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 May 6, 2005 at DMR's Hogan Regional Office in Hathorne, Massachusetts.

Those present for the proceedings were:

[redacted]	Appellant
	Appellant's Mother
Brad Brooks	Lead Teacher, [redacted]
Veronica Wolfe	Regional Eligibility Manager
Frederick Johnson, Psy.D.	DMR Psychologist
David Fleischman	Attorney for DMR

The evidence consists of Documents submitted by DMR numbered D1-6, documents submitted by the Appellant numbered A1-2. and approximately two hours of oral testimony. The Department objected to the introduction of the Appellant's documents on the basis that they had not received them until the day of the hearing. The objection because the Fair Hearing Notice dated February 2, 2005 stated in part that all pertinent information could be brought to the hearing. Although the notice stated that a copy of any evidence the Appellant wished to use should be sent directly to the Hearing Officer, it is not my practice to review any evidence prior to the hearing nor has it been my practice to provide copies of all documents to the parties. The Department did not provide me with any documents prior to the hearing. I did not give consideration to any documents provided to me after the hearing. 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). At the hearing the DMR's attorney stated that the DMR had no issue with the Appellant having deficits in adaptive skills, but that the issue to be decided concerned the Appellant's cognitive ability.

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 21 year-old man who currently resides with his mother in [redacted] MA. (D1-2)

3. One evaluation of the Appellant's cognitive functioning before the age of 18 was entered into evidence. This document appeared to be incomplete. It was unsigned. I was not able to ascertain the reporter's level of education or his/her licensure. Although did not give great weight to this document, I did take give it some consideration when reaching my decision. (D4)

4. Two evaluations of the Appellant's cognitive functioning after the age of 18 were entered into evidence. (A2, D5)

5. One assessment of the Appellant's adaptive functioning after the age of 18 was entered into evidence. There was no issue relative to adaptive functioning; however I did give some consideration to this document when reaching my decision. (A1)

6. In November of 1992 when the Appellant was 9 years 6 months of age, he was tested by B. Finley as part of an evaluation under Chapter 766. On the Wechsler Intelligence Scale for Children (WISC), the Appellant received a Verbal Score of 72, a Performance score of 48 and a Full-Scale score of 57. He scored a low of 1 on the Verbal Subtests and a high of 11. He scored a low of 0 on the Performance Subtests and a high of 7. The examiner pointed out that were many subtests that the Appellant declined to take. There was no diagnosis offered by the examiner. There was no indication of the examiner's level of education or licensure. The document presented was unsigned and appeared to be only one page of a multiple page document. (D4)

7. In March of 2003 when the Appellant was 19 years 9 months of age, he was evaluated by Heidi Van Horn, a Psychology Intern under the supervision of Daniel W. Rosa, Ph.D., and a Licensed Psychologist. On the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) the Appellant received a Verbal IQ score of 82, a Performance IQ score of 64 and a Full Scale IQ score of 72. The examiner stated in the Test Results and Interpretation section of her report that although the Appellant's Full Scale IQ score falls in the borderline range of intelligence, the 18 point difference between Verbal and Performance IQ suggests extreme caution be must be used in interpreting his intellectual profile based on his Full Scale IQ score. The examiner stated in the Conclusions and Statement of Needs section of her report that it is difficult to forward an overall IQ due to the discrepancy that exists when comparing his Verbal and Performance IQ scores. She went on to say that it is clear that the Appellant's verbal comprehension falls within the average range and his overall verbal IQ falls in the low average range, while his processing speed and working memory scores both fall in the deficient range. She also stated that this assessment suggested a similar profile to the assessment done in 1992. (D5)

8. In November of 2004 when the Appellant was 20 years 5 months of age, he was

evaluated by Otto J. Judicke, Psy.D. The Appellant had been referred to Dr. Judicke by the Lowell, Massachusetts Rehabilitation Commission. On the WAIS-III, the Appellant obtained a Verbal IQ score of 80, a Performance IQ score of 67 and a Full Scale IQ score of 72. Dr. Judicke stated in his paragraph labeled "Learning and Verbal Reasoning" that the Appellant's vocabulary is strong (average range) and, along with high average performance on a test that assesses range of factual knowledge (Information), this reflects a clear strength in previously learned, crystallized knowledge. He went on to say that within the structure provided by testing the Similarities test was within the low average range. He also stated that borderline performances on the Comprehension test and Word Generation test that were well within the extremely low range reflect concrete verbal concept formation, limited verbal explanatory reasoning abilities, and a greatly reduced ability to generate and produce words "on demand". He reported that qualitatively, all tests of verbal reasoning contained responses that were marked by run-on, off-track/tangential and sometimes perseverative responses which indicate that, despite an average vocabulary and a better than average range of factual knowledge, the Appellant is not able to make effective use of these abilities, e.g. during discourse of during functional tasks that emphasize verbal reasoning. Dr. Judicke stated in his "Summary" that the Appellant's current IQ testing falls within the range that can be associated with mild mental retardation. He also stated that the Appellant presents with global limitations. (A2)

9. In November of 2003 when the Appellant was 20 years 5 months of age his adaptive behavior was assessed using the Vineland Adaptive Behavior Scales: Survey Form and the Classroom Edition. Craig R. Thibaudeau, Psychology Intern and Laura Craig--Bray, Ph.D. provided a report of the assessments. The evaluators were the Appellant's mother, [redacted] and his classroom teacher, Brad Brooks. The results of this test show that for all of the domains rated by his mother and his classroom teacher, the Appellant is performing significantly lower than an individual his age. According to the Survey form completed by his mother the Appellant's Adaptive Behavior Composite is consistent with a child that is aged 5 years 11 months. According to the Classroom Edition Form completed by his classroom teacher, the Appellant is consistent with a child that is aged 9 years 11 months. The reporters concluded that the Appellant's overall functioning was in the low range. (A1)

10. Veronica Wolfe, DMR's North East Regional Eligibility Manager testified on behalf of the Department. She stated that she was responsible for supporting and monitoring the eligibility process for between 700-900 applications for adult DMR services each year. She stated that she had no clinical role in the determination of eligibility and that a psychologist oversees the clinical process and makes a recommendation to the Eligibility Team. She signs the letter that goes out to the applicant. She stated that a letter was sent under her signature to the Appellant stating that he did not meet DMR's adult eligibility criteria. She stated that an Informal Conference was held in October of 2003. Following that conference, the decision of the Appellants ineligibility was upheld. She stated that the Appellant and his mother had written to the Department requesting a fair hearing. (D1-2)

11. Frederick Johnson, Psy.D. testified as an expert witness on behalf of the Department. He stated that he was the Eligibility Psychologist for DMR's Carver Region and had been in his position since July of 2004. He explained that the Eligibility Specialist gathers the applicant's information, conducts interviews and presents the information to him. He then makes a clinical determination of eligibility. (D3)

Dr. Johnson testified that he was familiar with the WISC-R and the WAIS-III and stated that one of the tests is the Wechsler Intelligence Scale for Adults and one is the Wechsler Intelligence Scale for Children. He went on to say that the primary difference is in the age of the person who is being tested. He stated that there are differences in the items asked. Dr. Johnson explained that in regards to psychometric testing, validity refers to whether you are testing what you are going about to test. With an IQ test this means are the test scores able to predict how the person will perform in the real world. He stated that reliability means how reliable the test is, in other words will one get consistent scores over time. He also stated that to be reliable the score on one IQ test should produce a similar score on a different IQ test. He testified that validity and reliability are very important. Dr. Johnson stated that a true score is a theoretical concept of what an individual's actual true ability or true score is on a test. He explained that the term "true score" is what an individual's score should be based on his ability. He went on to say that depending on the circumstances there can be some fluctuation between a person's true score and their attained score on an IQ test. Dr. Johnson testified that the standard error of measurement suggests the range someone's actual score will have when they take an exam relative to their true score.

Dr. Johnson stated that DMR's regulatory definition of mental retardation requires that the person must have an IQ score of below 70. They have to do poorly on a test of adaptive behavior in several spheres. If the person is an adult, it has to be demonstrated that the person was functioning in the mentally retarded range prior to age 18. It has to be shown that the person's low intellectual and adaptive functioning is not due to another illness, primarily psychiatric.

Dr. Johnson testified that the AAMR definition of mental retardation is less stringent than the DMR definition of mental retardation around the adaptive behavior.

Dr. Johnson testified that the purpose of the subtests that are part of psychometric testing is to evaluate the person's relative strengths and weaknesses in a number of areas of intellectual functioning. He stated that subtest scatter refers to the variations in a person's performance on different subtests.

Dr. Johnson stated that it is possible to artificially suppress one's score on an IQ test but that one could not artificially inflate the score.

Dr. Johnson testified that he was familiar with the Appellant relative to the eligibility process in that he was requested by Veronica Wolfe to review the Appellant's file and to

determine whether he concurred with the determination of ineligibility. He went on to say that he was then asked to testify at the Fair Hearing. He indicated that he reviewed all of the documents that had been submitted to DMR and agreed with the determination that the Appellant did not meet the adult eligibility criteria.

Dr. Johnson testified relative to the test report authored by B. Finley based on testing that was done in November of 1992 when the Appellant was 9 years 6 months of age. Dr. Johnson stated that the 24 point difference between the Verbal IQ (72) score and the Performance IQ score (57) obtained by the Appellant on that test was significant because most people do not have such a spread in their capacities; it is more than an artifact of statistics. He went on to say that the person has tremendous relative strengths and weaknesses in their overall cognitive functioning. He stated that the Appellant's score of 10 on the Verbal Information Subtest equates to an average level of functioning. He stated that you would not typically find a mentally retarded individual with a score of 10 on this subtest. He stated that in general, given that there are always exceptions to this rule, most folks with mental retardation do not have a large degree of variability within their capacities. He testified that you would not usually see scores of 11 and 1 in the Verbal domain in someone with mental retardation. You might see something more like a score of 4-5 in Arithmetic and a score of 4,5 or 6 in Vocabulary. He agreed that this is what is known as subtest scatter and that such scatter was significant. He explained that although the Appellant's knowledge of information (10) was average among his peers, he had very little understanding of social norms and social interactions based on his comprehension. (1) He pointed out that this suggests that while he had no problem in acquiring information, he had difficulty understanding social cues and norms and interactions. Dr. Johnson stated that the subtest scatter on the Performance subtests - high of 7 low of 0 was significant. He said that it was highly unusual for someone to score a 0. He questioned whether the examiner gave the subtests where he obtained a 0 and was informed by the Appellant's mother that he did not. He stated that the 7 that the Appellant obtained, while not particularly high, is relatively high in comparison to what he did on the rest of the Performance subtests. The doctor stated that the test was not valid for the parts of the test that the Appellant did not do. He testified that the Appellant was not eligible for DMR adult services despite a Full Scale IQ score of 57. He stated that he was not basing the decision of the Appellant's ineligibility on how he was doing at the age 9, but even if this were how he was functioning when he was older, he would be found ineligible based on his Verbal score of 72 and his capacity to do so well on certain Verbal tasks would not meet the requirements for retardation. When asked whether it would be impossible to have a low of 1 and a high of 11, Dr. Johnson stated that it would not be impossible to see such scatter in someone classified as mentally retarded. When asked if he would consider the reliability and validity of this evaluation suspect, Dr. Johnson stated that he did not know the qualifications of the tester and opined that there may be pages of the report missing. (information provided by [redacted]; D4)

Dr. Johnson testified relative to the test report authored by Heidi Van Horne when the Appellant was 19 years 9 months of age. He stated that the Appellant's Verbal score of 82 signified low average, which is not the same as mental retardation. He stated that the

18 point difference between the Appellant's Verbal IQ score and his Performance IQ score was significant because it shows that the Appellant has a tremendous range of relative strengths and weaknesses. He stated that there are certain things that the Appellant can do as well as or better than his peers and there are other things where he falls dramatically behind. The doctor stated that the Appellant's subtests scores of 12, 9, 8, are higher than one would expect from someone who was mentally retarded. He agreed that the evaluator's characterization of the Appellant's Full Scale score of 72 was in the borderline range. Dr. Johnson stated that there were some similarities between this test and the test administered by B. Finley. On both tests the Appellant's highest Verbal subtest scores were on Information and Vocabulary. There was also consistency in his Performance subtests in that his highest scores were on Picture Completion. There was a dramatic increase, assuming the previous score was valid in the Similarities subtest where the Appellant scored a 4 on the previous test and an 8 on the more recent test. He stated that when looking at an individual with a low subtest score of 2 and a high subtest score of 12 he would hypothesize that the individual might have a learning disability or some type of brain damage or some form of Pervasive Developmental Disorder (PDD), something like Asperger's. He agreed with the tester's statement in her report that the Appellant's overall verbal comprehension falls in the average range when compared with his peers and stated that one would not expect to see someone whose verbal comprehension falls in the average range to be mentally retarded. He stated that this evaluation shows that the Appellant has significant strengths and weaknesses and is clearly someone who he would assume needs a lot of assistance in his day-to-day functioning. (D5)

Dr. Johnson testified relative to a Speech-Language Evaluation of the Appellant performed in March of 1996 when he was 12 years 10 months of age by B. Tomasic Bowman, MA, an employee of the [redacted] Public Schools. The doctor stated that this evaluation helped him in reaching his determination relative to the Appellant's eligibility. He stated that the high scores (95%ile) that the Appellant obtained in Receptive Language/Comprehension would not be the score of a mentally retarded individual. (D6)

Dr. Johnson testified relative to a hand written note authored by Karen Spangenberg Postal, Ph.D., a board certified neuropsychologist employed by Neuropsychology Consultants of Andover, Massachusetts dated September 26, 2003. He stated that he found this note to be relevant because it appeared that an IQ test was given to the Appellant only a short time after his previous testing. Dr. Johnson stated that it was not customary to give two IQ tests within such a short period of time. He did note that his Verbal and Performance Index scores appear to be consistent with prior testing. He noted that the neuropsychologist diagnosed the Appellant with a Severe Non-Verbal Learning Disability and Autism, perhaps PDD. He stated while these diagnoses were separate and distinct from mental retardation, that in some cases mental retardation can overlap with Autism, but not with the a Non-Verbal Learning Disability. He testified that he was never provided with Dr. Postal's report. (D7)

12. Brad Brooks, formerly the Appellant's teacher and currently Lead Teacher at the [redacted] in [redacted] Massachusetts acted as an advocate for the Appellant. He asked Dr. Johnson if in his experience he had seen such a wide range of scores between Verbal and Performance IQ's as was present in the instant case. He asked if such a person would be functioning at a MR level. Dr. Johnson stated that he had reviewed tests with scores similar to the Appellant's and that although he had seen individuals with those types of test scores, it was unusual. He further stated that these individuals usually fall within the diagnosis of Asperger's or PPD. He stated that one needs to have deficits in both the Verbal and the Performance areas in order to have a diagnosis of mental retardation. Mr. Brooks pointed out a statement contained within the Psychological Report authored by Craig R. Thibaudeau dated November 25, 2003 that referenced the WAIS-III test report from Marcy 2003 in which the tester stated that since the Appellant's Verbal and Nonverbal abilities indicated an 18-point difference that "extreme caution" is used when interpreting the Full Scale score. Mr. Brooks stated that although the Appellant has high scores in the Verbal area, he performs in the mentally retarded range. Dr. Johnson stated that the use of the phrase "extreme caution" indicates that the Full Scale IQ score does not give the full picture of the Appellant. He went on to say that in his opinion, someone with a Verbal score of 82 would not be someone who would meet the criteria of mental retardation. The doctor stated that the Full Scale IQ score of 72 would suggest that the Appellant functioning in the borderline range, but that the individual subtests show that the he is scoring very well in some areas and doing very poorly in other areas. (testimony Frederick Johnson, A1, D5)

Mr. Brooks also testified for the Appellant and stated that the Appellant's vocational performance is very deficient, and that he is more deficient than individuals who have IQ scores in the 50s and low 60s.

On redirect, Counsel for the Department asked Dr. Johnson if his opinion relative to the Appellant's ineligibility had changed after he reviewed Dr. Judicke's report from November of 2004. Dr. Johnson testified that his opinion had not changed. He stated that it was consistent with the information that he had previously reviewed. He also stated that the report was based on testing done at the Appellant's current age so that even if it were significant, it would not be relevant to the question of whether he was mentally retarded before the age of 18. He further stated that he was not familiar with the format of the report and questioned the diagnosis of mild mental retardation. (A2)

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. Evidence was presented and there was no dispute that the Appellant meets the first criteria and the third criteria. Based on the evidence presented relative to the second criteria, I find that he meets the definition of a person with Mental Retardation.

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. My specific reasons are as follows:

All of the evidence submitted relative to the Appellant's IQ revealed scores of 70 to75 or below. These scores were obtained both prior to the age of 18 and after the age of 18. Despite DMR's expert's testimony, I find that an individual does not have to have an IQ of below 70 in order to meet the definition of mental retardation. The AAMR definition states that the individual must have significant sub average intellectual functioning defined as an IQ score of 70 to 75 or below. Despite DMR's expert's testimony that most people do not have a 24 point spread in their capacities, the AAMR Fact Sheet states that within an individual limitations often coexist with strengths. I find that the AAMR definition does not require that the individual have comparable scores on the Verbal and the Performance subtests. The expert's testimony stated that some of the Appellant's scores were not typical. He did not say that it would be impossible for someone with mental retardation to receive those scores. I find that the fact that the Appellant shows relative strength in the Verbal area does not preclude a finding that he is mentally retarded.

I find that the weight of the evidence presented relative to the Appellant's intellectual functioning showed that the Appellant has significantly sub-average intellectual functioning and that he functioned at this level prior to the age of 18. I find that he has related limitations in a number of areas including communication, daily living skills and social skills and that he had these limitations prior to the age of 18. I find that he is currently in need of specialized supports in the areas of communication, self-care, home living and work.

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: May 26, 2005

Marcia A. Hudgins
Hearing Officer