

The Commonwealth of Massachusetts  
Executive Office of Health & Human Services  
Department of Mental Retardation  
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July 27, 2006

Ms. Kristin J. Nault  
c/o J. [REDACTED] E.  
DMH/Central MA - Worcester LSS  
305 Belmont Street - 4E  
Worcester, MA 01604

Re: Appeal of J. [REDACTED] E. - Final Decision

Dear Ms. Nault:

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.*  
Gerald J. Morrissey, Jr.  
Commissioner

GJM/ecw

cc: Marcia Hudgins, Hearing Officer  
Terry O'Hare, Regional Director  
Marianne Meacham, General Counsel  
Damien Arthur, Regional Eligibility Manager  
John Geenty, Assistant General Counsel  
Victor Hernandez, Field Operations Senior Project Manager  
Efile

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of J. [REDACTED] E. [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 June 28, 2006 at DMR's Worcester Area Office in Worcester, Massachusetts.

Those present for the proceedings were:

Richard Costigan, Psy.D.  
John Geenty

DMR Regional Psychologist  
Attorney for DMR

The evidence consists of documents submitted by the Appellant numbered A1-10, documents submitted by DMR numbered D1-3 and approximately 1 hour of oral testimony. The Appellant was not present and 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).

**SUMMARY OF THE EVIDENCE PRESENTED**

1. This Appeal is based on the Appellant's denial of eligibility for DMR services. (testimony of Richard Costigan)
2. The Appellant is a 20-year-old female who resides in the Commonwealth of Massachusetts. (D2)
3. Three evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. I did not give a great deal of weight to the testing done in 2002 because it did not result in an IQ score that could be compared to other tests given to the Appellant. Furthermore the Appellant offered no expert testimony to refute DMR's expert who characterized this test as an achievement test that did not produce a Wechsler type score. (A4 and A6, D2)
4. One report of the Appellant's auditory functioning was entered into evidence. (A2)
5. No other reports of psychological testing or other testing were submitted.

6. In 1993 when the Appellant was 7 years, 2 months of age, she was tested by Susan M. Thompson, M.Ed. using the Wechsler Intelligence Scale for Children - III (WISC-III). On that test, the Appellant received a Verbal IQ score of 84, a Performance IQ score of 94 and a Full Scale IQ score of 87. Ms. Thompson stated in her report that the Appellant was functioning in the low average to average range cognitively with stronger visual-spatial than verbal abilities. She noted that there was a 10 point split between the Verbal and the Performance IQ scores but stated that this was not statistically significant. Ms. Thompson found some evidence of mild dyslexia. The report noted that the Appellant tried very hard to do well, even when tasks were difficult for her. Ms. Thompson opined that the Appellant's extra effort seemed to help her compensate for some of her learning weaknesses. (A6)
7. In 1996 when the Appellant was 10 years, 4 months of age, she was tested by Susan B. Gunther, NCSP (Nationally Certified School Psychologist) using the WISC-III. Ms. Gunther stated in her report that in general the test results are considered to be accurate estimates of the Appellant's current levels of development. On the WISC-III the Appellant received a Verbal IQ score of 88, a Performance IQ score of 82 and a Full Scale IQ score of 84. Ms. Gunther's report states that these results indicate that the Appellant is functioning in the low average range of intellectual ability with an estimated Full Scale IQ score of 80-89. Ms. Gunther did some additional testing including the Woodcock-Johnson Psycho-Educational Battery (WJ-R) and noted in her report that the Appellant's academic achievement is at or above expectations based on her aptitude and ability. She suggested that continued resource support in the areas of math and written language would be appropriate. (A4)
8. In 2002 when the Appellant was 16 years, 3 months of age, she was tested by Ann Leonard-Zabel, Ed.D. Dr. Leonard-Zabel is a Licensed Educational Psychologist in the Commonwealth of Massachusetts. Dr. Leonard-Zabel used the Woodcock Johnson-III Tests of Cognitive and Achievement (WJ III) to determine the Appellant's level of intellectual functioning. Dr. Leonard-Zabel stated in her report that overall the results of the testing and evaluation procedures appear to be valid for the purpose of the referral which was a Special Education Re-Evaluation. Dr. Franklin-Zabel stated that the Appellant's general intellectual ability (GIA) is in the low range compared to her peers. This conclusion was based on the Appellant's standard score of 72 on the WJ III. Dr. Leonard-Zabel also reviewed the Appellant's cognitive abilities and achievement as well as her academic progress. These areas were consistent with her general intellectual ability. (D2)
9. In 1993 when the Appellant was 7 years, 2 months of age she was given an audiological evaluation at the Youville Hospital and Rehabilitation Center. The evaluation was performed by Nancy Miller, M.A., CCC-A, Consulting Audiologist. Ms. Miller concluded that the Appellant demonstrates normal hearing acuity in the right ear and a significant mixed hearing loss in the left ear. She noted that although the Appellant's hearing was currently adequate for speech

and language development and education, she may encounter difficulty when speech is at a distance, or on her left side or in noisy conditions. (A2)

10. Richard Costigan, Psy. D. testified as an expert witness for DMR. He stated that he was employed by DMR as the Regional Eligibility Psychologist and the Area Office Psychologist. He stated that he reviewed documents related to eligibility for approximately 1200 individuals a year and has been doing such evaluations for seven years. He also stated that he has testified in other eligibility cases. (D1)

Dr. Costigan stated that the Appellant had provided him with only two psychological evaluations to consider when making his initial determination of eligibility. He stated that at the informal hearing, the Appellant requested that the decision of eligibility be delayed pending the production of an additional psychological evaluation. He further stated that the additional assessment provided by the Appellant was not a cognitive assessment, but was rather an achievement assessment. Based on all of the information provided to DMR by the Appellant, Dr. Costigan stated that he found the Appellant ineligible for DMR services. (A6, A4, D2)

Dr. Costigan testified that on February 26, 1993, a WISC – III yielded a Full Scale IQ of 87, a Verbal IQ of 84 and a Performance IQ of 94. He also stated that on April 30, 1996, a WISC – III yielded a Full Scale IQ of 84, a Verbal IQ of 88 and a Performance IQ of 82. (A6, A4)

Dr. Costigan stated that no other cognitive assessments were submitted. When asked if he believed that the tests were given and interpreted by qualified individuals, he stated that the test given in 1996 was given by a Certified School Psychologist who would have been well trained in administering the WISC-III. When asked whether the tester's description of the Appellant as a "slow learner" was the same as that of "mentally retarded", he stated that they were not the same. He went on to say that the Appellant carries a diagnosis of Obsessive Compulsive Disorder which is well documented and that can contribute to a person being slow. He explained that this condition causes a person to be concerned that everything is right and to follow certain rituals. He also stated that the term "slow learner" when used in an educational assessment is generic, not a specific diagnosis. This person may require more time for testing. (A4, D2)

Dr. Costigan stated that the test given in 1993 was given by an M.Ed. and in most cases when a test is given by someone with an M.ED., it is countersigned by a psychologist. He stated that while this was not the case, this test is pretty consistent with the other report and nothing led him to believe that this test was not valid. (A6)

Dr. Costigan explained that the test given to the Appellant in 2002 at the New England Attentional & Learning Assessment Clinic (N.E.A.L.A.C.) did not give an IQ score. He stated that the test was Woodcock Johnson –III Tests of

Cognitive and Achievement. He explained that this test gives cognitive achievement but it is not the same as a Wechsler score. He stated that the achievement scores received by the Appellant on this test do not suggest mental retardation but are consistent with previous cognitive testing. He stated that everything that has been presented shows that the Appellant is functioning in the high end of the borderline range to the low average range with some scores at the higher end of the average range. (D2)

Dr. Costigan stated that the Department had evaluated the Appellant's adaptive skills using an ABAS. The Appellant's sister and mother completed the ABAS survey. He stated that the area of Work wasn't pertinent because the Appellant didn't have a job, but her score of 13 in Home Living is in the above average range. Her score of 12 in Self-Care is in the above average range. Her score of 7 in Functional Academics is not what one typically sees in the case of someone who has mental retardation. An individual with mental retardation usually has a scaled score of 1 or 2 in this area. Dr. Costigan explained that the Appellant's score of 7 is at the low end of the below average range. He also noted that the Appellant's score on Health and Safety was a 7 which is what one would expect. He explained that one would need 4 or below to be in need of supports and that the Appellant received no scores of 4 or below.

## FINDINGS AND CONCLUSIONS

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

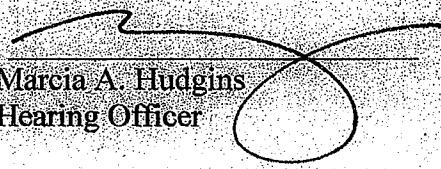
I find that the Appellant does not have significantly sub average intelligence. The evidence showed that two out of three scores on tests given prior to the Appellant's 18<sup>th</sup> birthday were above 75. The third test yielded a standard score of 72 which the report stated was in the low range compared to the Appellant's peers. Based on expert testimony at the hearing, I find that this score is not comparable to the other scores and therefore did not give it great weight when making my decision. From the evidence presented it appears that the Appellant has some hearing loss as well as Obsessive Compulsive Disorder.

Because I find that the majority of the Appellant's IQ scores are higher than required by the AAMR standards, it is not necessary to make a finding relative to related limitations in her adaptive functioning.

## 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(S)].

Date: July 18, 2006

  
Marcia A. Hudgins  
Hearing Officer