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October 26, 2004

Re: Appeal of [REDACTED]
Final Decision

Dear Mr. & Mrs. [REDACTED]

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 G.L. c. 30A. The regulations governing the appeal process are 115 CMR 6.30-6.34 and 801 CMR 1.01-1.04.

Sincerely,


Gerald J. Morrissey, Jr.
Commissioner

cc: Marcia Hudgins, Hearing Officer
Amanda Chalmers, Regional Director
Marianne Meacham, General Counsel
Veronica Wolfe, Regional Eligibility Manager
Elina Wayrynen, Psychologist
David Fleischman, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project Manager

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 September 17, 2004 at the Department's Hogan Regional Center in Hathorne, Massachusetts. Those present for all or part of the proceedings were:

[REDACTED]
Susan Fitchett
Ann M. Josephson
Elina Wayrynen, Ph.D.
Veronica Wolfe
David Fleischman

Appellant
Parent
Parent
Program Manager, [REDACTED] High School
Family friend
DMR Psychologist
DMR Regional Eligibility Specialist
Attorney for DMR

The evidence consists of documents submitted by the Appellant numbered A1-11, documents submitted by DMR numbered D1-5 and approximately one and one-half hours of oral testimony. DMR objected to some of the documents offered by the Appellant on the basis that they had not been provided to DMR in advance of the hearing. The objection was overruled. The Fair Hearing Notice that was sent to the Appellant states, "You have the option of either sending the evidence you wish to use directly to the Hearing Officer, or bringing all pertinent information with you to the hearing". There is no requirement that documents be provided to DMR in advance of the hearing. DMR also objected to some of the Appellant's documents on the basis of relevance. The objection was overruled. M.G.L. Chapter 30A, sec. 11(2) states, "Unless provided by any law, agencies need not observe the rules of evidence observed by courts..." It also states that "Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs". I find that the documents that were offered by the Appellant to meet the requirements of Chapter 30A.

ISSUE PRESENTED

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

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services.
(D1)

2. The Appellant is a 21-year old woman who currently resides at the [REDACTED] a residential post-high school program for students diagnosed with Williams Syndrome located in [REDACTED] MA (D19)

3. Two evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. I did not give consideration to the Pediatric Neurology Report that listed the Appellant's IQ scores because I had no Psychological Test Report, no indication when the test was administered or who administered the test. (A6, A8)

4. Two evaluations of the Appellant's intellectual functioning after the age of 18 were entered into evidence. (A11, D3)

5. Three achievement tests were entered into evidence. (A7, A11, D4)

6. No formal measurement of the Appellant's adaptive functioning such as an ABAS was presented; however two Individual Education Programs (IEPs) and Summary notes from the May 17, 2004 IEP meeting were entered into evidence. These documents speak to the Appellant's functioning in several areas. None of these evaluations were done prior to the age of 18. (A1, A10, D5.)

7. When the Appellant was 15 years 2 months of age she was tested by Helen Wiseman, M.A., an employee of the [REDACTED] Public Schools. At that time she was given the Wechsler Intelligence Scale for Children - Third Edition (WISC III). On this test the Appellant had a Verbal IQ score of 75, a Performance IQ score of 53 and a Full Scale IQ score of 62. Ms. Wiseman reported that the Verbal Score of 75 was in the borderline range, the Performance IQ of 53 was in the intellectually deficient range as was the full-scale IQ score of 62. She noted that the difference between the Verbal and Performance scores is significant. She also stated that the Appellant was well spoken and articulate in verbal expression and that she used words and phrases appropriate for her age; however, the content was not necessarily matched to the subject at hand. She concluded that the Appellant's mental abilities as measured on the WISC III fall below the average range for intelligence. (A6)

8. When the Appellant was 18 years of age she was again tested by Helen Wiseman. Ms. Wiseman used the Wechsler Adult Intelligence Scale (WAIS-III) to evaluate the Appellant. On this test the Appellant had a Verbal IQ score of 84, a Performance IQ score of 70 and a Full Scale IQ score of 76. Ms. Wiseman reported that the Verbal IQ of 84 was within the low average range of intelligence, the Performance IQ of 70 was in the borderline range as was the Full Scale IQ score of 76. The Appellant was also given the Wechsler Individual Achievement Test (WIAT) when she was 18 years of age. Her scores on that test showed the Appellant to be average in the areas of Basic Reading Comprehension, and Spelling. Kathleen B. Stem, M.S. Ed., a Educational Diagnostician employed by the [REDACTED] Public Schools noted in her report that the Appellant's outgoing verbal expression can suggest that more skills have been acquired than actually apply. She went on to say that the Appellant is a motivated student who could become

overwhelmed and confused if confronted with too many elements to comprehend, organize and process. (D3, D4)

9. When the Appellant was 21 years of age, she was retested by Helen Wiseman using the WAIS-III. Ms. Wiseman noted that the results were felt to be a valid and reliable estimate of the Appellant's skills at the time. On this test, the Appellant had a Verbal Score of 88, a Performance score of 77 and a Full Scale IQ score of 81. She stated that the Appellant's Verbal and Full Scale IQ scores fell within the low average range, and the Performance IQ was in the borderline range. She also noted that the Appellant profile is consistent with those of previous administrations of the WAIS-III and the WISC-R. She went on to say that the Appellant's mental abilities remain stable. (A11)

10. The Appellant's IEP prepared when she was 20 years of age made the following statements concerning the Appellant's level of functioning:

- (a) Academic skills are significantly below grade level
- (b) Supervision during outings due to safety issues - impulsive and easily distracted
- (c) Concerns with nutrition and poor eating habits that result in fatigue
- (d) Difficulty with social boundaries
- (e) Impulsive and has a confused work approach. Needs assistance in handling material and visual sequencing material. Is easily distracted from task and requires cuing to remain on task (D5)

11. The Student Strengths and Key Evaluation Results Summary contained in the Appellant's May 2004 IEP stated that the Appellant is functioning in the low average range of intelligence. Verbal skills are in the low average range and non-verbal, performance skills are in the borderline range. The Summary went on to say that these scores are not an accurate representation of the Appellant's true functioning level. She actually functions in the deficit range of cognitive ability. Her high verbal skills mask significant difficulty in her ability to link information and to make appropriate judgments.

The IEP made the following statements concerning the Appellant's level of functioning:

- (a) Needs residential and intensive program to develop more independent living
- (b) Lacks social understanding and boundaries
- (c) Supervision needed during outings
- (d) Behavior plan needed to address concerns with nutrition and poor eating habits
- (e) Poor organizational and visual motor perceptual skills (A10)

12. Susan's Fitchett's Summary Notes dated May 17, 2004 state that the Appellant has deficits in several areas including the areas of communication, safety and vocational. She states that although the Appellant has excellent verbal skills, these skills mask

significant deficits in her ability to understand and function at these levels. She has difficulty with social boundaries and understanding social pragmatics. She states that the Appellant has safety issues that interfere with her ability to travel independently. She is easily distracted, can be impulsive and make poor judgments and requires constant supervision. The Appellant needs assistance in mastering vocational expectations in any given setting. She continues to need a job coach. The Summary states that the Appellant will need assisted living, assisted vocational training, and work as well as organized leisure activities. (A1)

13. Veronica Wolfe, The Regional Eligibility Manager testified on behalf of DMR. She testified that she oversees the work of the Regional Eligibility Team and makes the final formal communication of the decisions of eligibility. She identified the letter sent to the Appellant dated March 12, 2003 relative to finding her ineligible for DMR services as an adult. She testified that attached to the letter was a notification of the Appellant's appeal rights. (D1)

14. Elina Wayrynen, Ph.D. testified for DMR as an expert witness. She stated that she is the Regional Eligibility Psychologist for the Northeast Region of DMR. She testified that she is responsible to determine the eligibility of individuals who are seeking services from DMR. She attends informal conferences and hearings. She testified that she is a licensed psychologist and is familiar with psychometric testing. She stated she has participated in somewhere between 800 and 1000 eligibility determinations. She stated that her role in the eligibility determination that of the psychologist who makes the clinical determination as to whether an adult has mental retardation. She stated that she makes the determination primarily on the documentation that is presented to her.

Dr. Wayrynen testified that reliability in psychometric testing refers to the consistency of test results. Validity has to do with whether a test measures what it is supposed to measure. These two concepts contribute to how accurate a measure is. True score in terms of intelligence testing is a hypothetical construct. It is really difficult to get a true score because in testing there is variance. There can always be some error. The standard error of measurement is a range around the score that someone receives on a test. Research shows that the true score lies somewhere within that range.

Dr. Wayrynen stated that DMR currently uses the 1992 AAMR definition of mental retardation. The definition states that a person who has a valid Full Scale IQ score of 70 or below with concurrent substantial limitations in 2 or more areas of adaptive functioning is mentally retarded. The areas include communication, self care, home living, community use, health and safety, functional academics, work, self-direction, social skills and leisure. This definition states that mental retardation must manifest prior to age 18. It continues beyond 18, but must manifest itself before age 18.

Dr. Wayrynen stated that DMR bases eligibility criteria on the 1992 AAMR definition, but in determining the need for services they do not consider the adaptive areas of self-direction, social skills or leisure. She stated that she uses the definition of mental

retardation found in 115 CMR 2.00 and that the reference to the 1994 AAMR definition is a typographical error. It should be the 1992 definition. According to Dr. Wayrynen, AAMR did not revise its definition in 1994. She explained that because DMR does not consider three of the adaptive areas when determining eligibility, even though someone may be determined to be mentally retarded they may not be eligible for DMR services.

Dr. Wayrynen testified that the term significantly sub-average intellectual functioning is operationally defined as having an IQ of 70 or below. She stated that the purpose of subtests within the IQ test is to examine the various cognitive abilities that contribute to overall intelligence. She stated that typically people with mental retardation obtain subtest scores of 4 or below.

Dr. Wayrynen testified that she knew the Appellant by having reviewed a number of documents that were submitted in regards to her DMR eligibility and by meeting her at the Informal Conference. She did not give the Appellant any tests because the Appellant had been tested around the age of 18 and there was no reason for her to question the findings. Dr. Wayrynen testified that the Appellant has a long-standing diagnosis of Williams Syndrome and has many of the features physically, socially, cognitively associated with that disorder.

Dr. Wayrynen explained that individuals with Williams Syndrome have some developmental delays and many medical conditions. There is a fairly typical cognitive profile where these individuals have excellent verbal abilities although there is a range of abilities. Spatial skills are very impaired and related to that, organization skills are impaired. They also have difficulty with math.

Dr. Wayrynen testified relative to the WAIS-III that was administered to the Appellant at age 18. This was the test that she reviewed when making her determination that the Appellant was not eligible for services. She stated that the WAIS-III has good validity and reliability. She stated that a Verbal IQ of 84 is low average. This is not the same as mental retardation. She stated that the verbal subtests show that the Appellant has some obvious strengths along with some obvious weaknesses, but that the Appellant's verbal subtest profile is not that of someone with mental retardation. Someone with mental retardation would typically have subtest scores of 4 or below. She stated that the 5s and 6s that the Appellant scored on the performance subtests were in the borderline range with the 5s being low borderline. She stated that a valid Full Scale IQ score of 76 is considered within the borderline range. She stated that she had no indication that the test was not valid. She stated that at the time she was determining eligibility this was the only valid IQ test that she was provided. She stated that based on this evaluation the Appellant does not meet the criteria for eligibility because she has abilities in the verbal area that are beyond what people with mental retardation are capable of. (D3)

Dr. Wayrynen testified that in reviewing the Wechsler Individual Achievement Test (WIAT) administered to the Appellant around the same time as the WAIS-III, she found that the results were clearly not the results of a person with mental retardation. The

Appellant's profile is not the profile of an individual with mental retardation. Some of the Appellant's scores were average, some low average, some borderline and some deficient. (D4)

Dr. Wayrynen testified that she reviewed the Appellant's IEP dated April 18, 2003 and found it to be very consistent with her intellectual profile. She stated that the Appellant has very good verbal communication skills. Her cognitive and intellectual abilities appear to be stronger than what she can actually do. She has substantial problems with organization, judgment and safety. (D5)

Dr. Wayrynen testified that she had reviewed additional materials brought to the hearing by the Appellant. One of the documents provided was the report authored by Helen Wiseman who administered the WISC-III to the Appellant when she was 15 years 2 months of age. Dr. Wayrynen testified that she could not tell the validity of the report because she stated that the examiner did not give any behavioral observations nor did she make a comment concerning validity. Dr. Wayrynen stated that due to the 14 point discrepancy between the Appellant's Full Scale IQ score on this test and on the test given when she was 18, it was her opinion that for some reason the Appellant was not able to perform as well on the 1st test as she did subsequently. She stated that she did not know why. She stated that because there was more than a 20 point difference between the Verbal (75) and the Performance (53) IQ scores on this test that the Full Scale IQ score (62) was invalid. She stated that the Appellant's Full Scale IQ score does not accurately support the constructs of her ability. A WAIT was given to the Appellant at the same time as the IQ test. Dr. Wayrynen stated that based on the Appellant's test behavior noted in the report, the test results were valid. The results on that test indicate that the Appellant has a learning disability. (A6, A7)

Dr. Wayrynen reviewed the Appellant's IEP dated May 17, 2004 and stated that nothing in it changed her opinion regarding the Appellant's eligibility for DMR services. She stated that although the Appellant appears to function in the low average range overall, she has difficulty applying her intelligence in the real world. (A10)

Dr. Wayrynen reviewed the Psychological Test Report prepared by Helen Wiseman, M.A. based on her testing of the Appellant at age 21. The report indicates that the Appellant was motivated when being tested. The test results show that the Appellant is functioning at the low average range. She stated that all of the sub-test scores were above the level that someone would attain if they were mentally retarded. (A11)

Dr. Wayrynen testified relative to the Appellant's adaptive skills. She stated the Appellant clearly has some deficits in adaptive skills and also that she has some strengths. She has deficits in her work skills, functional academics, health and safety, community use and self care. She requires a great deal of supervision. She stated that even though the Appellant has many deficits in adaptive skills, she does not meet DMR eligibility because her level of intelligence as shown on standardized intelligence tests is above the level of mental retardation. She does not have adaptive deficits because of her global

intelligence. She testified that the Susan Fitchett's Summary Notes and the Academy Program Student Progress Report - Winter Trimester were consistent with the other information she reviewed. She also testified that other documents presented by the Appellant, an acceptance letter from the Berkshire Hills Music Academy and a letter from the Salk Institute had no relevance to eligibility. (A1, A3, A4, A5)

On cross-examination, by Anne M. Josephson, Dr. Wayrynen agreed that the Appellant's IQ scores went up and down. She also explained that two of the IQ test reports that she reviewed had narrative information that assisted her in determining the validity of the test. One test did not have such a narrative. Dr. Wayrynen further explained that a Full Scale IQ score represents the construct of global intelligence. There is error variance within which a person's true score lies. In some documents this error variance is 5 but in the WAIS-III Manual and the AAMR's most recent book, the WAIS III has a standard error of measurement of 1.98 -2.58.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite her obvious need for continuing supports, 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. 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.

I find that the Appellant is not "mentally retarded" as that term is used in statute and regulation for the determination of eligibility for DMR supports. While there was one Full Scale IQ score that indicated the Appellant has significant sub-average intellectual functioning, DMR's expert witness testified that the score (62) was not valid because there was a greater than 20 point difference between the Verbal score (75) and the Performance score (53). DMR's expert also testified that she would not consider the test score valid because of the lack of information in the report relative to the Appellant's test behavior.

The tester pointed out in her report that there was a significant difference between the two scores. She concluded in her Summary that the Appellant's mental abilities fell below the average range of intelligence, but she did not make a diagnosis of mental retardation.

The other two IQ test reports that I considered found the Appellant to be functioning within the borderline to low average range with Full Scale IQ scores of 76 and 81. DMR's expert testified that she found these test scores to be valid based on the tester's reports of the Appellant's test behavior. The Appellant's scores on achievement tests supported these two IQ scores in that most of the Appellant's scores were in the average, low average and borderline range. She had definite deficits but the deficits were not global in nature.

While there was evidence presented relative to the Appellant's functional limitations and her need for continuing supports, I did not give consideration to such evidence in reaching my determination because I found that the weight of the evidence presented relative to the Appellant's intellectual functioning showed that the Appellant does not have significantly sub-average intellectual functioning. Because the Appellant failed to show by a preponderance of the evidence that she met the criteria of the first prong of the three pronged AAMR definition of mental retardation, I did not find it necessary to consider the Appellant's functional limitations in reaching my decision. Functional limitations can result from a variety of conditions. Unless the weight of the evidence shows that an individual has significantly sub-average intellectual functioning, it is not necessary to give consideration to such functional limitations.

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: October 18, 2004



Marcia A. Hudgins
Hearing Officer