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Executive Office of Health & Human Services
Department of Mental Retardation
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Commissioner

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April 14, 2008

Re: Appeal of - Final Decision

Dear :

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your daughter's eligibility determination.

The hearing officer 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. 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
Commissioner

EMH/ecw
cc: Marcia Hudgins, Hearing Officer
Richard O'Meara, Regional Director
Marianne Meacham, General Counsel
Allegra Munson, Assistant General Counsel
Elizabeth Moran Liuzzo, Regional Eligibility Manager
Randine Parry, Psychologist
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of

This decision is issued pursuant to the regulations of the Department of Mental Retardation (DMR) (115 CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on March 11, 2007 at DMR's Wrentham Developmental Center in Wrentham, Massachusetts.

Those present for all or part of the proceedings were:

	Appellant's mother and guardian
Randine Parry, Ph.D.	DMR Psychologist
Allegra Munson	Attorney for DMR
James Bergeron	Attorney for DMR – observer
William Grant	DMR Hearing Officer - observer

The evidence consists of documents submitted by DMR numbered D1-15 and approximately 1 and 1/4 hours of oral testimony. The Appellant provided 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).[1]

SUMMARY OF THE EVIDENCE PRESENTED

1. The Appellant is 19-year-old female who resides in [redacted] MA. (D7, 9)
2. The Appellant applied for DMR eligibility on May 1, 2006. (D7)
3. This Appeal is based on the Appellant's denial of eligibility for DMR services. (D12,14)

[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. Six evaluations of the Appellant's intellectual functioning before the age of eighteen were entered into evidence (D1-6)

5. An Adaptive Behavior Assessment System-II (ABAS-II) was entered into evidence. (D8)

6. In November of 1997 when the Appellant was 9 years 6 months of age, she was tested by Aida Khan, Ph.D. On this occasion the Appellant was given the Wechsler Intelligence Scale for Children – Third Edition (WISC-III). The Appellant's scores on this test were as follows: Verbal IQ score – 74, Performance IQ score – 83, Full Scale IQ score – 77. The tester stated that this was consistent with overall cognitive ability in the borderline range. Dr. Khan's report stated that the Appellant had been diagnosed with ADHD (Attention deficit hyperactivity disorder), Bipolar Disorder and Oppositional Defiant Disorder. Dr. Khan noted that the Appellant was able to complete a lengthy test protocol and was fully cooperative with all measures administered. She also pointed out that there were a number of indications that the Appellant's scores are mild underestimates of her true underlying cognitive ability. She based this opinion on the fact that the Appellant obtained scores which were solidly in the average range on 2 hands-on constructional tasks, a low average score on a nonverbal reasoning task, and the degree to which the Appellant's language processing problems depressed her performance on all language and language related materials. (D1)

7. In December of 2000 and January of 2001 when the Appellant was 12 years 7 months of age, she was tested by Joyce E. Cummings, Ph.D. On this occasion the Appellant was given the WISC-III. The Appellant's test scores were as follows: Verbal IQ score – 75, Performance IQ score – 82, Full Scale IQ score – 77. Dr. Cummings stated that these scores are quite consistent with the Appellant's 1997 evaluation and that the scores represent a level of functioning within the borderline range of ability. She concurred with Dr. Khan's 1997 report suggesting that the Appellant's scores are mild "underestimates" of the her actual ability. Dr. Cummings stated that in some areas the Appellant performed significantly better than in 1997 and in some areas significantly worse. She attributed this inconsistency to issues of inattention, opposition and maturity working for and against her demonstration of her actual ability (D2)

8. In January of 2004 when the Appellant was 15 years 8 months of age, she was tested by Nancy L. Ricks, Ed.D. At this time the Appellant was an inpatient at the [redacted] Hospital in [redacted] Massachusetts. According to Dr. Ricks' report the Appellant had been admitted to the hospital 6 days prior to testing after holding out scissors in a threatening way to her mother. On this occasion the Appellant was given the WISC-III. The Appellant's scores were as follows: Verbal IQ score – 65, Performance IQ score – 63, Full Scale IQ score – 61. Dr. Ricks noted that during the first day of testing, the Appellant cried from time to time about missing her mother and ran out to check and see if she was still around in a way that a 4 or 5 year old might do. She also noted that at times the Appellant was oppositional. Dr.

Ricks stated that the Appellant's overall level of intellectual functioning was extremely low. She also stated that the results are consistent with a diffuse encephalopathy of long-standing with cognitive functioning at this time within the mild mentally retarded range. Dr. Ricks did not compare the Appellant's previous IQ scores with her scores on this administration, most likely because she did not have access to these scores. (D3)

9. In March of 2004 when the Appellant was 15 years 10 months of age, she was tested by Charles Ferro, a licensed psychologist. On this occasion, the Appellant was given the WISC-III. The Appellant's scores were as follows: Verbal IQ score – 77, Performance IQ score – 96, Full Scale IQ score – 76. The tester noted that overall the Appellant related very well to the examiner and was easily tested. Because the Appellant was tested at the [redacted] Hospital within approximately a year, the tester stated that the above test results are considered invalid due to test-retest reliability. (D4)

10. In October of 2004 when the Appellant was 16 years 6 months of age, she was again tested by Charles Ferro. On this occasion, the Appellant was given the Stanford Binet Intelligence Scale Form L-M. The Appellant's IQ score on this test was 80. Mr. Ferro stated in his report that the Appellant related well to him and was easily tested. He reported that she was functioning in the mental age range of 13 years old. He noted that she displayed good splinter skills of age appropriate vocabulary and verbal conceptual skills, but had a significantly difficult time with her immediate memory skills and math abilities. He also pointed out that the Appellant's test results were significantly affected by her impulsivity, lack of perseverance and level of investment. (D5)

11. During the months of June-September 2005, the Appellant who was 17 years of age received a neuropsychological evaluation. The evaluation was performed by Joyce E. Cummings, Ph.D. who previously tested the Appellant when she was 12 years of age. On this occasion, the Appellant was given the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). The Appellant's Full Scale IQ score was 66 placing her within the mildly impaired range of intelligence. Dr. Cumming's report noted that the Appellant's testing was interrupted by her hospitalization. Dr. Cummings also noted that throughout the course of the testing the Appellant appeared unmotivated, making minimal effort, becoming oppositional and avoidant, while continuing a stream of complaints. Dr. Cummings pointed out that many tasks were abandoned midstream as the Appellant would not be coaxed, pushed or encouraged to complete anything that she believed to be difficult or frustrating. Dr. Cummings concluded that in view of the behavioral difficulties, lack of effort and inattention, the test results do not appear to be a valid indicator of the Appellant's actual ability level. Instead, they do reflect the impact of her behavior upon her cognitive functions. Dr. Cummings drew attention to the four indices upon which the Full Scale score was determined and noted a marked discrepancy between the Appellant's highest and lowest scores: Verbal Conceptual score of 80 – borderline range --- Processing Speed score of 54 – below the 1st percentile. She opined that

in view of the wide discrepancies, the Appellant's Full Scale IQ score of 66 most likely underestimates her ability. (D6)

12. When the Appellant was 18 years 3 months of age, her adaptive behaviors were rated using the Adaptive Behavior Assessment System –II (ABAS-II). Her behaviors were rated by Andrea Londquist, LCSW. Although there was no explanation of the scores given, it appears that the Appellant has significant difficulty in the areas of Community Use, Functional Academics, Health and Safety, Self- Direction and Social. Ms. Londquist noted that the Appellant is very impulsive and demonstrates poor self control when socially interacting. She also pointed out that the Appellant has difficulty with self preservation skills when facing with a socially dangerous situation. (D8)

13. testified on behalf of the Appellant. She stated that the Appellant will be 20 years of age on April 16, 2008. She stated that the Appellant was diagnosed with ADHD and learning disabilities at age 5. She also stated that the Appellant repeated 1st grade and was diagnosed with Oppositional Defiant Disorder (ODD). She reviewed the Appellant's IQ test scores noting that in 2004 while hospitalized, the Appellant received a Full Scale IQ score of 61. She testified that the Appellant thinks very concretely and was unable to participate in adolescent mental health programs. She stated that she believes that Department of Mental Health (DMH) programs are too high functioning for the Appellant. She stated that the Appellant has done well at [redacted] in [redacted] MA. The Appellant has been living there since her last hospitalization. testified that she is concerned for the Appellant's safety in the community in that she parrots behaviors but cannot make independent decisions. She stated that the Appellant needs supervision with home living activities and needs prompting relative to activities of daily living (ADLs). She stated that the Appellant doesn't know how to transfer skills and needs a job coach.

On cross-examination, testified that the Appellant has received DMH services and has been hospitalized on three occasions. She stated that the Appellant receives antipsychotic medication and that the Appellant is under guardianship which is based on her mental illness.

14. Radine Parry, Ph.D., DMR's Metro-Region Psychologist testified as an expert for DMR. Dr. Parry testified that she had reviewed all of the Appellant's records that were presented as part of her application for DMR eligibility. Dr. Parry explained that in order to be eligible for DMR services, the regulations require that an individual have an IQ score of 70 or below and have deficits in adaptive behaviors in three or more areas. She also explained that there are factors other than mental retardation that could cause an individual to obtain a low score on an IQ test. She stated that a head injury that occurs after age 18, dementia, mental illness and behavioral issues during testing are reasons that an individual might score poorly on an IQ test. Dr. Parry stated that in the instant case she reviewed the Appellant's IQ test reports from 1997, 2000, three test reports from 2004 and a report from 2005.

She explained that although one report stated that the Appellant was mentally retarded, she did not give credence to this determination because the tester did not consider the Appellant's adaptive behaviors when making her diagnosis and because this score was inconsistent with most of the other test results. (D1-6, D15)

Dr. Parry reviewed the test report from 1997 and noted that the Appellant had been diagnosed as being bipolar. She also pointed out that the tester opined that the Appellant's Full Scale IQ score of 77 was probably an underestimate of her abilities. (D1)

Dr. Parry reviewed the test report from 2000 and noted that the Appellant's scores were a Verbal IQ score of 75, a Performance IQ score of 82 and a Verbal IQ score of 77. She agreed that the report did not offer a diagnosis of mental retardation. (D2)

Dr. Parry reviewed the test report authored by Nancy Ricks, Ph.D. She noted that this test administration was given while the Appellant was hospitalized. At the time of the testing the Appellant was taking Seroquil and Zoloft. She explained that the Appellant's Full Scale IQ score was an anomaly and was likely affected by the medications the Appellant was taking for her mental illness. (D3)

Dr. Parry reviewed an IQ test report dated March 1, 2004 and stated that the Appellant's Full Scale IQ score of 76 obtained when she was no longer in the hospital was more in line with earlier testing. (D4)

Dr. Parry reviewed a test report dated October 22, 2004. The Appellant's IQ score on the administration of the Sanford Binet was 80 which placed her in the low average range of intelligence. Dr. Parry pointed out that the tester noted that the Appellant was trying hard, but made careless mistakes. (D5)

Dr. Parry reviewed a test report from 2005. Dr. Parry testified that the Appellant's Full Scale IQ score of 66 was invalid because the Appellant was hospitalized during the administration of the test. (D6)

Dr. Parry testified that based on her review of the Appellant's IQ test results, it is her opinion that the Appellant is not mentally retarded. She stated that the Appellant's valid test scores put her in the upper borderline range of intellectual functioning and that behavioral issues and her mental illness have negatively impacted on the Appellant's test scores. Dr. Parry testified that although an individual can have a duel diagnosis of mental retardation and mental illness, in her opinion, this is not the case relative to the Appellant. Dr. Parry explained that before the Appellant became mentally ill, her IQ scores were in the low average range and with the onset of mental illness they have diminished so that her scores are now in the borderline range of intellectual functioning.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite her 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 2.01and (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.

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. My specific reasons are as follows:

Although the Appellant had two Full Scale IQ test scores that were below 70, one of those scores was obtained while she was hospitalized due to her mental illness and the other was obtained during a period when she was in and out of the hospital relative to her mental illness. Based on my review of these reports and the testimony of DMR's expert, I find that these scores are underestimates of the Appellant's intellectual functioning. I find that the remainder of the valid Full Scale IQ test scores (77, 77, 80) do not constitute sub average intellectual functioning in that they are not 70-75 or below.

Because the Appellant has failed to demonstrate that she has sub average intellectual functioning, it is not necessary to make a determination relative to her adaptive skill 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 7, 2008

Marcia A. Hudgins
Hearing Officer