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 January 16, 2004 at DMR's Middlesex West Area Office in Framingham, Massachusetts.

Those present for the proceedings were:

[redacted]	Mother and Guardian of [redacted]
Robert W. Kauffman, Ph.D.	Clinical Psychologist
Renee Briggs, Ph.D.	DMR Psychologist
Thomas J. Frain	Attorney for [redacted]
George M. Casey	Attorney for DMR

The evidence consists of Documents submitted by DMR numbered D1-17; a photograph submitted by the Appellant numbered A1 Documents submitted by the Appellant numbered A2-3 and approximately 4 and 1/2 hours of oral testimony. The Appellant's mother testified on his behalf . Expert testimony was offered by DMR and the Appellant.

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. (D1)

2. The Appellant is a 19-year-old young man who lives at [redacted], a residential school located in [redacted] Massachusetts (A2, testimony of [redacted])

3. Three (3) evaluations of the Appellant's intellectual functioning before the age of eighteen (18) were entered into evidence (D10, D12, and D13)

4. One (1) evaluation of the Appellant's intellectual functioning after the age of eighteen (18) was entered into evidence. (D2)

5. Two (2) Adaptive Behavior Assessments were entered into evidence. (D11, A2)

6. One (1) Summary of the Appellant's Adaptive Behavior was entered into evidence. (A2)

7. When the Appellant was seven (7) years old, he was evaluated by Denise Carver, a School Psychologist employed by the [redacted] Public Schools, [redacted] School District. At that time the Appellant was attending [redacted] in [redacted] MA. Ms. Carver administered four (4) non-verbal subtests of the Wechsler Intelligence Scale for Children - Revised Edition (WISC-R). Her report of that evaluation stated that the Appellant scored at the first percentile (1%) on the Picture Arrangement Subtest. The tester stated that this subtest suggests that understanding the cause and effect of novel social situations may be difficult for the Appellant. On Object Assembly, a task of integrating puzzle pieces into concrete pictures, the Appellant also scored in the first percentile (1%). However, the tester stated that the Appellant's ability to work with blocks and to reproduce abstract designs was superior, ninety-first percentile (91%). She explained that this indicated that the Appellant has an excellent ability to work from part to whole. High scores on this test often correlated with a good ability to read. The fourth subtest, which tested visual motor integration, as measured by Coding was at the fifth percentile (5%). His fine motor coordination and eye hand coordination were areas of weakness. Ms. Carver stated in her Summary that the Appellant had an impulsive learning style. She suggested that his significant strengths in reading needed to be capitalized in order for him to receive and express information. She did not calculate an IQ score for the Appellant. She made no diagnosis of mental retardation. (D13)

8. Denise Carver tested the Appellant again when he was ten (10) years old. She administered the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). At that time he was in the third grade at the Thoreau School, a public school in Concord, MA. Although she did not report the Verbal, Performance or Full Scale IQ scores, she did report that the Appellant scored in the Low Average Range on the Verbal Scale (21st percentile), in the Borderline Range on the Performance Scale (8th percentile) and that his Full Scale score was in the Low Average Range (12th percentile). In her Summary she stated that the Appellant was functioning in the Low Average Range of General Cognitive Functioning. She made no diagnosis of mental retardation. (D12)

9. When the Appellant was sixteen (16) years of age he was again tested by Denise Carver. He was referred to her for a reevaluation in order to update testing and assess his cognitive development. At that time the Appellant was in the ninth grade at the Concord-Carlisle Regional High School and was in the Pathways Program. The Wechsler Intelligence Scale for Children-Third Edition (WISC-III) was administered by Ms. Carver. She did not report the Verbal, Performance or Full Scale scores that the Appellant received on the test; but she did state that on the Verbal Scale he scored in the

Average Range and on the Performance Scale his score was in the Borderline Range. His Full Scale Score was in the Low Average Range. She noted that a twenty point discrepancy between his Verbal and Performance scores is significant and renders his Full Scale score a meaningless measure of his overall ability. She noted in her Summary that the Appellant's cognitive profile indicates that he has many strengths to draw upon and can use them to compensate for weaknesses. He has strong abstract verbal reasoning and does best when he can express what he knows in one or two words. She went on to say that Perceptual Organization continues to be compromised for the Appellant which means that organizing and sequencing tasks are difficult for him particularly if they involve handwriting. She also stated that the timed nature of nonverbal tasks make his performance a minimal estimate of his ability. She made no diagnosis of mental retardation. (D10)

10. In November 2002 when the Appellant was eighteen (18) years, nine (9) months of age, he was tested by Rafael Castro, Ph.D. and Rachel Wiseman, Psy. D, both psychologists employed by the Children's Evaluation Center in Newton, MA. He was given the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III.). He received a Verbal IQ score of 81, a Performance IQ score of 85 and a Full Scale IQ Score of 81. The testers stated that accommodations were made in testing the Appellant due to his pronounced articulation difficulties; he was encouraged to write his answers when necessary in order for the examiners to clearly understand his responses. They pointed out that there were no significant differences between the Verbal and Performance scores, indicating equally well developed verbal and non-verbal skills. His scores on the Verbal Subtest ranged from a high of 10 to a low of 3. The testers stated that when asked questions regarding everyday situations and social protocol (Comprehension), the Appellant scored significantly below average. They concluded that his profile reveals a young man who exhibits cognitive abilities in the Low Average range, with a slight tendency toward better performance on non-verbal tasks. They made no diagnosis of mental retardation. (D2)

11. In December 2002 when the Appellant was eighteen (18) years of age, his mother, [redacted] completed the Adult Form of the Adaptive Behavior Assessment System (ABAS) In reviewing this document it would appear that the Appellant has significant adaptive deficits in every area of his life. Communication, Community Use, Home Living, Health and Safety, Self-Care, and Self-direction are the most compromised. (D11)

12. On January 8, 2004 when the Appellant was nineteen (19) years, eleven (11) months of age Robert W. Kauffman, Ph.D. completed the Vineland Adaptive Behavior Scales. The results showed that the Appellant's adaptive skills were low with age equivalents of between 3.3 years (Personal Daily Living Skills) and 8.1 years (Written Communication) In his Summary, Dr. Kauffman stated that the results suggest that the Appellant's current adaptive functioning falls generally well within the parameters of mental retardation. He also noted that these results fall considerably below what would be predicted from his Full Scale IQ (81). He went on to say that some of this variability

may be accounted for by limitations on his development of adaptive skills imposed by Familial Dysautonomia. He also pointed out that it is important to note that the approximate mental/adaptive age of adults with mental retardation is from 8 to 11 years and stated that the Appellant clearly falls within these parameters. (A2, A3)

13. [redacted] testified on behalf of the Appellant. She stated that he was born prematurely and had difficulty sucking from the time of his birth. He experienced his first seizure at eight (8) months. He was put on seizure medication at that time. His hips weren't formed properly and for a period of time he was in a brace for twenty-three (23) hours a day. He has scoliosis. He was diagnosed with Familial Dysautonomia. According to Ms. [redacted] the Appellant is one of four hundred (400) people in the world with this condition. He has a flat tongue and can't taste. He cannot smell. He has sensory neuropathy. Most of his face is numb. He has no feeling on his left side from his knee down. He has dry eyes and has to have eye ointment put into his eyes every two (2) hours. When his corneas get holes in them, he has to have the medication every hour. He has had a number of eye surgeries. His eyes have been sewn shut on the sides to preserve moisture. He has had his tear ducts cauterized. He wears protective goggles and his vision cannot be improved with corrective lenses. He can't chew his food; it must be pureed. He has difficulty with articulation causing him to be difficult to understand. When he was young, he wore a helmet; everything had to be padded. He was self-abusive and scratched his face. He has had blood poisoning. At age three (3) he made his first civilized communication through sign language. At age four (4) he began attending [redacted] where he stayed for a year and a half working on behavior control. This included a home program and the use of restraint. It took a year to transition him to public school. During elementary and middle school he had a one to one tutor. He had a shared tutor during high school.

Ms. [redacted] testified that the Appellant has been receiving Mass Health since age three (3) or four (4). He has been deemed a disabled adult child by Blue Cross and by Social Security. He currently attends [redacted] in [redacted] five days a week. According to Ms [redacted] this residential school serves students with low IQs, Autism and Downs Syndrome. She testified that the Appellant reads wrestling magazines. He doesn't read books.

Ms. [redacted] testified that the Appellant doesn't have a clue how to take care of himself. He doesn't wipe himself when going to the toilet. He grinds is teeth and has broken teeth and receding gums. He can dress himself but not well. He needs prompting on what to wear. He learned to tie his shoes in eighth grade but can do so only when the laces are soft and of the right length. He needs help with zipping and buttoning. He's 5'1'' and weighs 110 pounds. He doesn't know how to cook or prepare food. He needs a lot of calories. He drinks two (2) Ensure Pluses each day. He can pour Ensure into a cup. He eats with a mirror so he can tell where to put the food. He must use plastic spoons and Tupperware so he won't damage his teeth. He can't make his bed, shop for groceries or plan meals. He does not have the ability to administer first aid when he is injured. He cannot take care of himself medically. He falls and bumps into things. He can't take his

medications without assistance. He has no safety skills. He is not careful when crossing the street. People don't understand his speech so it is difficult for him to use the telephone. Although he is friendly to others, he is not socially appropriate. He doesn't understand space issues. He is at times too friendly and can be taken advantage of. He cannot use public transportation. At times he wakes up in the middle of the night in severe pain.

Ms. [redacted] testified that she became her son's guardian when he turned eighteen (18). The basis for the guardianship was physical incapacity.

On cross-examination, Ms. [redacted] testified that at one time a neuropthomologist had stated that the Appellant was obviously retarded. A Dr. Lynn stated that he probably had an IQ of around 70. She went on to say that she always tried to make the Appellant the best that he could be and did not want to label him retarded. (Testimony of [redacted] D17)

13. Dr. Stuart Kauffman, Ph.D. testified as an expert for the Appellant. He stated that he administered the Vineland Adaptive Behavior Test to the Appellant on January 8, 2004 at [redacted] He met with the Appellant for a half-hour to forty-five (45) minutes. He also asked the Appellant's Advisor/Case Manager, Charles McNamara a series of structured questions. Dr. Kauffman testified that the Appellant was personable, engaging and cooperative. Because Dr. Kauffman couldn't understand the Appellant's verbal output, the Appellant used a Light Writer and gave short but complete answers to questions. The Appellant stated that he was attending [redacted] so he could learn more and become more independent.

Dr. Kauffman stated that the Vineland showed that the Appellant functions between the ages of 3.5 and 8. He has no ability to live independently and would die if he had to live on his own. He stated in his opinion the Appellant needs care on a 24 hour basis, 7 days a week, 365 days a year. When asked by counsel if the Appellant is mentally retarded, Dr. Kauffman stated that if one was to go by the numbers that the Appellant is not classically retarded. He is, however, mentally retarded in terms of his adaptive functioning. He testified that in his opinion there was no difference in an IQ score of 75 and that of 81. He recognizes the need for parameters but stated that there are individuals with IQs of 56 that are higher functioning than the Appellant. He went onto say that there are multiple causes of mental retardation and that the Appellant's deficits have a lot to do with his Dysautonomia. He stated that the Appellant makes an atypical presentation that doesn't fit very well into the regulations.

When asked about the Appellant's Full Scale IQ score of 81, Dr. Kauffman questioned how much assistance was given and if perhaps the Appellant was given more time than usual on the timed portions of the test. He opined that the score of 81 may be an overestimate of the Appellant's intellectual ability. (Testimony of Stuart Kauffman, A-2, A3)

14. Renee Briggs, Ph.D. testified as an expert for DMR. She stated that she had made a determination that the Appellant was not mentally retarded in her role as Regional Eligibility Psychologist for Metro Region. She testified that in making her determination that the Appellant was not mentally retarded she reviewed all of the materials gathered by the DMR caseworker. She also testified that she had met with the Appellant and talked with his mother, [redacted] She said that all the evidence shows that the Appellant has significant deficits in his adaptive functioning. She stated that there were significant discrepancies between his intellectual and adaptive functioning as demonstrated by his mother's description of his functioning and the results of the ABAS and the Vineland. She testified that a diagnosis of mental retardation is not just a measure of adaptive behavior; it has to take into consideration cognitive, intellectual functioning as well. Dr. Briggs testified that in the Appellant's case there is a consistent pattern from age seven (7) on that shows his cognitive functioning in at least the Low Average area. She noted that on page two (2) of the Psychological Evaluation authored by Denise Carver in 2000, the tester found the Appellant to have a Full Scale IQ score in the Low Average Range which Dr. Briggs stated is an IQ score of between 80-89. She also stated that in order to receive services from DMR an individual must be mentally retarded in accordance with the American Association of Mental Retardation's (AAMR) definition of mental retardation which is an IQ score of 70-75 or below. This definition takes into account the standard error of measurement. She testified that the Appellant's physical abilities have an impact on testing. She stated that the report of the results of Academic Testing of the Appellant performed on March 6, 2000 showing mostly scores in the average range is consistent with the Appellant's IQ scores. Additionally she stated that these results were consistent with the Neurodevelopmental Assessment authored by Dr. Castro and Dr. Wiseman which reported a reading comprehension shills equivalent with a mid 7th grade level, and numerical operations at a late 10th grade level of proficiency.

On cross-examination, Dr. Briggs stated that she had never tested the Appellant. She stated that although there was only one (1) Full Scale IQ score reported, in her capacity as a professional psychologist she could determine Full Scale IQ scores based on reported subtest scores. She stated that any professional psychologist could do the same. (Testimony of Renee Briggs, A3, D1, D2, D9, D10, D11, D17)

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite 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 specifically 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. I gave the most weight to the IQ score set out in the report of Dr. Castro and Dr. Wiseman. This Full Scale IQ score of 81 indicates that the Appellant is functioning within the Low Average range. The other reports of IQ testing and the report of his Academic Achievement are consistent with this level of intellectual ability. I was not persuaded by Dr. Kauffman's opinion that the Appellant's IQ score of 81 may be an overestimation of his intellectual functioning. That score was consistent with other testing and with the testers' reports of the Appellant's intellectual functioning. There was no evidence to suggest that the Appellant was given assistance in reaching his answers that he was given more time to complete the timed portions of the test. While there was a great deal of evidence presented relative to the Appellant's functional limitations and his need for continuing supports, I did not give consideration to such evidence in reaching my determination because I found that the weight of the evidence presented relative to the Appellant's intellectual functioning showed that the Appellant does not have significantly sub-average intellectual functioning. Because the Appellant failed to show by a preponderance of the evidence that he met the criteria of the first prong of the three pronged AAMR definition of mental retardation, I did not find it necessary to consider the Appellant's functional limitations in reaching my decision. Functional limitations can result from a variety of conditions. Unless the weight of the evidence shows that an individual has significantly sub-average intellectual functioning, it is not necessary to give consideration to such functional

limitations.

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 27, 2004

Marcia A. Hudgins
Hearing Officer