

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

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Kerry Healey  
Lieutenant Governor

Timothy Murphy  
Secretary

Gerald J. Morrissey, Jr.  
Commissioner

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November 20, 2006

Re: Appeal of [REDACTED] - Final Decision


Dear [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

GJM/ecw

cc: Marcia Hudgins, Hearing Officer  
Richard O'Meara, Regional Director  
Marianne Meacham, General Counsel  
Elizabeth Moran Liuzzo, Regional Eligibility Manager  
John Mitchell, Assistant General Counsel  
Victor Hernandez, Field Operations Senior Project Manager  
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 23, 2006 at DMR's Southeast Region's Brockton Area Office in Brockton, Massachusetts.

Those present for all or part of the proceedings were:

|                           |   |
|---------------------------|---|
| [REDACTED]                | Appellant                                     |
| [REDACTED]                | Appellant's Mother                            |
| [REDACTED]                | Appellant's Brother                           |
| Carol Gulino              | Massachusetts Rehabilitation Commission (MRC) |
| Karen Mongello            | Sped Teacher, Brockton Public Schools         |
| Frederick Johnson, Psy.D. | DMR Psychologist                              |
| John Mitchell             | Attorney for DMR                              |

The evidence consists of documents submitted by the Appellant A1-3 and by DMR numbered D1-7 and approximately two and one-half hours of oral testimony. The Appellant offered 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. (D1-2)
2. The Appellant is a 20-year-old male who resides with his family in Brockton, MA. (D2)
3. Two evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. (D3 and D7)
4. One evaluation of the Appellant's intellectual functioning after the age of 18 was entered into evidence. (A2, D4)

5. A Behavioral Assessment completed when the Appellant was 18 years of age was entered into evidence. (A3)
6. A copy of the Appellant's Individualized Education Program (IEP) dated June 24, 2004 was entered into evidence. The IEP made mention of the Appellant's scores on a Wechsler Abbreviated Intelligence Scale (WASI). I did not give these scores great weight as there was no indication of who administered the test or the conditions under which the test was given. (D6)
7. A letter from an Educational Consultant dated October 22, 2003 was entered into evidence. I did not consider the information contained in this letter when reaching my decision due to its lack of relevance. (A1)
8. A Discharge Summary from Pembroke Hospital was submitted by DMR, but it was not considered due to its lack of relevance. (D7)
9. A document labeled Office Visit dated July 19, 2000 was submitted by DMR; however the document was incomplete so I did not give it any consideration when making my decision. (D5)
10. In October of 1999 when the Appellant was 13 years, 3 months of age, he was evaluated by Julie Trafton, CAGS, a school psychologist employed by the Brockton Public Schools. On this occasion, Ms. Trafton administered the Wechsler Intelligence Scale for Children - Third Edition (WISC-III) to the Appellant. On this test the Appellant received a Verbal IQ Score of 95, a Performance IQ Score of 104 and a Full Scale IQ score of 99. The tester noted that the Appellant appeared to put forth his best effort when taking the test. The tester also noted that the Appellant's grades were excellent and that he appears to have a desire to succeed academically. She concluded that his cognitive ability appears to fall within the average range, with some difficulty in the area of auditory attention and short term auditory and visual memory. She did not offer a diagnosis of mental retardation. (D3)
11. In March of 2004 when the Appellant was 17 years, 4 months of age, he was evaluated by Nancy L. Ricks, Ed.D., a clinical neuropsychologist employed by Pembroke Hospital located in Pembroke, Massachusetts. On this occasion, Dr. Ricks administered the Wechsler Adult Intelligence Scale - 3 (WAIS-III) to the Appellant. She noted that the Appellant had been admitted to Pembroke Hospital several days prior to the testing for out of control behavior. She also noted that there was evidence of distractibility during testing. On this test, the Appellant received a Verbal IQ score of 94, a Performance IQ score of 94 and a Full Scale IQ score of 94. Dr. Ricks stated in her report that the Appellant's overall level of intellectual functioning is within the average range with no significant discrepancy between his verbal and non-verbal functioning. She concluded that she doubted that the Appellant has a Pervasive Developmental Disorder (PDD) but questioned the presence of some type of genetic disorder with behavioral, reading, written

language and attention impairment. She did not offer a diagnosis of mental retardation.

12. In December of 2004 when the Appellant was 18 years, 5 months of age he was evaluated by Anne Hutton, Psy.D., a licensed neuropsychologist from Lifespan Neuropsychological Services, Inc. located in Braintree, Massachusetts. The purpose of the evaluation was to assess the Appellant's neuropsychological functioning and academic skills and to make recommendations for school. On this occasion, Dr. Hutton administered the WAIS-III and the Wide Range Achievement Test – Third Edition (WRAT-III) as well as a variety of other tests. Although Dr. Hutton did not list the Appellant's IQ scores in her report, she stated that his overall level of intellectual functioning was measured in the average range at the 55<sup>th</sup> percentile. His scaled scores on the Verbal Subtests ranged from a low of 7 (16<sup>th</sup> percentile) on Digit Span to a high of 12 (75<sup>th</sup> percentile) on Vocabulary. His scaled scores on the Performance Subtests ranged from a low of 6 (9<sup>th</sup> percentile) on Coding to a high of 15 (95<sup>th</sup> percentile) on Picture Completion and Picture Arrangement. The Appellant's achievement level in reading and spelling was at the third grade level while his achievement level in arithmetic was at the seventh grade level. Other testing suggested that although the Appellant has a sufficient vocabulary, he is unable to use his vocabulary to communicate in an efficient manner. In her Summary, Dr. Hutton states that the results of the evaluation indicate that the Appellant's overall intellectual functioning falls in the average range. She explained that the Appellant has several areas of strengths and weaknesses. She stated that he has weaknesses in reading comprehension, processing speed, expressive language, visual memory skills, executive functions, impulsivity and attention. His strengths include his nonverbal intellectual skills such as visual spatial skills, visual abstract reasoning and visual perceptual skills as well as strengths in receptive vocabulary and verbal memory. She pointed out that test results indicate that the Appellant presents with Asperger's disorder and with an academic profile consistent with a specific learning disability in reading. She did not offer a diagnosis of mental retardation. (A2, D4)
13. In 2005 when the Appellant was 18 years, 8 months of age, he underwent a behavioral assessment. Robert F. Putnam, Ph.D. BCBA, a licensed psychologist performed the assessment. The purpose of the evaluation was to assess the Appellant's social skills and behavior status and to make recommendations relative to his educational services. The Scales of Independent Behavior – Revised (SIB-R) were completed by the Appellant's parents. According to Dr. Putnam's report, the SIB-R assesses an individual's functional independence, and adaptive behavior in motor skills, social and communication skills, personal living skills and community living skills. Dr. Putnam's report states that the Appellant earned a Broad Independence Score of 11 years 7 months. In the domain of motor skills, the Appellant's score of 87 and percentile rank of 19 indicate that his skills in this area are one of his relative strengths. His gross and fine motor skills both show significant delays. In the domain of social interaction and communication skills, the Appellant earned an age equivalent of 8 years, 11 months which represents the

extent of his ability to engage in interactions with others in various social settings, understanding of language and communication of language, In the domain of personal living skills, the Appellant earned an age equivalent of 13 years, 2 months. In the domain of community living skills, the Appellant earned a score of 8 years, 6 months. (A3)

14. The Appellant's 2004-2005 IEP states that current testing indicates that he is functioning in the low average range in reading comprehension. It also states that the Appellant can express himself orally; however, he has difficulties putting his ideas on paper. At the time, he was functioning in the very low range in broad written language. The report notes that the Appellant's receptive language is a weakness while his expressive language is a strength. It points out that math is a strength for the Appellant. The report indicates that the Appellant is in a "Partial Inclusion Program" meaning that he spends between 21%-60% in a general education classroom. In the section labeled "Assessments", the report states that the Appellant's scores on the WASI were as follows: a Verbal IQ score of 109, a Performance IQ score of 106 and a Full Scale IQ score of 109. The report further stated that based on his intelligence level, the Appellant should be in the average range in most of his achievements. (D-6)
15. [REDACTED] the Appellant's mother testified on behalf of the Appellant. She stated that there were some problems during her pregnancy. The Appellant was born early and weighed 5 pounds, 13 ounces. He was always small for his age. [REDACTED] testified that she and her husband wondered if the Appellant was developing on the slow side. The Appellant was tested by the Brockton Schools at age 4. Although the school system determined that he was not below his age level, the Appellant's preschool and pediatrician as well as the family believed him to be so. When he was retested several months later, he was still found to be performing appropriately for his age. The family had the Appellant retested at Braintree Rehabilitation where he was found in need of speech therapy. He was diagnosed with ADHD and put on Ritalin at age 5 years, 6 months years of age. Braintree Rehabilitation also found that the Appellant had difficulties with fine and gross motor skills and provided OT rehab for these problems. [REDACTED] testified that the Appellant received rehab for many years. She stated that by the time the Appellant was in the 2<sup>nd</sup> grade he was placed in a specialized Speech and Language classroom with a maximum of 12 children. From that time forward, the Appellant has been in special education (special ed.). [REDACTED] stated that the Appellant has had a few hospitalizations. He has trouble with frustration and anger. His coping skills are very poor. He becomes overwhelmed very easily. There was difficulty in finding the right medications for the Appellant. [REDACTED] explained that the Appellant has always been developmentally and socially delayed. She testified that he needs to be in a nurturing environment. He cannot function at a full-time job. He can go to school half time and work half time. When he was working at Brockton Hospital, he could not keep up the regular pace as so he was let go. [REDACTED] testified that she feels that at this time the Appellant needs more help than she can provide.

\_\_\_\_\_ stated that although IQ testing of the Appellant renders a score of around 100 which does not meet DMR criteria, he does not function as a person that has a 100 IQ. He is functioning at a much lower level. \_\_\_\_\_ stated that the Appellant received accommodations when taking the MCAS. He used an Alpha-Smart which is a hand held device that corrects spelling and punctuation. The Appellant took the English portion of the MCAS twice before passing. She also stated that in order to complete the portion of the test requiring a written summary of a story, the Appellant's teachers worked with him for a year. She testified that he committed the summary to memory and then wrote it on the Alpha-Smart. The witness testified that it took the Appellant three times to pass the math portion of the MCAS. She stated that the Appellant had no time restrictions on the completion of the MCAS.

16. \_\_\_\_\_ the Appellant's brother testified on behalf of the Appellant. Mr. \_\_\_\_\_ stated that he has an understanding of the IQ criteria and how that works, but pointed out that the Appellant has been diagnosed with Asperger's and other developmental disorders related to PDD. He stated that he believes that the Appellant would fit into the new Autism Division which is for minors; however the Appellant did not receive services through that division when he was a minor because it was not in existence. He stated that he believes that the Appellant needs those services. Mr. \_\_\_\_\_ believes that the Appellant does not function as a 20 year old adult and is not capable of living independently. (A2-A3, D4)

Mr. \_\_\_\_\_ went on to pose questions to the Appellant's witnesses.

17. Carol Gulino, a representative from MRC testified on behalf of the Appellant. She agreed that MRC will provide services to the Appellant after he graduates from Brockton High School. She stated that MRC can provide vocational supports to the Appellant. She stated that although the Appellant presents with an IQ of 94-100, that is not how he functions. She stated that she feels strongly that the Appellant needs DMR supports. He needs case management at this time. She stated that with the right supports, the Appellant could do very well with a job. He may need a job coach. MRC will be there to support him in the workplace. She testified that he needs help in functional activities such as going through mail and getting to appointments. She agreed that DMR would be a better agency to support the Appellant in such areas as community residential supports, family and individual supports and socialization.

On cross-examination, the Appellant testified that she was not a licensed psychologist. She is a vocational rehab counselor. She agreed that although the Appellant does not function as an individual with an IQ of 100, she is not qualified to say that his low functioning is due to mental retardation. She stated that she is not a DMR employee and does not know how DMR resources are allocated. She stated that MRC refers individuals to other agencies that they feel may be helpful.

She stated that she believes that the Appellant applied to the Department of Mental Health (DMH).

18. Karen Mongello, a special education teacher employed by the Brockton Public Schools testified on Behalf of the Appellant. She stated that she has been working with the Appellant for 2 years as a liaison between Mrs. [redacted] and the special ed staff at the high school relative to his transition from high school to adult services. Her role is basically getting the Appellant set with work and helping his mother with the transition process.

The witness testified that the Appellant is a loner. He does not have many friends at school. He has had problems with kids in classes. He was suspended for a fight. He relates much better to adults. Ms. Mongello stated that she reviewed that Appellant's transcript in preparation for the hearing, and that the transcript showed that the majority of the Appellant's classes at Brockton High School were special ed. classes. She explained that the Appellant always had a contact person, a special education teacher attached to him. Ms. Mongello stated that in her opinion the Appellant gets along much better with students in the special ed. program as opposed to students in non special ed. students.

Ms. Mongello stated that based on her knowledge of the Appellant and his family, he will need continuing help with social skills, independent living skills training and community based skills. When asked how the Appellant passed the MCAS, Ms. Mongello stated that she did not know what accommodations were provided. She did not know how many times it took the Appellant to pass the MCAS.

On cross-examination, the witness stated that she came to know Kevin after the age of 18. She stated that she is not a psychologist and can't testify as to whether the Appellant meets the criteria for DMR eligibility. She stated that she could not testify as to the Appellant's academics.

19. Frederick Johnson, Psy.D. testified as an expert for DMR. Dr. Johnson testified that he has a doctorate in psychology from Nova University and that he is a licensed psychologist. The Appellant's mother and brother stipulated to Dr. Johnson's qualifications as an expert in the field of Mental Retardation. Dr. Johnson testified that he met the Appellant at the Informal Hearing. Dr. Johnson reviewed the Informal Conference Report dated September 30, 2005. Dr. Johnson stated that the Appellant was found ineligible because of his IQ testing which has consistently been out of the range for a diagnosis of mental retardation. Dr. Johnson stated that the decision set out in the report was based on a test that was reported in the Appellant's 2004 IEP. The Full Scale IQ score reported in the IEP was 109. Dr. Johnson stated that the Appellant achieved this score on a WASI and that he would not make a determination on the basis of the results of a WASI, but concurred with the decision because the Appellant had previously been given an adult IQ test. (D1, D6-7)

Dr. Johnson testified that he made his own determination of eligibility and set out his decision in a document labeled Eligibility Report. Dr. Johnson testified that he determined that the Appellant did not meet the criteria for a diagnosis of mental retardation and as such was not eligible for DMR services. He stated that he based his finding on two Full Scale IQ scores achieved by the Appellant. One was an adult test taken in 2004 and one was a children's test that was taken at age 13. Dr. Johnson stated that the Appellant's Full Scale IQ score of 99 at age 13 was in the average range of intellectual functioning. He stated that this score is significant because the Appellant consistently scores in the average range and in order to have a diagnosis of mental retardation, an individual must have an IQ score of 70 or below. Dr. Johnson said in making a determination of eligibility he looks first at the IQ scores. If the scores do not fall within the mentally retarded range, the individual is automatically ruled out. If the scores fall within the mentally retarded range, he looks at functional capacity. He stated that he did not need to consider the Appellant's functional capacity because the first criterion needed to meet the diagnosis was not met. (D3, D7)

Dr. Johnson stated that he reviewed other records, and there was nothing in those records to indicate that the Appellant suffers from mental retardation. Dr. Johnson testified that none of the testimony that he heard at the hearing would cause him to believe that the Appellant would be appropriately diagnosed as mentally retarded.

Dr. Johnson stated that it would be unusual for someone with Asperger's to fall in the mentally retarded range of intellectual functioning and that he would not diagnose someone with Asperger's as mentally retarded solely on the basis of Asperger's. He stated that in making a diagnosis of mental retardation he would look at IQ scores and functional capacity. He concluded that based on those criteria, the Appellant does not have mental retardation.

Dr. Johnson stated that none of the evidence presented relative to the Appellant's behaviors would cause him to conclude that the Appellant has mental retardation. He explained that some individuals with mental retardation have concurrent behavioral difficulties and some do not.

Dr. Johnson stated that he believed that he had reviewed the Appellant's Neuropsychological Evaluation dated December 6, 2004 when making his decision regarding the Appellant's eligibility. He testified that the document assisted him in coming to his conclusion on the basis of the Appellant's IQ scores on the WAIS. He stated that this test is widely used. Although no IQ scores were given, Dr. Johnson stated that he was able to determine the scores using the tables from the test manual. He testified that he came up with the following scores: Verbal IQ score of 96, a Performance IQ score of 110 and a Full Scale IQ score of 102. Dr. Johnson stated that the Appellant's Full Scale IQ score of 102 would place him in the average level of intellectual functioning. (A2, D4)



Dr. Johnson concluded that based on the Appellant's IQ scores, the evidence in the Appellant's record and the evidence presented at the hearing he could not find the Appellant eligible for DMR services.

## FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his need for continuing supports, I find that the Appellant has failed to show by a preponderance of the evidence that he meets the DMR eligibility criteria. My specific reasons are as follows:

In order to be eligible for DMR supports, an individual who is 18 years of age or older must meet the three criteria set forth at 115 CMR 6.03: (a) he must be domiciled in the Commonwealth, (b) he must be a person with Mental Retardation as defined in 115 CMR 2.01<sup>1</sup>, and (c) he must be in need of specialized supports in three or more of the following seven adaptive skill areas: communication, self-care, home living, community use, health and safety, functional academics and work. There is no dispute that the Appellant meets the first criteria and I specifically find that he meets that criterion.

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) 1992 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 DMR supports.

I find that the Appellant does not have significantly sub-average intellectual functioning. According to two test reports that I considered, the Appellant received Full Scale scores of 99 and 94 respectively on IQ tests administered prior to age 18. Each of

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<sup>1</sup> 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.

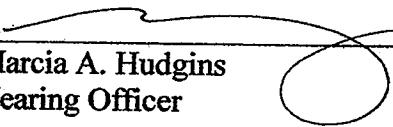
the testers found the Appellant to be within the average range of intellectual functioning. Mention was made in the Appellant's IEP of a Full Scale IQ score of 109. Although I did not give great weight to this score, I found it to be consistent with the Appellant's other scores. I also gave consideration to the Appellant's most recent IQ score which was obtained on a test given when he was 18 years of age. I find that on that test the Appellant achieved a Full Scale IQ score of 102. Again the tester found the Appellant to be functioning in the average range of intelligence. None of the test scores presented at the hearing met the definition of significantly sub-average intelligence.

While DMR agreed that the Appellant has multiple functional limitations and, evidence was presented relative to the those functional limitations and the 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 he 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: November 9, 2006

  
Marcia A. Hudgins  
Hearing Officer