The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
500 Harrison Avenue
Boston, MA 02118

Mitt Romney
Governor

Kerry Healey
Lieutenant Governor

Ronald Preston
Secretary

Gerald J. Morrissey, Jr.
Commissioner

Area Code (617) 727-5608
TTY: (617) 624-7590

February 10, 2004

[redacted]

Re: Appeal of [redacted]
Final Decision

Dear Ms. [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 denied.

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
C.J. Gagne, Assistant General Counsel
Terry O'Hare, Regional Director
William Zimmer, Regional Eligibility Manager
Victor Hernandez, Field Operations Senior Project Manager

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of Luke Rivers

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 13, 2004 at DMR's Western Massachusetts Regional Office in Springfield, Massachusetts.

Those present for all or part of the proceedings were:

[redacted]	Appellant
	Appellant's Mother
	Appellant's Father
	Appellant's Case Manager
William Zimmer, Ph. D.	Regional Eligibility Manager
C.J. Gagne	Attorney for DMR

The evidence consists of Documents submitted by DMR numbered D1-6. Documents submitted by the Appellant numbered A1-3 and approximately one hour 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. (D1)

2. The Appellant is a 20-year old male who resides in [redacted] MA. (D-5, Testimony of Ellen Barman)

3. Three (3) evaluations of the Appellant's intellectual functioning before the age of eighteen (18) were entered into evidence (D2, D3, D4)

4. One (1) evaluation of the Appellant's intellectual functioning after the age of eighteen (18) was entered into evidence. (A1)

5. When the Appellant was six (6) years old, he was given the Wechsler Intelligence Scale for Children-Revised Edition (WISC-R) by M. Baron, an examiner who was employed by the [redacted] Massachusetts Pubic Schools. The results of this test were a Verbal IQ score of 100, a Performance IQ score of 67 and a Full Scale IQ score of 81. The test report indicates that the Appellant was in the bottom of the low average range. The tester noted that the Verbal IQ score was average while the Performance IQ score was extremely low and that the Appellant was reported to have Muscular Dystrophy. His scaled scores on the Verbal Subtests ranged from a low of three (3) to a high of fifteen (15). His scaled scores on the Performance Subtests ranged from a low of one (1) to a high of thirteen (13). The tester did not make a diagnosis of mental retardation. (D2)

6. When the Appellant was thirteen (13) years old, he was given the Wechsler Intelligence Scale for Children-III (WISC-III) by Diana L. King, Psy.D, an employee of the Massachusetts Hospital School. Dr. King did not report the Appellant's Verbal, Performance or Full-Scale IQ scores but stated in her Test Findings that the Appellant's overall intellectual functioning was demonstrated to be in the borderline range. She noted that there was significant inter-test scatter with abilities ranging from average to significantly below average. His scaled scores on the Verbal Subtests ranged from a low of one (1) to a high of nine (9). Dr. King also administered the Wide range Achievement Test-R-2 (WRAT-2) and stated that the Appellant's scores showed growth since his last testing. In the Summary and Recommendation section of Dr. King's report she stated that the Appellant is developing basic academic skills and has been making steady progress thus far. She did not make a diagnosis of mental retardation. (D3)

7. When the Appellant was fifteen (15) years old, he was given the WISC-III by Wayne Klein, Ph.D., an employee of the Massachusetts Hospital School. He stated in his report that the Appellant obtained a verbal IQ score of 75, the borderline impaired range. He went on to say that this was identical to the score obtained when the Appellant was assessed by Dr. Diana King two years earlier. He did not report Performance or Full Scale IQ scores. He noted that closer analysis reveals that the Appellant's comprehension to be significantly better than would be predicted based on his Verbal IQ. His WISC-III Verbal Comprehension Index Score of 83 was in the low average range, around the 13th percentile. Dr. Klein opined that the Appellant could easily memorize facts if assisted and that his poor fund of information is largely secondary to lack of interest. He stated that the Appellant requires assistance in linking his interests to areas of knowledge that he does not pay attention to. He did not make a diagnosis of mental retardation. (D4)

8. When the Appellant was eighteen (18) years old he was again tested by Dr. Wayne Klein. On this occasion, he was given the Wechsler Adult Intelligence Scale-III (WAIS-III). The test resulted in a Verbal IQ score of 81 which Dr. Klein states is at the very bottom of the low average range. He noted that at the 95% confidence level, the Appellant's true score ranged between the low average and the borderline impaired. Dr. Klein stated that he gave the Appellant pojective testing and that it showed that he relied heavily on denial, a very primitive defense mechanism. He is not socially and

emotionally oriented. Dr. Klein went on to say that the Appellant's psychological style of defense mechanisms and interests both reduce his capacity to pay attention to and learn from social interactions. (D-5)

9. Ellen Barman, the Appellant's Case Manager testified on his behalf. She stated that the Appellant has Duchenne Muscular Dystrophy which is a progressive disease. Duchenne Muscular Dystrophy is the most agressive form of Muscular Dystropy. Ms. Barman explained that the Appellant's heart functions at 30% capacity, he has a compromised respiratory system and is prone to aspiration pneumonia. She stated that his IQ scores are in the borderline range or low average range and that he showed no intellectual growth over a period of two (2) years. She stated that as of last year the Appellant was still working on coin recognition. As far as his executive functioning, Ms. Barman stated that the Appellant has poor judgment, engages in wishful thinking, is not self preserving, has a hard time conforming to social norms and doesn't appreciate the consequences of his actions. She said that he does learn but that he forgets. He is very impulsive. Ms Barman stated the Appellant has a reckless disregard for his safety and the safety of others, needs structure and can't be left at home alone. She believes that the Appellant needs a guardian. She does not believe he could live on his own with a personal care assistant (PCA). She stated that he does work hard but needs interventions to keep him on the straight and narrow. (Testimony of Ellen Barman, A1, D4)

10. [redacted] the Appellant's mother testified on his behalf. She stated that the since the Appellant has been on Zoloft the violent side of him has improved. She feels that he has come a long way. She testified that a very structured environment would be beneficial to the Appellant. He seems to work better where there is someone who is offering suggestions that he do certain things at certain times. On cross-examination, Ms. [redacted] agreed that at the Informal Conference she acknowledged that the Appellant is not mentally retarded. (Testimony of [redacted]

11. [redacted] testified on his own behalf. He stated that if he was in the community with a PCA he would not be able to take care of himself. He explained that if the PCA were to steal from him or not show up, he would need someone to help him out or give him the guidance he needs. He stated when he was a young kid he had a lot of anger but the medication has turned things around. He stated that he is not good with math. He testified that when people say certain things to him he doesn't always have the capability to make good decisions about his responses. On cross-examination, the Appellant stated that he did not recall acknowledging that he was not mentally retarded at the Informal Conference. (Testimony of [redacted])

12. William Zimmer, Ph.D. testified for DMR. He stated that he has a doctorate in community psychology and has worked for DMR for thirty (30) years. He currently is the Manager for the Regional Eligibility Team in Western Massachusetts and the Area Manager for the Franklin/Hampshire Area. He was also the principle author of DMR's current eligibility manual published in 1995 as well as the principle author of the new eligibility manual, which will be sent out for public comment in the spring. He explained

the adult eligibility process, which consists of gathering all the information that bears upon whether the person meets DMR's three fold eligibility criteria. He stated in order to be considered a person with mental retardation an individual must meet three (3) criteria. The first is that a person must have a tested IQ of 70 or below. That is the national standard. That is known as significantly sub-average intellectual functioning. They must also have adaptive deficits that are at the same level of impairment. The disorder has to manifest itself in the developmental period; that is before age eighteen (18). Dr. Zimmer stated that at the Informal Conference the reasons for finding the Appellant ineligible were explained to the Appellant. He testified that at that time both the Appellant and his mother stated that the Appellant had never been diagnosed as mentally retarded. Dr. Zimmer testified that the decision to find the Appellant ineligible was based on a clean application of the eligibility criteria. The Department based its decision on the information it reviewed. The Appellant had never been assessed in the mentally retarded range but rather in the borderline range. Dr. Zimmer stated that although the Appellant has some cognitive limitations, he is not mentally retarded. The eligibility team did not consider the adaptive behavior prong. Dr. Zimmer went on to say that in the Appellant's case, functional limitations are due to his physical incapacities, his motivation, and his emotional state. On cross-examination, the Appellant asked Dr. Zimmer if there was any significance to the fact that he failed the MCAS. Dr. Zimmer stated that it was not relevant to a diagnosis of mental retardation and that many individuals who are not mentally retarded fail to pass the MCAS. He stated that it is clear that the Appellant has some difficulties in school, particularly in the area of arithmetic. (Testimony of William Zimmer, D1)

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. Although the Appellant does appear to have cognitive deficits, the weight of the evidence does not support a finding of mental retardation. All of the test reports entered into evidence indicate that the Appellant functions in the bottom of the low average to the borderline range. None of these reports indicate that the Appellant is mentally retarded. Although two of the testers reported Verbal IQ scores of 75, there appear to be reasons other than cognitive deficits for these scores. Some of the Appellant's cognitive deficits appear to be related to his lack of interest, his psychological style of defense mechanisms and his impulsivity. Performance and Full Scale IQ scores were not reported in three (3) of the four (4) test reports. This appears to be due to the Appellant's Muscular Dystrophy which limits his ability to perform on the performance part of the tests. No one testified that the Appellant met the criteria for a diagnosis of mental retardation.

While there was evidence presented relative to the Appellant's very significant 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.

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: February 4, 2004

Marcia A. Hudgins
Hearing Officer