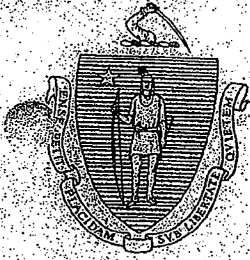

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
500 Harrison Avenue
Boston, MA 02118

Deval L. Patrick
Governor

Timothy P. Murray
Lieutenant Governor

JudyAnn Bigby, M.D.
Secretary

Elin M. Howe
Commissioner

Area Code (617) 727-5608
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January 14, 2008

Re: Appeal of - Final Decision

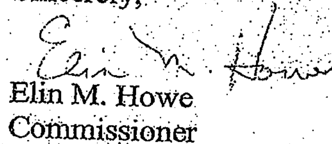
Dear Mr.

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 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
Enclosure
cc: Deirdre Rosenberg, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
John Geenty, Assistant General Counsel
Richard P. Costigan, Psychologist
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. c. 30A. A fair hearing was held on June 15, 2007 at the Department of Mental Retardation's Worcester Area Office. Those present were:

[redacted]	Appellant
[redacted]	Appellant's Mother
[redacted]	Appellant's Father
Richard P. Costigan, Psy.D.	DMR Psychologist
John C. Geenty, Jr.	DMR Attorney

The evidence consists of the following exhibits and approximately one and one quarter hours of oral testimony:

1) Psychological Evaluation of Janet L. Brown, Ph.D., 10/18/96

2) Psychological Evaluation of Pamela Cochrane, 11/19-20/97, 12/2-3/97

3) Psychological Evaluation of Ellen D. Nannis, Ph.D., 3/2001

4) Adaptive Behavior Assessment System (ABAS-II), 3/6/06

5) Eligibility Report of Richard P. Costigan, Ph.D.

6) Letter of Keith Levy, MD, 6/11/07

7) Excerpt from IEP, 1/4/06

8) Massachusetts Rehabilitation Commission, DSM-IV Multiaxial Evaluation Report

9) Core Evaluation: Report on Child Treatment, 1/11/99

ISSUE

Whether the Appellant meets the eligibility for DMR services by reason of mental retardation as defined in 115 CMR 6.03(1).

BACKGROUND

[redacted] is a 22 year old male who lives in Worcester with his parents and younger sister. After attending kindergarten in a local public school, he received his education in outside day placements at the following schools: Community Therapeutic Day School in Lexington, Massachusetts and the Manville School at Judge Baker Center in Boston. After Judge Baker, he entered a residential program at the Cotting School, also in Lexington, where he was in a program which focused on developing daily living skills. Currently he has his own apartment and works twenty hours per week at a Stop and Shop. [redacted] was diagnosed with Asperger's syndrome when he was in kindergarten, and also suffers from significant anxiety, for which he takes Risperdal and Lexapro.

SUMMARY OF THE EVIDENCE

The first cognitive evaluation in the record was conducted by Janet L. Brown, Ph.D., in 1996, when the Appellant was twelve years old (Exhibit #1). This was the sixth time Dr. Brown had evaluated the Appellant. It appears that she worked at the Community Therapeutic Day School, where [redacted] was a student. On the Weschler Intelligence Scale for Children, Third Edition (WISC-III), he received the following scores:

Verbal IQ	95
Performance IQ	79
Full Scale	86

Dr. Brown described his verbal abilities as solidly average. She attributed his significantly lower performance score to "his inability to attend for the longer periods required by the WISC-III than the WISC-R, Split Half, rather than to any real deficits. (Exhibit #1, p. 2). His scores on the previous evaluations administered by this clinician were generally higher. At age 7-4 he received a Verbal IQ of 108, Performance IQ of 95, and Full Scale IQ of 101; at age 8-1 his scores were 103, 91, and 97; at age 9-6, they were 113, 92, and 103; and at age 10-11, they were 94, 88, and 88. It is important to note that the WISC-III was not used in any of the evaluations done prior to 1996. Dr. Brown found all the assessments to be consistent, with strength exhibited in the verbal realm, and weakness on the performance side. The Appellant was described as a "very appealing boy who tries hard to function on academic work and cope with his learning disabilities but who has little ability to deal with the slings and arrows of real life." (Exhibit #1, p. 2)

The next intellectual assessment of [redacted] was conducted by Pamela Cochrane, Ed.D., in 1997, when James was twelve years old (Exhibit #2). She administered the WISC-III, with the following results:

Verbal IQ	92
Performance IQ	79
Full Scale IQ	84

As can be seen, the discrepancy between his verbal and performance scores was significant, and similar to prior test results. Ms. Cochrane attributed this primarily to "insufficient attention to detail and to slow processing speed" (Exhibit #2, p. 2). His decoding and spelling skills were described as strong, while his arithmetic skills were somewhat below what one might expect. She stated that the Appellant was "polite, very cooperative, and invested in doing well on testing" (Exhibit #2, p. 2). I assume, therefore, that Ms. Cochrane considered the results to be a valid picture of his abilities.

On March 12 and 19, 2001, another cognitive evaluation of [redacted] conducted (Exhibit #3). He was sixteen years old at the time of this assessment. Again, his IQ was measured on the Weschler scales:

Verbal IQ	85
Performance IQ	73
Full Scale IQ	75

The clinician who performed the evaluation, Ellen D. Nannis, Ph.D., said that she believed that the Appellant's verbal score was lowered because of the arithmetic subtest, and had his verbal score been calculated substituting the optional digit span subtest for the arithmetic subtest, his score would have been 93, instead of 85. Dr. Nannis stated that she felt that the higher score better reflects Mr. Sanford's abilities (Exhibit #3, p. 2). However, it appears that the arithmetic subtest was used to calculate his verbal IQ in 1997, when he received a 92 on the verbal scale (using the same test), so I am not sure that her observation is correct. Finally, she attributed his lower scores in subtests which require him to manipulate non-representational information in his head to a lack of expected development, rather than to any cognitive slippage.

Dr. Richard Costigan, who is the Department's Regional Psychologist for its Worcester and North Central Offices, testified that he had concluded that [redacted] was not eligible for DMR services because his IQ scores did not meet the DMR standard. At the time that the Appellant applied for services, the standard in effect was "an IQ of approximately 70 to 75 or below."[1] [redacted] full scale IQ scores were 101 at age 7-4; 97 at age 8-1; 103 at age 9-6; 88 at age 10-11; 86 at age 11-10; 84 at age 12-10; 75 at age 16-3. Therefore, I agree with Dr. Costigan's determination regarding the Appellant's

[1] Effective June 2, 2006, DMR changed its definition of "mental retardation" to "significantly sub-average intellectual function" as defined by "intelligence indicated by a score of 70 or below..." *See* 115CMR2.00.

eligibility. Because his IQ disqualifies him from receiving DMR services, it is unnecessary to discuss his adaptive skills. However, the record does include an Adaptive Behavior Assessment System—Second Edition (ABAS-II) (Exhibit #4) rating for [redacted] and Dr. Costigan testified that all of his scores were above the Department's eligibility level.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, 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 criterion and I specifically find that he meets that criterion. However, I find that he is not mentally retarded as that term was defined at 115 CMR 2.01 when he applied for Department of Mental Retardation services (see footnote 1, preceding page).

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 had adopted the American Association on Mental Retardation (AAMR) standards as the clinical authority to which it referred in determining whether an individual has "inadequately developed or impaired intelligence," and the AAMR standard was in effect when [redacted] applied for DMR services. 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 include 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 criteria (a) and (b) before the age of 18.

Because [redacted] consistently received full scale IQ scores above 75, I concur with the Department of Mental Retardation that he does not have "inadequately developed or impaired intelligence," and is thus ineligible for its services.

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: January 3, 2008 Deirdre Rosenberg

Deirdre Rosenberg
Hearing Officer