

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of

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 June 23, 2005 at the DMR Central Office in Boston, Massachusetts.

Those present for all or part of the proceedings were:

Appellant
Appellant's Mother
Appellant's Brother
Expert Witness for Appellant (by telephone)
Regional Eligibility Manager
DMR Psychologist
Attorney for Appellant
Attorney for DMR

The evidence consists of Documents submitted the Appellant numbered A1-27, documents submitted by DMR numbered D1-16 (originally labeled A-P) and approximately five 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. (D1)
2. The Appellant is a 37 year-old man who currently resides with his mother in MA. (D1, testimony of)
3. Three evaluations of the Appellant's cognitive functioning before the age of 18 were entered into evidence. Although there were IQ scores from an evaluation (WPSI) performed in 1975 when the Appellant was 6 years 10 months of age referred to in other evaluations and other test scores listed on an evaluation performed in 1978, I did not consider these scores because no reports accompanied these scores. (A4, A11-12, D3, D8)

4. One evaluation of the Appellant's cognitive functioning after the age of 18 was entered into evidence. (A1, D12)

5. Two assessments of the Appellant's adaptive functioning after the age of 18 were entered into evidence. (A1, D2, D12)

6. In June of 1978 when the Appellant was 10 years 3 months of age, he was evaluated by _____ a School Psychologist as part of an Annual Re-evaluation. On the Wechsler Intelligence Scale for Children-Revised (WISC-R), the Appellant received a Verbal Score of 73, a Performance score of 82 and a Full-Scale score of 76. He scored a low of 3 on the Verbal Subtests and a high of 7. He scored a low of 1 on the Performance Subtests and a high of 11. The report stated that there had been some improvement in the Appellant's overall intellectual functioning. Ms. _____ also noted that his visual memory and visual-motor coordination remained his weakest areas. The examiner did not offer a diagnosis. (A12, D3)

7. In July of 1979 when the Appellant was 11 years 4 months of age, he was evaluated at the Massachusetts General Hospital. Although the report's letterhead names _____ M.D. as the Clinical Director, it is unclear who did the testing and who wrote the report. The report is signed but the signature is not legible. On the WISC-R, the Appellant received a Verbal IQ score of 64, a Performance IQ score of 86 and a Full Scale IQ score of 72. No objections were raised as to this report being considered. The report states that his present general ability was measured in the "borderline" range overall, with persistently greater weakness in the "defective" verbal score than in the "low average (dull)" non-verbal score. It also notes that there was a very striking degree of variability across subtest scores on both scales. On the Gray Oral Reading Test, it was noted that the Appellant did not obtain a score on standardized oral reading passages, reflecting oral reading ability well below the Grade 1.4 level. On the Stanford Achievement Test (Primary Level I), the Appellant was reading at Grade 1.5 with 40% accuracy. When he had to write words that were dictated, his spelling was at Grade 1.5 with 23% accuracy. The KeyMath Diagnostic Arithmetic Test showed that the Appellant was at Grade 2.1. The report noted that his math skills were clearly stronger than his reading and spelling skills, but that his math skills remained at very low levels for his age. He was not able to write a passage on a topic of his choice, and he was unable to read what he wrote down. The report concludes that the Appellant's reasoning ability is very weak for both verbal and non-verbal material, and his memory skills are well below adequate limits for both visual and auditory material. At that time, the Appellant was characterized as a virtual non-reader and a non-speller. The report recommends special class placement with any new material presented in a very elementary, concrete, multi-sensory and highly repetitious manner, with as much individual attention as possible. (A11)

8. In February of 1983 when the Appellant was 14 years 10 months of age, he was evaluated by _____ an examiner employed by the _____ Public Schools as part of a Re-Evaluation. There is no indication that the tester was a School

Psychologist, nor was there any indication of his level of education or his licensure. No objections were raised by either party as to this report being considered. The tester reported that the Appellant's test behavior was within normal limits. On the WISC-R, the Appellant received a Verbal IQ score of 66, a Performance IQ score of 87 and a Full Scale IQ score of 74. The Test Summary states that the Appellant is functioning within the borderline range of intelligence. It also states that his Verbal Score is at the upper limits of the mild retardation range and his Performance score was at the upper limits of the low average range. Annual Review accompanying the WISC-R test report states that the Appellant made good gains in both decoding and oral reading comprehension where he scored at a high 3rd, mid 3rd grade respectively. He scored at a nearly 2nd grade level in silent reading comprehension. The test had to be stopped after 55 minutes as the Appellant was getting into more difficult material. He scored at nearly a 4th grade level in math. (A4, D8-9)

9. In June of 2004 when the Appellant was 36 years 3 months of age, he was evaluated by _____ Ph.D. using the Wechsler Adult Intelligence Scale-3rd edition (WAIS-III). On this test the Appellant received a Verbal Score of 69, a Performance Score of 72 and a Full Scale IQ score of 67. Dr. _____ noted that the Appellant put forth good effort when taking the test. Dr. _____ report concludes that the Appellant's overall intellectual functioning was assessed as being in the extremely low range. He notes that his primary deficits involve executive functioning, including impaired attention, working memory, organization, and mental flexibility. He goes on to say that higher level reasoning and problem-solving skills are significantly impaired. His academic skills range from the 3rd to the 7th grade. (A1, D12)

10. In November of 2003 when the Appellant was 35 years and 3 months of age, an Inventory for Client and Agency Planning (ICAP) was completed by the Appellant and his mother. _____, Ph.D., the DMR Eligibility Team Psychologist for Region 3 reviewed the ICAP and concluded that based on the four ICAP domains: Motor Skills, Social and Communication, Personal Living and Community Living; the Appellant's adaptive functioning is superior to what persons with mental retardation are able to accomplish. (D1-2)

11. In June of 2004 when the Appellant was 36 years 3 months of age, the Appellant's mother completed an ABS-RC: 2, an adaptive behavior checklist that assesses everyday living skills in a variety of domains. According to the report of this evaluation written by Dr. _____ the Appellant's mother rated him as having fairly well-developed skills in the areas of Independent Functioning, Self-Direction and Responsibility. Dr. _____ states in his report that overall, these resulted in a high score in terms of Personal Self-Sufficiency.

¹ The ICAP Computer Scoring Form indicates that the Appellant and his mother completed the inventory; however the Appellant's mother testified that although she was present when the ICAP was being administered, only the Appellant answered the questions.

However, Dr. _____ goes on to report that the Appellant's mother rated him as having significant deficits in the areas of Language Development, Numbers, Time and Socialization. His report also indicates that the Appellant's mother indicated limitations in 4 additional areas. These were Physical Activity, Economic Activity, Domestic Activity and Vocational Activity. He states that the Appellant's overall level of functioning in terms of Community Self-Sufficiency was at a 9 year old level. His overall Personal-Social Responsibility was at an 11 year level. (A1, D12)

12. _____, the Appellant's mother testified on his behalf. She was examined by Attorney _____ Attorney for the Appellant. She stated that her son lived with her in _____ MA and had lived with her his entire life. She stated that 5 months into her pregnancy with the Appellant she experienced false labor and then lost her water 6 weeks before her son's due date. She testified that he was born 3 weeks before his due date. She said that at birth there was some difficulty in getting her son to breath. She testified that his eyes were crossed and that he had 3 surgeries to correct the problem. She also stated that he was slow to progress. He was difficult to feed; he didn't like food. He was late to sit up, a late walker and a late talker. He was almost 4 years old before he was toilet trained. She testified that around age 3-4, it was apparent that he was behind. She stated that she was not aware of any early intervention programs available at the time. The Appellant attended nursery school at age 4 for socialization and ½ day kindergarten at age 5. Mrs. _____ testified that the Appellant played in kindergarten; he didn't learn. She stated that the Appellant was tested at Children's Hospital before entering first grade and that the information was given to the _____ School System where he was to attend school.

Mrs. _____ testified relative to an Educational Study that was performed on February 11, 1975 by the _____ Public Schools when the Appellant was 6 years 11 months of age. She stated that this was the year C.766 began. She explained that this was a new law that had been passed which was designed to help kids with learning problems. She stated that implementation was a little confusing for the schools. At this time there had not been a determination made that the Appellant was in need of special education; however she stated that the school system knew he was in need of some help. (A23, D15)

Mrs. _____ testified relative to an 8 week Educational Plan dated September 23, 1975. She stated that this was the 1st month the Appellant was in the "Collaborative" She testified that the Collaborative was a special education program set up by three communities: _____ and _____. She stated that the Appellant was in a separate classroom for kids with learning disabilities. Most of the Appellant's day was spent in a separate classroom with approximately 15 students with learning disabilities. He did spend some time integrated into regular classes. (A21)

Mrs. _____ testified relative to a Progress Report dated December 10, 1975. She stated that the Appellant has a hand tremor and this problem with motor control made fine motor work difficult for him. (A20)

Mrs. _____ stated that the Appellant was in the Collaborative all the way through school. The only subjects that he ever had in a regular classroom were gym, art and music.

Mrs. _____ testified relative to a Psychological Report dated March 26, 1976. She stated that the IQ test scores reported in the document were from the testing that had been done at Children's Hospital and that both she and her husband agreed that there were some very optimistic numbers being thrown out. (A19, D12)

Mrs. _____ testified relative to a June Final Report dated June 10, 1976. She agreed that at that time the Appellant continued to exhibit motor control problems. She agreed with the report's statement that the Appellant was a pleasant child and that he was cooperative, but she noted that he could get stubborn. At this time he was playing with other kids as opposed to next to them. As to the statement in the report that most of the children like him and try to protect him, she agreed that children saw him as different. (A18, D13)

Mrs. _____ testified relative to a Speech and Language Report dated June, 1978. At this time she stated he would have been around 10 and likely in the 4th grade had he been in a regular classroom. Although the report states that the Appellant was receiving 4 sessions of speech therapy per week and that 1 session was held in the Appellant's home, Mrs. _____ stated that she did not recall the any services being provided in the home. She agreed with the report in that at this time the Appellant knew the names of the days of the week, but stated that she did not believe that he was aware of the time. She stated that time was always difficult for the Appellant and continues to be so. (A17)

Mrs. _____ testified relative to an Individual Education Plan (IEP) for the period September 1977- June 1978. She stated that the Appellant continued to have auditory memory problems and some depth perception problems. She agreed that the report points out that the Appellant has motor control problems and needs to be in a highly structured setting. She stated that the report explains that he does better on a one-to-one basis because he is easily distracted. She stated that she observed these things at home. Things had to be repeated because it was very hard for him to retain information. She stated that throughout his school history he was never doing grade level work. When asked to compare the Appellant with other individuals his age, she stated that although he knows the rules of reading, he can't read. By the time he gets through the sentence, he's lost the meaning. He does not retain sight words and he has not mastered the skills of reading. He works very hard but has difficulty expressing himself in writing and will guess at words when reading. She agreed that throughout school he received specialized instruction in reading including the Orton Gillingham program and individualized tutoring in reading but that he has serious limitations in reading. She stated that his math skills are a little better. She testified that the Appellant can add and subtract and do basic math, not multiplication or division. (A15)

Mrs. _____ testified relative to an IEP for the period September 1978 - June 1979. She agreed that this report indicates that the Appellant was still attending the Collaborative. She also agreed that the report indicates that the Appellant does best on a one-to-one basis in a program that is highly structured. (A14)

Mrs. _____ testified relative to a Cortical Functioning Test performed at Massachusetts General Hospital dated July 5, 1975. She stated that she did not remember why they wanted to do this but that it was recommended. She stated that the school paid for the test. She believed that _____ who made the referral for the testing was employed by the _____ School System, and she believed that the reason for the testing had something to do with whether or not the Appellant would be suitable for vocational training. She agreed that this testing was done prior to the Appellant's going into the _____ School (between 5th and 6th grade). She stated that the test report indicated that on an IQ test the Appellant's Full Scale IQ score was 72, his Verbal IQ score 64 and his Performance IQ score was 86. She stated that the report states that on an oral reading test, he was reading at 1.4 grade level. She compared this to his reading level in 2nd grade which was 1.0 and stated that she believed that they (the school) had been very optimistic. She stated that his Spelling was at the 1.5 grade level, another reading score was at the 1.5 grade level and that his Math was at the 2.1 grade level. She agreed that the report indicates that his reasoning ability in both verbal and nonverbal areas is very weak. She agreed that the report indicated that the Appellant was a virtual non-reader and a non-speller. She stated that she was not shocked when she received this report. From her experience the report expressed levels that seemed logical. (A11, A24-25, D16)

Mrs. _____ testified relative to two reports: an Educational Plan for the period September 1979-June 1980 and a Report from the Learning Disabilities Unit at the _____ School dated April 29, 1980. She agreed that each of the documents contained information related to the Appellant's continuing need for supports in reading, memory skills, logical thinking, sequencing, vocabulary and sentence building. (A9-10)

Mrs. _____ testified relative to another IEP dated April 30, 1980. She stated that the Appellant's Student Profile noted that he was a young man with severe learning disabilities. His major deficit areas are in the visual and auditory areas. She pointed out that the report says that he has shown improvement in cursive writing and in working independently. She also noted that a report dated September 10, 1979 states that the Appellant needs review on picking out the correct hour as he does confuse the hour and the minute hand. She agreed that this report was generated when the Appellant was in 7th grade. She stated that one of the goals of the 1980 IEP was to increase the Appellant's social skills. She went on to say that the Appellant's friends are his family. She mentioned that he had one friend, another special needs student but that he moved away some 15 years ago. (A8)

Mrs. _____ testified relative to a Speech/Language/Hearing Tutorial Report dated February 11, 1982. She stated that the Appellant swallows his words. She stated that at

the time of this report his voice was a little high. She also noted that at times, both then and now, he speaks a little quickly when he is anxious or upset. (A7)

Mrs. _____ testified relative to an IEP dated April 5, 1982. This was the educational plan for the Appellant when he was in the 8th grade. She noted that he was still in a special education at this time. (A6)

Mrs. _____ testified relative to an IEP dated May 1, 1984. She stated that the Appellant was attending _____ High School to receive vocational training. She also stated that the school had a program for special needs students. She stated that the Appellant took Small Engine Repair. She said that he was also exposed to carpentry, metal work and cooking. He received his high school degree in Small Engine Repair. He spent almost all of his time in a small group setting with instruction primarily one-on-one. She stated that at this time which would have been the Appellant's 10th grade year in school the IEP shows that his Spelling was at a 2.0 grade level, his Word Recognition was at a 3.7 grade level, his Oral Reading was at a 2.5 grade level and his Math was at a 4.0 grade level. She agreed that he was still receiving Speech Therapy and that he failed a Screening Test of Adolescent Language. She also testified relative to a Progress Report dated June 1, 1984. She stated according to this report, the Appellant was taking some type of cooking course and was learning basic measurement. She stated that according to a Progress Report dated January 20, 1984, the Appellant was working on everyday money problems and needed to spend more time on money as well as the calendar and its uses and measurements. She agreed that all of his teachers give him very favorable reports, that he had no behavior problems and was well liked. She agreed that he needed a lot of one-on-one in the Carpentry Program. She agreed that these documents confirmed her understanding of the Appellant's abilities at the time. (A2)

Mrs. _____ testified relative to a document labeled Slosson Oral Reading Test dated April 30, 1984. This test was administered when the Appellant was in the 9th grade. She agreed that the Appellant's reading level was reported as 3.7. (A13)

Mrs. _____ stated that the Appellant graduated from _____ Tech and got an award for being the best student in the special needs group in Small Engine Repair and won some tools. He was not required to pass the MCAS. That was the end of the Appellant's formal education. She testified that he worked in a small engine repair place for a few months but that rather than repairing things, he was putting lawnmowers together. He worked at _____ for a few months, but he hated the job because there was a lot of pressure and so he quit. He then got a job at _____ which is a company owned by someone that the Appellant's father knew. He has worked there for 15 years. It is a plastic forming company. He works 40 hours a week and makes \$11.00 per hour plus overtime. He was laid off after September 11th and looked for work. She stated that she sent out the Appellant's resumes with cover letters to help him find a new job. She testified that the Appellant did get some interviews but did not get hired. She also stated that he gets very nervous when being interviewed. She stated that he tried to get a job at

, but he was not able to read the written exam. She explained that he needs help in filling out job applications.

Mrs. _____ testified that the Appellant has trouble managing money. She stated that it just flies away. She stated that she watches how he spends his money. She reads his bank statements. She explained that the Appellant pays her \$80.00 every two weeks out of which she pays his car insurance. He buys home safety kits and flies for fishing. When they moved, they had to toss out a number of the kits. At one time he spent a lot of money going to a strip club. He took the interest on a CD and also spent all of his paycheck each week going to the club. He spent every single penny he had. The family had to get this straightened out. She explained that this happened just after her husband died, and she hadn't been paying attention to the Appellant's money management. She estimated that he had spent thousands of dollars before they were able to straighten this out.

Mrs. _____ stated that the Appellant likes to help people. She testified that the Appellant has a driver's license but that he did not take a written exam. She explained that he drives back and forth to work and has a few other destinations where he can go. She went on to say that everyplace he goes has been mapped out by the family. The Appellant and his family practice going to new destinations. He only goes to the places he knows. He does not go on the highway. She stated that he does not go on the highway because of the speed, the number of lanes and because of the Appellant's inability to read the road signs.

Mrs. _____ stated that the Appellant can take care of his basic needs but that he needs reminding. He needs reminders to maintain good personal hygiene. He does not do weekly shopping but can get some items for himself. His mother thinks that she could possibly work on that task with him. She stated that he can make simple meals. He likes to cook and she works with him with cooking as a project.

Mrs. _____ stated that the Appellant can tell time but that he has no perception of time. He allows much more time to do something than is necessary. She stated that he can't write a letter but that he can write a note.

Mrs. J _____ stated that she applied for DMR services because the Appellant needs support. He needs someone to help him with money; he needs someone to help him get an apartment; he needs someone to help him get a job. His support has been his family. She opined that if something happened to her and to the Appellant's brother, she doesn't think the Appellant would know who to call. She testified that he needs someone to help him cope with living.

On cross-examination, _____, counsel for DMR asked Mrs. _____ if any of the documents that she testified about ever used the term mental retardation relative to the Appellant. She stated no, not that she was aware of. She did say that at that time that term was not used. She agreed that an individual could be learning disabled but not

mentally retarded. She affirmed that she believed that some of the reports of the Appellant's functioning were somewhat optimistic. She stated that she had read Dr. _____ report and that she agreed with it. She thought it was pretty close to the mark. (A1, D12)

Mrs. _____ stated that the Appellant does not have a social group although he is friendly with people. She supposed that he doesn't have friends because he is odd. She went on to say that he's different than the average guy and that he makes inappropriate remarks at times.

Attorney _____ asked Mrs. _____ questions relative to the ICAP. Mrs. _____ stated that she was present at the meeting with _____ when the ICAP was completed, but that the Appellant answered the questions. (D1)

Mrs. _____ stated that the Appellant has expressed interest in having his own apartment. She explained that she has looked into the _____ House in _____ but in order to qualify an individual must have a disability. Since he is earning his own income and is not on Social Security Disability, she doesn't think he would qualify. She expressed concern about how the Appellant would manage on his own and stated that the family would give him support if he were to get his own apartment.

Mrs. _____ stated that the Appellant had not taken any courses since high school that might have helped him with his reading or math, but that he had audited a couple of courses at _____. She explained that in those courses he was not required to write anything or take a test. She stated that he wanted to go to work and he did.

She stated that at home the Appellant does the basics with reminders. She explained that he has to be told to take a shower, to wash his hair, to get a haircut, to change his bed. She stated that if not reminded, he would go for as long as a week without taking a shower.

13. _____, the Appellant's brother testified on his behalf. He stated that he grew up with the Appellant and was 2 ½ years older. He explained that they did not go to school together for the majority of the Appellant's elementary and secondary education. He testified that the _____ that the Appellant attended was a substantially separate program. He stated that the Appellant has always been developmentally behind his peers and currently is on a level with his (_____'s) son who 9 years old and has just finished the 3rd grade. He then went on to say that he believes that the Appellant is significantly developmentally behind his son in such areas as reading and math. He needs prompting to take a shower, to bathe, to get a haircut. The Appellant does cook, but it is a project. He stated that the Appellant is allowed to drive on about 6 roads. He stated that although the Appellant lives at home, he is able to have a great deal of independence due to the constant monitoring by the family. He does many things because it is a constant effort on the part of the family.

Mr. _____ stated that he sees his brother 3-4 times a week. He stated that the Appellant spends a great deal of time at his house. He stated that the Appellant was very slow at doing jobs and could not do some jobs due to his problems with fine motor skills. In his current job, the Appellant is doing a job that no one else wants. He stated that the Appellant would like to do another job in the company where he works but that they don't want him to do it. Mr. _____ stated that he gets frustrated with the Appellant's slow speed at completing projects.

Mr. _____ stated that he designed the route that the Appellant takes to work, beginning with a road that the Appellant was very familiar with and adding only one more road. He explained that the Appellant goes a much longer route than is necessary because that route is less confusing. He stated that the Appellant still does not know his multiplication tables and has difficulty reading.

Mr. _____ stated that the Appellant has dreams that the family has tried to encourage. He testified that the Appellant can't read a sentence without support. He stated that the Appellant can't manage money. Someone will always have to support him as far as money management is concerned. He has never seen him demonstrate that he can handle activities of daily living without support. He stated that he believed that the Appellant would live in squalor if he did not have support. He stated that the Appellant cannot make long range plans. He goes to the movies on a weekly basis but he doesn't really grasp the time he needs to be there, and he doesn't have an idea of what movie he is going to see before he gets to the theatre. He said the family has tried to use charts to help the Appellant with remembering things but they have not worked. He opined that perhaps the family was not disciplined enough.

Mr. _____ stated that he believed that his mother is overly optimistic relative to the Appellant's problems. He stated that people want him to help out on community projects, but that this does not generate a peer group for the Appellant to socialize with.

Mr. _____ stated that he has heard the term mentally retarded used to describe the Appellant. He also stated that his father had used the term. He went on to say that his parents wanted to keep the Appellant at home before they tried to get state services because they thought it would be better for the Appellant.

Mr. _____ stated that he had questions relating to the authenticity of the testing done by the school department stating that he did not believe that the testing was done by a clinical psychologist. He stated that the _____ was established to show growth and improvement in students and that the evaluations were done by faculty and people within that school district, not non-biased evaluators. He stated that the program wanted to show progress in order to maintain funding.

Mr. _____ stated that he may be biased but that he does believe that most of his assessments of the Appellant are pretty clean.

On cross-examination, Attorney _____ asked the witness if the Appellant had a guardian. He stated that his mother was the Appellant's guardian. He stated that the family had hired an attorney and that the guardianship was filed in Probate Court in _____ County 3 years ago. This was done to assist the Appellant in managing his money. Upon further reflection, he agreed that they did not have a Guardianship Decree and that at the present time the Appellant was deemed competent to make his own decisions. Attorney _____ asked if as adult the Appellant had been introduced to other people with learning disabilities. He indicated that the Appellant has limited contact with such individuals. He stated that the Appellant works well with his hands. He is slow but does a good job. He stated that although he can cook a dish, he cannot cook a meal. He agreed that although his father had used the term "mentally retarded" in reference to the Appellant that his father was not a psychologist or a psychiatrist. He opined that his father had used the term after reading some of the Appellant's evaluations but agreed that the paperwork presented by the Appellant may not have used the term "mentally retarded" but instead used the term "mildly retarded" to describe the Appellant.

14. The Appellant gave testimony relative to his eligibility for DMR services. The Appellant stated that he was nervous and that he didn't like labels. He stated that he tried to be self sufficient and agreed that it was important to him. He agreed that he worked every day and took care of himself as best he could. When asked whether he needed his mother's help, he stated that he did and also needed his brother's help. He testified that he forgets things. He stated that his mother's and his brother's testimony was not untrue. He stated that he understood why he was there. He stated that he has problems with math and with time. He stated that he had some limitations on his driving. He stated that he does not drive on highways because he has a hard time reading the road signs. When he tries to read the signs he pulls off the road or may get into an accident. He said that this was a rule made by his family but that he knew himself of his limitation. He stated that when he was laid off, he could not find another job because he could not pass the tests given by the prospective employers. He stated that the answers he gave to questions posed by DMR on intake were answered truthfully. He stated that if he had to use a phone book to call someone, he would have a bit of trouble because of reading and trying to determine who to look for. He stated that he sometimes he becomes nervous when meeting new people.

The Appellant stated that he remembered the testing done by Dr. _____ and he said that he tried his best on the tests he was given. He stated that he would need help if he were to live alone. He would need help with money, with shopping and cooking. He agreed that he would need someone to check on him from time to time to see if things were going ok. He stated he goes to the movies every Friday and often Saturday night. He was not sure how long he had been doing that but said it was probably since he got his driver's license. He was not sure how old he was when he got his driver's license. He agreed that he had problems with reading and writing. He sometimes has problems making change and trusts people to give him the right change. He stated that although he can tell time, his sense of time is probably off. He agreed that he was supportive of the application for DMR eligibility. (A1, D12)

On cross-examination, Attorney [redacted] asked the Appellant questions relative to the ICAP. He stated that he gave answers to the ICAP questions that he thought were correct. Attorney [redacted] pointed out that with a few exceptions his answers on the ICAP indicate that he does most things very well, in contrast to his testimony. He stated that he wasn't sure what was meant by some of the questions on the ICAP, and he gave the answers that he thought were appropriate. He said he did not remember how long he had been laid off. He said he tried to apply for 3 or 4 jobs while was laid off. When asked why he wasn't able to get another job, he replied that all of the jobs he applied for had testing and that he couldn't pass the testing. When asked whether he could make his own decisions, he stated that he probably would need some help because he sometimes doesn't feel confident in his own decisions. (D2)

On re-cross, Attorney [redacted] pointed out that on the ICAP the Appellant had told the interviewer that he could write letters for mailing. He then asked the Appellant if he wrote letters to anyone. The Appellant replied that he did not. He stated that he had never written a letter to anyone. The Appellant agreed that he had difficulty using the Yellow Pages. Attorney [redacted] pointed out that this was in contrast to what he told the ICAP examiner. The Appellant stated that he wasn't sure what the examiner meant.

15. [redacted], Ph.D. testified as an expert witness for the Appellant. Dr. [redacted] estimated that he does approximately 40-50 psychological evaluations per year. He stated that of those evaluations approximately 3 or 4 are of adults. He estimated that of the 3 or 4 adult evaluations that he does per year, approximately 2 are for adults with developmental disabilities. He estimated that over the course of his professional career, he has probably done over 200 evaluations of adults with developmental disabilities. (A27)

He stated that he examined the Appellant on June 4, 2004. He agreed that he prepared a report based on his examination. He testified that the Appellant was at ease during the testing and that he believed that the Appellant put forth his best effort. He said he did not believe that the Appellant was distraught or upset. In Dr. [redacted]'s opinion, the results of the test were valid and represented the Appellant's functioning at that time. He stated that he administered the Wechsler Adult Intelligence Test and that the Appellant scored at the extremely low range, at the 1st percentile on the Full Scale IQ. He stated that the scores on the Verbal (69) and Performance (72) tests were not too dissimilar. He stated that he did have a few prior test results available to him. He testified that he thought that in comparison with the test that he administered that previous Full Scale IQ scores were fairly consistent. He explained that there is always a certain amount of variability in these scores which is known as the standard error of measurement. Dr. [redacted] testified that he recently reviewed the Appellant's test scores from a Wechsler Preschool Scale of Intelligence (WPPSI). He stated that these scores were somewhat different than the other test scores he had seen. (A1, D12)

Dr. [redacted] testified relative to Appellant's test scores on a WISC-R that was given in June

of 1978. He stated that he did not know what the standard error of measurement was for the test but that the standard error of measurement with a 95% confidence interval is usually within a 3-6 point range. When asked whether a Full Scale IQ score of 72 which was the Appellant's score on a test given in 1979 would meet the AAMR definition of being 2 standard deviations from norm, Dr. [redacted] stated that his understanding of the current criteria is to look at an IQ of 75 or below. When asked whether he found the Appellant to have a language based learning disability, Dr. [redacted] stated that the Appellant certainly has some difficulties with language. He also had difficulty on the test administered by [redacted] as the tasks became more complex. He had difficulty in both the verbal and the nonverbal areas whenever reasoning was involved. He stated that the older versions of the WISC: the WISC -R and the WISC-III did not have the same sort of nonverbal test that the new versions of the WISC or the WAIS have which is called Matrix Reasoning. He opined that this may be a more valid reflection of a person's nonverbal reasoning ability. He testified that the Appellant struggled with Matrix Reasoning. He scored in the 5th percentile on this test. He went on to say that even that was a little misleading because the Appellant scored higher on the earlier part of the test which is more perceptual based (completing patterns), but as the items became more complicated and required more reasoning, the Appellant really could not do them. He testified that the capacity for reasoning is clearly going to be significant for anyone's functioning. He explained that when presented with novel tasks that required reasoning, the Appellant struggled and that this would have a lot of implications on his ability to function in real life situations. (A12, D3)

Dr. [redacted] testified that he gave some additional tests to the Appellant. One was executive functioning which has a lot of implications for independent functioning. He explained that executive functioning includes such things as the ability to plan, to choose strategies, to organize, to monitor, to choose options. He also looked at learning and memory. He stated that the Appellant struggled on tests in both of those areas. He testified that the Appellant had significant trouble with attending to relevant information, trouble with working memory, a lot of trouble with organization, and trouble with mental flexibility. He went on to say that those executive deficits translate directly into some of the Appellant's learning and memory deficits. Dr. [redacted] noted that the Appellant struggled on both verbal and nonverbal tests that involved learning and recall of information. (A1, D12)

Dr. [redacted] stated that there have been a number of people who have focused on deficits in executive functioning as being critical to mental retardation. Some of the experts in the field of intelligence believe that these executive functions are critical for what is termed intelligence. Dr. [redacted] stated that in his experience, he most often saw deficits of executive functioning when working with individuals with mild mental retardation.

Dr. [redacted] stated that in order to measure the Appellant's functional limitations he used the ABS which was designed to correlate with the AAMR's breakdown of adaptive behavior skills. The Appellant's mother completed the questions related to his adaptive functioning. Dr. [redacted] found the Appellant to have strengths in some areas. The areas

were: independent functioning, self direction and responsibility. The areas where the Appellant obtained the lowest age equivalents were: language development, numbers and time and socialization. There were other areas that were not quite as weak but significantly below what you would expect for an adult. These areas were: physical development, economic development, domestic activity and vocational activity. He stated that although he spoke to the Appellant in general about his likes and dislikes and what he could and could not do, a reliable informant is needed to fill out the forms relative to adaptive behavior. When asked why this was necessary, he stated that when dealing with someone with some significant cognitive impairments, the individual is not necessarily going to be able to reliably report on their abilities. (A1, D12)

When asked by counsel whether in his professional opinion the Appellant was presently exhibiting significantly sub average intellectual functioning that is demonstrated by an IQ that is 2 standard deviations below the mean, Dr. _____ stated that he believed that the Appellant was impaired within that definition. He agreed that this was based upon his Full Scale IQ finding. He stated that in his professional opinion that there was evidence to indicate that the Appellant had significant cognitive impairments within the definition prior to age 18. He stated that his opinion was based on prior IQ scores which would meet the AAMR definition of mental retardation. He testified that the Appellant's current impairment of a developmental disorder is consistent with the developmental history where there was oxygen deprivation at birth. He stated that he had information about the Appellant's vocational and living situation and nothing led him to believe that there was any significant environmental deprivation. He stated he believed that the Appellant's cognitive impairments were related to a developmental issue. He stated that in his opinion the Appellant currently has significant functional limitations that are related to intellectual deficits. Dr. _____ stated that the Appellant has significant deficits in the areas of communication, functional academics, social skills, community use, health and safety. Dr. _____ stated that he believed that the Appellant is in need of specialized supports in the area of finances and economic activity and with medical decisions. Dr. _____ stated that he believes that the Appellant meets the 1992 AAMR definition of mental retardation. (A1, D12)

On cross examination Attorney J _____ asked Dr. _____ questions related to IQ scores and adaptive functioning. When asked what kinds of changes occur over multiple testings, Dr. _____ stated that the IQ will apparently increase until a new IQ test becomes available with updated norms. Attorney _____ also asked Dr. _____ to explain the subtest scatter that was present in the Appellant's test scores. He stated that in his experience the earlier items on the WISC tend to have more of a perceptual basis to them. He stated that as individuals get older even if they have good perceptual ability, deficits in executive functioning such as planning and strategizing cause their scores to go down over time. This is what he noticed in the Appellant's case. He stated that in his experience, it is not unusual for a person with mental retardation to have a lot of subtest scatter. He stated that individuals with mild mental retardation have their own strengths and weaknesses and that in his opinion that what is what is seen in the Appellant's subtest scatter. He stated that the low Coding score that the Appellant attained on the WISC-R

administered in 1978 reflects deficits in attention and executive functioning. He stated that this does not mean the low score would be attributable to attention deficit disorder. He went on to say that attention and executive functioning problems are quite common in developmental disabilities. DR. stated that he had access to the 1978 report of test scores which made reference to a test given in 1977 where it appears that the Appellant obtained a Full Scale IQ score of 69. He stated did not have the 1977 test report. He stated if he does not have a full report he is not able to make use of those scores. (A12, D3)

Dr. stated that he had information relating to the DMR requirements for eligibility. He stated that the AAMR definition requires substantial deficits in cognitive functioning, that there is evidence that these significant limitations occurred before the age of 18 and that there are limitations in area of 2 or more adaptive skills. He agreed that he believes that the Appellant has deficits in communication, academic functioning, social skills, community use and health and safety. Dr. testified that he believes that the Appellant meets the DMR definition of mental retardation.

16. Wolfe, DMR's Northeast Regional Eligibility Manager testified on behalf of the Department. She stated that she has been her position for 4 years. She explained that she provides administrative supervision and support to the Regional Eligibility Team (Team) which is the team that accepts, processes and prepares applications for eligibility for the Northeast Region. She stated that she met the Appellant at the Informal Conference in March of 2004. She stated that at that meeting the Team upheld the original ineligibility determination. She stated that the determination was based on Dr. 's opinion which stated, "The available information indicates that the Appellant does not have mental retardation. His intelligence test scores show a remarkably consistent pattern of low average to average nonverbal reasoning/visual spatial skills with impaired verbal abilities. In addition, his current adaptive functioning is superior to what persons with mental retardation are able to accomplish". Ms. stated that she was aware of DMR's criteria for eligibility. She stated that for adult eligibility that the applicant must show that they are domiciled in Massachusetts, are 18 years of age or older and have a diagnosis of mental retardation. She went on to say that the Department seeks evidence that the applicant has deficits in 3 out of 7 areas of adaptive functioning that are related to the mental retardation. She stated that to establish mental retardation that one must have an IQ of 70 or below on valid testing over time. She stated in order to be found eligible for DMR services; there must be substantial deficits in the areas of communication, community use, functional academics, work, home living, health and safety and self care. She stated that the team is not allowed to consider difficulties with socialization, leisure or self direction when considering the second prong of eligibility. She stated that one of the reasons for a finding of ineligibility would be if they could not find substantial deficits in 3 of the 7 areas. (D1, D16)

On cross examination, Ms. affirmed her previous testimony that an individual had to have substantial deficits in 3 out of the 7 areas in order to meet the eligibility criteria. She then agreed with the Appellant's attorney that that the DMR regulation concerning

eligibility found at 115 CMR 6.04 does not say anything about substantial deficits but instead says, "in need of specialized supports".²

On re-direct, Ms. [redacted] stated that when determining if someone is need of specialized services, they look at adaptive behavior scales: the ABS, the ABAS and adaptive functioning assessments to identify areas of need that would warrant a response for services.

On re-cross, Ms. [redacted] testified that that establishment of MR requires a functioning testing and assessment before the age of 18 but the adaptive functioning requirement does not specify "prior to age 18" to the best of her knowledge. She stated that the psychologist looked at the Appellant's adaptive functioning before the age of 18. She stated that the psychologist reviewed all of the information. She stated that in addition to the ICAP, there was information related to adaptive functioning throughout the Appellant's records. She stated that the ICAP was designed for service planning. She agreed that it was not designed to measure deficits. When asked if the ICAP was therefore not relevant, she stated that she was not the psychologist and that all information was relevant and that she knew that the psychologist reviewed all of the information. She stated that she did not know why an ABS or an ABAS had not been done but pointed out that DMR did not have a requirement to use one of those instruments at that time. She testified that it is the responsibility of the team's psychologist to determine if more information is needed and in this case the psychologist did not request additional information. (D1)

17.] [redacted], Ph.D. testified as an expert in psychology for DMR. He stated that he has administered approximately 2 dozen psychometric tests during his career over a period of 30 years. Dr. Fredovich estimated that he had assessed approximately 100 individuals for mental retardation. He stated that he was familiar with the AAMR definition for mental retardation and DMR's requirements for eligibility. He stated that he reviewed the materials in the Appellant's packet and reviewed Dr. [redacted]'s findings in regard to the Appellant's application for eligibility and his application for reconsideration. (D16)

Dr. [redacted] testified relative to a WISC-R dated June 9, 1978. He stated that the Full Scale score on this test was a 76. He also testified that there was substantial difference between the Verbal score (73) and the Performance score (82). He noted that was a remarkably low score on the Coding subtest. He testified that this score and the low score on the Information subtest brought down the Appellant's score. He stated that the disparity between the Verbal score and the Performance score was not unusual but was of note. (A12, D3)

Dr. [redacted] testified relative to a WISC-R dated February 3, 1983. He agreed that on

² The cite is 115 CMR 6.03

this test the Appellant attained a Full Scale IQ score of 74. He stated that the appellant's score could have gone down due to a personal situation or a situation with the tester. He stated that there was a substantial difference between the Verbal and Performance scores similar to what had been seen on the previous test. He stated that the Appellant's Performance score was not substantially different from normal. He stated that he again had two very low subtest scores. (A4, D8))

Dr. _____ testified relative to an Evaluation Summary from Children's Hospital dated February 10-12, 1975. A statement in the summary stated that the Appellant's intellectual skills showed a wide scatter on testing. He stated that in his experience he would expect to find more uniform test results. He agreed that the statement might be significant. (D10)

Dr. _____ testified that a learning disability is characterized by a relatively circumscribed problem in certain areas whereas mental retardation refers to a more general impairment of cognitive functioning not attributable to other causes and with associated deficits in adaptive functioning. He stated that Dyslexia is an example of a learning disability.

When asked whether he was aware of any IQ score of the Appellant's that was under 70 prior to age 18, Dr. Fridovich stated that he concurred with Dr. _____. Although he stated that he was concerned about the Appellant's low IQ score at age 36, he stated that there could be any number of reasons for the low score. (D1)

Dr. _____ stated that in his opinion the Appellant does not have mental retardation or at least does not meet the criteria for DMR intervention.

On cross examination Dr. _____ stated that he had spent the last 18 years in clinical administration. He stated that a large part of his job includes individual case consultation. He stated that often he does not do testing but that he reviews a packet of materials prepared by others to determine eligibility or treatment. He testified that about 1/2 of the time his assessments include contact with the individual. He estimated that he has done approximately 50 person to person assessments of people with MR. He stated that in approximately 10 of the 50 cases he came to a diagnosis of mental retardation as opposed to a diagnosis of mental illness. He stated that the last time he administered a psychometric test was over 20 years ago. He agreed that the tests have changed over time. He stated that he did not recall ever administering the WISC-R. He stated that his testimony concerning scatter and the Coding items was based on his familiarity with the test and experience in doing that analogous activity over his professional career. He stated that he had never tested children and agreed that the WISC-R was a test for children. He stated that he had done reading on psychometric testing, most recently the previous evening. He did not recollect reading anything about the WISC-R.

Dr. [redacted] stated that he was familiar with the Manual of Diagnosis and Professional Practice of Mental Retardation (Manual) and had made use of it. He agreed it a product of the American Psychological Association. Dr. [redacted] stated that Dr. [redacted] tested the Appellant at age 36 and if he accepts Dr. [redacted]'s findings as valid then there is an unexplained decrement in the Appellant's intelligence from the age of approximately age 15 to age 36 or 37. He stated that he had no reason to believe that the testing of the Appellant done at age 14 was invalid. He agreed that on the WISC-R the Appellant's Verbal score was reported to be at the upper level of mental retardation. He stated that that he did not know if the DMR regulation specified that one needs to look at a Full Scale IQ score when making a determination of mental retardation but said it was DMR's practice. He did not know how that practice began. He did not know what the Manual called for and believed it was in the AAMR definition. He stated that the low Coding score on the WISC-R should not be thrown out but that one should seek to try to understand it. He agreed that the Appellant consistently scored low on Coding subtests. Dr. [redacted] stated that Coding tests attention, executive functioning, and ability to concentrate. He stated that some of these factors are related to intelligence. He agreed that executive functioning is part of general intelligence (G). He agreed that the fact that there is a very low Coding score does not make the test invalid. Dr. [redacted] agreed that the Appellant's scores on the Information subtests are also low. He explained that the Information scale tests one's fund of information, educational background, environmental opportunities to learn and verbal skills to a certain extent. He stated that low scores on the Information subtest would not be unusual to find in an individual with mental retardation. Dr. [redacted] stated that the extent of scatter found in the Appellant's subtests would not be expected in a person with mental retardation. He stated that the scatter found in the 1983 WISC-R test results is significant. He stated that is surprising to find this much scatter in a person with mental retardation. He said this opinion was based on his review of several dozen people as part of the DMR eligibility process. (A4, D8))

Dr. [redacted] said he was familiar with the notion that people with mild mental retardation often have significant differences amongst themselves in terms of attributes. He agreed that there is greater variability in individuals with mild to moderate mental retardation than there is with individuals with severe mental retardation. He agreed that this variability might be reflected in greater variability in subtest scores on an IQ test.

Dr. [redacted] testified relative to the 1983 WISC-R and noted the 21 point difference between the Verbal and the Performance IQ scores. He stated that he did not know if this was statistically significant. He stated that he believed that a 21 point spread between Verbal and Performance scores is relatively rare. He stated that the standard error of measurement on the WISC-R is 5 points. He stated that this meant that a single testing of an individual's intelligence might vary as much as 5 points. When asked whether that meant if DMR had one test to look and if the individual scored a 75 on a full scale IQ test that they would AAMR definition, Dr. [redacted] stated that that's not the way that DMR applies the criteria. He stated that they seek to understand the subtest scores and get an idea of the individual's underlying intelligence. (A4, D8)

Dr. [redacted] stated that he did not find anything in the Appellant's record relative to Dyslexia or Disarticulation. He stated that there was reference to the Appellant's speech problems early on. He stated that that he believed that there was some reference to verbal learning disorders. Dr. [redacted] testified relative to the WISC-R was that was done in 1978. He agreed that the report states that the Appellant's perceptual-motor development remains below grade level. Dr. [redacted] also responded to questions relating to the testing done by Dr. [redacted] and stated that the Appellant has deficiencies in reading. He stated that according to Dr. [redacted]'s report the Appellant reads at a 3rd to 4th grade level. He agreed that the Appellant also has a depressed math level. Dr. [redacted] stated that he is familiar with people who have mild mental retardation and agreed that some such individuals function at a 6th grade level. He stated that Dr. [redacted] reported that the Appellant had areas of cognitive deficits as well as areas of strengths. Dr. [redacted] agreed that the Appellant has deficits in verbal and in the perceptual/motor area and does not just have a verbal based learning disability. (A12, D3)

Dr. [redacted] testified relative to the testing done at the Massachusetts General Hospital dated July 5, 1979. He agreed that the Appellant's Full Scale score on the IQ test contained in this report was 72. He agreed that the 22 point discrepancy between the Verbal and the Performance IQ scores was consistent with the Appellant's other IQ scores. Dr. [redacted] testified that the findings reported in the document were not in and of themselves inconsistent with a finding of mental retardation. He also stated that the oxygen loss that was reported to have occurred at the time of the Appellant's birth in and of itself may or may not have led to mental retardation. He agreed that the loss of oxygen would be a factor in making a diagnosis of mental retardation. (A11)

Dr. [redacted] testified that he was familiar with the ICAP. He stated that DMR uses the ICAP for planning and for evaluating prioritization for supports. He agreed that the ICAP in and of itself is not used for assessing adaptive skills in making a diagnosis. (D2)

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 he meets the first criterion. Based on the evidence presented relative to the second and third criteria, I find that he meets the definition of a person with Mental Retardation and is in need of specialized supports.

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:

The evidence showed that 3 out of 4 of the Appellant's IQ scores come within the AAMR definition with only one score out of the four, a 76 falling outside the definition. These scores were obtained both prior to the age of 18 and after the age of 18. Despite testimony from DMR witnesses, 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 in his experience he would expect to find more uniform sub test results in a person with mental retardation, 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. I find that the preponderance 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 preponderance of the evidence showed that prior to age 18 the Appellant demonstrated related limitations in communication, self-care, home living, social skills, community use, self direction, health and safety and functional academics. He was late to sit up, a late walker and a late talker. He was in special education classes throughout his school career. He struggled with academic subjects and was far below grade level in all academic subjects. With one exception, he did not have friends.

I also find that the preponderance of the evidence showed that the Appellant is in need of specialized supports in the areas of communication, self-care, home living, community use, health and safety, functional academics and work. Although the Appellant is currently able to function in many of these areas, I find that he is able to do so because of the supports provided by his family. The instrument used by DMR to evaluate the Appellant's need for specialized supports, the ICAP was designed for service planning and for evaluating prioritization for services, not for assessing an individual's adaptive skills for a determination of eligibility. I find that even if the ICAP could be used for such a purpose, a reliable informant such as a family member should have been asked to assess the Appellant's adaptive 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:

August 17, 2005



Marcia A. Hudgins
Hearing Officer

