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Dr. Deborah Spitalnik
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Dear Deborah:

Thank you for your inquiry about the implementation of the definition of mental retardation in the context of capital cases. As you know, several states have had these statutes for more than a decade, so we have some experience to apply in states enacting laws for the first time.

Most of the states that passed mental retardation statutes between 1989 and 2001 used the 1983 version of the American Association on Mental Retardation (AAMR) definition. A few states chose to codify the 1992 version of that same definition. In the Legislative Guide on this issue that I prepared at the request of state chapters of The Arc, I discussed those definitions, but recommended that states give serious consideration to adopting the 2002 version of AAMR's definition. As a longtime member of the AAMR's Committee on Terminology and Classification, you are aware that there is not substantial difference among these three versions in terms of the number or identity of individuals who are included within the diagnosis. But after studying the matter, I have concluded that the 2002 version is more easily adapted to the needs of the criminal justice system. And since this version is already becoming the diagnostic standard within the mental retardation field, it will be familiar to the New Jersey clinicians who will be asked to perform evaluations of defendants for the criminal courts.

The issue has also arisen whether it is desirable to include an IQ score in the text of the legislation, either as part of the definition or in the form of an evidentiary presumption. Although I was involved in the drafting of several statutes that did include such a score, experience in those states has persuaded me that this is a bad idea. Although on the surface, it would appear that such a score would help the courts by establishing a benchmark for the deficit in measured intelligence, in practice, the statutory score has proven to be a source of difficulty. This is particularly true when a defendant has scores on different tests over his lifespan that are generally consistent, but has one score that diverges from that pattern, either upward to downward. Often it turns out that the divergent score is less reliable because of the conditions under which it was administered, but the existence of such a score sometimes invites "game playing" by either defense counsel or prosecutors, and thus obscures the reality of whether a defendant actually has, or does not have, mental retardation. As you know, there is overwhelming

consensus among clinicians as to the level of intellectual impairment required for a diagnosis of mental retardation, and therefore a statutory score is unnecessary. Since it has produced difficulties in other states, I would recommend that the statutory language not include a particular score.

If there is any other assistance that I can provide to you, or to members of the Legislature, please do not hesitate to call.

Best wishes,

James W. Ellis
Regents Professor of Law