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

Mitt Romney
Governor

Kerry Healey
Lieutenant Governor

Ronald Preston
Secretary

Gerald J. Morrissey, Jr.
Commissioner

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

May 5, 2004

[redacted]

Re: Appeal of [redacted]
Final Decision

Dear Ms. [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
Gail Gillespie, Regional Director
Marianne Meacham, General Counsel
Susanna Chan, Regional Eligibility Manager
Kim LaDue, Assistant General Counsel
Wesley Hernandez, Field Operations Senior Program 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 December 16, 2004 at DMR's Walter E. Fernald Developmental Center in Waltham, Massachusetts.

Those present for the proceedings were:

[redacted]	Appellant's Mother
Susanna Chan, Ph.D.	Metro Region Regional Eligibility Manager
Randine E. Parry, Ph.D.	Regional DMR Psychologist
Kim LaDue	Attorney for DMR

The evidence consists of Documents submitted by DMR numbered D1-5 (D5 was submitted by DMR after the close of the hearing.), Documents submitted by the Appellant numbered A1-2 (A2 was submitted by the Appellant after the close of the hearing.) and approximately one and a half-hours of oral testimony. I did not consider the Children's Hospital Discharge Summary (D5) when reaching my decision because it dealt primarily with the Appellant's mental health and contained no results of psychological testing.

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.

2. The Appellant is a 19 year-old man who is lives with his parents in [redacted], MA. (D1)

3. The Appellant is currently enrolled in a post high school LAB program. (testimony of [redacted] A2)

4. Two (2) evaluations of the Appellant's intellectual functioning before the age of eighteen (18) were entered into evidence (D2-3)

5. One (1) evaluation of the Appellant's intellectual functioning after the age of eighteen (18) was entered into evidence (A2).

6. When the Appellant was fourteen (14) years of age he was evaluated by Nicholas Johnson, Ph.D., an employee of the [redacted] Public Schools. Dr. Johnson administered the Wechsler Intelligence Scale for Children-III (WISC-III). On that test, the Appellant obtained a Verbal IQ score of 106, a Performance IQ score of 84 and a Full Scale IQ score of 95. Dr. Johnson reported that the Appellant's Verbal score was in the upper part of the Average range, at the 66th percentile. His Performance score was in the Low Average range, at the 16th percentile. Dr. Johnson concluded that the Appellant was functioning at the fourteen-year-old level intellectually but was much younger in his socio-emotional development. He stated that the Appellant may qualify for a diagnosis of mild Asperger's Disorder-or more likely not, because his restricted and stereotyped behavior seemed at a minimum. He opined that the Appellant has some form of a Pervasive Developmental Disorder. He did not offer a diagnosis of mental retardation. (D2)

7. When the Appellant was fifteen (15) years of age, he was evaluated by Carolyn London, M.S., Liana M. Pena, Ph.D. and Donna Jenkins, Ph.D. employees of McLean Hospital. Among other testing, they administered the Standford-Binet Intelligence Test - 4th Edition (SB-IV). On that test, the Appellant's intellectual functioning was found to be in the Average to High Average Range. His Verbal Skills fell solidly in the Average range (Verbal Reasoning - 98 with a significant weakness in his ability to reason verbally about social situations). His Quantitative Reasoning for tasks that were presented both verbally and visually clustered in the High Average range - 112. He was deficient in his ability to copy figures but when asked to construct abstract designs from blocks, he could produce age appropriate responses. They concluded that overall the Appellant was demonstrating strong reasoning skills across verbal, quantitative and visual domains. These testers stated that the Appellant's developmental and social history and his cognitive profile are clearly consistent with Asperger's Disorder. They also noted that he has significant problems inhibiting his inappropriate social behavior, which further creates social problems. He is severely overwhelmed by his environment. They noted that he also exhibits signs of ADHD and depression. They offered a lengthy list of recommendations relative to these diagnoses. They did not offer a diagnosis of mental retardation. (D3)

8. When the Appellant was eighteen (18) years of age, he was evaluated by Barbara Bruno-Golden, Ed.D, a Clinical Neuropsychologist. Dr. Bruno-Golden administered the Wechsler Adult Intelligence Scale-III (WAIS-III). On that test, the Appellant obtained a Verbal IQ score of 114, and Performance IQ score of 87. Dr. Bruno-Golden administered many other tests during this evaluation. She stated that the Appellant is performing

within the bright average range of verbal intellectual ability and within the low average range of nonverbal intellectual ability, which is associated with relative weakness in processing speed. She found that his neurobehavioral presentation is consistent with individuals who exhibit a history of Asperger's Disorder, associated with Attention Deficit Hyperactivity Disorder and neuro-intergrative deficits with respect to the functions of the right hemisphere. Dr. Bruno-Golden concluded that the Appellant's cognitive and behavioral deficits are not easily classified and that his performances on measures of intellectual ability are not predictive of his overall ability at an adaptive functional level. Although she did not offer a diagnosis of mental retardation, she opined that the Appellant's current clinical management is appropriate within service agencies for the mentally retarded. She recommended that DMR services include the development of a comprehensive service plan for adaptive living (i.e., a more restrictive home residential component), providing full-time staff, vocational (i.e., continued support of employment model) and social skills (e.g., community and recreational opportunities). (A2)

9. Susanna Chan, Ph.D, the Metro Region Eligibility Manager testified on behalf of DMR. She explained the eligibility process. She stated that it has been a regional process since 2002. She testified that when individuals apply for eligibility they are assigned an Intake Specialist to complete the intake of applicant. This involves obtaining information and completing the Adult Eligibility Information Intake Form. There is an interview with the applicant and/or the family. She said that signed releases are obtained so that DMR can obtain information from care providers relative to the applicant. The information is obtained from schools, hospitals, primary health providers and any source that would shed light on the individual's eligibility status. The Specialist then compiles all of the information. After all of the pertinent information has been obtained it is forwarded to a licensed psychologist who is a member of the eligibility team for review and eligibility determination. After the licensed psychologist has made a determination, the Eligibility Manager releases the notification of the determination based on the recommendation by the psychologist.

Dr. Chan explained that in order to be eligible for DMR supports as an adult, an individual must meet two conditions. He or she must have cognitive limitations, which translates into intelligence quotients as measured by standardized tests such at the WAIS-III or the Standford-Binet. The regulations state that the Department needs to look for functioning with an IQ score in the range of 70 to 75. Dr. Chan explained that it is a range, not a single number because of the margin of error. This level of functioning must be demonstrated before the age of eighteen (18). Along with such cognitive deficits, the Department looks for deficits in adaptive functioning. She stated that the IQ scores are a prerequisite for the review of adaptive functioning.

In this case, Dr. Renee Briggs, a DMR psychologist who is now retired reviewed the information given to her and made a recommendation of ineligibility. Dr. Parry reviewed Dr. Briggs' findings and concurred with the findings. Dr. Chan testified that in this case,

the recommendation of ineligibility was based on the finding that there was no evidence of mental retardation prior to the age of eighteen (18). (testimony Susanna Chan, D1)

10. Randine Parry, Ph.D. testified as an expert witness for DMR. Dr. Parry testified that she reviewed Dr. Briggs' report and the Appellant's file and met with the Appellant and his mother. She testified relative to the [redacted] School Department's Psychological Evaluation. She said in this report, the Appellant's Verbal Score on the WAIS-III was in the average range (90-110). His score was 106. His performance IQ fell within the low average range. She explained that the Appellant has a diagnosis of Asperger's Syndrome. To get that diagnosis, one must have average cognitive abilities, but there is often some sensory difficulty or motor coordination difficulties. All of the Appellant's performance scores fall in the low average to the average range. He showed poor motor planning and coordination. Dr. Parry testified that the Appellant's scores on this test do not lead to a diagnosis of mental retardation. She stated that because of the large discrepancy between the Verbal and the Performance scores, the tester should not have calculated the Full-Scale score. She explained that someone with a diagnosis of Asperger's Syndrome can have some motor delay or motor clumsiness along with a lot of social interaction problems. She also noted that the Appellant has diagnoses of ADHD and non-verbal learning disabilities. This account for his lower Performance IQ score. She found nothing in this report to indicate mental retardation.

Dr. Parry testified relative to the McLean Hospital Evaluation which was done in 2000. She suggested that the Standford-Binet was probably used because the WISC-III had been given recently. She explained that in Verbal Reasoning, the Appellant received a score in the average range, Abstract Visual Reasoning was solid average. Short Term Memory was in the average range. The Quantitative Reasoning was in the high average range. All of the subtests fell in the average range with the exception of copying. His overall score was 104. She testified that the Appellant has Asperger's with the possibility of learning disability. The report also indicated that the Appellant has ADHD and suffers from depression, which Dr. Parry noted is understandable given some of his difficulties.

Dr. Parry noted that in her review of the Appellant's Individualized Educational Program (IEP), the Appellant's academic performance is what she would have expected, mostly average, some high average and some low average. Dr. Parry testified relative to the Appellant's IEP. She noted that according to the IEP, the Appellant passed the MCAS. She stated that a person with mental retardation would not be expected to pass the MCAS. Dr. Parry stated that in reviewing the Appellant's psychological evaluations and the educational material she did not find any indication that the he is mentally retarded. (testimony of Randine Parry, D2-4)

11. [redacted] asked the witnesses for DMR questions relative to the adaptive functioning on a DMR client with an IQ score of 70-75. Dr. Chan gave examples of deficits in the areas of health and safety and self care. She stated that it would mean that

in adaptive functioning scales, such a person would not be able to bathe on their own, wash, rinse and dry their hair, would not brush their teeth without assistance or prompting. She testified that DMR looks to see if the issue is motivation or ability. As far as health and safety, can the individual cross the street without someone being there to help them? Would they be able to navigate around the neighborhood? Can the person count change so they would not be exploited?

Ms. [redacted] asked Dr. Parry if other factors go into determining intelligence. Dr. Parry replied that individuals could have many deficits but the reasons may not be mental retardation. There could be other problem areas. She went on to say that even with some deficits, the Appellant's IQ scores are good.

Mrs. [redacted] stated that she has seen how some mentally retarded individuals function and that they have more of a life than her son has. She believes that they have more social interactions and function better at work. She read a prepared statement outlining her son's problems. She stated that he was born with Asperger's Syndrome and that he functions at a level lower than someone with an IQ of 70. She outlined his adaptive functioning which appears to be very low. She stated that he has no friends, does not use good judgment. He depends on adults for his needs. He has a hard time processing social information. He lives at home and his mother tries to get him to go to school. He works at a LAB collaborative doing filing at [redacted] in [redacted] MA. Currently he has issues with one of the other students. He is on medication. It is hard to get him to take it. He sees a psychologist once a month. It is very difficult to get him to do anything. (testimony of [redacted], A1)

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his obvious 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, 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. However, I find that he 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. All of the test scores outlined in the psychological reports that I considered are significantly higher than the AAMR standards. Applying those standards, the Appellant does not have significantly sub average intellectual functioning in that all of his IQ scores exceed 70 to 75 or below.

While there was evidence presented relative to the Appellant's functional limitations and his 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: April 22, 2004

Marcia A. Hudgins
Hearing Officer