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

Gerald J. Morrissey, Jr.
Commissioner

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

April 12, 2007

Elaine W. Cockroft
Attorney at Law
P.O. Box 324
Bedford, MA 01730

Re: Appeal of [redacted] Final Decision

Dear Attorney Cockroft:

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

GJM/ecw
cc: Deirdre Rosenberg, Hearing Officer
Amanda Chalmers, Regional Director
Marianne Meacham, General Counsel
Veronica Wolfe, Regional Eligibility Manager
Douglas White, Assistant General Counsel
Elise Kopely, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project 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. c. 30A. A fair hearing was held on December 14, 2006 at the Department of Mental Retardation's Hogan Regional Center in Hathorne, Massachusetts. Those present were:

[redacted]	Appellant's mother
	Appellant's father
Elaine Cockcroft	Appellant's counsel
Douglas White	DMR Assistant General Counsel
Elise Kopley	DMR Assistant General Counsel, observing
Patricia White	DMR Eligibility Psychologist

The evidence consists of the following exhibits and approximately one and one half hours of oral testimony.

1. Determination Letter dated 3/30/06
2. Eligibility Report dated 3/22/06
3. Franciscan Children's Hospital Neuropsychology Assessment dated 8/30-31/95
4. Psychological Evaluation dated 3/27/96
5. Neuropsychology Service Evaluation dated 10/20/97
6. Cognitive and Psychological Evaluation dated 3/06

ISSUE

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

BACKGROUND

Mr. [redacted] a 19 year old man who lives with his parents and younger brother in Reading, Massachusetts. He has received Special Education services since he began his schooling. He attended public school in Lynn, Massachusetts for five years, followed by one year in Marblehead, then three years at the LABBB program at Belmont and

Lexington, Massachusetts. During his adolescence he apparently developed severe behavioral problems. As a result, he was placed in a residential program at the Devereaux School, which is located in Rutland, Massachusetts. He remained there for two years. Currently, he attends the Colborne School in New Marlborough, Massachusetts.

The Appellant was diagnosed as having Attention Deficit Hyperactivity Disorder when he was four and one half years old and has taken Ritalin for that condition since then. He has had a long history of numerous physical problems, including poor motor planning, gross/fine motor impairments, and various kidney or urinary and bowel difficulties. He was born with microcephaly.

By letter dated March 30, 2006, the Appellant's application for DMR supports was denied on the grounds that he did not meet the Department's definition of mental retardation, as set forth at 115 CMR 2.01. He appealed that decision and a fair hearing was held on December 14, 2006.

SUMMARY OF THE EVIDENCE

The first evaluation of the Appellant in the record was a Neuropsychology Assessment Report conducted by the Franciscan Children's Hospital in Boston, Massachusetts (Exhibit #3). The date of the evaluation was August 30 and 31, 1995. Mr. Lentz was seven years, nine months old at the time. The test administered, among others, was the Stanford-Binet Scale (4th Edition). He received the following scores:

Verbal Reasoning	78
Abstract/Visual Reasoning	85
Short-Term Memory	71
Test Composite	74

Dr. Emma Kraidman, who conducted the evaluation, wrote in her report that "[redacted] cooperation was so fragile that it was difficult to discriminate between genuine deficits and inattentiveness" (Exhibit #3, p. 6). Significant impulsivity and distractibility were noted.

[redacted] was next assessed on March 27, 1996, when he was eight years old. The testing was conducted as part of his Chapter 766 Annual Review by Lionel S. Lyon, Licensed Psychologist (Exhibit #4). The Appellant was a student in a regular second grade classroom at the time of the evaluation. The test administered was the Wechsler Intelligence Scale for Children--Third Edition (WISC-III). His scores were as follows:

Verbal IQ	79

Performance IQ 87

Full Scale IQ 81

Mr. Lyon was very positive about the Appellant's abilities and potential, noting that his performance on the visual memory sub-test (Coding) was greatly improved from the previous testing. According to Mr. Lyon, "a good score in this sub-test is often correlated with a child's ability to more adequately master reading, writing and arithmetic functions" (Exhibit #4, p. 5). He also stated that [redacted] performed poorly on the Picture Arrangement sub-test because he could not complete the task in the time allotted. In fact, he was able to put the puzzle together correctly. Mr. Lyon said that "[redacted] just needed more time to look at what was in front of him, understand how the discrete pieces related to the whole, and then, once he understood the nature or the task, quickly put the things together"(Exhibit #4, p. 4). This clinician anticipated that at some future point the Appellant would do much better on the Picture Arrangement sub-test, thus significantly improving his scores. However, he reported that he continued to have profound problems with eye-hand motor coordination.

In 1997, the Appellant was evaluated by the Neuropsychology Service of Beverly, Massachusetts (Exhibit #5). He was nine years and eleven months old at the time of this assessment. He received the following scores on the Wechsler Intelligence Scale for Children--Third Edition:

Verbal IQ 65

Performance IQ 78

Full Scale IQ 69

As can be seen, his scores were significantly lower than what he achieved on the 1996 WISC-III. The clinicians who conducted the 1997 evaluation did not address the decline in scores, but stated that the "amount of variability within and between both Verbal and Performance subtests reflects possible higher potential..."(Exhibit #5, p. 6). They also observed that his slow processing speed resulted in lower scores on Coding and Picture Arrangement, where he understood the tasks, but completed them more slowly than he should have. As other evaluators mentioned, these clinicians believed that the Appellant's performance was enhanced when he was medicated.

The final cognitive assessment in the record took place in March, 2006, as part of a three year reevaluation carried out in accordance with Massachusetts Special Education laws (Exhibit #6). The Appellant was eighteen years old at the time of the evaluation, which was conducted by Carolyn Ferguson, a Certified School Psychologist with the Reading Public Schools. The test administered was the Wechsler Adult Intelligence Scale--Third Edition (WAIS-III). Mr. Lentz's scores were as follows:

Verbal IQ 77

Performance IQ	72
Full Scale IQ	72

Ms. Ferguson stated that the Appellant "displayed a positive attitude and was a pleasure to work with" (Exhibit #6), as had all the previous clinicians who had worked with him. She concluded that the results were valid and reliable indicators of his current cognitive abilities.

Dr. Patricia Shook, regional psychologist for the Department's Region 3, determined that Mr. [redacted] was ineligible for DMR supports because he did not meet DMR's definition of significantly sub-average intellectual functioning, defined as "an IQ score of approximately 70 to 75 or below."[1] The cognitive evaluations which were the basis of her written decision (Exhibit #2) were the WISC-III of 1997 (Exhibit #4), and his most recent evaluation in 2006 (Exhibit #6), utilizing the WAIS-III. Regarding his WISC-III scores, which yielded a full scale IQ of 69, she wrote that in the summary section of that report it was noted that his results are indicative of a child with ADHD and related language impairments. At the hearing, Dr. Shook testified that although the 1995 assessment (Exhibit #3) was the least reliable in the record (and not used in reaching her eligibility determination), his scores were most likely an underestimate of the his abilities due to his poor ability to cooperate. In regard to his scores on the WAIS-III (Exhibit #6), she stated that the scores he achieved were not consistent with those of someone who was mentally retarded. Her determination letter also referenced the Appellant's scores on two administrations of the Adaptive Behavior Assessment System, Second Edition (ABAS-II). Since neither of these tests was in the record before me, I did not consider them in reaching my decision.

There was testimony that Mr. [redacted] behavior at home was out of control, and that he was a danger to himself and other family members.[2] While his reported behavioral problems are very disturbing, I did not consider them in reaching my decision to uphold the Department's determination that the Appellant's IQ did not meet its definition of significantly sub-average intellectual functioning. The first prong of that test is based solely on an applicant's IQ scores. Other factors do not enter into an eligibility decision unless an applicant's IQ is in the range set forth above.

While it is true that in 1997 and 2006 his full scale IQ scores were 69 and 72, respectively, I agree that these were likely not an indication of his true potential because both his distractibility and slow processing speed depressed his scores. In addition, I gave great weight to the 1996 assessment of Dr. Lionel Lyon (Exhibit #4), which was

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[1] Effective June 2, 2006, DMR changed its definition of mental retardation to "significant sub-average intellectual function" as defined by "intelligence indicated by a score of 70 or below..." *See* 115 CMR 2.00. The Appellant filed his appeal before the new definition was adopted.

[2] This is in contrast to how he was described by all the clinicians who assessed the Appellant. At least in the testing environment, he was found to be personable and a pleasure to work with, although at the 2006 evaluation, [redacted] escribed himself as struggling with his temper (Exhibit #6).

especially thoughtful and detailed. In describing the Appellant's approach to tasks on the Performance scale, he stated that "clearly he is using some wonderful intellectual work in order to see things well before he...asks his hands to do the work" (Exhibit #4, p. 4). He also reported that [redacted]'s second grade teacher (in a regular, non-special education classroom) found him to have "some of the best ideas" in her class (Exhibit 4, p. 2). Dr. Lyon summed up his performance as being "just within the low average range of functioning, with some better potential noted in the non-language areas" (Exhibit #4, p. 3). The Appellant's severe fine motor deficits and attention deficit problems, this clinician believed, negatively affected the Appellant's IQ scores. For these reasons, I agree with the Department that the Appellant is not "mentally retarded" as that term is defined in the regulations in effect at the time DMR made its decision.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, and despite Mr. [redacted]'s need for continuing support, I find that he 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 is defined at 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 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 stated above, I concur with the Department of Mental Retardation's determination that the Appellant is not a person with "inadequately developed or impaired intelligence." Thus, he is ineligible for DMR supports and 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: 4/1/07

Deirdre Rosenberg
Hearing Officer