ score. (Appellant M)

Dr. Parry stated that she did not know if the WAIS-III Technical Manual had been peer reviewed. The Appellant's counsel raised the issue of the testing company having a business interest in convincing the public that their product is reliable. (DMR 19)

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his need for an ongoing support system, I find that the Appellant has failed to show by a preponderance of the evidence that he meets the DMR eligibility criteria. My specific reasons are as follows:

In order to be eligible for DMR supports, an individual who is 18 years of age or older must meet the two criteria set forth at 115 CMR 6.04: (a) he must be domiciled in the Commonwealth, (b) he must be a person with Mental Retardation as defined in 115 CMR 2.01.[2] By statute, M.G.L. c. 123B, section 1, a mentally retarded person "is a person

[2] DMR changed its definition of "mental retardation" and the incorporated the definition of "significantly sub-average intellectual functioning" effective June 2, 2006. Because the Appellant's application for DMR supports was filed after June 2, 2006, the most recent standard applies.

who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." Consistent with its statutory mandate, the Department has promulgated regulations which define mental retardation. The Department's regulations define mental retardation as significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. Significantly sub-average intellectual functioning is defined as an intelligence score that is indicated by a score of 70 or below as determined from the findings of an assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners. Significant limitations in adaptive functioning is defined as an overall composite adaptive functioning limitation that is two standard deviations below the mean or adaptive functioning limitations in two out of three domains at 1.5 standard deviations below the mean of the appropriate norming sample determined from the findings of an assessment using a comprehensive, standardized measure of adaptive behavior, interpreted by a qualified practitioner. The domains of adaptive functioning that are assessed shall be: (a) areas of independent living/practical skills; (b) cognitive, communication, and academic/conceptual skills, and (c) social competence/social skills. There is no dispute that the Appellant meets the first criterion and I specifically find that he meets that criterion. There is also no dispute that the Appellant has significant limitations in adaptive functioning. However, I find that he is not mentally retarded as that term is defined in 115 CMR 2.01.

There were three test reports presented containing Full Scale IQ scores prior to age 18, none of which rendered an IQ score of 70 or below as required for a finding of mental retardation under the current DMR regulations. Likewise, the Appellant's most recent Full Scale IQ score of 72 obtained when he was 18 years 3 months is higher the score required under the current regulations. The Appellant's long standing language based difficulties as well as his social and emotional profile appear to contribute to his below average IQ scores.

Although the Appellant's IQ scores declined and were in the borderline range of intelligence prior to age 18, there is credible evidence that such decline was the function of psychiatric and behavioral issues that surfaced around the time of adolescence. Such issues appear to have affected the Appellant's ability to concentrate and to manipulate information. I find that these issues likely contributed to the decline in the Appellant's scores on IQ tests administered after age 11.

The Appellant asks that I apply the Flynn Effect to his IQ scores and take into consideration the standard error of measurement which would serve to lower the Appellant's obtained score. The "Technical Report" issued by the publisher of the Wechsler series of tests does not endorse the recommendation of Dr. Flynn to adjust the WAIS-III scores. Applying the standard error of measurement to the Appellant's IQ scores would result in a range of scores but would not provide conclusive evidence that his true IQ score is 70 or below. It was pointed out by the Appellant that the AAIDD

"User's Guide: Mental Retardation" states that the clinician needs to take into consideration the Flynn Effect as well as the standard error of measurement when estimating an individual's true IQ score. Dr. Prather tested the Appellant on three occasions: twice using the WISC-III and once using the WAIS-III. The Appellant offered no objection to Dr. Prather's qualifications to administer the IQ tests. The Appellant offered no objection to Dr. Prather's test reports which contained the results the Appellant's IQ tests. None of the scores reported by Dr. Prather relative to the Appellant's Verbal, Performance or Full Scale IQ scores are 70 or below. While it is impossible to know whether Dr. Prather considered the Flynn Effect when forming her diagnosis, I find that her reports did not find the Appellant to be mentally retarded, but rather characterized him as having cognitive abilities that were below average. Although Dr. Prather clarified her diagnosis of the Appellant in a letter to DMR relative to the Appellant's eligibility to receive services, she did not use the current DMR definition of mental retardation, but found him to meet the criteria for a diagnosis of mild to moderate mental retardation using the DSM-IV definition.

Finally, although the Appellant's expert witness believes that the Appellant's IQ score meets the DMR definition of mental retardation when applying the Flynn Effect and the standard error of measurement, I am not persuaded that I am in a position to make such adjustments. The clinicians who administered IQ tests to the Appellant reported his Full Scale IQ score as above 70 which renders him not eligible for DMR services under the current DMR regulations.

DMR's mission is to assist individuals that are mentally retarded, and it must have a method for determining whether an individual applying for services is disabled due to mental retardation. It is therefore reasonable and permissible for DMR to establish a definition of mental retardation in determining whether an individual applying for services has mental retardation. There is nothing in any of the test reports or in the testimony which indicates that the assessments used were not valid or comprehensive. Nor is there any evidence that they were not administered in standardized formats and interpreted by qualified practitioners.

APPEAL

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

Date: January 11, 2009

Marcia A. Hudgins
Hearing Officer