

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
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June 6, 2007

Re: Appeal of [redacted] - Final Decision

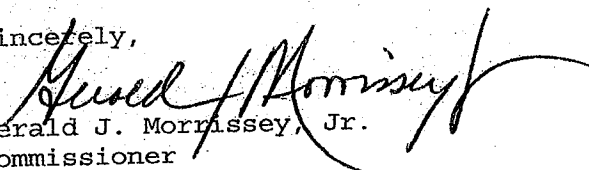
Dear Ms. [redacted]

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
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Damien Arthur, Regional Eligibility Manager
John Geenty, Assistant General Counsel
Richard Costigan, Psychologist
Beth Manna, DSS Worcester Area Office
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 January 26, 2007 at the Department of Mental Retardation's Worcester Area Office. Those present were:

[REDACTED]	Appellant
Beth Manna	Appellant's mother
Shannon Carlson	DSS social worker
Devon Forbes	YOU, Inc. Family Networks
Sue Harrison	YOU, Inc. Family Networks
John C. Geenty, Jr.	Kolburne School
Richard P. Costigan, Psy.D.	DMR Attorney
	DMR Eligibility Psychologist

The evidence consists of the following exhibits and three hours of oral testimony.

1. Eligibility Report dated 8/22/05
2. WISC-III Testing dated 9/30/98
3. Neuropsychological Evaluation of Miriam E. Sexton, Ph.D., dated 3/6/00
4. WISC-III Testing dated 2/13/02
5. Adaptive Behavior Assessment System dated 2/2/05
6. JFK Middle School Testing dated 9/23/98-10/2/98
7. Report of Worcester Public School's Child Study Department, dated 11/28/06

ISSUE

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

BACKGROUND

Mr. [redacted] is a twenty-one year old man who has attended the Kolburne School in New Marlborough, Massachusetts, since 2002. Prior to that, he attended special education classes in the Worcester Public Schools until approximately the 8th grade. At some point during 2002, he spent eight months at the Lowell Youth Treatment Center. Currently he lives in an off campus group home at Kolburne which focuses on the development of daily living skills. Mr. [redacted]'s functionality has improved during his time at the Kolburne School, although, according to the testimony of Beth Ann Manna, who has been the Appellant and his mother's case worker for the last three years, he needs constant prompting to stay on task. He is currently diagnosed with Pervasive Developmental Disorder (PDD) NOS, and Dysthymic Disorder. In addition, his vocal cords are paralyzed (apparently from birth). As a result, he is extremely soft spoken, making it difficult for others to understand his speech.

The first cognitive assessment of the Appellant in the record was administered on September 30, 1998, when Mr. [redacted] was 12 years old (Exhibit #2). The test used was the Wechsler Intelligence Scale for Children—Third Edition (WISC-III). He received the following scores:

Verbal IQ 85

Performance IQ 64

No full-scale IQ was computed because of the twenty-one point difference between the verbal and performance scores. According to the clinician who evaluated him, [redacted]'s unique set of thinking and reasoning abilities make his overall intellectual functioning difficult to summarize" (Exhibit #2). Clearly, the test scores indicate that his verbal reasoning abilities were much better developed than his nonverbal reasoning abilities.

Mr. [redacted] was also tested in September of 1998 in a separate evaluation by Gene LaFleur, who was one of the Appellant's teachers at the JFK Middle School in Hudson, Massachusetts. Mr. LaFleur's qualifications are not described in this report (Exhibit #6). The test administered was the Woodcock-Johnson Psychoeducational Battery, Revised. According to Dr. Richard Costigan, Eligibility Coordinator for the Department in the Worcester Region, this battery of tests, unlike the WISC-III or the Stanford-Binet, only measures a person's verbal abilities. As noted above, Mr. [redacted]'s strengths lie in the verbal realm. Therefore, it is to be expected that the results seen on this test present a more positive picture of his cognitive abilities than is actually the case. However, the scores were not presented in a format that is readily comparable to any of the Wechsler Scales or the Stanford-Binet, and for that reason are not set forth in my decision. That being said, Mr. LaFleur stated that [redacted]'s test scores placed him in the low average range of intellectual ability. He also reported that he "appears to have great difficulty sustaining concentrated visual attention and working under time

restraints...which [might] affect a student's performance in reading and mathematics"(that is, depress them) (Exhibit #6).

The next testing in the record was a Neuropsychological Evaluation by Miriam E. Sexton, Ph.D., Licensed Child Psychologist (Exhibit #3) conducted on March 6, 2000. The Appellant was 13 years and 10 months old at the time. Dr. Sexton used the Stanford-Binet Intelligence Scale, Fourth Edition to measure his cognitive abilities, with the following results:

Verbal Reasoning	84
Abstract/Visual Reasoning	90
Short Term Memory	94
Test Composite	74

Dr. Sexton reported that the Appellant scored within the middle of the low average range on the Stanford-Binet, which she stated was a very similar performance to what he achieved on the Woodcock-Johnson Psychoeducational Battery in 1998. She "felt that test results were a reasonably representative sample of his current skills and abilities due to his overall good effort and good attitude"(Exhibit #3).

In 2002, when he was almost 16 years old, the Appellant was evaluated by Steffen Fuller, Ph.D., of the Boston Center (Exhibit #4). Ben was assessed using the WISC-III, with the following results:

Verbal IQ	71
Performance IQ	52
Full Scale IQ	58

As can be seen, and as was noted by Dr. Fuller, Mr. [redacted] scores were significantly lower than in the past. However, since the Appellant was "relatively free from distractibility," and had a "relatively strong capacity to attend and concentrate," Dr. Fuller considered the results to be a valid measure of his current functioning (Exhibit #4). But he also stated that Mr. [redacted] had a very slow processing speed, and demonstrated difficulty managing his rocking and spitting behaviors (Exhibit #4).

The Appellant was last evaluated on November 28, 2006, when he was 20 years and 6 months old (Exhibit #7). The assessment was conducted by Dr. J. Lindquist Grady, Psy.D., a school psychologist in the Worcester Public School System. He received the following scores, as measured on the Wechsler Adult Intelligence Scale—Third Addition (WAIS-III):

Verbal IQ	77
Performance IQ	70
Full Scale IQ	72

Dr. Grady described these results as being in the borderline category. She further noted that Mr. [REDACTED] needed extra time to complete certain tasks, and therefore "did not receive full credit or any credit for some of his answers on the test" (which in fact were correct) (Exhibit #7, p. 4). In other words, if the time factor had been removed from certain of the tests, he would have received higher scores. According to this clinician, the previous concern regarding cognitive slippage did not appear to be a current issue. Dr. Grady also stated that the Appellant had made progress in both Performance and Full Scale IQ scores (Exhibit #7, p. 5).

Dr. Richard Costigan testified that he had found the Appellant ineligible for DMR supports because his IQ scores demonstrated that he was not mentally retarded. In particular, he found that several of Mr. [REDACTED] verbal IQ scores were not consistent with mental retardation, and cited as examples his scores on the Stanford-Binet in 2000 (Exhibit #3), and his Verbal IQ score of 85 in 1998 (Exhibit #2). He also stated that when the Appellant received low scores during certain evaluations, this was primarily attributable to his PDD rather than to mental retardation.

Several of the Appellant's witnesses expressed concerns about his ability to function without the structure of the Kolburne School, a concern which I find to be well-founded. Nevertheless, because I also find that he does not meet the Department's definition of impaired intelligence, it is unnecessary for me to consider these concerns.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, and despite Mr. [REDACTED]'s obvious need for a highly structured residential setting, 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 was defined at 115 CMR 2.01 when he applied for Department of Mental Retardation services (see footnote 1 below).

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 that standard was in effect when Mr. [redacted] applied for DMR services.¹ 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.

Relying on the position of the Department's expert witness, Dr. Richard Costigan, I concur with the DMR that the Appellant does not have "inadequately developed or impaired intelligence," as evidenced by his IQ scores, 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: May 20, 2007

Deirdre Rosenberg
Deirdre Rosenberg
Hearing Officer

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.