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

Deval L. Patrick
Governor

Timothy P. Murray
Lieutenant Governor

JudyAnn Bigby, M.D.
Secretary

Elin M. Howe
Commissioner

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

February 1, 2008

Ms. Amy Berube, Social Worker
DSS/Fall River Area Office
1561 North Main Street
Fall River, MA 02720

Re: Appeal of [redacted] Final Decision

Dear Ms. Berube:

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

The hearing officer's recommended decision made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DMR regulations and therefore adopt its findings of fact, conclusions of law and reasoning as my own. Your appeal is therefore denied.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with 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

Elin M. Howe
Commissioner

EMH/ecw
cc: Marcia Hudgins, Hearing Officer
Richard O'Meara, Regional Director
Marianne Meacham, General Counsel
Patrick Murphy, Assistant General Counsel
Frederick Johnson, Psychologist
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of [redacted]

This decision is issued pursuant to the regulations of the Department of Mental Retardation (DMR) (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on October 22, 2007, at DMR's Southeast Regional Office in Carver, Massachusetts.

Those present for the proceedings were:

[redacted]	Appellant
Donald Schenck, LMHC	Clinician, Swansea Woods
Amy Berube	Social Worker, DSS
Tania Vitorino	Residential Specialist, JRI RRC
Frederick V. Johnson, Psy.D.	DMR Psychologist
Patrick Murphy	Attorney for DMR

The evidence consists of documents submitted by DMR numbered D1-6 and approximately one and one half hours of oral testimony. Other documents were submitted by the Appellant to the Department and were referred to by the parties but these were not offered in evidence and so I did not consider them when making my decision. The Appellant presented no expert testimony.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DMR supports by reason of mental retardation as set out in 115 CMR 6.03.[1]

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services. (D2)

2. The Appellant is a 22-year old woman who currently resides at the Swansea Woods Residential School in Swansea, Massachusetts. (testimony of Amy Berube, D2)

3. Three evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. (D3-5)

[1]DMR changed its criteria for "general eligibility" effective June 2, 2006. Because the Appellant's application for DMR supports was filed before June 2, 2006, the earlier regulations apply.

4. One evaluation of the Appellant's intellectual functioning after the age of 18 was entered into evidence. (D6)

5. In September of 1996 when the Appellant was 10 years of age, she was evaluated by Robert Viti, Psy. D. who was employed by the South Bay Mental Health Center in Brockton, MA. Dr. Viti noted in his report that although the Appellant was easily distracted during the testing, she always complied with his directions to redirect her attention. He also stated that she appeared to enjoy trying to do her best. On this occasion, the Appellant was given the Wechsler Intelligence Scale for Children – Third Edition (WISC-III). She earned a Verbal IQ score of 64, a Performance IQ score of 83 and a Full Scale IQ score of 71. Dr. Viti stated that the 19-point difference between the Appellant's Verbal and Performance scores indicates that her nonverbal skills are better developed than her verbal skill and opined that her poor development in the verbal domain was due to various learning disorders. Dr. Viti concluded that although the Appellant's presentation may suggest mild mental retardation at times, the results of his testing indicate that the appropriate diagnosis is borderline intellectual functioning. (D3)

6. In August and September of 1998 when the Appellant was 12 years and 9 months of age, she was evaluated by Emma Kraidman, Ph.D., a Clinical Neuropsychologist employed by Franciscan Children's Hospital. Dr. Kraidman noted in her report that the Appellant worked hard and seemed to be trying her best. She stated that the test results are considered to be valid measures of the Appellant's current functioning. On this occasion, the Appellant was given the WISC-III. She earned a Verbal IQ score of 60 and a Performance IQ score of 83. Dr. Kraidman stated that the wide discrepancy between the two parts of the test occurs infrequently and makes a global Full Scale IQ score meaningless. She went on to say that the fact that the Appellant was able to obtain average to low average scores on four of the nonverbal tests rules out a general cognitive slowness. She opined that the discrepancy between the reduced verbal skills and the low average nonverbal performance suggested a language-based disability and noted that the Appellant's scores on this evaluation were consistent with scores obtained in the previous evaluation. Dr. Kraidman concluded that the Appellant's behavior and test results did not meet the criteria of attention-deficit disorder or mental retardation. (D2)

7. In November of 2001 when the Appellant was 16 years of age, she was evaluated by Norman E. Weitzberg, Ph.D. Dr. Weitzberg noted in his report that the Appellant was cooperative and the test he administered appeared to be a valid estimate of her current functioning. He also stated that she no longer showed such a dramatic difference between her nonverbal and her verbal information processing. On this occasion, the Appellant was given the WISC-III. She earned a Verbal IQ score of 69, a Performance IQ score of 75 and a Full Scale IQ score of

70. Dr. Weitzberg stated that her Full Scale score places her at the crease between mild mental retardation and borderline intellectual functioning, but noted that her subtest scores tend to distribute into a distinct pattern suggestive of a language-based learning disability. (D5)

8. In January of 2005 when the Appellant was 19 years and 1 month of age, Dr. Weitzberg reevaluated the Appellant. He noted in his report that the Appellant was cooperative with the assessment and that the test results appear to be a valid estimate of her current functioning. On this occasion, the Appellant was given the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). She earned a Verbal IQ score of 75, a Performance IQ of 78 and a Full Scale IQ score of 75. Dr. Weitzberg pointed out in the report that the Appellant's Verbal IQ score was just 3 points lower than her Performance IQ score, and her Full Scale IQ score now places her solidly in the borderline range of intellectual functioning. (D6)

9. Amy Berube testified on behalf of the Appellant. She testified that the Appellant became involved with the Department of Social Services (DSS) in 1993 and went into foster care in 1996. In October of 2000, the Appellant was placed at the Swansea Woods School. Ms. Berube explained that Swansea Woods is a very structured residential program with 24/7 supervision. Ms. Berube explained that the Appellant would be turning 22 on November 24, 2007 and aging out of DSS custody. Ms. Berube stated that the Appellant had been denied adult DMH eligibility as well as adult foster care services. She questioned the accuracy of some of the Appellant's IQ test scores stating that the Appellant was familiar with the tester and wondered if that might positively affect the Appellant's scores.

10. Donald Schenck testified on behalf of the Appellant. He stated that he had been the Appellant's clinician since 2000. He reported that the Appellant's test scores at age 16 were a Verbal IQ score of 69, a Performance IQ score of75 and a Full Scale IQ score of 70. He stated that she has come along way since her admission to Swansea Woods but that there is much more work to be done after she leaves. He stated that the Appellant is not yet ready for independence and living on her own. He stated that she will need services following her discharge from her current program in order to avoid decompensation and regression.

Mr. Schenck testified that first and foremost the Appellant will need assistance with the administration of medications and the scheduling of her doctors' appointments. He stated that the Appellant will need assistance with transportation. He stated that she is not independent as far as purchasing food and preparing meals. He continued by saying that the Appellant needs help budgeting and structuring her daily routine. He stated that the Appellant will need some sort of a day program or a vocational program with a job coach and will need some sort of support system at work in order for her to be successful. Mr. Schenck testified that she would need continued help and support with coping skills and problem solving. He testified that the Appellant has come along way since her admission to Swansea Woods and has done an outstanding job. He stated that she

needs continued support to be successful.

11. On cross examination, DMR's counsel asked the witness if the Appellant had progressed satisfactorily at the Swansea Woods School. Mr. Schenck stated that the Appellant was not quite there yet. Mr. Schenk agreed that a report dated October 25, 2000 stated the Appellant's diagnosis included borderline intellectual functioning and a language-based learning disorder. The witness also agreed that that a Educational Assessment done in 2000 stated that among other things, the Appellant was reading at the 6th to 8th grade level and was working on the history of the United States at the 6th grade level. The witness agreed that the Appellant's 2005-2006 IEP demonstrates that she has many strengths but pointed out that she exhibits such strengths within the highly structured setting of the Swansea Woods School. Mr. Schenck agreed that according to a medical report dated May 18, 2005 the Appellant has several psychiatric diagnoses and was taking medications for those conditions. The witness agreed with statements from a clinical/behavioral summary written by him dated May 31, 2005 indicating that the Appellant has strong leadership skills and is often called upon her peers for feedback because she is able to express her thoughts and opinions clearly. When asked why the Appellant would likely exhibit adaptive deficits outside the program, the witness opined it was because she would not have the structure and supervision that is present at the Swansea Wood School.

12. Frederick Johnson, Psy.D. testified as an expert witness for DMR. Dr. Johnson stated he is a licensed clinical psychologist in the state of Massachusetts and has been working at Carver as the full time eligibility psychologist since 2004. He stated that he does some research at McClain Hospital where he has been on the staff since 1988. He stated that he has been qualified as an expert witness in the past. There was no objection to him testifying as an expert witness. (D1)

Dr. Johnson testified that he was familiar with this matter as he was the intake psychologist and pointed out a typographical error in his Eligibility Report. He stated that "WIAS-III" in the second paragraph of his report should be "WAIS-III". He stated that he was also familiar with the case because he had attended the informal conference. (D2)

Dr. Johnson agreed that he had reviewed all of the materials presented to DMR by the Appellant and that he gave his opinion as to the Appellant's eligibility. He stated that some documents are much more useful than others in determining a diagnosis of mental retardation. He testified that the documents that are most useful are reports of IQ tests that are comprehensive. He also stated that adaptive behavior scales are also useful in making the diagnosis of mental retardation. He agreed that it is the practice of professionals in his field to use comprehensive IQ tests when making a diagnosis of mental retardation.

Dr. Johnson agreed that he had the opportunity to meet with the Appellant both at this hearing and at the informal conference.

Dr. Johnson testified relative to the Appellant's Eligibility Report which he prepared. Among other things contained in the report, Dr. Johnson pointed out that the Appellant's current Full Scale IQ score was 75. He stated that the Appellant presents with a number of psychiatric difficulties and that in his clinical opinion she does not meet the criteria for a diagnosis of mental retardation. Dr. Johnson testified that his initial impression did not change upon meeting the Appellant. (D2)

Dr. Johnson stated that in making or confirming a diagnosis he looks at the individual's cognitive functioning to determine if he or she is in the mentally retarded range of cognitive functioning. Next he looks to see if the person was also functioning in the mentally retarded range prior to the age of 18. He testified that he also looks to see if there could be other conditions that could have any impact on the individual's capacity to perform intellectually or to do well on testing, such as a psychiatric illness as is present in the Appellant's case.

Dr. Johnson stated that DMR uses 70 or below to determine if an individual is mentally retarded assuming that the deficits are not due to other factors. He stated that the AAMR and DSM III are essentially consistent with the DMR regulations. He agreed that a test score is not conclusive and that clinical judgment is needed to make a diagnosis of mental retardation. He agreed that at some point he looks at adaptive functioning in making his diagnosis and agreed that any deficit in adaptive functioning must be related to a deficit in cognitive functioning.

Dr. Johnson explained that in psychometric testing, 100 is the mean and that 15 points is the standard deviation. Low average intelligence is 15 points below the mean, borderline range of intellectual functioning is 30 points below the mean and below 70 is considered to be in the mentally retarded range of intellectual functioning. Dr. Johnson stated that borderline is not currently considered to be mental retardation. Dr. Johnston stated that the purpose of IQ testing is to obtain an individual's true score which is an accurate rendering of where the individual stands relative to the rest of the population. He explained that the more samplings you have over a period of time the closer you get to the individual's true score.

Dr. Johnson stated that there is a standard error of measurement for all currently accepted IQ tests. He also stated that there are a number of factors that can compromise the test results and explained that most test reports will comment on any factors that might have negatively impacted the test results.

Dr. Johnson reviewed the psychological test report dated September 20, 1996 authored by Robert Viti, Psy D. Dr. Johnson stated that the 19 point difference between the Appellant's Verbal IQ score of 64 and her Performance IQ score of 83 could be seen as a learning disability. He stated that if a tester offers a Full Scale IQ score with such a large discrepancy, they are not offering very valid description of the individual in comparison to the general population. He stated

that there was a tremendous spread within the Appellant's subtest scores. He agreed that on this test the Appellant was struggling with her verbal skills. Dr. Johnson agreed that the test report indicated that the Appellant was functioning in the borderline range of intellectual functioning and that borderline intellectual functioning is not mental retardation. (D3)

Dr. Johnson reviewed the psychological test report dated September 2, 1998 authored by Emma Kraidman, Ph.D. Dr. Johnson agreed that the report references a number of psychiatric hospitalizations and offers a number of diagnoses. He agreed that the report references testing done at St. Anne's Hospital and agreed that according to that report, the Appellant was found to be functioning in the borderline range. He noted that this impression was likely based on the assessment of a physician, not on psychological testing. Dr. Johnson agreed that the results of the testing performed by Dr. Kraidman, were a Verbal IQ score of 60 and a Performance IQ score of 82 and that no Full Scale score was reported. Dr. Johnson stated that the information contained in the report relative to the Appellant's average to low average scores on the nonverbal subtests was not something that strongly suggested the presence of mental retardation. He noted the tremendous difference between the Appellant's Verbal and Performance subtest scores. He agreed that in looking at the big picture, the Appellant's scores on this test are consistent with the previous test scores. Dr. Johnson agreed with the conclusion that the results on this test did not meet the criteria for mental retardation. (D4)

Dr. Johnson reviewed the psychological test report dated November 11, 2001 authored by Norman Weitzberg, Ph.D. He agreed that on this testing the Appellant received a Verbal IQ score of 69, a Performance IQ score of 75 and a Full Scale IQ score of 70. He noted that her Comprehension subtest scaled score was higher than in both previous testings suggesting that there had been some intervention and that she is more socially aware. He also noted that she did very well in the Information subtest which is sensitive to education and exposure and an enriched environment. He noted that the Appellant does better with visual material and that there is less of a spread between her Verbal IQ score and her Performance IQ score than in previous testings. He agreed that Dr. Weitzberg concluded that the Appellant has a language-based learning disability. He stated that the focus of this report as well as previous reports was the Appellant's psychiatric profile. (D5)

Dr. Johnson reviewed the psychological test report dated January 10, 2005 authored by Dr. Weitzberg. Dr. Johnson agreed that this psychological evaluation was performed when the Appellant was 19 years of age which is outside the development era, but stated that it was useful to him because in making a diagnosis of mental retardation he wants to know if the person is currently functioning in the mental retarded range. He emphasized that it is also necessary to know if the person was functioning in the mentally retarded range during the developmental era. He agreed that the report states that on this test administered

by Dr. Weitzberg, the Appellant received a Verbal IQ score of 75, a Performance IQ score of 78 and a Full Scale IQ score of 75. He noted that there continues to be a tremendous variability in the Appellant's subtest scores. He noted that her subtest scaled scores on Vocabulary and Similarities have increased and that her scaled scores on Information and Comprehension remain relatively high compared to testing done when she was younger. He attributed these improvements to her enriched environment. He also noted that there is less of a spread between her Verbal and her Performance IQ scores than was present in previous testings. Dr. Johnson stated that the report does not show that the Appellant is globally impaired. He explained that this is not consistent with the presentation of most mentally retarded individuals who have little variability in their scores. He agreed that Dr. Weitzberg concluded that the results of this assessment reflect that the Appellant is an individual of borderline intellectual functioning with an uneven pattern of skill development. (D6)

Dr. Johnson agreed with the conclusions of the four test reports that he reviewed which put the Appellant in the borderline range of intellectual functioning. He opined that the Appellant's increased scores over time can be attributed to what actually happened to her including removal from a difficult situation and placement in a more structured, stimulating and positive environment. Dr. Johnson recognized that familiarity with the tester could have a positive effect on an individual's test score, but noted that such familiarity would not improve the individual's intellectual capacity. Dr. Johnson stated that after reviewing all of the test reports and meeting with the Appellant it was his clinical opinion that the Appellant is clearly not mentally retarded and is functioning in the borderline range. (D3-6)

Dr. Johnson agreed that no standardized instrument had been used to assess the Appellant's adaptive skills. He stated that based on his review of the documents and of the testimony given, it would be very hard to give an opinion as to how the Appellant would do on such a standardized test. He noted that she is able to do a lot of things but that the standardized instruments measure what a person does, not what they have the capacity to do. He said that she might have difficulty in the area of health and safety and would likely require assistance in medication administration. He stated that although the Appellant has the capacity to do a lot, she needs a great deal of help due to her psychiatric challenges and attentional problems.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite her obvious need for an ongoing support system, I find that the Appellant has failed to show by a preponderance of the evidence that she 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) she must be domiciled in the Commonwealth, (b) she must be a person with Mental Retardation as defined in 115 CMR 2.01, and (c) she 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.[2] There is no dispute that the Appellant meets the first criteria and I specifically find that she meets that criterion. However, I find that she is not mentally retarded as that term is defined in 115 CMR 2.01.

By statute, M.G.L. c. 123B, section 1, a mentally retarded person "is a person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." Consistent with its statutory mandate, DMR has adopted the American Association on Mental Retardation (AAMR) standards as the clinical authority to which it refers in determining whether an individual has "inadequately developed or impaired intelligence". The AAMR standards establish a three-prong test: (a) the individual must have significantly sub average intellectual functioning defined as an IQ score of approximately 70 to 75 or below, based on assessments that includes one or more individually administered general intelligence tests, (b) related limitations in two or more of the following adaptive skill areas: communication, self care, home living, social skills, community use, self direction, health and safety, functional academics, leisure and work must exist concurrently with sub average intellectual functioning, and the individual must have manifested the criteria (a) and (b) before the age of 18.

Although the Appellant has Full Scale IQ scores that fall within the AAMR definition of sub average intellectual functioning, the professionals who tested her as well as DMR's expert found her to be in the borderline range of intellectual functioning. Most of the testers concluded that she has a language-based learning disability as evidenced by the much higher scores that she obtained on the Performance portion of the IQ tests particularly in the earlier testings. Additionally, there was evidence presented to demonstrate that the Appellant's psychiatric illness has had a negative impact on her capacity to perform intellectually. As her psychiatric symptoms have been addressed, her IQ scores have increased. I find that the improvement in her scores is also due to her enriched environment.

Even if I were to find that the Appellant met the AAMR definition of sub average intellectual functioning, she has failed to demonstrate that she has related limitations in at least two areas of adaptive functioning. Although there was testimony given demonstrating that the Appellant has limitations in a variety of adaptive skill areas

[2] DMR changed its definition of "mental retardation" and the incorporated the definition of "significantly sub-average intellectual functioning" effective June 2, 2006. Because the Appellant's application for DMR supports was filed before June 2, 2006, the earlier standard applies.

including community use, health and safety, functional academics and work; I find that such limitations are not related to her intellectual capacity, but are rather related to her psychiatric difficulties and her lack of opportunities to develop her adaptive skills. The Appellant has been living in a very structured environment which has allowed her to grow in many ways, but she has not had the opportunity to learn or to exercise independence in many areas. I find that any adaptive skill deficits that she has are not related to her intellectual capacity.

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: January 10, 2008

Marcia A. Hudgins
Hearing Officer