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Executive Office of Health & Human Services
Department of Mental Retardation
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March 14, 2005

[redacted]

Re: Appeal of [redacted]
Final Decision

Dear Attorney [redacted]:

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

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

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

Sincerely,

Gerald J. Morrissey, Jr.
Commissioner

cc: Marcia Hudgins, Hearing Officer
Marianne Meacham, General Counsel
Susanna Chan, Regional Eligibility Manager
Kim LaDue, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project Manager
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of J[redacted] C[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 August 16, 2004 at the Department's Middlesex West Area Office in Framingham, Massachusetts. Those present for all or part of the proceedings were.

[redacted]	Appellant
	Appellant's Father
	Appellant's Mother
Rick Sprague, Ph.D.	Appellant's expert witness
[redacted]	Attorney for the Appellant
Radine Parry, Ph.D.	DMR Psychologist
Susanna Chan	DMR Regional Eligibility Specialist
Kim LaDue	Attorney for DMR
Deirdre Rosenberg	Hearing Officer (observer)
Diane Johnson	Attorney for DMR (observer)

The evidence consists of documents submitted by DMR numbered 1-19, documents submitted by the Appellant numbered A1-17 and approximately six hours of oral 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.

2. The Appellant is a 20-year old man who resides in [redacted] Massachusetts.

3. Three evaluations of the Appellant's intellectual functioning before the age of 18 containing IQ scores were entered into evidence. (A11&D7, A12&D9, A13&D11) I did not give great consideration to the two evaluations that were done prior to age 10 years 3 months as the evaluations were based on history provided by the family and observations rather than psychometric testing. (A2&D1, A5& D6)

4. One evaluation of the Appellant's intellectual functioning after the age of 18 was entered into evidence. (A1)

5. Three evaluations of the Appellant's Adaptive Behaviors were entered into

evidence. (A7, A14-15)

6. Other evaluations and assessments were submitted by the parties, however I relied exclusively on the IQ test scores, the adaptive behavior assessments and expert testimony in reaching my decision.

7. In 1994 when the Appellant was 10 years 3 months of age, his intellectual functioning was evaluated using the Wechsler Intelligence Scale for Children (WISC-III). Freda Weimer, MA; CAGS; NCSP administered the test. On this test the Appellant's Verbal IQ score was 87, his Performance IQ score was 64 and his Full Scale IQ score was 73. The tester noted that there was a 23-point discrepancy between the Verbal and the Performance scores. She did however compute the Full Scale score. She stated that the intertest scatter showed the Appellant's cognitive strengths and weaknesses. The tester stated that the Appellant's Full Scale score of 73 was in the borderline range. She noted his distractibility and his difficulty understanding a task, processing of language and expressive language. (A11, D7)

8. In 1997 when the Appellant was 13 years 4 months of age, his intellectual functioning was evaluated again using the WISC-III. Donna L. Moilanen, Ph.D. administered the test. On this test the Appellant's Verbal IQ score was 79, his Performance IQ score was 64 and his Full Scale IQ score was 69. The tester stated that the Appellant had a significant preference for expressing his intellectual abilities through verbal as opposed to nonverbal means. Although she noted that the Appellant was very fidgety and easily distracted by the extraneous stimuli within the room, he was relatively easy to refocus and redirect on the task at hand. She stated that results of this test were considered to be a valid estimate of the Appellant's current level of intellectual functioning. She went on to say that the results of this test were fairly consistent with those previously obtained when the Appellant was 10 years 3 months of age. Dr. Moilanen reported that the Appellant's overall level of intellectual functioning was within the high end of the intellectually deficient range. (A12, D9)

9. In 2000 when the Appellant was 16 years 4 months of age, his intellectual functioning was evaluated using the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III). Richard Rotella, CAGS; NCSP administered the test. On this test the Appellant's Verbal IQ score was 89, his Performance IQ score was 74 and his Full Scale IQ score was 80. Like the previous test there was a 15- point difference between the Appellant's Verbal IQ score and his Performance IQ score. The tester stated that the Appellant's general cognitive ability as measured by the WAIS-III was at the lower limit of the low average range. (A13, D11)

10. In 2003 when the Appellant was 19 years of age his intellectual functioning was evaluated using the Stanford-Binet 4th Edition and the K-BIT. Rick Sprague, Ph.D. administered the tests. On the Stanford-Binet the Appellant's Full Scale IQ score was 69. His domain standard scores were: Verbal Reasoning 79, Quantitative Reasoning 70, Abstract/Visual Reasoning 83 and Short-Term Memory 56. On the K-BIT the Appellant's Full Scale IQ score was 65. His Vocabulary score was 72. His Matrices

score was 64. Dr. Sprague found the Appellant to have a pervasive developmental disorder and mild mental retardation. (A1)

11. When the Appellant was 16 years 5 months of age, his adaptive skills were assessed using the Vineland Adaptive Behavior Scales Survey Form. A teacher at [redacted] High School who was the Appellant's liaison and had worked with him during two classes was interviewed. The assessment resulted in the following: The Appellant's communication skills were below average – a mild deficit. His daily living skills were below average – a moderate deficit. His socialization skills were below average – a severe deficit. His adaptive composite was in the moderate deficit level of adaptive functioning. (A7)

12. When he was 18 years of age, the Appellant's adaptive skills were evaluated using a DMR Worksheet on Adaptive Skills. The Appellant's mother provided the Eligibility Specialist with information relative to the Appellant's adaptive skills. Among other things, Mrs. [redacted] noted that the Appellant will eat continuously if allowed to; requires prompting to take medications; needs to be reminded to wash his hair; needs to be prompted to shave completely; needs to be reminded to brush his teeth; does not use a stove top for cooking; does not use any kitchen appliances with the exception of the microwave; and does not do his own laundry. (A14)

13. When the Appellant was 19 years of age, his adaptive skills were evaluated using the Adaptive Behavior Assessment System (ABAS). [redacted] the Appellant's mother completed the questionnaire. All of the Appellant's scaled scores were 5 or below. His general adaptive composite was 59. (A15)

14. Rick Sprague, Ph.D. testified as an expert witness for the Appellant. According to his CV and his testimony, Dr. Sprague has been a psychologist for over 30 years and has evaluated over 1000 individuals in the course of his career. He received his Ph.D. from Boston University in 1984. He is a licensed psychologist in Clinical Psychology, Consulting and Clinical Neruopsychology as well as a licensed School Psychologist. Dr. Sprague testified that he reviewed documents relative to the issue of the Appellant's intellectual functioning and adaptive functioning as well as met with the Appellant and evaluated him using psychometric testing. (A17)

Dr. Sprague testified that based on his review of the Appellant's records and his own testing that he found that the Appellant met the AAMR definition of mental retardation. He pointed out that two of the three tests administered to the Appellant prior to his 18th birthday resulted in Full Scale IQ scores of between 70-75 or below. A third test resulted in a Full Scale IQ score of 80. He testified that this score was in the low average range. He could not be certain of why this score was higher than the previous two tests and the test that he administered after the Appellant's 18th birthday, but he speculated that this test may have been administered in a supportive, highly structured environment. He also pointed out that the test revealed the Appellant's difficulty with working memory and processing speed which he explained are necessary to be able to function in the world of work. (A11, A12, A13)

Dr. Sprague testified that he administered the Standford-Binet to the Appellant when he was 19 years of age. He testified that the Appellant's Full Scale IQ score of 69 met the AAMR criteria for a diagnosis of mental retardation. He stated that in his opinion the Appellant has a pervasive developmental disorder (PDD) as well as mild mental retardation. (A1)

Dr. Sprague testified that based on his review of the records relative to Adaptive Behavior Skills that the Appellant has deficits in communication, social skills, self-direction, home living, community use and academics. He stated that each of the evaluations he reviewed highlighted problems with communication and social skills. A7, A14, A15)

On cross-examination DMR's attorney asked Dr. Sprague why none of the previous testers gave the Appellant a diagnosis of mental retardation given some of his low scores. Dr. Sprague explained that the previous testers had been school psychologists, and that within the context of Special Education, specifically Chapter 766, the term "mental retardation" has not been used since the 1970s. He stated that within the school setting the term "developmental delays" is used when describing an individual such as the Appellant.

The attorney brought the Appellant's subtest scores to Dr. Sprague's attention. She noted that some of the Appellant's subtest scores were 8s and 10s while others were lower. He explained that variance in subtest scores is called subtest scatter and show an individual's strengths and weaknesses. He went on to say that people with mental retardation do not necessarily have flat subtest scores and that a diagnosis of mental retardation is not based on subtest scores. Dr. Sprague was also asked about the 23 point and 15 point discrepancies between the Appellant's Verbal and Performance IQ scores. Although he testified that such discrepancies raised the question of the validity of the Full Scale IQ scores, he stated that the AAMR definition of mental retardation does not speak to this issue but simply looks at the Full Scale score. (A11, A12, A13)

On redirect, Dr. Sprague testified that it was not appropriate to draw clinical generalizations from a single subtest score. He said that this was the case because the subtest measures are very discrete can be used only in the context of the other subtests and the overall findings. Subtests are used best as confirmation or to form hypotheses about discrete impairments and then additional testing could be done. He stated that another reason that one cannot form generalizations from a subtest score is that such scores are not statistically reliable.

Dr. Sprague also explained that a 30-point difference between the Verbal and the Performance scores is good evidence of an organic impairment. He went on to say that a 23-point discrepancy is strong indication of a possible organic impairment. He stated that there had been strong indications since the age of two that the Appellant has had some organic impairment. He went on to say that the Appellant has problems with organization, processing, and inefficiencies.

Dr. Sprague testified that in a majority of school settings the term mental retardation is not used. The reason being that that term carries a great deal of stigma. The Appellant's condition was characterized in the reports he reviewed first as a developmental problem and then as a severe developmental problem.

When asked to explain the difference between a testing done by a school psychologist and that done by a in the context of a neuropsychological evaluation, Dr. Sprague explained that generally a school psychologist is asked to speak to the functioning and the strengths and weaknesses of an individual relative to the demands of school. They are asked to determine what supports the individual needs. The school psychologist most often limits their testing to the IQ test and relies upon other members of the educational team to do other types of testing within their respective disciplines. A neuropsychological evaluation takes into account aptitude data, all previous testing and medical information. The psychologist attempts to understand the individual's strengths and impairments and how might these be accounted for. The assessment tries to find out the environment that will best work for the individual.

15. [redacted] testified on behalf of the Appellant. She testified that the Appellant did not take the MCAS because he was not required to take it. She stated that he had the right to enjoy graduation with his classmates, but he received a certificate instead of a diploma He will receive a diploma at the age of 22. She testified that the Appellant had modifications to his learning environment. From 4th grade on he often had a one on one aide in the classroom and was given tests in a separate area of the classroom. His exams were modified with no time limits. The questions were given verbally with multiple-choice answers. Often cues were given. Many times there were no tests given in regular classes. He would have a discussion with the teacher to see if he understood the topic. Mrs. [redacted] testified that although the Appellant has a driver's license his drivers ed course was given one on one. She stated that he took a verbal exam rather than a written exam and that he failed his first driving test. She further testified that he has had three mishaps since receiving his license. She explained that she arranged for the Appellant to be given an independent neuropsychological exam after she was told that the Appellant was probably not eligible for DMR services based on his previous IQ test results. She noted that the school system used Dr. Sprague's evaluation instead of retesting the Appellant as part of his three year 766 evaluation.

16. Susanna Chan, Ph.D. testified on behalf of DMR. She explained that she is the Regional Eligibility Manager and has held that job for two years. She has administrative responsibility for the intake and eligibility process. She explained the requirements for DMR eligibility. She testified that in order to be eligible for DMR services an individual must have significantly sub average intellectual functioning concurrent with deficits in at least two out of ten areas and that these two criteria must exhibit themselves prior to the age of 18. She stated that these criteria are in accordance with the 1992 AAMR guidelines. She testified that she did not suggest that additional testing be done in this case but believed that Dr. Renee Briggs who was the eligibility psychologist at the time may have suggested that additional testing be done. She stated that upon receiving the

additional information it was determined that the Appellant was not eligible for DMR services. She explained that she does not make the determination of eligibility, that the determination is made by the Regional Eligibility Psychologist. She stated that she believed that under the AAMR definition it is permissible to rule out mental retardation on the basis of a Verbal or Performance score in excess of 70-75 even if the Full Scale IQ score is 70-75.

17. Radine Parry, Ph.D. is the DMR Regional Eligibility Psychologist for the Metro Region. She testified as an expert for DMR. She has a Ph.D. in Psychology from the University of Chicago. She is a Licensed Psychologist HSP (Health Service Provider). She has worked for DMR as a psychologist since 1977. She testified that in order to diagnose someone as mentally retarded, one must first look at IQ test scores. She reviewed the tests in the eligibility packet in making her determination. She testified that she did not find the diagnosis of mental retardation prior to age 18 in any of the documents that she reviewed. (D19)

In reviewing the test given to the Appellant when he was 10 years 5 months of age (Full Scale score of 73), Dr. Parry concluded that the Verbal IQ score (87) was not typically the score of someone with mental retardation. She noted that he has strength in the verbal area and is weak in the performance area primarily due to his processing speed. She noted the report suggests that the Appellant was highly distractible. She opined that this could have brought down the Appellant's scores on this test, and noted the tester's belief that the Appellant's Performance score was an underestimate of his ability. She stated that the test scores on this test do not necessarily mean that the individual is mentally retarded. (D7)

Dr. Parry testified that the test given when the Appellant was 13 years 4 months of age (Full Scale score of 69) showed subtest scatter that would not be typical of a person with mental retardation. She went on to state that the scatter was not terribly great in the Performance scales. She stated that the scatter between the Verbal and the Performance subtests confirmed that the Appellant has very different skills in those areas. She stated that the scores on this test do not necessary mean that the individual is mentally retarded and noted that the tester did not make a diagnosis of mental retardation. (D9)

Dr. Parry testified that the Language Evaluation reported when the Appellant was 16 years of age concluded that the Appellant was in the average range. (D10)

Dr. Parry testified that the psychological test given when the Appellant was 16 years 4 months of age (Full Scale score of 80) that resulted in a higher IQ score than previous testing may have been the result of better conditions. He may have been less anxious. She noted that his processing speed continued to cause him problems. She testified that the results on this test were consistent with the results of the Language Evaluation. When asked whether one would see the gains that were mentioned in the report of this test in a person with mental retardation, Dr. Perry stated that one would not likely see someone with such excellent verbal skills that the Appellant showed in this test. (D11)

Dr. Parry stated that the results of the Woodcock Johnson given when the Appellant was 16 years of age were consistent with the results of the IQ test given around the same time. The results of this test showed him to be overall in the low average range. (D13)

Dr. Parry testified about the Appellant's interest and knowledge about trees, cars, housing costs and maps. She stated that most of the things that the Appellant was knowledgeable about would not be typical of someone with mental retardation. Dr. Parry also testified that typically someone with mental retardation would not be able to keep a checkbook balance and use an ATM card, but she would want to know more information before rendering an opinion on this area of functioning. (D14)

Dr. Parry stated that her Axis II diagnosis for the Appellant would not be mental retardation but more likely would be high borderline. She stated that some people with PDD do have mental retardation and some do not. She testified that there are some aspects of the Appellant that are typical to individuals with PDD and some that are not.

Dr. Parry concluded that based on her understanding of the AAMR definition of mental retardation, the Department's regulations and her experience in the field she would not find the Appellant to be a person with mental retardation.

On cross-examination, Dr. Parry stated that she met the Appellant after the determination that he was not eligible for DMR services. She stated that she interviewed the Appellant in preparation for the fair hearing. She testified that she was not involved in the original eligibility determination. Dr. Parry agreed that the determination of eligibility was based solely on the records presented at the hearing.

When asked why no psychologist's report was written in this matter, Susanna Chan testified that there was no requirement that a report be written and that one would only be written if DMR counsel requested a report. Susanna Chan stated that Dr. Briggs, the previous eligibility psychologist who met with the Appellant gave no indication that she believed the Appellant to be mentally retarded and therefore eligible for DMR services.

On cross-examination, Dr. Parry testified that the determination of eligibility was made on the basis of the Appellant's IQ. She stated that the determining test was the one done when he was 16 years of age, which produced a Full Scale IQ score of 80 and was backed up by other tests done at that time. When asked hypothetically if the Appellant had an IQ of 70 or below would his skill deficits qualify him for DMR services, Dr. Parry answered yes without other interfering variables. (D10, D11, D13)

Dr. Parry stated that the discrepancy between the Verbal and Performance IQ scores on the test given when the Appellant was 10 years 3 months was so great that the Full Scale IQ score should not have been reported. She testified that the reporting of such a score is not unheard of, but it is not technically accurate to report the Full Scale IQ score. (D7)

Dr. Parry testified that she was somewhat surprised at the results of the K-BIT IQ test given by Dr. Sprague, which resulted in a Vocabulary score of 72. In response to a question concerning the Stanford-Binet Full Scale score of 69, she stated that the

Appellant did not do well at all on the subtests that went into the Short-Term Memory issue. She stated that Dr. Sprague's opinion that the Appellant's deficits indicated impairments of sub cortical and frontal systems involved in perceptual processing and self- regulation was a possibility, although she was not 100% sold on it. She stated that the Appellant shows difficulty in processing speed. She stated that someone could have brain injury or autism and not have mental retardation. She stated that someone could have ADD (attention deficit disorder) and have processing difficulties. They may not be mentally retarded. (A1)

Finally Dr. Parry testified that the Appellant has deficits in a number of areas that seem to be long standing. She stated that all of the academic testing performed during 2000 was consistent with the cognitive testing done at that time. She agreed that the Appellant would need some sort of supports at least for a time. (D10, D11, D13)

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, I find that the Appellant has shown 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. I find that the Appellant is domiciled in Massachusetts, is a person with metal retardation as defined in DMR's regulations and is in need of specialized supports in at least three of the enumerated adaptive skill areas.

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 "mentally retarded" as that term is used in statute and regulation for the determination of eligibility for DMR supports in that he has significantly sub average intellectual functioning as evidenced by the scores on two out of three general intelligence tests administered before age 18 both of which were 70-75 or below and related limitations in the areas of communication, self-care, home living, social skills, self direction, health and safety, functional academics, leisure and work. All of the psychological tests administered to the Appellant showed a significant discrepancy between his Verbal and his Performance scores. DMR cannot choose to accept a Full Scale IQ score of 80 with a 15-point discrepancy between Verbal and Performance scores yet decide to negate a Full Scale IQ score of 69 because of a 15-point discrepancy. The fact that the Appellant obtained higher scores in the Verbal domain than in the Performance domain does not preclude a finding that he is mentally retarded. The AAMR Fact Sheet dated March 20, 2003 states that within an individual, limitations often coexist with strengths.

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 22, 2004

Marcia A. Hudgins
Hearing Officer