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May 12, 2008

Sherry Goyette, Social Worker
DSS/Holyoke Area Office
261 High Street
Holyoke, MA 01040

Re: Appeal of _____ Final Decision

Dear Ms. Goyette:

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

The hearing officer 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. Your appeal is therefore approved.

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

Sincerely,

Elin M. Howe
Commissioner

EMH/ecw
cc: Elizabeth Silver, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Cynthia Gagne, Assistant General Counsel
Damien Arthur, Regional Eligibility Manager
Katrin Weir, Psychologist
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of [redacted]

This decision is issued pursuant to MGL Chapter 30A and the regulations promulgated thereto, 115 CMR 6.00 *et seq.* A fair hearing was held Friday, April 11, 2008 at DMR's Springfield Area office, Springfield, MA.

Those present at the hearing:

Sherry Goyette	Guardian/DSS Social Worker
Emeka Unegbu	Program Director, Sullivan & Associates
Sean Shimansky	Behavior Specialist, Sullivan & Associates
Keith Arnett	STEP School
Cynthia Gagne	Attorney for DMR
Katrin Weir	Eligibility Psychologist for DMR

The evidence submitted by DMR includes Exhibits D1 through D38. The Department also provided approximately forty-five minutes of expert testimony. The Appellant introduced two additional evaluations marked as Exhibits 39 and 40, and provided a total of approximately one-half hour of testimony from Ms. Goyette, Mr. Unegbu, and Mr. Shimansky.

ISSUE PRESENTED:

The issue for this hearing is whether the Appellant, [redacted], meets the definition of mental retardation and is thereby eligible for DMR services.

SUMMARY OF THE EVIDENCE

Exhibit D1 - Resume of Katrin Rouse-Weir.
Exhibit D2 - Notice of Receipt of Fair Hearing Request by Department dated August 20, 2007.
Exhibit D3 - Appeal of the denial of eligibility for services dated August 9, 2007. The appeal was timely filed.
Exhibit D4 - Denial of Appellant's request for DMR services dated July 19, 2007, based on the determination that the Appellant did not meet the criteria for mental retardation.
Exhibit D5 - Eligibility Report dated July 18, 2007 and prepared by Dr. Katrin Rouse-Weir in which she reviewed a psychological evaluation of Mr. Cruz as well as his mental health history and adaptive functioning. Dr. Weir concluded that Mr. Cruz did not meet the DMR eligibility criteria.
Exhibit D6 - Letter dated July 9, 2007 from Sherry Goyette to Damien Arthur, DMR Director of Clinical Services attaching a June 15, 2007 Psychological Evaluation for Mr. Cruz administered by Christine Kline, Ph.D., Licensed Psychologist. Mr. Cruz was 19 years 5 months at the time of Dr. Kline's evaluation. Dr. Kline administered the Wechsler Adult Intelligence Scale III - (WAIS) along with the Bender, Early Memories, and the Rorschach tests. On the WAIS, Mr. Cruz attained the following scores:

Full Scale IQ 57, Verbal IQ 61, and Performance IQ 59.

Verbal Subtests	Age-scaled Scores	Performance Subtests	Age-scaled Scores
Vocabulary	4	Picture Arrangement	3
Similarities	7	Picture Completion	4
Information	5	Block Design	3
Comprehension	3	Matrix Reasoning	4
Arithmetic	1	Coding	3
Digit Span	3		

Dr. Kline concluded that these scores indicated [redacted] intelligence fell solidly in the mild mentally retarded range of functioning. She also reported that the results of the Bender appeared commensurate with the WAIS scores.

The results of the Rorschach and Early Memories disclosed "a very disturbed young man" who has "an identity crushing complex of emotional neediness that easily preoccupied him and simultaneously filled him with such agonizing despair and hopelessness about never feeling cared for, that the experience completely disorganized him and fractured his sense of self and his capacity to function or recover in the moment." In addition, Dr. Kline noted that Mr. [redacted] "copes with emotionally challenging and complex situations by assuming an agitated and oppositional stance." She suggested that this behavior actually helped Mr. [redacted] get organized and move through challenging moments.

In reporting on Early Memories, the Appellant talked about the beatings he got from both his mother and her boyfriend Miguel. Dr. Kline had concerns that " . . . Mr. [redacted] has little internal psychological structure to contain his angry eruptive impulses," although she also noted that he never indulged explosive moments and was able to comply with redirection.

Dr. Kline's summary stated: "Given Mr. [redacted] very substantial intellectual and emotional limitations along with his chronic and notable history of aggression, it would be hard imagining a situation where Mr. [redacted] could live independently" . . . "both because of his mild mental retardation and because of his crippled identity development." Dr. Kline's Axis I diagnosis was Chronic Post Traumatic Stress Disorder and Axis II diagnosis was Mild Mental Retardation along with Personality Disorder NOS with morbid and aggressive features.

Exhibit D7 – dated Letter April 25, 2007 from Damien Arthur to Sherry Goyette requesting she submit the results of an IQ test.

Exhibit D8 - Informal Hearing Report dated April 25, 2007 keeping the hearing open for 10 days to obtain IQ testing.

Exhibit D9 - Notice dated March 27, 2007 to Sherry Goyette of the informal hearing scheduled for April 25, 2007.

Exhibit D10 – Letter dated February 12, 2007 from Damien Arthur to Sherry Goyette denying eligibility for DMR services for [redacted]

Exhibit D11 - Eligibility Report dated January 29, 2007 prepared by Dr. Katrin Rouse-Weir concluding Mr. [redacted] does not meet the DMR eligibility criteria.

Exhibit D12 - Application for DMR Eligibility dated July 31, 2006.

Exhibit D13 - Adult Eligibility Determination Information Intake Form dated November 15, 2006

Exhibits D14a and D14b - Adaptive Behavior Assessment System II, Adult Form (ABAS II) dated November 15, 2006 when Mr. [redacted] was 18 years 9 months. Exhibit

D14a is the Adult Information form, and Exhibit 14b is the Adult – Other Rating Summary.

Scores from this report showed a General Adaptive Composite score of 88, which is in the 21st percentile, and other scores as follows: Conceptual score of 82, in the 12th percentile, Social score of 91 in the 27th percentile, and Practical score of 93 in the 32nd percentile.

The ABAS II was prepared by someone named "Chris" who is described in the Rater Information section as a residential staff person, but no last name was given. No one who attended the fair hearing could identify Chris. The tallies in the Raw Scores were incorrect in two instances: In the Community Use section, the raw score was reported as 55 but the actual tally was 52, and in the Social section the raw score was reported as 61 when the correct tally was 58.

Exhibit D15 - Neurologic Reevaluation dated December 1, 2003 done by Anthony H. Jackson, MD when the Appellant was 15 years 10 months. The visit was a one year neurologic follow-up reevaluation because of a seizure disorder. As reported by Dr. Jackson, the Appellant had only had one seizure in the previous year. He was deaf in both ears and had hearing aids. Upon examination Dr. Jackson reported slow speech and evidence of mild mental retardation. His impressions were: 1) Complex partial to secondary generalized major motor seizure disorder, with only a single recurrence, now under good control on a higher dosage of Tegretol; and 2) Post-traumatic encephalopathy with residual mild mental retardation, probable blindness O.D., bilateral deafness and mild distal spastic diparesis, stable.

Exhibit D16 - Letter to Sherry Goyette from Dr. Anthony Jackson dated December 10, 1999 regarding a neurologic assessment done when the Appellant was 11 years 10 months. Based on reports by Ms. Goyette, Dr. Jackson recounted the Appellant's history in which he suffered a head injury when he fell off a cinderblock wall and another cinderblock hit him in the head. The Appellant went into a coma and was in the hospital for months. He also wasn't able to speak normally for some time. Additionally, he was blind in his right eye and deaf in his right ear, both of which Dr. Jackson understood to have occurred subsequent to the head injury.

In discussing the Appellant's cognitive level, Dr. Jackson reported that the Appellant's teacher said the Appellant knew some basic math but could not read or spell, although there had not been any formal neuropsychological or psychological testing. Upon neurologic examination the Appellant had evidence of right-left confusion with trouble writing his first name accurately, reversing the "s." He was unable to do even simple addition or subtraction with single digit numbers. There was no evidence of any definite hyperactivity or inattentiveness. He was able to copy a circle, cross, square and triangle but unable to copy a diamond, putting him at the six to seven year level in terms of visual motor perceptual skills. He was unable to read any simple words, but he was able to complete a simple proteus maze accurately. Although his speech was slow without appropriate grammatical connecting words, it was unclear whether this was related to the language barrier.[1]

Dr. Jackson's Impression was: Status-post traumatic encephalopathy with residual mild to moderate cognitive impairment, probably blindness O.D. and deafness in the right ear. In the Comment section, he acknowledged that the Appellant's cognitive level was difficult to assess, particularly because of a language barrier. The fact that the

[1] The Appellant grew up in Puerto Rico and Spanish was the only language spoken by his family. There was some question when he arrived in Massachusetts as to whether he actually spoke Spanish and which language he was most comfortable with over time while in Massachusetts. See, Exhibits D20 and D23, and the testimony of Sherry Goyette, *infra*.

Appellant was able "to complete a simple proteus maze suggests that he has some fairly good residual visual spatial functions, planning abilities (executive functions) and attentional skills, the latter of which would be against a diagnosis of ADHD. He certainly appears limited academically since he is at a kindergarten/early first grade level."

Exhibit D17 - Education Evaluation dated March 15, 2004 when the Appellant was 16 years 2 months. Christopher Duff, M.Ed administered the Woodcock Johnson III Tests of Achievement Standard Test to test the Appellant's academic achievement and oral language abilities. The Appellant's performance was average on tasks requiring listening ability, and understanding of English-language oral vocabulary, meaningful memory, and expressive language. The Appellant's performance was very limited on tasks requiring receptive oral language. He also scored within the very low range on broad reading, math calculation skills, broad math, written expression, broad written language as follows:

Test	Score	Grade Equivalent	Percentile Rank	Age-Equivalent
Oral Language	67	2.1	1	7-8
Total Achievement	56	2.3	0.2	7-9
Broad Reading	56	2.7	0.2	8-0
Broad Math	41	2.3	<0.1	7-8
Broad Written Lang	39	1.8	<0.1	7-3
Math Calc Skills	48	2.7	<0.1	8-1
Written Expression	47	1.8	<0.1	7-1
Academic Skills	28	2.4	<0.1	7-9
Academic Fluency	58	2.6	0.2	7-10
Academic Apps	43	2.1	<0.1	7-6

Dr. Duff reported that the Appellant's academic skills were negligible, and summarized that when compared to others at his grade level, the Appellant had very low oral language skills and very low broad reading, mathematics, math calculation skills, written language, and written expression.

Exhibit D18 - Safety Plan dated July 13 and 14, 2005.

Exhibit D19 - Safety Plan, similar to Exhibit D18, *supra.*

Exhibit D20 - Behavioral Health Network Crisis Assessment done by Gail Vivian, MA, on October 4, 2005 when the Appellant reported suicidal ideation. He had had five assessments in 2005 by the BHN Crisis Services Holyoke team for "trashing" his specialized foster care home, swearing, failing to follow rules, and making suicidal statements. He was assessed for mood lability and anger management issues and was admitted to the hospital for a week beginning late July 2005. He had also become very upset when he was told he couldn't see his girlfriend based on the mistaken belief that he was a level III sex offender. This exhibit recounts the Appellant's history of sexual abuse by a stepfather. It also reports the cinderblock injury and resulting problems including mild cognitive deficits and vision and hearing loss. The report also explains that the Appellant had been abandoned by his mother and had been in 20-30 foster care placements. When he came from Puerto Rico, the Appellant had no English and his Spanish was unintelligible.

The reporter's clinical impressions were that the Appellant had a significant history of sexual abuse and neglect, and his cognitive limitations left him with few coping skills. The Mental Status exam provided a diagnosis of mild mental retardation.

The Appellant's thinking was concrete and there was no evidence of a thought disorder. The Discharge Diagnoses on Axis I were 313.30 Impulse control disorder, 309.81 PTSD, and 295.70 Schizoaffective Disorder (by history), and on Axis II 317 Mild Retardation.

Exhibit D21 - DSS Area Office Quarterly Reviews dated May 11, 2006 and August 22, 2006. The two progress report summaries state that the Appellant could become verbally aggressive and make inappropriate comments to staff, and that he could misinterpret social cues. He needed redirection and limits. There was also attached a report card from the School Transition and Employment Project (STEP) in which the Appellant received mostly A's and B's in the school years of 2003-04, and 2004-05, and mostly C's in the 2005-06 school year.

Exhibit D22 - another copy of the Appellant's report card.

Exhibit D23 - DSS Assessment Worksheet completed July 7, 1999. It provides that the Appellant was born in Puerto Rico in 1988 and was healthy with no developmental delays. In 1989 the Appellant's father died of a massive coronary, then later that year his mother ([redacted]) became involved with an abusive man (Angel) who was physically violent with her as well as with the Appellant. He was a drug addict, drug dealer and alcoholic and was fatally shot in 1994. Three years later [redacted] got involved with [redacted] another abusive man whom [redacted] left after a couple of years. She went into a domestic violence shelter in Puerto Rico, and from there she moved to a shelter in Florida, then New York, and then Massachusetts. The Appellant was 11 when the family moved to Massachusetts. After moving to Massachusetts [redacted] got back together with [redacted]

While living in Puerto Rico, the Appellant and his siblings were removed from their mother's custody because of deplorable living conditions (rats, roaches, no electricity or running water), and the house was condemned. The children were returned within about a year.

This report details the Appellant's head injury from the cinderblock falling on him, and that he was he was in a coma for three months. He was in a vegetative state when he awoke for about three more months and spent an extra six months in the hospital trying to do physical therapy. His mother had to re-teach him to walk, eat, and talk.

DSS got a care and protection order in May 1999 and the children were placed in foster care. The report indicates that the Appellant ran away from his foster home, went to Prospect House but assaulted staff, used foul language and acted out. He was on the verge of getting a therapist from Gandara.

Exhibit D24 – DSS Service Plan for the period from 3/17/05 to 9/17/05 that summarizes the background of DSS' involvement in the Appellant's life, Outcomes/Indicators for the Appellant to work on, and tasks for DSS. DSS took presumptive custody in May 1999 after police responded to a Hotline call alleging neglect by the Appellant's mother. DSS briefly reunited the family (other than the Appellant who was in residential placement), but eventually the Appellant's mother signed surrenders on all of the children in 2002. Outcomes for the Appellant on this service plan include exhibiting fewer tantrums, angry outbursts, and foul language, and demonstrating a decrease in maladaptive behaviors related to past abuse/neglect.

Exhibit D25 - IEP meeting on March 23, 2005 for the year from 3/23/05 to 3/22/06. The Appellant was 17 years 2 months. The IEP summarizes the Appellant's diagnoses of PTSD, developmental delay, mood disorder, traumatic encephalopathy, seizure disorder, complete loss of hearing in the right ear and significant loss in the left, and complete visual loss in the right eye. It summarizes his scores on the WJIII (see Exhibit D17), his current performance level, and his goals. In English, he was reading fluently at a 2nd grade level and his goal was to demonstrate skills at the 3rd grade level. In math, the

Appellant had basic comprehension of patterns in numbers and basic shapes, and his understanding of measurement was again at the 2nd grade level. His goal was to perform math at the 3rd grade level. The report also discussed vocational goals (to participate in vocational opportunities upon availability) and social skills goals of appropriate interaction with peers and staff.

The IEP also notes the Appellant had a severe receptive and expressive language disorder in addition to a profound hearing loss in his right ear. He had particular weaknesses in vocabulary, auditory processing and maintaining an appropriate volume and fluency during conversational speech.

Exhibits D26, D27, D28 - IEP Progress Reports dated 11/11/05, 8/25/06, and 6/30/06 respectively. With respect to English skills, each progress report said the Appellant was reading fluently at the 2nd grade level with the goal of demonstrating skills at the 3rd grade level, he had math skills at the 2nd grade level with the goal of demonstrating 3rd grade skills, vocational and social skills similar to those noted in the IEP (Exhibit 25, *supra*), and all three reports noted severe receptive and expressive language disorder in addition to the profound hearing loss in the right ear.

The 11/11/05 report (D26) notes that the Appellant was hospitalized for the majority of that quarter (see Exhibit D30, *infra*) and so had made no progress towards his annual goal. The 6/30/06 report (D28) notes that the Appellant was usually either absent from school or sleeping during school. He would become hostile when confronted with this, or with his lack of work. The Appellant had been working as a custodial cleaner at a skating rink four afternoons per week and was reportedly able to follow simple instruction. However, at the writing of this report the Appellant was having issues with the job and did not want to go. He had been given the chance to participate in other vocational activities during the quarter, but he regressed. He would be found sleeping when he should have been working or he walked away from a job to go home or to DSS, or he refused to go to work.

In terms of social progress, all three reports indicate the Appellant made no progress on social skills. On the 6/30/06 report, the Appellant had continued to express his feelings in inappropriate ways, to become angry when told things he didn't want to hear, and to make inappropriate comments.

Exhibit D29 – September 5, 2006 Probate Court Affidavit of Lynda LaFountain, Advanced Practice Registered Nurse from Valley Psychiatric Services, Inc for an Antipsychotic Medication Treatment Plan. Ms. LaFountain reported that the Appellant suffered from S/P post traumatic brain injury, PTSD, intermittent explosive disorder, R/O dysthymia, bipolar II disorder, seizure disorder, and mental retardation, severity unspecified (although Ms. LaFountain had not gotten any IQ test results). She recounted the results of a May 2004 test (Exhibit D35, *infra*) in which the Appellant was diagnosed with severe expressive/receptive language issues. As to competency, Ms. LaFountain concluded that the Appellant did not have the ability to make informed decisions due to his continued limited cognitive abilities and delays, as well as continued poor judgment and potential for violence. He had the potential to become very unstable emotionally, which, without medication, could progress to highly aggressive and violent behavior. Accordingly, she recommended the administration of antipsychotic medications in order to help with potentially aggressive and violent behavior.

Exhibit D30 - Discharge Instructions from Westwood Lodge Hospital based on 10/7/05 - 01/23/06 hospitalization. These instructions list several different discharge medications and DSM diagnoses of PTSD, Bipolar Disorder on Axis I and Mild Mental Retardation on Axis II.

Exhibit D31 - Dare Family Services Medical and Dental Encounter Forms from a) 7/23/05, b) 7/27/05, and c) 7/28/05, along with d) 8/4/05 Discharge Planning Sheet from Caritas Holy Family Hospital. Two of these reports include diagnoses of Mild MR (a and b), one has history of head injury (d), three have diagnoses of PTSD (a,b,d), and one lists diagnoses of psychiatric crisis, with depression and anxiety (c).
Exhibit D32 - Safety Contract
Exhibit D33 - Quarterly Progress Report June-August 2005. Although the fax notation on the side of this report says it is from Dare Springfield, it is not clear that it was written by anyone from Dare. The report has no identifying information. There is no date, no author, no organization, and the word "Draft" is handwritten across the bottom of the front page. The next exhibit, Exhibit D34, is a Progress Report from Dare with a very different format and identifying information, leading this hearing officer to believe Exhibit D33 is not from Dare. Accordingly, this hearing officer gives Exhibit D33 no weight.
Exhibit D34 – Dare Family Services Treatment Plan/Quarterly Progress Report signed by a variety of people between 11/5/04 and 1/30/05. The Report sets forth various long-term goals, target dates, and service/interventions offered to the Appellant. Notable among the 3-6 month objectives, under the category of Maintain Stability in Therapeutic Community-Based Setting: Comply with household rules at least 50% of the time and limit verbal aggression to 5 incidents per week, and under the category of Develop Positive Interpersonal Relationships and Coping Skills: Will not engage in verbal/physical conflicts with peers more than 5 times per week and will develop and maintain age appropriate reciprocal relationships.
Exhibit D35 - Speech and Language Evaluation dated May 2004 administered by Mary Ellen Pope, MS, CCC/SLP of the Children's Therapy Center of the Pioneer Valley when the Appellant was 16.3 years. The examiner administered the Peabody Picture Vocabulary Test-Third Edition (PPVT-III) Form A, which assesses the ability to comprehend single word vocabulary items, the Expressive Vocabulary Test (EVT), which is a norm referenced assessment of expressive vocabulary and word retrieval skills, and the Clinical Evaluation of Language Fundamentals-Third Edition (CELF 3), a formal test that measures language skills and identifies children who lack the basic foundations of form and content that characterize mature language use. The results of the tests were as follows:

Tests	Standard Scores	Percentile	Rating
PPVT-III Form A	63	1st percentile	Extremely low
EVT	54	Below 1st percentile	Extremely low
CELF 3			
Receptive Lang	50	Significantly below	Severely depressed
Expressive Lang	50	average except one	language skills
Total Language	50	supplementary subtest	

CELF 3 Subtests	Standard Scores	Percentile
<u>Receptive Skills</u>		
Concepts & Directions	3	1st percentile
Word Classes	4	2nd percentile

Semantic Relationships	3	1st percentile
Listening to Paragraphs	7	16th percentile
Expressive Skills		
Formulated Sentences	3	1st percentile
Recalling Sentences	3	1st percentile
Sentence Assembly	3	1st percentile
Word Association	6	9th percentile

All the Receptive Language Skills scores were significantly below average with the exception of Listening, which was low average, and the Expressive Language Skills were all significantly below average.

With respect to Articulation/Voice/Fluency, Ms. Pope noted that the Appellant demonstrated a profound hearing loss in his right ear that affected articulation mildly and accounts for slurred speech, but overall his intelligibility was good.

In summary, Ms. Pope concluded that the Appellant demonstrated a severe receptive and expressive language disorder.

Exhibit D36 - The Center for Rehabilitation Audiological Evaluation dated June 12, 2003 was an evaluation of the Appellation's hearing in the left ear (a profound loss in the right ear since early childhood had already been established). Test results showed continued normal hearing through 2000 Hertz with a mild dip at 3000-6000 Hz, returning to within normal limits at 8000 Hz. Speech recognition abilities at normal conversation levels were excellent in the left ear. The Appellant was cleared for a hearing aid.

Exhibit D37 – Third Quarter/Winter Educational Progress Report from the Eagleton School dated January 30, 2002 when the Appellant was 14 years old. The report indicated very limited academic functioning (using First Readers Level 1 which is Pre-K). In math the Appellant could use multi-digits with and without regrouping with accuracy 85% of the time, and in science he demonstrated knowledge of several concepts at the 3rd grade level with 80% accuracy.

Exhibit D38 - Student Progress Report for Reading, Speech and Language, and in the Horticulture Program dated January 20, 2002. The Appellant continued to work on these programs, participated well, and demonstrated improvement.

Exhibit 39 - Report of Adaptive Behavior Testing dated March 24, 2008 when the Appellant was 20 years 2 months. Sean Shimansky of Sullivan and Associates was the Examiner, and Angel Moreno was the Respondent, and they used the Scales of Independent Behavior-Revised (SIB-R). Broad independence is a measure of overall adaptive behavior based on an average of four areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills. The overall results of the Broad Independence score was a standard score of 73, which placed the Appellant in the 4th percentile. The Appellant's scores were as follows:

Cluster	Standard Score	Percentile Rank
Broad Independence	73	4
Motor Skills	85	16
Social/Communication	79	8
Personal Living	87	19
Community Living	57	0.2

The Appellant's score on Social Communication, which measures the Appellant's interactions with others in various social settings, placed the Appellant at more than 1.5 standard deviations below the mean. The score of 57 in Community Living, which measures the skills the Appellant needs to successfully use community resources and perform in an employment setting, is more than 2 standard deviations below the mean. The Appellant's overall score of 73 in Broad Independence is also more than 1.5 standard deviations below the mean.

In breaking down the tasks within personal living skills, the examiner noted the Appellant had limited skills in eating and meal preparation, dressing, personal self-care, and age-appropriate toileting and domestic skills. Within the area of community living, the Appellant had limited punctuality, money and value, work, and home and community orientation skills. In social interaction and communication skills, the Appellant had limited language comprehension and expression skill, and limited- to age-appropriate social interaction skills. Gross motor skills were limited to age-appropriate, and fine motor skills were limited.

The examiner also looked at the Maladaptive Indexes and reported a general maladaptive index of –21, which is considered moderately serious. In the summary, the examiner notes that the Appellant demonstrated moderately serious problem behaviors, marginally serious asocial maladaptive behaviors and marginally serious externalized maladaptive behaviors.

Exhibit 40 - Eagleton School Educational Progress Report dated April 18, 2001 prepared by Theresa Lux, a teacher at the school, when the Appellant was 13 years 3 months. In this report, the Appellant was functioning at the Kindergarten level in language, math, science, and social studies, and had difficulty in independent living skills and social/emotional skills.

TESTIMONY

Sherry Goyette, social worker for DSS, which is the Appellant's guardian, testified that she has known the Appellant since he was 12 years old when he came to Massachusetts from Puerto Rico. She testified the Appellant has a stocky build, likes to dress like a gangster and has a strong personality. She stated that he has suffered greatly as his father died when he was young and his mother turned him over to DSS and terminated her parental rights when the Appellant was 13, so he's grown up as a ward of the state.

Ms. Goyette testified that when she met the Appellant, he was virtually non-verbal and would rock in his chair muttering "'amburger." Since then he has learned to speak English through many structured residential programs and can now minimally speak some Spanish. Because he cannot live on his own, he currently resides with Sullivan and Associates, an adult-based program for people with disabilities. This placement is sponsored by DSS. The program provides 24 hour/day staffing. He goes to a specialized school to meet his needs and to learn basic living skills. He is unable to budget money, can't make change, and doesn't know how to purchase things. He knows what a stove is, but he doesn't know how to cook. He would turn the stove to 250° but thinks the food is done when it smells done. He likes to smoke and knows how much cigarettes cost, but has no grasp of where the money comes from. He loves to clean, and is very neat and tidy. He gets paid for cleaning some part of the school, which is part of his vocational training, and he takes pride in his work.

Ms. Goyette continued testifying stating that the Appellant has very minimal social skills with peers and adults. He doesn't understand boundaries or social relationships and how they typically work. As an example, the minute he has a girlfriend he believes they are engaged.

Ms. Goyette testified that the Adaptive Behavior report (Exhibit 39) is a good summary of the Appellant's skills. She stated that the Appellant couldn't survive on his own and needs services to help with supportive living. He would not be able to maintain an apartment or a job to support himself. DSS's goal has been to obtain services with an adult care agency.

On cross-examination, Attorney Gagne asked about the Appellant's place and language of origin. Ms. Goyette responded that Appellant came with his mother from Puerto Rico and when they met, the Appellant's mother only spoke Spanish but the Appellant couldn't speak much at all -- in either Spanish or English. Ms. Goyette tried to communicate with him in both languages (she speaks Spanish) but he was mostly non-verbal. She stated that it was difficult to ascertain from the Appellant's own speech what his preferred language was, but since his siblings all spoke Spanish only Ms. Goyette assumed Spanish was the language of the Appellant's birth.

Continuing with cross-examination, Attorney Gagne questioned Ms. Goyette about the Appellant's hearing and sight losses. Ms. Goyette agreed that the Appellant was deaf in the right ear and blind in the right eye. In addition, she agreed that the hearing on his left side was very impaired, but she was not sure when that was diagnosed. He had been prescribed hearing aids. Ms. Goyette agreed that the Speech and Language Evaluation report from May 2004 (Exhibit D35) only noted hearing loss in the right ear but not the left. With respect to Audiological Evaluation from June 2003 (Exh D36), Ms. Goyette agreed that report noted there was continued monitoring of hearing loss in the left ear. Ms. Goyette explained that while the Appellant wears hearing aids in both ears, the hearing aid takes sounds from the right side and transmits them to his left ear so as to amplify the sound for his left ear.

Ms. Goyette acknowledged on cross-examination that there were many individuals who were unable to survive on their own but did not meet the definition of mental retardation. She testified that DSS applied for services for the Appellant through the Department of Mental Health but DMH denied services because of the Appellant's IQ scores. Ms. Goyette testified that she did not appeal to a fair hearing because years ago a supervisor told her that DMR was the most appropriate adult service agency to provide services. More recently, she stated that she has been advised to carry the DMR case through to fair hearing because her agency felt that DMR is the appropriate agency to provide services to the Appellant.

After cross-examination, Attorney Gagne objected to allowing Mr. Emeka Unegbu, Program Director at Sullivan & Associates, to testify. Inasmuch as the Appellant had no attorney and the individuals present had relevant information to this hearing, this hearing officer allowed Mr. Unegbu the opportunity to present testimony.

Mr. Unegbu testified that Sullivan and Associates provides 24 hour/day residential services to the Appellant. He said the Appellant needs constant support and structure in his life. He has three hours of waiver time per week by himself, during which he goes

out into the community for usually no more than an hour. If it were more than that, a staff person would need to be with him. At home, the Appellant has some living skills and can do a number of things independently. He enjoys cleaning and keeps his room spotless. He also likes dressing himself, but he does require minimal assistance and supervision to complete those skills. He can shower himself, but the staff has to check that he's completed the task (like making sure he has rinsed his shampoo). Mr. Unegbu testified that the Appellant has problems with money management and can't budget his money or pay his bills independently. He has a bank account and can deposit money he gets from the STEP program. He likes to smoke a lot and buys cigarettes with his money. He is on psychiatric medications, but doesn't know which medications to take when and doesn't know the side effects of his medications. He has very limited social skills in the community and cannot interact with strangers. He has some problems with comprehension skills – if you tell him one thing he thinks you told him something else. Usually when he has waiver time he goes to places he's been before, especially a convenience store to buy cigarettes or the mall to talk to his girlfriend. He can do a lot of things in the house but needs a lot of supervision, support, and structure

Sean Shimansky, Behavior Specialist at Sullivan & Associates, testified to the Appellant's behavior and his interactions with other people. He testified that recently, after his girlfriend's father told the Appellant that he couldn't see her any more, he became very aggressive and broke a few windows in the house. Mr. Shimansky said the Appellant intimidates others when he doesn't get what he wants and doesn't understand appropriate boundaries with other people. He's had limitations around the house with respect to cooking and dealing with housemates, and if staff isn't around he can get into fights.

In response to questions from the hearing officer, the parties indicated there were no IQ tests from a time prior to the Appellant turned 18 years old.

Attorney Gagne's direct examination of Katrin Rouse Weir established that Dr. Weir was a licensed psychologist for the Commonwealth as well as a forensic psychologist. Dr. Weir has a Bachelor's degree in psychology from the University of Massachusetts in Amherst and a Master's and Doctorate from American International College in Springfield. She is employed by DMR as an eligibility and intake psychologist to review applications by individuals and families with regard to the regulatory requirements for services from the Department. Dr. Weir has had experience administering IQ tests in the past through outpatient clinics, and has conducted psychological evaluations for about 1500 children and adults. She also has experience interpreting IQ test results. Dr. Weir also had experience working with individuals with mental retardation at the beginning of her career when she worked for nine years as a staff psychologist at Munson Developmental Center, and then at UMass Medical School on a forensic unit. As the senior forensic psychologist on the unit at UMass Medical School, Dr. Weir also had experience working with individuals with mental illness and did psychological and forensic evaluations with this population. During that time Dr. Weir continued working on her private practice, which began in about 1989, and also continued to conduct evaluations with individuals outside of hospitals regarding mental health issues. Dr. Weir continued to consult with DMH and also provided services to Providence Hospital for evaluations for involuntary hospitalizations. Dr. Weir has had experience working with juveniles as well as adults. I find that Dr. Weir is qualified as an expert witness in the field of Mental Retardation.

Dr. Weir explained in detail both the clinical diagnosis and then the regulatory criteria for mental retardation. Dr. Weir testified that generally there was no difference between the diagnostic and regulatory criteria for mental retardation.

Dr. Weir testified that she reviewed the Appellant's case and made an eligibility determination based on the information she had at the time, which did not include IQ or adaptive functioning tests. Dr. Weir testified to the record as follows: The Appellant was raised in Puerto Rico until the age 11. At the age of three he suffered a head injury when a cinderblock fell on his head and he was in a coma for three months. His father died when the Appellant was two years old. Then his mother became involved with first one and then another man, both of whom were abusive to everyone in the family. Eventually the Appellant's mother was sent first to Florida, then New York, and then finally to Massachusetts for protection. DSS became involved with the family in 1999, and then in 2002 the Appellant's mother signed her rights over to DSS. Dr. Weir reviewed other records regarding educational and speech and language issues. The Appellant had been described as having had a severe expressive and receptive language disorder which was complicated by his visual and hearing limitations. Also, Dr. Weir discussed a neurological consult necessitated because the Appellant was essentially non-verbal. He had grown up in a Spanish speaking house so his exposure was to Spanish, which complicated some of the diagnostic findings initially.

Dr. Weir testified the records indicated that when the Appellant came to Massachusetts he attended the Eagleton School where he settled in and was making good progress. But beginning in May and then in July and September 2005 there was a series of incidents that required intervention from the Behavioral Health Network crisis program in Holyoke and also necessitated two psychiatric hospitalizations. Someone had incorrectly labeled the Appellant as a sex offender, but despite the fact this wasn't true he wasn't allowed to continue seeing his girlfriend, which led to emotional problems and the psychiatric hospitalizations. In addition, he had been living in foster care and initially appeared to settle in well but after a couple of months his foster mother accused the Appellant of going into her room or stealing money. She later recanted but got a restraining order. Dr. Weir said it seemed clear the Appellant did not engage in any such behavior, but the accusations contributed to his destabilization. After being hospitalized, the Appellant was diagnosed with PTSD and Bipolar Disorder. He had trouble sleeping and was withdrawn, and his progress slowed. Dr. Weir also testified that the Appellant had always been reviewed in English, so it was hard to assess his cognitive barriers (see Exhibits D16, D20, and D25).

Dr. Weir stated that at the informal conference DMR agreed to keep the record open for DSS to get a psychological evaluation done. Dr. Weir reviewed the report even though it was conducted after the Appellant turned 18 (Exhibit D6), but it didn't change her opinion regarding eligibility because it didn't include any information about adaptive functioning. With respect to the IQ testing, Dr. Weir acknowledged that at first blush looked like the Appellant would meet DMR eligibility criteria because his IQ was below 70, but Dr. Weir also looked at other portions of the report. She testified that on the Rorschach, Dr. Kline had to go through it more than once to get a valid response. Dr. Kline discussed the Appellant's behavioral issues including agitated and oppositional behavior in emotionally challenging situations. Dr. Weir said this information was consistent with other documents she reviewed. The test was administered in English,

which could limit the reliability of the scores or the weight to be given the scores since the test was presented verbally and normed based on English speaking people. In addition, Dr. Weir testified that the Appellant's psychiatric illness could have affected his attention, concentration and other skills, which in turn could affect a psychologist's ability to get a good picture of an individual's real abilities.

Dr. Weir discussed the ABAS scores (Exh D 14a, and 14b) and said that the overall score of 88 was less than one SD below the mean. She said that individuals who tend to be appropriately diagnosed as mentally retarded have flatter profiles intellectually as well as adaptively, but the Appellant's pattern over the sub-domains were consistently not 2 standard deviations below the mean.

After reviewing the SIB-R adaptive test submitted by DSS at the hearing (Exhibit 39), Dr. Weir stated that her opinion regarding eligibility didn't change because the Appellant was 20 when the test was administered, and in addition it was not inconsistent with his performance on the ABAS. His standard score on the SIB-R was 71-75, which was not quite the two standard deviations below the mean that the regulations require.

Dr. Weir testified that the Appellant experiences limitations in his functioning. There are many factors from his history that contribute to these functional limitations including neglect, abuse, displacement, abandonment, the head injury at age 3, the change in culture, and his diagnosed and treated psychiatric disorder. Dr. Weir testified that before the age of 18, the Appellant demonstrated survival skills resulting in near average scoring in adaptive functioning. In addition, the expressive and receptive language issues plus his being bilingual would impact his performance on tests. Dr. Weir testified that there was nothing heard at the hearing that changed her mind, and she would not diagnose the Appellant as mentally retarded.

On cross-examination by Ms. Goyette, Dr. Weir said Bob Collins, the DMR eligibility specialist, scored the ABAS. Bob didn't make any notes regarding how long Chris knew or worked with the Appellant.

Over Attorney Gagne's objection, the hearing officer allowed Ms. Goyette to ask questions of Mr. Unegbu and Mr. Shimansky. Mr. Unegbu testified he did not know how long Chris had worked with the Appellant at the house because there was no last name on the report. He said there were several people named Chris who had come and gone at the house where the Appellant lives but there was no Chris currently working at the house at the time of the hearing.

Mr. Shimansky testified that Angel [Moreno] administered the Adaptive Behavior Testing to the Appellant (Exh 39) and that Angel was a staff member of the program who had worked with the Appellant for a long time. According to Mr. Unegbu, Angel starting working with the Appellant since just after the Appellant's 18th birthday.

In response to follow-up questions from Attorney Gagne about the ABAS II, Dr. Weir testified that she considered the adaptive scores as relayed in Exhibit D14b, not Exhibit D14a, the latter being the part of the report that included the name Chris.

In response to this hearing officer's question regarding the impact of a psychological illness on IQ scores, Dr. Weir testified that if an individual with psychiatric issues is in an

acute stage, their symptoms can impair their ability to accurately respond to or understand directions given to them. She said there is an indication in prior assessments when the Appellant was being reviewed for speech and language that he had difficulty following directions, and that was prior to having his acute psychiatric episode. Thus, Dr. Weir thought behavioral problems meant a person couldn't participate effectively with regard to the testing environment.

In a follow up question about whether there was an indication these factor were operating in the Appellant's case, Dr. Weir recounted Dr. Kline's report that the Bender Gestalt challenged the Appellant's frustration tolerance, which according to Dr. Weir could affect an individual's participation. Also, the Appellant had to be prompted for the Rorschach to provide enough information. With respect to the WAIS, speaking to flattened profiles for individuals with MR, the Appellant didn't demonstrate a significant difference between his verbal and non-verbal abilities in terms of his subtest scores (61 Verbal, 59 Performance, not a significant difference statistically). He had more of a flat profile on performance subtests (mostly 3's and 4's) and a less flat profile on verbal abilities. The Appellant's highest score was a 7 on the Similarities subtest, which taps into an individual's abstract reasoning abilities, which is a higher level of cognitive function. The Appellant scored very low on the Arithmetic subtest which involves some arithmetic ability but also has to do with attention and concentration, which would be consistent with his performance overall. Dr. Weir said that while Dr. Kline concluded the Appellant's intelligence was in the mild mental retardation range of functioning, she didn't complete an adaptive standardized instrument of his adaptive functioning, which is required to come up with a definition of mental retardation.

Dr. Weir testified that generally an individual's psychiatric disorder will result in a reduction of an individual's cognitive measure (although there are some disorders such as OCD where that will be different), but the Appellant's case his highest score was on abstract reasoning, which would suggest some solid abstract reasoning ability. Dr. Weir couldn't say what the more accurate score would be because there was nothing to compare it to. She stated it was clear from the records that the Appellant demonstrated deficits in areas that are related to the measurement of intellectual functioning, for example, language, which has an affect on his communication abilities. The Appellant suffered a head injury so there are some cognitive limitations. But in Dr. Weir's opinion, these limitations were not related to a disorder that occurred prior to age of 18 that affects the Appellant's adaptive abilities to the degree required to meet the regulatory requirements for DMR services.

At the conclusion of Dr. Weir's testimony, Ms Goyette submitted a progress report from the Appellant's school (Exhibit 40), which reported the Appellant was working at second grade level.

The parties made closing arguments.

FINDINGS AND CONCLUSION

The Law

M.G.L c. 123B defines a mentally retarded person as follows:

[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.

A mentally retarded person may be considered mentally ill provided that no mentally retarded person shall be considered mentally ill solely by virtue of his mental retardation.

115 CMR 6.04 sets forth the general eligibility requirements for DMR services. In relevant part these provide:

(1) Persons who are 18 years of age or older are eligible for supports provided, purchased, or arranged by the Department if the person:

(a) is domiciled in the Commonwealth; and

(b) is a person with mental retardation as defined in 115 CMR 2.01. . .

115 CMR 2.01 provides the following definitions:

Mental Retardation

Mental Retardation means significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. A person with mental retardation may be considered to be mentally ill as defined in 104 CMR (Department of Mental Health), provided that no person with mental retardation shall be considered to be mentally ill solely by reason of his or her mental retardation.

Significantly Sub-average Intellectual Functioning

Significantly Sub-average Intellectual Functioning means an intelligence test score that is indicated by a score of 70 or below as determined from the findings of assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners.

Significant Limitations in Adaptive Functioning

An overall composite adaptive functioning limitation that is two standard deviations below the mean or adaptive functioning limitations in two out of three domains at 1.5 standard deviations below the mean of the appropriate norming sample determined from the findings of assessment using a comprehensive, standardized measure of adaptive behavior, interpreted by a qualified practitioner. The domains of adaptive functioning that are assessed shall be:

(a) areas of independent living/practical skills;
(b) cognitive, communication and academic/conceptual skills; and
(c) social competence/social skills.

Procedural Background

The Appellant filed an application for services on July 31, 2006 (Exh D12). DMR denied his application by letter dated February 12, 2007 (Exh D10), and an informal conference was held on April 25, 2007 (Exh D8). On July 19, 2007 DMR again denied the application (Exh D4) and the Appellant timely appealed. As the Appellant filed his application subsequent to June 2006, this case falls within the current DMR regulations.

Appellant's Early Years

The Appellant was born in Puerto Rico on January 16, 1988. He had a healthy birth and no developmental delays. At the age of 3, the Appellant suffered a severe head injury when he fell off a cinderblock wall and another cinderblock hit him in the head. As a result of this injury, he was in a coma and hospitalized for months. When he awoke he was in a vegetative state for about three more months. As a result of this injury, the Appellant was blind in his right eye and deaf in his right ear, and was unable to speak normally for some time. His mother had to teach him to eat, walk, and talk again. (Exh D23)

The Appellant's father died in 1989 (Exh D23) and subsequently his mother became involved with other men who were physically violent both to her and her children, including the Appellant. There are allegations the Appellant also was a victim of sexual abuse (Exh D20). At one point the children were taken from her because of deplorable living conditions. In 1999 when the Appellant was 11 years old, he came to Massachusetts with his mother and siblings after his mother left an abusive partner and went into shelter. DSS took custody of the Appellant and his siblings in 1999 after receiving an allegation of neglect against his mother. When DSS took custody, the Appellant and his siblings smelled and had head lice. (Exh D23) The Appellant's mother signed surrenders on all the children in 2002. (Exh D24)

As a result of his traumatic childhood, the Appellant suffers from "very substantial intellectual and emotional limitations" and "chronic and notable history of aggression." (D6).

Test Results

There are no IQ or Adaptive Functioning tests in the record that were administered prior to the Appellant turning 18. Accordingly, I have reviewed the tests and reports in the record done prior to the Appellant turning 18 to glean the Appellant's cognitive abilities and adaptive functioning prior to age 18. I have also reviewed the testing done after the Appellant turned 18 along with all the other reports and documents in the record plus the extensive testimony offered at the hearing and compared these results to the reports from the Appellant's earlier years.

Testing Done Before the Appellant was 18 Years Old

The earliest report in the record is a December 10, 1999 Neurological Consultation done by Anthony Jackson, MD, when the Appellant was 11 years 10 months. (Exh D16) Dr. Jackson's impression was status-post traumatic encephalopathy with residual mild to moderate cognitive impairment (along with blindness in the right eye and deafness in the

right ear). However, Dr. Jackson acknowledged difficulty in assessing the Appellant's cognitive level because of the language barrier, and noted some other of the Appellant's strengths. But he commented that the Appellant appeared limited academically since he was at a kindergarten/early first grade level.

On December 1, 2003, Dr. Jackson re-assessed the Appellant when he was 15 years 10 months (Exh D15) and reported the same diagnoses as in the 1999 assessment including slow speech and evidence of mild mental retardation. The Appellant had reportedly lost the hearing in his left ear since the 1999 evaluation.

The report from the WJ-III, administered when the Appellant was 16 years 2 months, concluded that the Appellant's academic skills were negligible. When compared to others at his grade level, the Appellant had very low oral language skills and very low broad reading, mathematics, math calculation skills, written language, and written expression. (Exh D17).

Test results from the Speech and Language Evaluation done when the Appellant was 16.3 years concluded that the Appellant demonstrated a severe receptive and expressive language disorder compared to his same age peers. (Exh D35).

Finally, the BHN Crisis Assessment (Exh D20) done when the Appellant was 17 years 8.5 months provided a discharge diagnosis of mild retardation. (Exh D20).

School records from the time prior to the Appellant turning 18 indicate that at the age of 13 years 3 months, the Appellant was functioning at the kindergarten level in language, math, science, and social studies and had difficulty with independent living skills and social/emotional skills. (Exh 40). At age 14, the Appellant had very limited academic functioning. (Exh D37). When the Appellant was 17 years 2 months, his IEP reported that he was performing at the second grade level in both reading English and math. (Exh D25). The report noted that the Appellant had a severe receptive and expressive language disorder in addition to a profound hearing loss in his right ear. IEP progress reports from when the Appellant was 17 years 10 months (Exh D26) again indicated English and math skills at the 2nd grade level and severe receptive and expressive language.

Testing Done After the Appellant Turned 18 Years Old

The only IQ test in the record is a June 15, 2007 Psychological Evaluation (Exh D6) when the Appellant was 19 years 5 months. This is the report that DMR agreed to consider and for which it kept open the Informal Conference process. (Exh D8). Dr. Kline reported the scores on the WAIS III were Full Scale IQ 57, Verbal IQ 61, and Performance IQ 59. The subtest scores ranged on the verbal subtests from 1 in Arithmetic to 7 in Similarities, and were all 3's and 4's on the Performance Subtests. Dr. Kline concluded that these scores indicated Mr. [redacted] ntelligence fell solidly in the mild mentally retarded range of functioning. The results of the Bender appeared commensurate with the WAIS scores. Dr. Kline provided an Axis II diagnosis of Mild Mental Retardation.

The Adaptive Behavior Assessment System II, Adult Form (ABAS II) dated November 15, 2006, was administered when the Appellant was 18 years 9 months. (Exh D14a and

14b). The General Adaptive Composite score was 88, which is in the 21st percentile, and the other scores were Conceptual 82, in the 12th percentile, Social 91, in the 27th percentile, and Practical 93, in the 32nd percentile.

There are a number of problems with this test. Ms. Goyette credibly testified that she did not know who [redacted] was, that there was no [redacted] who worked with the Appellant for any length of time, and because of what she viewed as inaccurate ratings, the Chris who completed the report could not have known the Appellant well. As the Appellant's guardian and someone who had known the Appellant since he was 12, Ms. Goyette was able to supply specific examples of the Appellant's behavior that were different from that reported on the ABAS II (for example, Ms. Goyette testified that the Appellant knows what a stove is but doesn't know how to cook. On the ABAS II , in response to "cooks simple foods on a stove," Chris rated the Appellant "always." Another example came from Emeka Unegbu, Program Director at Sullivan & Associates, who testified that the Appellant could shower himself but the staff needs to check that he rinsed out his shampoo. This stands in contrast to Chris' rating on the ABAS II that the Appellant always washes his own hair.

Because of the infirmities in this report (unknown rater, incorrect tallies, credible contradiction of the assessment of the Appellant's behavior), I accord it less weight than the Report of Adaptive Behavior Testing (SIB-R) Exhibit 39, *infra*. While Dr. Weir testified that she considered the adaptive scores in Exhibit D14b, not Exhibit D14a, the scores in D14b are taken from the answers provided in D14a and, obviously, dependent on the rater.

Both the ABAS II and the SIB-R were administered after the Appellant turned 18, although the ABAS II was administered much closer to the Appellant's 18th birthday than the SIB-R. However, because of the above noted limitations and problems with the ABAS, in particular determining the identity of the rater, I find the SIB-R the more credible of the two adaptive functioning reports and the more realistic in terms of the Appellant's adaptive functioning. The SIB-R (Exh 39) was administered by a staff member who had known and worked with the Appellant for more than two years. Ms Goyette also credibly testified to her knowledge of the Appellant and the fact that the scores on the SIB-R comported with her knowledge of the Appellant's abilities. While, as Dr. Weir testified, the results were similar in some respects to the ABAS II, the Appellant's scores in Broad Independence, Social Communication, and Community Living were lower than those on the ABAS II, and fall 1.5 to 2 standard deviations below the mean. These areas reflect the domains of independent living/practical skills, communication skills and social competence/social skills.

I find the SIB-R consistent with earlier testing and school records as described above, as well as with the credible testimony of Ms. Goyette, a DSS social worker who has known the Appellant since he was 12 years old.

The other reports from the period after the Appellant turned 18 include the Probate Court Affidavit regarding from September 5, 2006 when the Appellant was 18 years 7.5 months (Exh D29), which was predicated, at least in part, on the Appellant's incompetence to make informed decisions because of his limited cognitive abilities and delays. There were also two IEP progress reports, one from when the Appellant was 18 years 5.5 months, and the other from when he was 18 years 7 months (Exhs D27 and D28). These

reports indicated English and math skills at the 2nd grade level along with a severe receptive and expressive language disorder.

Mental Health Issues

It is clear that the Appellant has had very significant emotional and psychiatric issues, dating back to early childhood. He experienced a traumatic upbringing, which included neglect, physical and sexual abuse, displacement, the death of his father, his abandonment by his mother, a change in culture, and numerous foster care placements.

In the various reports in the record, he has been diagnosed with PTSD and Personality Disorder NOS with morbid and aggressive features (Exh D6); Impulse Control Disorder, PTSD, and Schizoaffective Disorder (by history) (Exh D20); S/P Post Traumatic Brain Injury, PTSD, Intermittent Explosive Disorder, R/O Dysthymia, Bipolar II Disorder (D29); PTSD and Bipolar Disorder (Exh D30); and PTSD; and Psychiatric Crisis, Depression and Anxiety (Exh D31). The March 2005 IEP noted psychological diagnoses of PTSD, developmental delay, mood disorder, and traumatic encephalopathy. (Exh D25).

Dr. Kline probably best summarized the Appellant's mental status when she reported the results of the Rorschach and Early Memories tests that disclosed "a very disturbed young man" who has "an identity crushing complex of emotional neediness that easily preoccupied him and simultaneously filled him with such agonizing despair and hopelessness about never feeling cared for, that the experience completely disorganized him and fractured his sense of self and his capacity to function or recover in the moment." She reported on the Appellant's aggressive nature and the concern he might not be able to control himself. In her summary, Dr. Kline stated: "Given Mr. [redacted] very substantial intellectual and emotional limitations along with his chronic and notable history of aggression, it would be hard imagining a situation where Mr. [redacted] could live independently" . . . "both because of his mild mental retardation and because of his crippled identity development." (Exh D6).

Other reports discuss the Appellant's significant emotional issues. The DSS service plan discussed getting control of the Appellant's tantrums, angry outbursts, foul language, and maladaptive behaviors related to past abuse/neglect. (Exh D24). The IEP Progress Reports similarly mention that the Appellant had continued to express his feelings in inappropriate ways, to become angry when told things he didn't want to hear, and to make inappropriate comments. (Exhs D26-28) The Probate Court Affidavit from Lynda LaFountain states that the Appellant's potential to become very unstable emotionally could progress to highly aggressive and violent behavior. (Exh D29). The Appellant was hospitalized twice because of his mental health problems (Exhs D30 and D31). On the SIB-R, the examiner noted that the Appellant demonstrated moderately serious problem behaviors, marginally serious asocial maladaptive behaviors and marginally serious externalized maladaptive behaviors. (Exh 39).

Decision

The Appellant's IQ scores fall squarely within DMR's definition of Significantly Sub-average Intellectual Functioning. Dr. Weir credibly testified that the Appellant's significant behavioral issues and the language barrier could have affected his scores on

the WAIS III so that they appear to be lower than the Appellant's actual capabilities, but she stopped short of testifying that these problems were absolutely responsible for the low scores.

It is difficult if not impossible to separate out the Appellant's emotional and psychiatric issues from his cognitive deficits. It is equally challenging to decipher what impact the Appellant's mental health and behavioral issues had on his low IQ and adaptive functioning scores. However, despite these uncertainties, inasmuch as the IQ scores in this case are consistent with the long line of tests, evaluations, and assessments in the record from the time prior to when the Appellant turned 18, I find the WAIS III scores to be an accurate reflection of the Appellant's cognitive abilities. School reports in the record began when the Appellant was 13 years 3 months and run through the age of 18 years 7 months. They reflect consistent academic performance in the kindergarten to second grade level in almost all subjects, and reflect the views of professionals that the Appellant is mildly mentally retarded. The results of Dr. Jackson's neurological assessments and the WJ III also reflect extremely limited academic skills. Accordingly, I find that the Appellant meets the Department's definition of significantly sub-average intellectual functioning.

With respect to the Appellant's adaptive limitations, as stated above, I find the SIB-R report more credible and reliable than the ABAS II. The SIB-R was rated by someone who knew and worked with the Appellant for more than two years, as opposed to the unknown individual who was the rater on the ABAS II. While the low overall score on Broad Independence does not meet the first prong of the DMR definition of significant limitation in adaptive functioning (73 is not quite two standard deviations below the mean), the scores in Social Interaction/Communication and Community Living comprise two domains (social competence/social skills, independent living/practical skills) that are more than 1.5 standard deviations below the mean. These scores meet the second prong of the definition of significant limitation in adaptive functioning.

The Appellant's head injury is the most critical incident in his formative years. Prior to that time he was normal and without developmental delays. While it cannot be said with absolute certainty, it appears that the Appellant's problems, including his cognitive limitations and many behavioral issues, and loss of vision and hearing, stem from this tragic injury. One can speculate about which emotional or psychiatric issues would be present as a result of the Appellant's extraordinarily traumatic childhood, but I believe the cognitive limitations that resulted from his head injury either exacerbated the Appellant's emotional problems or made him less equipped to deal with them.

Even Dr. Weir acknowledged that the Appellant had cognitive limitations as a result of his head injury (although in her opinion these limitations were not related to a disorder that occurred prior to age of 18 that affected the Appellant's adaptive abilities to the degree required to meet the regulatory requirements for DMR services.) But when one considers the Appellant's age when he sustained the head injury and/or his age range during his traumatic childhood, there can be no dispute that the Appellant's disorders began long before he turned 18. Accordingly, the only question is whether his adaptive limitations exist concurrently with and related to the Appellant's significantly sub-average intellectual functioning. I find that they do.

Based on a careful review of all the tests, reports, assessments, evaluations and testimony in this case, I conclude that the Appellant has shown by a preponderance of the evidence that he meets the DMR eligibility criteria and that he is eligible for DMR services.

APPEAL RIGHTS

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L c. 30A and 115 CMR 6.34(5).

Date: May 6, 2008

Elizabeth A. Silver
Hearing Officer