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 November 10, 2005 at DMR's Central Office in Boston, Massachusetts. Those present for the proceedings were:

[redacted]	Appellant
Charles Sanzone	Appellant's mother and Guardian
Randine Parry, Ph.D.	Clinician - [redacted]
John O. Mitchell	DMR Psychologist
	Attorney for DMR

The evidence consists of documents submitted by DMR numbered D1-5, documents submitted by the Appellant numbered A1-9 and approximately 3 hours of oral testimony.

The parties stipulated that the Appellant has adaptive deficits in a number of areas and agreed that the issue before the hearing officer was his level of cognitive functioning.

The Appellant offered no expert testimony.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DMR supports by reason of mental retardation as set out in 115 CMR 6.03(1).

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services. (D3-4)

2. The Appellant is a 21 year-old man who resides at the [redacted] in [redacted] MA. (D2, D4)

3. The report of one psychological evaluation prior to age 18 was entered into evidence. This report contained scores from two previous psychological tests administered to the Appellant prior to his 18th birthday. (A2)

4. The report of one psychological evaluation after age 18 was entered into evidence. (A8)

5. In 1993 when the Appellant was 9 years 8 months of age, he was referred for an evaluation of his cognitive, emotional, and behavioral/attentional functioning to aid in determining his educational placement. The evaluation was performed by Chris Di Paola, a Certified School Psychologist. The evaluator noted in his report that the Appellant had previously been given IQ tests and had received the following scores: In 1989 when the Appellant was approximately 5 years old, he was tested using the WPPSI. On this test, he reportedly received a Verbal IQ score of 96, a Performance IQ score of 107 and a Full Scale IQ score of 101. In 1990 when the Appellant was approximately 6 years old, he was tested using the WISC-R. On this test, he reportedly received a Verbal IQ score of 87, a Performance IQ score of 109, and a Full Scale IQ score of 97. Mr. Di Paola tested the Appellant using the Wechsler Intelligence Scale for Children - Third Edition (WISC-III). On this occasion, the Appellant received a Verbal IQ score of 85, a Performance IQ score of 77 and a Full Scale IQ score of 77. Mr. Paola stated in his report that the Appellant's score was in the borderline range of intellectual functioning and noted that there was a 13-point discrepancy between his Verbal and his Performance IQ scores suggesting greater facility in the verbal realm. He also pointed out that while the Appellant's Verbal IQ score was consistent with a previous testing, there had been a significant drop in his Performance score. The evaluator noted in his report that the Appellant evidenced a complex motor tic as well as some obsessive-compulsive behaviors. He stated that the discrepancy in scores reflects the detrimental impact of the Appellant's tics, which were more severe than they were when he had been tested three years prior and pointed out that the Appellant's attention deficit, obsessive-compulsive behavior and medication side effects had a negative impact on his score. He concluded that the Appellant's true abilities are more likely in the low average to average range. The evaluator pointed out that the Appellant's eye-hand coordination, spatial judgment and visual processing speed were deficient. Mr. Di Paola did not offer a diagnosis of mental retardation. (A2)

6. In 2003 when the Appellant was 19 years 3 months of age, he was referred for a psychological evaluation to aid in determining his cognitive level and functioning. On this occasion, he was tested by Thomas Schnatterbeck, Psy.D., a Licensed Clinical Psychologist. Dr. Schnatterbeck administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). On this test, the Appellant received a Verbal IQ score of 81, a Performance IQ score of 70 and a Full Scale IQ score of 74 which Dr. Schnatterbeck stated placed the Appellant in the borderline range of intellectual functioning. He went on to say that in the Appellant's case, the Full Scale IQ score is less meaningful because there are large discrepancies between the scores that compose either the Verbal or the Performance Scales. He stated that the Appellant's verbal reasoning abilities are most appropriately characterized by his score on the Verbal Comprehension Index, which is in the average range and better than approximately 32% of his peers. Dr. Schnatterbeck noted that the Appellant's clinical profile reflected a high degree of psychological distress. He appeared to be fearful, tense, apathetic and withdrawn. His thinking and views about himself and the work seemed to be quite discouraged, confused and disorganized. He also stated that the Appellant found it hard to keep his mind on a task

or job and opined that this may be due to a high level of thoughts that preoccupy him with unusual beliefs and suspicions that are abstract or bizarre. He did not offer a diagnosis of mental retardation. (A8)

7. [redacted] testified on behalf of her son, the Appellant. She stated that she was the Appellant's legal guardian. The guardianship was obtained in the state of [redacted] and was a guardianship of a disabled person. Ms. [redacted] stated that she started to take the Appellant to various specialists when he was approximately two and a half years of age. She stated that even though he had jargon and was talking, she felt that his language should have been more developed. He attended a speech and language pre-school in [redacted] She stated that the school did some testing and gave him daily speech and language help. She testified that she took the Appellant to a pediatric neurologist at the age of three. The neurologist thought that the Appellant had ADD, but Ms. [redacted] testified that she thought it was too early to diagnose him with ADD so she continued to provide him with help with his speech and language skills. She stated that he went to regular kindergarten at age 5 and that his teacher observed certain behaviors indicative of ADD. The Appellant then received a full battery of tests. She stated that the results of the testing which was done in 1990 (WISC-R) resulted in a Verbal IQ score of 87, a Performance IQ score of 109 and a Full Scale IQ score of 97. She stated that he was previously tested in 1989 at age 5 using a WIPSI and received a Full Scale IQ score of 101. Ms. [redacted] stated that the Appellant was put on Ritalin and developed Tourette's She also stated that she did not know if the Tourette's disorder came before the administration of Ritalin or as a result of the Ritalin. (A1-2)

Ms. [redacted] testified relative to an IQ test (WISC-III) given to the Appellant in 1993 after the Tourette's had set in and the ADHD had been diagnosed. She pointed out that on this test the Appellant received a number of borderline and low average scores. The Appellant received a Verbal IQ score of 85, a Performance IQ score of 72 and a Full Scale IQ score of 77. She pointed out that this test showed a lowering of the Appellant's IQ. She stated that she did not have the reports of the tests given in 1989 or in 1990. She pointed out that the report of the testing done in 1993 noted the Appellant's motor tics and head thrusting as well as repetitive questions and distractions. Ms. [redacted] went on to say that the Appellant is charming and has a sense of humor and that these traits were pointed out in the 1993 test report. (A2)

Ms. [redacted] testified that the doctors were trying to determine if the Appellant had Williams Syndrome or one of the other syndromes but that the tests were negative. She stated that the only thing that was found was hyper/hypoparathyroidism which has to do with the thyroid gland and calcium. This condition produces some deformities. She stated that a report done by Dr. Sylvester in 1996 confirms and explains this diagnosis. (A3)

Ms. [redacted] stated that the Appellant was seen in 1988 by a developmental pediatrician. At this time, the Appellant was almost 5 years of age. She testified that according to the report, this doctor found the Appellant to have wide thumbs and toes.

He also noted that the Appellant had an unusual shaped head and some frontal bossing. This doctor found no neurological abnormalities. He found some significant fine motor problems and visual tracking along with some sensory integration difficulties. The doctor noted his concern with the Appellant's visual and motor skills. He was also concerned with the Appellant's academic and language skills. Ms. [redacted] stated that the Appellant has better relationships with adults than with his peers. The doctor stated in his report that the Appellant displayed an inattentive behavioral style as a result of developmental and/or cognitive problems. The doctor did not think that the Appellant would be able to keep up with his peers if placed in a regular classroom. The doctor recommended speech, language and occupational therapy, which Ms. [redacted] stated the Appellant did receive. The doctor stated in his report that there was no certain medical explanation for the Appellant's developmental delays. (A4)

Ms. [redacted] testified that the Tourette's began to show up when the Appellant was almost 10 years of age. He was seen at Yale University where the diagnosis was substantiated. She stated that they felt that he had physical tics as well as cognitive tics which is why he seemed to get stuck and have a great deal of perseveration.

Ms. [redacted] testified relative to a report from the Rush-Presbyterian-St. Luke's Medical Center's Department of Neurological Sciences. This report prepared in 2002 when the Appellant was 18 years of age notes that he has dystonic neck posturing from medication and that the frequency of the tics was increasing. (A5)

Ms. [redacted] testified relative to a report from the Larkin Center relative to an evaluation of the Appellant done in June of 2003 when the Appellant was 19 years of age. She pointed out that the diagnosis given in the report was Tourette's Disorder, Obsessive Compulsive Disorder (OCD) and Dysthymia on Axis I and Mental Retardation Mild with a history of mixed receptive and expressive language disorders. She pointed out that among other things listed in the Recommendations section of the report, the doctor stated that while he wasn't able to locate a specific IQ score, certainly from a functional point of view, the Appellant was functioning at a mentally retarded level at that time. Ms. [redacted] stated that she found this statement to be very interesting. She stated that the Appellant's functioning level is at a lower level than his IQ score. She stated that an IQ test was not given because so many other IQ tests had been given and that the psychiatrist who evaluated the Appellant was a consultant and did not have access to the Appellant's records. (A6)

Ms. [redacted] testified relative to a Discharge Summary prepared by two physicians employed by the Review Hospital for Children and Youth. She pointed out that in the report the term "cognitive tics' was used relative to the disruption in the Appellant's ability to think in an organized way thereby confirming her earlier testimony that he had been diagnosed with "cognitive tics". She also pointed out that the report stated that the Appellant is at risk for a lifetime of institutional care. (A7)

Ms. [redacted] testified relative to the report of the psychological evaluation conducted by

Thomas Schnatterbeck, Psy.D. in July of 2003 when the Appellant was 19 years 3 months of age. The Appellant was evaluated using the WAIS- III. She stated that the report indicates that the Appellant obtained a Full Scale IQ score of 74, which places him in the borderline range of intellectual functioning and above those of approximately 4% of his peers. She stated that she knew DMR's cut-off but that the Appellant's score could be a 64 or an 84 based on her understanding that an IQ score has a range of plus or minus 10 points. She stated that the Appellant's functioning levels are low. She also pointed out that the report states that the Appellant's knowledge of social conventions and behavior is less well developed than his other verbal reasoning skills. She stated that one should look at the whole child and look at the Appellant's adaptive functioning, his social functioning and his emotional functioning and if he misses the cut-off, one should consider the plus or minus points in deciding where funding should lie. She stated that the ICAP was given but was unable to provide the Appellant's score. (A8)

Ms. [redacted] testified relative to a Quarterly Progress Report from the Willowglen Academy dated January 8, 2004. She noted that there have been times when the Appellant has gross motor tics that caused him to stop him in a high traffic area and staff have been needed to help him move along. She stated that she was very worried for the Appellant's safety. (A9)

Ms. [redacted] again stated that the Appellant should be viewed as a whole person and if his IQ sore was off by only a few points, he should be viewed as needing services.

On cross-examination, the Attorney for DMR asked the witness if she were familiar with DMR's eligibility regulations. She indicated that she was familiar with the regulations. She stated that she knew that there was a cut-off. The Attorney also pointed out that in the documents contained the Appellant's Exhibit 1- Guardianship of Disabled Person, there was an annual report that did not mention that the Appellant was mentally retarded. The witness agreed that there was no mention of mental retardation in the report. The witness agreed that the Appellant's IQ score was 101 when he was tested by Nova University in 1989 and that this score would place him in the average range. She agreed that the report of testing done in 1993 made mention of his tics and the detrimental impact they had on his IQ score. She agreed that the report indicated that the Appellant's score was also impacted by his ADD, his OCD and medication side effects. She agreed that the report stated that the IQ scores he received on this examination should be viewed as a minimal estimate of his cognitive potential, with his true abilities in the low average to average range. She agreed that the report from Children's Memorial Hospital mentioned the Appellant's tics, his ADD and his OCD but nothing in the report indicated that he is mentally retarded. She agreed that the Larkin Center Report based the Appellant's Axis II diagnosis on his functional level and that the facility did not have access to IQ scores in making a diagnosis. She agreed that the report from the Riverview Hospital for Children and Youth indicated that the Appellant's most disabling symptom was his tics and that he manifested the most severe case of Tourette's disorder that the pediatric neurologist had ever seen. She agreed that in 2003 when the Appellant was 19 years of age, his Verbal IQ score was 81 and his Full Scale IQ score was 74. (A1-3, A6-8)

Ms. [redacted] stated that she has a master's degree in Special Education and has been part of a team that determines if a child is mentally retarded. She stated that she looks at the whole child and his functioning level, not at numbers. She stated that there are no regulations relative to this diagnosis at the school level and if the child is a few points off but has low functioning, schools do not go strictly by the numbers. She stated that she did not know what caused the Appellant's cognitive deficits but that she believed the deficits were not solely caused by Tourette's. The witness stated that there was no lack of oxygen at the time of the Appellant's birth but that she had taken anti-convulsive medication during her pregnancy. She also pointed out that in the Petition for Appointment of Guardian for Disabled Person she stated that mental and physical disabilities were the reasons for the guardianship. She went on to say that she was unaware of any mental disability other than mental retardation. She pointed out that if the Appellant had an emotional disability she would have stated that in her petition. (A1)

8. Charles Sanzone, a clinician from the [redacted] testified on behalf of the Appellant. He stated that the regulations and the stipulations do not come close to addressing the needs of the Appellant. He stated that even though the Appellant's tics are severe, they don't scratch the surface relative to his disability. They do not relate to his level of functioning or his behavior. He stated that the Appellant's improved level of functioning is due to the consistent work that has been done at the [redacted] and that the school is just scratching the surface with the Appellant's cognition, behavior and social skills. He stated that the Appellant is fearful of turning 22 and falling off the face of the earth. He stated that the Appellant can learn but needs lots of reinforcement. The goal of the [redacted] has been to help him to be a person who can make a contribution. Mr. Sanzone stated that the Appellant can work, and he can do well if he receives at least some services. Mr. Sanzone stated that the Appellant has started to make friends and that he would like to see him continue to progress.

9. Radine Parry, Ph.D. testified as an expert witness for DMR. She stated that she has worked for DMR since 1977 as a psychologist. She stated that she had met the Appellant and had reviewed the records that DMR had been provided before the hearing as well as documents that were presented by the Appellant on the day of the hearing. She reviewed DMR's Application for Eligibility and stated that the Appellant was found ineligible. She stated that she did not make the initial decision relative to the Appellant's ineligibility. She stated that the decision was made by Dr. Match. She stated that Dr. Match wrote an Eligibility Report relative to the Appellant. Dr. Parry stated that Dr. Match's report indicated that the Appellant had long history of psychiatric, behavioral, developmental and interpersonal problems and that testing did not support a finding of mental retardation. He also indicated in his report that the Appellant's verbal ability falls within the low average to average range, while his nonverbal ability is in the borderline range. Further, Dr. Match found that the Appellant reads and comprehends at a level much higher than would be expected of someone with mental retardation. Dr. Parry stated that she agreed with the determination that the Appellant is not an individual with mental retardation. She stated that she based her decision on a number of factors including

intelligence tests, particularly the Appellant's verbal ability as well as the Appellant's reading ability. She also stated that some of the Appellant's behavioral issues at the times when he was being tested could have interfered with his performance abilities. Dr. Parry also stated that upon meeting the Appellant and talking with him, she was able to confirm her decision that the Appellant is not mentally retarded. (D1, D3)

Dr. Parry reviewed scores that were received by the Appellant in 1989 when he was 5 years of age showing that the Appellant was functioning in the average range of intelligence. She stated that the VIQ of 96, meant that his verbal ability was average, adequate. She stated that a score of 90-110 would be in the average range. She stated that the PIQ was the Performance IQ score and that there was some time limit involved in the tests that make up the subtests within this area. She stated that the Appellant's score of 107 was in the average range. The FSIQ referred to the Full Scale IQ score, which is the individual's overall level of intellectual functioning. She agreed that the Appellant's score of 101 was solidly in the average range. (A2)

Dr. Parry reviewed scores received by the Appellant in 1990 when he was 6 years of age showing that his Verbal IQ score was in the low average range, his Performance IQ score was in the average range and his Full Scale score was in the average range. (A2)

Dr. Parry reviewed scores that were received by the Appellant in 1993 when he was 9 years 8 months of age. She stated that at this time the Appellant's Verbal IQ score was 85, which is in the low average range. His Performance IQ score was in the borderline range and his Full Scale IQ score was in the borderline range. (A2)

Dr. Parry stated that the individual who wrote the report relative to the 1993 testing was concerned that the Appellant's tics were interfering with the testing. His tics and distractions were slowing him down and hampered his performance. The report also stated that at times the Appellant failed on an easy item and succeeded on a more difficult one. The tester also noted in his report that the Appellant complained of blurred vision, which might have been a side effect of medication. Dr. Parry opined that this might have interfered with his performance on the IQ test. She stated that the evaluator felt that the Appellant's cognitive abilities were more likely in the average to low average range. She noted that the tics were more significant than three years prior. Dr. Parry stated that there was nothing in the report that would make her doubt the evaluator's conclusions. She also agreed that nothing in the document would lead her to believe that the Appellant had mental retardation. (A2)

Dr. Parry testified that if one is being timed while taking a test, tics could distract from the task and cause one to lose time. She stated that there were no other documents presented to DMR relative to the Appellant's IQ scores prior to his becoming 18. She noted that DMR has one report of IQ testing done after age 18. Dr. Parry stated that she would not rely soley on the scores of testing done in 1989 and 1990 in making a diagnosis because they were not accompanied by a report written by the examiner. She stated that you would usually want the full report especially if someone did very poorly. If someone

did very well, you would probably want to know the quality of the testers. She also stated that a score at age 5 is good to know. If someone did very well at an early age and then later does poorly, one would want to look at what happened during the time between the tests.

Dr. Parry testified relative to a psychological evaluation which was done when the Appellant was 19 years of age. Dr. Parry stated that the Appellant's Verbal score of 81 was in the low average range. She noted that his Verbal Comprehension was 93, which is in the average range. She agreed that his Performance scores declined from previous testing. At the time of this test, his Performance IQ score was 70. Dr. Parry stated that based on these scores and the other information in the report, she would not diagnose the Appellant with mental retardation. She stated that given the whole picture, his Verbal scores are very good. She stated that part of the Appellant's problem in the Performance area was his speed. Although many things could affect the Performance scores, Dr. Parry noted that the report indicated that the Appellant really didn't want to take the test. She stated there were clearly behavioral or other issues going on. She testified that mental retardation would not have anything to do with this. Dr. Parry testified that nothing in the report lead her to believe that the Appellant is mentally retarded. She stated that there are a number of things that seem to interfere with the Appellant's functioning including medications at certain times. Dr. Parry stated that due to large discrepancies between the Verbal and the Performance IQ scores, the Full Scale IQ score on this test may not be as meaningful as other Full Scale scores. (A8)

Dr. Parry testified that it is possible that the Tourette's or the OCD or the behaviors related to these conditions could have interfered with the Appellant's performance on the Performance tests because the timing would be interfered with by the behavioral manifestations of these conditions. Medications could also cause some problems.

Dr. Parry stated that she looked at the Appellant's Reading and Comprehension. She pointed to an Individualized Education Program (IEP) dated July 31, 2003 that stated that the Appellant was reading at an 11th grade level. She indicated that he was 20 years of age at this time. She stated that this was not something that she would expect from someone who had mental retardation. She stated that on an academic achievement test, the Woodcock Johnson, the Appellant averaged an 8th grade reading level. (D 4-5)

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his disabilities and his obvious need for continuing supports, 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 three criteria set forth at 115 CMR 6.03: (a) he must be domiciled in the

Commonwealth, (b) he must be a person with Mental Retardation as defined in 115 CMR 2.01, and (c) he must be in need of specialized supports in three or more of the following seven adaptive skill areas: communication, self-care, home living, community use, health and safety, functional academics and work. There is no dispute that the Appellant meets the first criteria, and I find that he meets that criterion. However, I find that he is not mentally retarded as that term is defined in 115 CMR 2.01.

By statute, M.G.L. c. 123B, section 1, a mentally retarded person "is a person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." Consistent with its statutory mandate, DMR has adopted the American Association on Mental Retardation (AAMR) standards as the clinical authority to which it refers in determining whether an individual has "inadequately developed or impaired intelligence". The AAMR standards establish a three-prong test: (a) the individual must have significantly sub average intellectual functioning defined as an IQ score of approximately 70 to 75 or below, based on assessments that includes one or more individually administered general intelligence tests, (b) related limitations in two or more of the following adaptive skill areas: communication, self care, home living, social skills, community use, self direction, health and safety, functional academics, leisure and work must exist concurrently with sub average intellectual functioning, and the individual must have manifested the criteria (a) and (b) before the age of 18.

I find that the Appellant is not "mentally retarded" as that term is used in statute and regulation for the determination of eligibility for DMR supports. The parties stipulated that the Appellant has limitations in several adaptive skill areas, however I find that he does not have significantly sub average intellectual functioning.

None of the Appellant's IQ scores before the age of 18 were 70 to 75 or below. His IQ score in 1989 when he was 5 years of age was 101; his IQ score in 1990 when he was 6 years of age was 97. His IQ score when he was 9 years of age was 77. While there was a decline in the Appellant's IQ scores from age 5 to age 9, none of the scores come within DMR's definition of mental retardation. It appears from the evidence that the Appellant developed Tourette's disorder at about age 8 or 9 and that this condition affected his ability to perform on the Performance portion of subsequent IQ tests. The documents in evidence explain that the Appellant's tics interfered with his ability to perform on the timed tests thereby lowering his scores. DMR's expert witness agreed with this explanation. The testing that was done in 2003 when the Appellant was 19 years of age follows the same trend toward lower scores in the Performance domain. While his Verbal IQ score on that test is in the low average range, his Performance IQ score declined to the borderline range. Other reasons for the decline in the Appellant's scores were suggested in the psychological reports as well as by Dr. Parry in her testimony. The reasons include ADD, OCD and the effects of medications that the Appellant was taking at the time of testing.

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 13, 2006

Marcia A. Hudgins
Hearing Officer