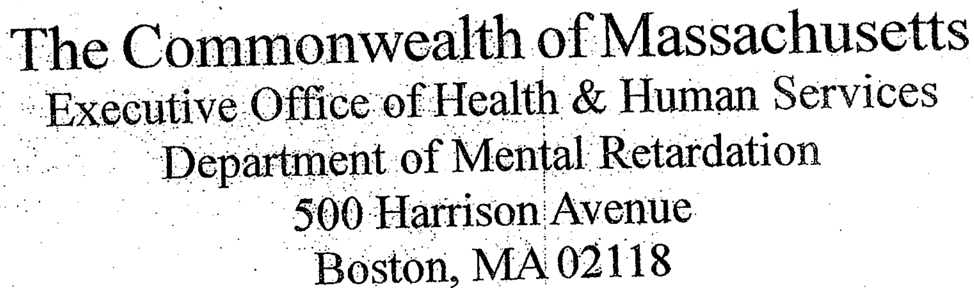

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation

500 Harrison Avenue
Boston, MA 02118

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Timothy P. Murray
Lieutenant Governor

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April 3, 2007

Mr. Frederick M. Misilo, Jr., Esq.
Fletcher, Tilton & Whipple
Counselors At Law
370 Main Street, 12th Floor
Worcester, MA 01608-1779

Re: Appeal of - Final Decision

Dear Attorney Misilo:

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

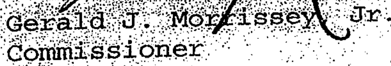
The hearing officer made findings of fact, proposed conclusions of law and a recommended decision. With regard to the proposed conclusions of law, I find that the hearing officer's decision contains errors of law, and those portions of the decision are stricken. However, I further find that these errors were not material to the hearing officer's conclusions, and therefore the appeal is ALLOWED.

With regard to the errors of law, I find that the statement that "the Department of Mental Retardation does not use the DSM definition of mental retardation[,]" Decision at p. 5, is incorrect. However, since the hearing officer applied the definition of mental retardation in effect *the time of the Appellant's eligibility determination,* the misstatement of law is immaterial.

Additionally, I find the statement that "DMR has adopted the American Association of Mental Retardation (AAMR) standard as the clinical authority to which it refers in determining whether an individual has 'inadequately developed or impaired intelligence[,]" Decision at 6, is incorrect as a matter of law. The AAMR standard is not consistent with DMR's current clinically eligibility standard. Therefore, these conclusions of law are stricken and are not part of my decision.

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: Marianne Meacham, General Counsel
John Mitchell, Assistant General Counsel
Deirdre Rosenberg, Hearing Officer
Richard O'Meara, Regional Director
Elizabeth Moran Liuzzo, Regional Eligibility Manager
Frederick Johnson, Psychologist
Victor Hernandez, Field Operations Senior Project Manager
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 or Department), (115CMR 6.30-6.34) and M.G.L. c. 30A.

The Appellant, ____________ was found to be ineligible for DMR Adult Services on October 6, 2004. She appealed that decision, and a fair hearing was held on October 26, 2006, at the Department of Mental Retardation's Southeast Regional Office in Carver, Massachusetts. Those present were:

____________	Appellant
____________	Appellant's Mother
____________	Appellant's Father
Frederick Misilo, Esq.	Counsel for Appellant
Ronald Ebert, Ph.D.	Appellant's Expert
Jeffrey Scott Long, Ph.D.	Appellant's Expert
John Mitchell, Esq.	Counsel for DMR
Frederick Johnson	DMR Psychologist
Kathleen Bown.	Hearing Officer (observing)

The evidence consists of the following exhibits, and approximately one and one half hours of testimony:

1. Department of Mental Retardation Report, 10/06/04
2. Psychology Consultants' Evaluation, 11/12/92
3. Whitman-Hanson Psychological Assessment, 2/5 and 6/96
4. Whitman-Hanson Psychological Assessment, 2/27/98
5. Whitman-Hanson Psychological Assessment, 3/09/01
6. Whitman-Hanson Psychological Assessment, 4/28/04

ISSUE

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

BACKGROUND

The Appellant, [redacted] is a 20 year old woman with a history of cognitive and functional delays who currently attends a substantially separate special education program at Hanson High School. She has received all of her education in the local public schools as a day student. Her parents are separated and she resides with her mother and sister in Hanson, Massachusetts. In addition to her cognitive deficits, Ms. [redacted] suffers from low muscle tone (hypotonia).

SUMMARY OF THE EVIDENCE

There were five different cognitive evaluations in the Appellant's record. The first was performed in 1992 by Robert D. Crook, Ed.D., of Psychological Consultants, when [redacted]s six and one half years old (Exhibit #2). The test used for this assessment was the Wechsler Intelligence Scale for Children—Third Edition (WISC-III). Her scores were as follows:

Verbal IQ	80
Performance IQ	75
Full-Scale IQ	76

[redacted] was next evaluated in 1996 as part of her Chapter 766 special education reevaluation. The assessment was conducted by Marjorie Dickinson, school psychologist in the Whitman Hanson Regional School District (Exhibit #3). The Appellant was nine and one-half years old at the time. Her intelligence was again measured on the WISC-III scales and was consistent with, but lower than, the results she achieved in 1992:[1]

Verbal IQ	74
Performance IQ	74
Full-Scale IQ	72

[redacted]as described by the examiner as being easily motivated, and she noted that the Appellant "put forth excellent effort as long as tasks were kept short and varied and were interspersed" with praise (Exhibit #3).

[1] The copy of Ms. [redacted] report contained in the record only included the Appellant's subtest scores. Presumably a page was missing. The above IQ scores were obtained from a 1998 evaluation of Christine, discussed above (Exhibit #4). Since their accuracy was not disputed by any witnesses at the fair hearing, I have included them as set forth above.

In 1998, when [redacted] was eleven years and eight months old, she was tested by Stuart I. Horowitz, another psychologist in the Whitman Hanson Regional School system (Exhibit #4). She achieved the following results:

Verbal IQ	66
Performance IQ	80
Full-Scale IQ	71

Dr. Horowitz wrote that [redacted] was friendly, happy, and talkative. He stated that she appeared to try her best throughout the testing, and "due to this and her level of excitement and cooperation, the results…should be considered as valid measures of her current level of functioning." (Exhibit #4) He offered no explanation for the eight point drop in [redacted]'s verbal IQ score and simultaneous six point increase in her performance test results. The test administered was, as in the past, the WISC-III.

The Appellant was evaluated for a fourth time in 2001, when she was 14 years and nine months old (Exhibit #5), using the WISC-III.

Verbal IQ	69
Performance IQ	68
Full-Scale IQ	65

The report states that her general cognitive ability was within the intellectually deficient range as measured by the WISC-III. [redacted] was again described as "alert, oriented, able to attend, focus and make good eye contact, and to listen to, process, and respond to questions and directions."

In April, 2004, the Appellant was administered the Wechsler Adult Intelligence Scale--Third Edition (WAIS-III) (Exhibit #6). The testing was part of her Chapter 766 three year reevaluation and was conducted by Wendy L. Price, CAGS. Her scores were as follows:

Verbal IQ	75
Performance IQ	73
Full-Scale IQ	72

In addition, Ms. [redacted] took the Wechsler Individual Achievement Test--Second Edition. With regard to the achievement test results, Ms Price stated that "[redacted] scores in all areas were lower than what was predicted for someone of her overall cognitive ability" (as measured by the WAIS-III IQ test). (Exhibit #6).

The Plaintiff's expert, Dr. Ronald S. Ebert, questioned whether the higher scores achieved on the WAIS-III were the result of inappropriate prompting of by the clinician who conducted the testing. In her report, Ms. Price had stated that when responded to certain test questions with one or two word answers, she had given her prompts to see if she was able clarify her responses (Exhibit #6, p. 3). She further stated that often demonstrated more knowledge after these prompts, which resulted in her earning more points and thus higher scores. Dr. Ebert said that although certain prompting is permitted during the administration of the WAIS, he was unable to tell from the report if the prompting followed testing guidelines. Since there is no way to know the answer to this question, I have given the possibility Dr. Ebert raised no weight in reaching my decision.

The Department's eligibility psychologist, Dr. Frederick Johnson, testified that although he found Ms. 's case to be a "close call," he had concluded that the Appellant was not retarded. One reason that led him to this conclusion was the fact that had achieved a verbal IQ score of 80 when she was tested in 1992 (Exhibit #2). He stated that it was highly unusual for a person with mental retardation to achieve such a score. Dr. Johnson also testified that the verbal comprehension subtest score the Appellant achieved in the cognitive evaluation of 2004 (Exhibit #6) was not consistent with a diagnosis of mental retardation. Also regarding Exhibit #6, Dr. Johnson initially said that he gave all the tests equal weight in reaching his eligibility decision, but amended his answer by saying that he probably gave the 2004 test more weight because it was the most recent test.

I do not agree with Dr. Johnson's opinion that the Appellant's case is a close call. First, although Dr. Johnson testified that a verbal IQ of 80 is inconsistent with a diagnosis of mental retardation, Dr. Ebert, Ms. 's expert, stated that while it is "not the norm" for a person who is mentally retarded to achieve such a score, "it is not that unusual." Also, as previously discussed, a verbal IQ score of 80 is less significant when, as here, that score was achieved by a six-year old, since IQ scores are fluid at this stage of an individual's development. Indeed, Dr. Ebert stated that he questioned the validity of the results of Exhibit #2 for that very reason. Finally, regarding the verbal IQ of 80 from 1992, I note that the numbers used by the Department—approximately 70 to 75 or below—refers to an individual's full-scale IQ, not the component performance and verbal scales. The score of 80 was the Appellant's score on the verbal scale.

In addition, there was no suggestion that the test scores in any way understate the Appellant's cognitive abilities. To the contrary, it was evident from the testimony of the Appellant's mother and information contained in various reports in the file that every effort has been made by her parents, and especially her mother, to expose to activities and programs that enrich her life. For example, she has participated in several different sports through Special Olympics for at least eight years, attended summer learning programs, and taken "every course" offered by their local Association of Retarded Citizens (testimony of Mrs.). It was also evident that her parents carefully monitor their daughter's school placements to insure that she receives

educational services suited to her special needs. This, coupled with what was described as a strong work ethic and positive test-taking habits, has convinced me that [redacted] IQ scores in no way understate her cognitive abilities and likely reflect the very upper limits of her potential.

Dr. Johnson testified that the standard he uses when determining whether or not an individual is mentally retarded is the Diagnostic and Statistical Manual of Mental Disorders (DSM). The DSM IQ criterion is a full scale IQ score of 70 or below. The Appellant received full-scale IQ scores of 76, 72, 71, 65, and 72. Under the DSM criterion, she would not be considered mentally retarded. However, the Department of Mental Retardation does not use the DSM definition of mental retardation. Rather, the standard in effect when the Appellant's eligibility was determined is that of the American Association of Mental Retardation—that is, "an IQ score of approximately 70 to 75 or below."[2] Under this more generous standard, her IQ scores would have exceeded the outer limit of the definition only once, in 1992, when she was six and one-half years old (Exhibit #2). To further put Ms. [redacted] cognitive abilities in perspective, when the five full-scale IQ scores in the record are averaged (including the score of 76 from the 1992 test) her average full-scale IQ was 71, which is solidly in the low end of the range used by the Department to determine whether an individual is mentally retarded. It is not clear to me why Dr. Johnson did not use the AAMR standard when making his determination, but I am confident, based upon all the evidence before me, that if he had, he would have concluded that the Appellant was mentally retarded on the basis of her IQ.

In addition to having significant sub-average intellectual functioning as described above, an applicant for DMR services must need specialized supports in two of seven enumerated adaptive skill areas. The Appellant provided extensive evidence regarding her adaptive skills, including expert testimony by Dr. Jeffrey Scott Long, who testified that [redacted] performance on the Vineland Adaptive Behavior Test was two standard deviations below the norm (as it must be to meet the Department's standards). I will not review evidence pertaining to her life skills abilities since, by its counsel, DMR stated that it would not dispute the Appellant's evidence on this issue. However, I do observe that there was no evidence presented regarding her life skills that would suggest that she was not mentally retarded.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, I find that the Appellant has shown that she meets the Department's eligibility criteria.

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,

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[2] 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.

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 two 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 she meets that criterion. In addition, I find that she is mentally retarded as that term is defined at 115 CMR 2.01.

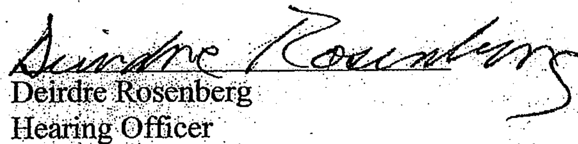
Consistent with its statutory mandate, DMR has adopted the American Association on Mental Retardation (AAMR) standards as the clinical authority to which it refers in determining whether an individual has "inadequately developed or impaired intelligence." The AAMR standards establish a three-prong test: (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 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.

For the reasons set forth on pages four and five above, I find that the Appellant also meets the second and third criteria, and that the Department's decision that she is ineligible for its services is incorrect.

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: 2/19/07



Deirdre Rosenberg
Hearing Officer