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) (115 CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on September 28, 2005 at the DMR Northeast Regional Office in Hathorne, Massachusetts.

Those present for all or part of the proceedings were:

[redacted]	Appellant
	Appellant's Mother
Susan Sewell	Case Manager/MARC
Veronica Wolfe	Regional Eligibility Manager
Sandra Brennan	DMR Eligibility Coordinator
Patricia Shook, Ph.D.	DMR Psychologist
Tim Sindelar	Attorney for Appellant
Douglas White	Attorney for DMR
David B. Fleishman	Attorney for DMR

The evidence consists of Documents submitted the Appellant numbered A1-24[1], documents submitted by DMR numbered D1-3 and approximately four hours of oral testimony. 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. (A11, D1)

2. The Appellant is a 20 year old man who currently resides with his mother in [redacted], MA. (A11, D1, testimony of [redacted], testimony of the Appellant)

3. Four evaluations of the Appellant's cognitive functioning before the age of 18 were entered into evidence. (A1, A2, A14, A19)

4. One evaluation of the Appellant's cognitive functioning after the age of 18 was entered into evidence. (A13)

[1] Although the Appellant originally offered documents numbered A1-9, additional documents were presented during the course of the hearing which were marked A10-24. DMR submitted only 3 documents.

5. An ICAP which was scored when the Appellant was 18 years, 4 months of age was entered into evidence as part of the Eligibility Determination prepared by DMR as was a DMR Supplemental Assessment of Client Support Needs. (A11)

6. The results of a SIB-R which measures adaptive behavior was also entered evidence. (A13)

7. The parties agreed that the Appellant has deficits in adaptive functioning which would support a finding that he is mentally retarded were he found to have significantly sub average intellectual functioning.

8. A number of Individualized Education Plans (IEPs) or parts thereof were entered into evidence. (A6-8, A20-23)

9. In 1989 when the Appellant was 4 years of age, he was referred for testing due to generalized developmental delays in the areas of speech and language, fine and gross motor coordination, and social interaction. Barbara R. Calveric, Ph.D. conducted the evaluation. She stated in her report that according to the Merrill-Palmer, the Appellant's psychomotor functioning fell at the 32 month level overall. She noted that his highest successes were at the 42 to 47 month level, where he completed three formboard or puzzle tasks. Dr. Calveric reported that if only language items are addressed, the Appellant did best on two items at the 24 to 29 month level. In the Summary and Recommendations Section of her report, Dr. Calveric stated that the Appellant's overall psychomotor function was at the 32 month level, which was significantly below chronological age. She also noted that it appeared that non-cognitive factors, either neurological and/or emotional, affected his cognitive functioning. (A1)

10. In 1993 when the Appellant was 8 years of age, he was referred for evaluation after being placed in a special needs classroom. He had previously been in another placement that was felt not to be appropriate for him. Dr. Calveric again performed the psychological evaluation. She tested the Appellant's cognitive functioning using the Wechsler Intelligence Scale for Children-III (WISC-III). On this test, the Appellant received a Verbal IQ score of 70, a Performance IQ score of 66-69, and a Full Scale IQ score of 65-67. She stated that these scores may not represent the Appellant's optimal potential, but they do reflect the level on which he is currently functioning. In the Summary and Recommendations section of her report, Dr. Calveric stated that the Appellant's current functioning is below the borderline range, and there is little discrepancy between the verbal and non verbal functioning. She also stated that there is a delay in the appellant's visual-motor integration skills that may well relate to his emotional status. (A2)

11. In 1995 when the Appellant was 9 years, 2 months of age, he was referred to the Boston Regional Medical Center for a comprehensive neuropsychological evaluation to obtain additional diagnostic clarification regarding an Attention Deficit Disorder (ADD), Pervasive Developmental Delay (PDD) or other cognitive/emotional contributions to his

current level of functioning. Robert A. Caggiano, Ed.D. tested the Appellant using the WISC-III. While he noted in his report that the Appellant appeared to be distracted by external and perhaps internal stimuli and needed extensive structure to stay on task, Dr. Caggiano concluded that the test findings represented a valid picture of the overall cognitive and emotional resources available to the Appellant at the time. On this administration of the WISC-III, the Appellant received a Verbal IQ score of 56, a Performance IQ score of 70 and a Full Scale IQ score of 60. In the Summary and Recommendations section of the report, Dr. Caggiano states that the results from his assessment indicate that the Appellant is functioning in the borderline to mentally deficient range of intelligence with a significant preference for processing information in the visual domain. He also stated that the neuropsychological assessment revealed numerous scattered deficits suggestive of a Pervasive Developmental Disorder NOS (PDD NOS). He recommended a highly structured academic setting with a low student to teacher ratio. (A19)

12. In 2002 when the Appellant was 17 years of age, he was referred by the [redacted] Public Schools for a re-evaluation of his cognitive functioning. Earl E. Walker Jr. Edam, a Psychometrist employed by Tri-City Mental Health and Retardation Center, Inc. administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) to assess Appellant's cognitive functioning. Stephan N. Border, Ph.D., a Licensed Psychologist and the Director of Tri-City's Psychological Testing Services signed the report along with Mr. Walker. The report states that the Appellant received a Verbal IQ score of 78, a Performance IQ score of 87 and a Full Scale IQ score of 78. In the TEST RESULTS: Cognitive Testing section of the report, it is stated that [redacted] subtest scores, IQ scores, and Index scores are listed below. In the same paragraph, the report states, "Additionally, Confidence Intervals are provided, demonstrating with a 95% certainty that [redacted] true scores lie within the corresponding ranges listed below. (my emphasis) This is followed by a chart that lists the scores. These are the only two instances in the report where the name [redacted] appears in place of the Appellant's name. This discrepancy calls into question the reliability of the test scores that are reported, however in the narrative part of the paragraph, the Appellant's name is used with the same scores that are set out in the chart. Mr. Walker states in the Recommendations and Plan section of the report that the results of his testing and clinical interview indicate that the Appellant has learning deficits reflected in the cognitive and achievement tests and would benefit from additional testing to identify his particular difficulties. He states that his abilities lie in the borderline to average range relative to other children his age. Similarly his overall achievement scores lie in the borderline to low average range. The tester raises the question of a learning disability. (A14)

13. In 2003 when the Appellant was 18 years of age he was referred to the Floating Hospital for Children at Tufts-New England Medical Center for a cognitive and social/emotional evaluation to assess his current academic and social functioning and provide recommendations for future programming and services that are needed. He was tested by Lois Carra, Ph.D. She administered the WAIS-III. On this test the Appellant received a Verbal IQ score of 81, a Performance IQ score of 85 and a Full Scale IQ score of 81. In the Summary and Recommendations section of the report, Dr. Carra states that

intellectually, the Appellant tested overall in the low average range. She noted that based on her evaluation of the Appellant's independent behaviors and adaptive functioning, he demonstrated significant and severe delays in all areas of performance across a variety of tasks and environmental circumstances. She went on to say that despite his overall low intelligence, he is functionally mentally retarded (her emphasis). In the areas of Gross and Fine Motor, Social Interaction and Communication, Personal Living and Self Care, and Community Living, the Appellant's age equivalent scores ranged from three years to eight years old with the mean age being five years five months old. She offered a diagnosis of Autism Spectrum Disorder and suggested that he apply for services from the Department of Mental Retardation and Massachusetts Rehabilitation Services. (A13)

14. [redacted] testified on behalf of her son, the Appellant. She stated that she lived in [redacted] Massachusetts with the Appellant who is 19 years of age. She stated that when the Appellant was an infant he had physical delays. She testified that he received some early intervention services prior to starting pre-school. She stated that he was placed in a separate special needs class for pre-school and elementary school. Ms. [redacted] stated that there was an attempt in first grade to place the Appellant in a regular classroom but because of problems, he was returned to the special needs classroom. She stated that during elementary school, he was always far behind in his academic work. She stated that the psychological evaluation done in 1993 was undertaken at the request of the school department and that there was never any issue about its validity. She also stated that it was relied upon by the school system. Ms. [redacted] stated that she requested that the Appellant be tested at the Boston Regional Medical Center in 1995 and received a copy of the report. She also stated that she had provided a copy of the report to DMR. She stated that as far as she recalled the school department had made use of this report and that there were no concerns raised about the validity of this report. She agreed that the Appellant attended special education classes in a substantially separate classroom during middle school. She stated that she had some concerns about the scores set out in the report of the psychological evaluation performed in 2002 because another boy's name was contained within the report. Ms. [redacted] testified that she arranged for an independent evaluation to be done at Tufts New England Medical Center. She stated that the Appellant is still in school and has not graduated and will continue to be eligible for special education services until his 22nd birthday. She stated that the Appellant has received some vocational training through a program called Triangle but has never received a paycheck. She testified that the Appellant currently takes math, English, history, art and health. She stated that he is trying to write sentences and paragraphs in his English class. He is trying to do math at a 6th grade level. (A2, A13, A14, A19)

On cross-examination, Ms. [redacted] agreed that she has advocated for the Appellant since he was four years old and that he has been receiving special education services since that time. She agreed that the Appellant has undergone a number of psychological tests which have been relied upon by the schools when planning for the Appellant. She agreed that they relied upon the 1993 and the 1995 evaluations. She stated that the school department had requested the evaluation done in 2002 and that this evaluation was contained in a report that referenced another boy's name. She stated that she thought that the [redacted] schools used this report and other test reports to plan for the Appellant's

educational program. She stated that she did not recall who sent her the report. She stated that she reviewed the report. She stated that a few months after reviewing the 2002 test results she noticed the discrepancy. She testified that she tried to talk to the individual from Tri-City who did the testing, but the individual was no longer working for Tri-City. She did talk to the person who signed off on the report, but she didn't think he was able to talk to the person who did the testing. Ms. [redacted] stated that she didn't remember if she talked to anyone at the school department about the discrepancy. She agreed that the name Andrew was used twice and that Tri-City said that maybe some kind of form or template was used on the computer. She agreed that the Appellant's name was used everywhere else in the report. She agreed that the [redacted] Public Schools could have used the 2002 evaluation as part of the Appellant's IEP. Ms. [redacted] testified that the Appellant was integrated into the regular classroom for maybe a couple of months in the 1st grade. She stated that after the 1st grade she did not remember the Appellant being in a regular class for anything other than art. When reviewing the 1997-1998 IEP, Ms. [redacted] stated that if the Appellant was included in a regular class for science and social studies, as a special needs student the material would have been tailored to his level. She also stated that he would have received additional help from his special needs teacher. She did not believe that he had ever been capable of doing regular grade level work. (A2, A6, A14, A19)

On re-direct, Ms. [redacted] testified that the phone number written in her handwriting at the top of the 3rd page of the 2002 Tri-City report was Dr. Broder's number, the individual who signed off on the report. She agreed that she had tried to talk to Dr. Broder about her concerns with the report. She agreed that she had crossed off some things in the report and written some things because the report contained some errors. She agreed that even though the report stated that the Appellant had a relationship with his brothers and sisters, at the time he had no such relationship. She stated that she did not recall any changes that were made to the Appellant's educational program as a result of this report. She agreed that he continued to be in a substantially separate classroom. (A6, A14)

On re-cross, Ms. [redacted] testified that she was not present when the Appellant was tested by Tri-City in 2002. She also stated that she did not know who provided the background information contained in the report. (A14)

15. The Appellant testified that he lives in [redacted] Massachusetts and that he needs help. He had no disagreement with the application for DMR services.

16. Veronica Wolfe testified on behalf of DMR. She testified that she is the Regional Eligibility Manager for DMR and as such has administrative responsibility within the Eligibility Team. She stated that eligibility is based on a clinical decision. She receives a report with recommendations from the Eligibility Psychologist and notifies the applicant as to the eligibility decision. She testified that in this case, the Appellant was found ineligible for DMR adult services. (A11, D1)

17. Patricia Shook, Ph.D. testified as an expert witness for DMR. She explained that

the WISC-III is used to test children between the ages of 7.3 and 16.11 years of age and that the WAIS-III is used to test individuals between the ages of 16 and 89. She stated that validity refers to whether a test measures what it is supposed to measure and that reliability refers to the consistency of test scores over time. She stated that the margin of error in psychological testing is usually plus or minus 5 points but that the margin on some tests could be smaller. She stated that it is not possible to score higher than one's ability on a psychological test. Dr. Shook explained that Verbal subtests measure verbal comprehension and reasoning while Performance subtests measure visual and motor ability. She stated that subtest scatter refers to scores that have a wider range than is usual. She also stated that individuals with learning disabilities have different strengths and weaknesses. She stated that she was familiar with the DMR regulation regarding eligibility. She stated that that the sole issue is relative to this proceeding was intelligence test scores. She agreed that the purpose of looking at test scores was to determine if there were substantial limitations in current functioning. She stated that she was familiar with the Appellant's application for eligibility and she had reviewed the documents. She stated that she had an opportunity to review the eligibility determination. She stated that Dr. Wayrynen made the determination. She stated that she reviewed the documents that Dr. Wayrynen used in making her determination of ineligibility. She stated that she agreed with that determination. She agreed that she reviewed two documents that were not used by Dr. Wayrynen. One was a psychological evaluation done in 1993. The other was an evaluation performed in 1989. She also reviewed additional educational documents. She stated that after reviewing these documents her opinion remained the same. (D1-3, A11)

Dr. Shook testified relative to the psychological evaluation done in 1989 when the Appellant was 4 years of age. She stated that the Appellant was given a test relative to his cognitive functioning that was used for young children. This test provides age equivalencies, not IQ scores. Dr. Shook testified that the results indicated that the Appellant was having problems. He had developmental delays in speech and language and social interaction. The test report mentioned that the Appellant had his own language. His scores were depressed but the tester noted that this may be due to neurological and/or emotional problems. Dr. Shook stated that scores on psychological tests can be affected by environmental or emotional issues and can depress one's scores. She noted that the tester pointed out that the Appellant has some emotional problems. She again stated that this can depress scores. Although the report points out that the Appellant has developmental delays, it does not offer a diagnosis. (A1)

Dr. Shook testified relative to the psychological evaluation done in 1993 when the Appellant was 8 years of age. She stated that this report was based on the WISC-III. She testified that the Full Scale IQ score on this test was 65-67. She stated that the Verbal score was 70 and the Performance score was 66-69. She stated that she there was subtest scatter particularly in the Verbal domain. She stated that the Verbal subtest scores ranged from 2-10, that a score of 10 was average, and that a score of 10 would not be indicative of mental retardation. She stated that individuals with mental retardation do not score in the average range on subtests. Dr. Shook stated that a Full Scale IQ score below 70 could be indicative of someone with mental retardation, but the low score could

be related to emotional factors. She also noted that the tested concluded that these scores may not represent the Appellant's optimal potential. She opined that the tester felt that there were other factors contributing to the Appellant's low test scores. She suggested that the Appellant may have some type of thought disorder and that a thought disorder does not mean that someone is mentally retarded. She stated that individuals with mental retardation can have other problems. Dr. Shook stated that based on the Appellant's IQ scores, the examiner could have made a diagnosis of mild mental retardation but that she did not. She went on to say that this suggests that despite the scores, the examiner did not believe that the Appellant had mental retardation. She stated that the examiner's recommendations that the Appellant continue his placement in a special needs class, continue in therapy and receive a medication consult were recommendations that would help him to improve his concentration and his ability to do academic work. She noted that there was no medication to treat mental retardation. Dr. Shook stated that she would not make a diagnosis of mental retardation based on this examiner's findings because of the other factors that might be influencing these scores. (A2)

Dr. Shook testified relative to the neuropsychological assessment performed in 1995 when the Appellant was 9 years, 2 months of age. She stated that the Appellant was given a WISC-III as part of this assessment. She stated that the Appellant's Full Scale IQ score on this test was 60. She agreed that this was a substandard score. She went on to say that the Appellant's Verbal score on this test was 56 and his Performance score was 70. She testified that there was a large discrepancy between the Verbal IQ and the Performance IQ and that due to this discrepancy the Full Scale IQ score is probably not as good of a representation of the Appellant's IQ as it should be. She then stated that the Verbal and Performance IQ scores should therefore be looked at separately. She stated that the Appellant has difficulty with verbal tasks. She stated that there was subtest scatter particularly in the Performance subtests where the range of scores was from 2-8. She stated that usually scores that go into the average range such as the Picture Arrangement subtest score are not found in individuals with mental retardation. She also noted that the examiner pointed out that the Appellant was distracted by external and perhaps by internal stimuli. She stated that although someone with mental retardation may have attention problems, those problems by themselves are not going to identify someone with mental retardation. Dr. Shook testified that the Appellant was also given a test called the Ravens Matrices which is a nonverbal test correlated with intelligence tests. This test gives one an idea of an individual's nonverbal performance and on this test, the Appellant performed in the solidly average range which would not be consistent with a diagnosis of mental retardation. Dr. Shook testified relative to the Rorschach test that was given to the Appellant during this assessment. She stated that the Rorschach showed that the Appellant was having difficulty with his emotional functioning including the possibility of a thought disorder. She stated that the examiner concluded that the Appellant was functioning in the borderline to mentally deficient range of intelligence based on his Performance and Verbal IQ scores. She also stated that the examiner opined that the Appellant has PDD NOS. She stated that there are a number of diagnoses that come under PDD NOS but that mental retardation is not one of them. Dr. Shook stated that she would not make a diagnosis of mental retardation based on this assessment due to the many other factors that are involved. Dr. Shook stated that she had never seen

anyone with mental retardation be able to increase their score by 20 points. (A19)

Dr. Shook testified relative to the psychoeducational evaluation done in 2002 when the Appellant was 17 years of age. She stated that Appellant was given a WAIS-III as part of this evaluation. She stated that Appellant's Full Scale IQ score on this test was 78, his Verbal IQ score was 74 and his Performance IQ score was 87. She stated that there was again a very large discrepancy between the Verbal and Performance IQ scores similar to the discrepancy found in the previous test results. She stated that the Appellant's subtest scatter was significant in that the Appellant scored in the average range on a number of subtests which is not typical of an individual with mental retardation. Dr. Shook agreed that the name "Andrew" which appears twice in this evaluation is not the name of the Appellant. She stated that the Appellant's name is used in the narrative which contains the same scores as those given in the summary. She stated the examiner raised some concerns relative to the Appellant's social and emotional well being in his report. She stated that if the Appellant had better reality testing he would have had better results on his IQ testing. Dr. Shook stated that the examiner found the Appellant to be in the borderline to average range relative to other children his age but that his academic achievement fell below that range indicative of a learning disability. (A14)

Dr. Shook testified relative to a neuropsychological evaluation performed in 2003 when the Appellant was 18 years of age. She stated that the Appellant was tested just after his 18th birthday. When asked what relevance an IQ test would have after an individual's 18th birthday, Dr. Shook stated that it would seem unlikely that there would be a significant difference in scores between the time one was 17 and one was 18. She stated that this evaluation was reviewed by the eligibility clinician in determining the Appellant's eligibility. Dr. Shook stated that she reviewed it as part of her determination of eligibility. She stated that DMR allows for consideration of such evaluations even though the Appellant was over the age of 18. She stated that the Appellant was given the WAIS-III and that he attained a Full Scale IQ score of 81, a Performance IQ score of 85, and a Verbal IQ score of 81. She stated that because there was only a 4 point difference between the Verbal and Performance IQ scores, you could rely more on the Full Scale IQ score. She stated that there was significant subtest scatter. She stated that the Appellant's test scores increased from prior test scores. She stated that it was not likely that the Appellant is just getting better at testing and that since a year had passed since his last test, she would rule out the "practice effect" that might cause an individual's scores to increase. She said that the "practice effect" would likely not influence scores after six months. When asked why the Appellant would have a score that was 20 points higher than an earlier score, Dr. Shook stated that it was unusual and that perhaps some of the problems that the Appellant had experienced in the past had been ameliorated. Dr. Shook opined that perhaps medication has controlled his thought disorder; perhaps he was afforded classroom instruction that helped him develop his skills. She stated this would most likely be true for someone who had a learning disability. She stated that mental retardation is generally a lifetime condition. She stated that based on her review of the test report, she found this testing to be valid and reliable. Dr. Shook stated that the examiner gave the Appellant a diagnosis of Autistic Spectrum Disorder and that autism falls within the spectrum of PDD which is not the same as a diagnosis of mental

retardation. Dr. Shook agreed with the examiner's diagnosis. Although the examiner states that the Appellant is functionally retarded, Dr. Shook stated that there is no definition for functional retardation. She stated that the Appellant's Full Scale IQ score is not within DMR's definition of eligibility because a score of 81 is within the average range. She also stated that DMR definition does not mention functional retardation. Dr. Shook stated that based on this evaluation she would not make a diagnosis of mental retardation. (A13)

Dr. Shook testified relative to a number of other evaluations of the Appellant. She noted that the report of the Speech and Language Evaluation done when the Appellant was 12 years, 5 months old made reference to the fact that he was taking Haldol to reduce thought disturbances. She stated that if someone is having thought disturbances and receives psychotropic medication, their scores should improve. She also stated that on the Peabody Picture Vocabulary Test-III, the Appellant scored a 76 which would be in the borderline range. She stated that this test was not however the same as an IQ test. She stated that the Stanford Achievement Test was an achievement test. She agreed that on the achievement test dated April, 1999, the Appellant's scores were mostly below average, a few were average and one was above average. Dr. Shook stated that based on her review of an evaluation performed at Children's Hospital in 1998, the Appellant was taking Haldol and been since he was 2 or 3 years of age. She stated that Haldol should have helped the Appellant to function better and therefore improve his IQ scores. (A3, A8, A16)

Dr. Shook said that nothing that she reviewed changed her opinion as to the Appellant's eligibility. She testified that she does not believe that he has mental retardation and based her opinion on all of the Appellant's test reports.

On cross-examination Dr. Shook testified that significantly sub average intelligence is defined as 2 standard deviations below the mean. She stated that this definition is not stated specifically in the DMR regulations. She stated that in her previous employment with DMR she did not have anything to do with eligibility, but that she had looked at the definition at that time. She stated that there are many definitions of mental retardation. She stated that the mean for intelligence tests is 100, but the standard deviations can vary. She stated that the last time she conducted a full psychological evaluation was in the 1990s when she was working at the Franciscan Children's Hospital and that she would have administered the WISC-III at that time. She stated that the Flynn Effect is a theory that says that there has been some increase in IQ scores of a broad population over time. This may be explained by better nutrition and better education. These things could account for why people are smarter today than they were at the beginning of the 20th century. She said in broad terms this could account for a 1-3 point increase over a 5-6 year period. She stated that she used the WISC approximately 20 times and administered the WAIS not as many times. Dr. Shook stated that the reference to 502.4 in the Appellant's IEPs indicates that the Appellant was taught in a substantially separate special education classroom and that most of his education was with other special education students. (A6-7)

Dr. Shook stated that subtest scatter can point to an individual's learning disabilities, but could not point out any place in the Appellant's psychological evaluations that specifically stated that he had a learning disability. Dr. Shook said that although she was familiar with "The Manual of Diagnosis and Professional Practice and Mental Retardation", she would probably not rely upon it in terms of intellectual functioning and testing. She stated that it had limited information on testing and intellectual functioning. She stated that it took a very limited approach and that it was very neuropsychological. She agreed that she was aware that studies have shown that there is more variability in the functioning of individuals with mild mental retardation than there is with those who have severe or moderate mental retardation. She stated that even though there could be subtest scatter in individuals with mild mental retardation, one would not generally see scatter in the average range. She stated that she has studied this area and that this is her area of specialty. She agreed that even though there may be subtest scatter within a Verbal IQ test, the scatter does not detract from the fact that a Verbal IQ score of 70 is significantly sub average. Dr. Shook stated that the Appellant has not been given a specific diagnosis of mental illness. She stated that although a thought disorder is referred to throughout the Appellant's evaluations, it is never tied down. She stated that generally speaking people do not prescribe Haldol for any old reason. She agreed that she had not seen the Appellant before today nor had she evaluated him and that the only documents that she had reviewed were those that were entered into evidence at this hearing. Dr. Shook stated that although mental illness was alluded to throughout the evaluations, she was not going to make a diagnosis. When reviewing the evaluations, Dr. Shook was unable to point to diagnosis of mental illness, but stated that the Appellant's symptoms seem to point to mental illness. (A13-14, A19)

Dr. Shook agreed that a diagnosis of PDD NOS doesn't exclude a diagnosis of mental retardation. She went on to say that autism falls under the category of PDD. Dr. Shook was unable to say what percentage of individuals with autism have mental retardation but agreed that a diagnosis of autism did not rule out that someone is mentally retarded. Dr. Shook was unable to explain the fact that although the Appellant appeared to be taking Haldol from an early age, his IQ scores did not improve until he was in his late teens.

Dr. Shook agreed that a diagnosis of ADHD is not inconsistent with a finding of significant sub average intellectual functioning. She agreed that poor executive functioning is not inconsistent with a finding of significant sub average intellectual functioning nor is it inconsistent with other findings. Dr. Shook agreed that the psychological evaluation performed in 1989 does not rule out that the Appellant has cognitive limitations but does say that either neurological and/or emotional factors affected his cognitive functioning. She agreed that there is nothing in the report to indicate that this was not a valid assessment. She stated that there was nothing in the report of the 1993 psychological evaluation of the Appellant that would indicate that the IQ scores were not valid. Dr. Shook agreed that this evaluation produced IQ scores within the range of significantly sub average intellectual functioning. Dr. Shook stated that the evaluator did not make a diagnosis of mental retardation and in her experience if an evaluator found mental retardation, he /she would include it in the his/her report. Dr. Shook stated that although she has seen the Massachusetts Special Education regulations,

she is not familiar with them. She stated that if a psychologist finds mental retardation, the diagnosis would be included in the report and that she would have put this diagnosis in her own report. She stated that she never remembered anyone being unwilling to give that diagnosis when appropriate. She stated that the examiner's finding that the Appellant was performing "below the borderline range" was an indication of significantly sub average intelligence, but noted that he did not make the diagnosis of mental retardation. (A1-2, A19)

Dr. Shook stated that the true score refers to the standard error of measurement. She explained that IQ scores use statistics and that there is some chance of random error. She stated that the true score exists within a range. There is a 95% confidence level relative to the Wechsler tests. She stated you can feel confident that a true IQ score on one of these tests is within plus or minus 5 points. This means an IQ score of 81 could be somewhere between 76 and 86.

Dr. Shook stated that based on her review of the psychological testing done in 1995, one could make a diagnosis of mental retardation, but that one would not want to do so unless he/she was very sure. She stated there were other things contained within the report that would militate against that diagnosis. She stated that if the same scores were consistent throughout the developmental period (preschool-18), one could make the diagnosis of mental retardation. She stated that even though the Appellant had consistently low scores on tests from 1985-1995, she would be reluctant to make a diagnosis of mental retardation because of other factors. Dr. Shook stated that if someone had a traumatic brain injury at age 15 and his/her scores were in the range of mental retardation, he/she would meet the DMR definition of mental retardation, but that someone who has low scores caused by other factors which may improve with treatment over time would not meet the DMR definition of mental retardation. (A19)

Dr. Shook agreed that she would look at standardize testing to determine an individual's reading level. She agreed that the Appellant's scores on Wechsler Individual Achievement test were not inconsistent with a finding of mental retardation. She also stated that the scores were not inconsistent with other findings.

Dr. Shook agreed that the Appellant was given projective testing and that such testing does not rule out that someone may be mentally retarded. She went on to say that such tests are complex and would be difficult for someone who was mentally retarded.

Dr. Shook agreed that she had testified that she had never seen anyone increase their scores like the Appellant's records indicate, but agreed that they had not increased by 20 points as she had testified to previously. She stated that it would be more likely that someone's scores would decrease because the adult tests are more difficult.

Dr. Shook agreed that the DMR Eligibility Manual indicates that the policy is to use information prior to age 18. She stated that information after the age of 18 can be taken into account and that such information was taken into consideration in the instant case. (A9)

Dr. Shook testified that one can't look at the earlier testing without looking at everything else that's presented and that it is her determination that the Appellant is not eligible.

On re-direct, Dr. Shook testified that in making her determination that the Appellant is not mentally retarded, she used the DMR regulation.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his obvious need for 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. Evidence was presented and there was no dispute that he meets the first and the third criteria.

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. My specific reasons are as follows:

The Appellant failed to show that he presently has significantly sub average intellectual functioning. While there was evidence that the Appellant received Full Scale IQ scores

of 70 to 75 or below prior to his 18th birthday, I find that these test scores were most likely impacted by emotional factors and not solely caused by low cognitive ability. The more current Full Scale IQ scores of 78 and 81 suggest that the Appellant's cognitive functioning has improved with the use of medication, counseling and small group instruction. While there were some concerns raised by the Appellant's mother relative to the accuracy of report of the psychological evaluation that was performed when the Appellant was 17 years of age I find the discrepancies to be most probably typographical in nature and accept the score as recorded.

DMR has developed a manual to be used for determining eligibility. The manual has an explanatory note under the heading "Significantly Sub average Intellectual Functioning" which states that the Intake Coordinator must obtain information that the person has (my emphasis) significantly sub average intellectual functioning. While the Appellant may have had some test results prior to his 18th birthday indicating that he had significantly sub average intellectual functioning, he does not appear to be functioning at that level at the present time. The AAMR definition of mental retardation requires that if one has significantly sub average intellectual functioning, such functioning must have been present prior to the individual's 18th birthday. However if the individual is currently functioning in the borderline to low average range of intelligence, he or she does not have significantly sub average intellectual functioning and previous low test scores are therefore not relevant. The Appellant's 2002 evaluation states that his abilities lie in the borderline to average range. The Appellant's most current evaluation states that he tested in the low average range. That evaluator went on to say that based on the Appellant's functional retardation and autism, he should apply for DMR services. While it is clear from the evidence and not disputed by the parties that the Appellant has functional deficits, it does not appear from the evidence that these functional deficits are the result of sub average intellectual functioning.

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: December 2 2005

Marcia A. Hudgins
Hearing Officer