2010-23

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
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2010

Madalyn Salvaggio, LSWA
Social Worker
Dept. of Children and Families

MA

Re: Appeal of - Final Decision

Dear Ms. Salvaggio:

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

The hearing officer 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 DDS regulations. Your client's 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
cc: Marcia Hudgins, Hearing Officer
Amanda Chalmers, Regional Director
Marianne Meacham, General Counsel
Barbara Green Whitbeck, Assistant General Counsel
Paula Potvin, Regional Eligibility Manager
Patricia Shook, Psychologist
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF DEVELOPMENTAL SERVICES

In Re: Appeal of [redacted]

This decision is issued pursuant to the regulations of the Department of Developmental Services (DDS) (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on [redacted] 2010 at DDS's [redacted] in [redacted], Massachusetts. Those present for the proceedings were:

Madalyn Salvaggio	DCF Social Worker
[redacted]	[redacted] Program Director
Maria Fourner	DCF Attorney
Patricia Shook, Ph.D.	DDS psychologist
Barbara Green Whitbeck	DDS attorney

The evidence consists of documents submitted by the DDS numbered 1-19, a document submitted by the Appellant numbered A1 and approximately two hours of testimony. DDS does not dispute the low adaptive functioning exhibited by the Appellant. The Appellant offered no expert testimony

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DDS supports by reason of mental retardation as set out in 115 CMR 6.04(1).

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DDS services. (4, 5, 8)

2. The Appellant is a 20-year old man who currently resides in [redacted] in [redacted] Massachusetts (17)

3. One evaluation of the Appellant's intellectual functioning before the age of 18 was entered into evidence. (15)

4. Two evaluations of the Appellant's intellectual functioning after the age of 18 were entered into evidence. (16-17)

5. One assessment of the Appellant's adaptive behavior was entered into evidence. (A1)

6. A Permanent Degree of Guardianship on the basis of mental illness was entered into evidence (14)

7. An Adult Eligibility Determination was entered into evidence (4)

8. The Curriculum Vita of Dr. Patricia Shook, Ph.D. was entered into evidence (1)

9. A [redacted] Treatment Plan relative to the Appellant was entered into evidence. (19)

10. An Individual Education Plan (IEP) was entered into evidence (18)

11. In [redacted] and [redacted] of 2003 when the Appellant was 13 years [redacted] of age, he was evaluated by [redacted], a Clinical Practicum Student and [redacted], Psy.D., a Licensed Psychologist. The Appellant was evaluated using the Wechsler Intelligence Scale for Children-Third Edition (WISC-III) as well as with a variety of other tests including the Wechsler Individual Achievement Test-Second Edition (WIAT-II). The examiners set out the Appellant's history of extreme abuse and neglect in their report and point out that he has a history of psychiatric hospitalizations. They note that he has been in residential treatment since 1998. They point out that little developmental history is known. The report states that Dr. [redacted] recently performed a personality assessment of the Appellant using the Rorschach and opined that the Appellant's cognitive limitations could be due to mental health issues. The report notes that at the time the WISC-III was administered, the Appellant was easily distracted by both internal and external cues but was submissive and cooperative during the testing. The examiners state that the Appellant had persistent difficulty with attention and concentration. They explain that because the Appellant was cooperative during testing, a good sample of his current functioning was believed to have been obtained, but that because of the likely presence of co morbid thought disorders and severe cognitive processing deficits, the Appellant may have greater cognitive potential than his present functioning level would suggest. On this administration of the WISC-III, the Appellant received a Verbal IQ score of 55, a Performance IQ score of 69 and a Full Scale IQ score of 58. The Appellant's Index Summary Scores were all below 60 with the exception of the Perceptual Organization score which was 76. His scaled scores on the Verbal Subtests were all 1, 2 or 3 while his scaled scores on the Performance Subtests ranged from a high of 8 on Picture Completion to a low of 1 on Coding and Symbol Search. The report states that the Full Scale IQ score of 58 does not describe the Appellant well because his nonverbal abilities are significantly better developed than his verbal reasoning abilities. The examiners suggest that the Appellant's low Processing Speed Index of 50 may be a reflection of his notable psychomotor retardation associated with depression. On the WIAT-II the Appellant was functioning at a 1st grade level in academic subjects with stronger performance in rote tasks as opposed to those requiring reasoning which according to the examiners reflects a concrete approach to learning. In the Summary Section of their report, the examiners conclude that his severe cognitive processing deficits coupled with his psychiatric difficulties combine to cause him to function in the mildly retarded range. They opine that he does have upward potential in his cognitive functioning. They suggest that the Appellant also has an overlaying attention deficit disorder and state that his difficulties with attention and concentration are likely to be caused by his psychiatric difficulties as well as possible neurological insult presumed from his severe physical abuse history. Ms. [redacted] and Dr. [redacted]

conclude that it is difficult to determine the respective contribution of these multiple causal pathways relative to the Appellant's cognitive processing and attention deficit difficulties. They offer an Axis II diagnosis of borderline intellectual functioning – rule out mild mental retardation. (15)

12. In [redacted] of 2008 when the Appellant was 18 years of age, he was evaluated by [redacted] Ed.D., A.B.P.P., a Licensed Psychologist. On this occasion the Appellant was given the Wechsler Adult Intelligence Scale (WAIS-III) as well as a number of other tests including a Rorschach and the Thematic Apperception Test (TAT) He was referred to Dr. [redacted] in order to develop a treatment strategy and to aid in determining his level of competency. In Dr. [redacted]'s report, he states that at the time of the testing, the Appellant denied the presence of visual hallucinations, but indicated that he did hear voices calling his name. The report states that the Appellant's attention was adequate for the task at hand and that his motivation was within normal limits. Dr. [redacted] reported that the Appellant's intellectual abilities as assessed on the WAIS-III were in the extremely low range. He noted a moderately significant variation between the Appellant's verbal and performance abilities with his performance abilities being slightly stronger and in the borderline range. The Appellant's scores on the WAIS-III were a Verbal IQ score of 64, a Performance IQ score of 76 and a Full Scale IQ score of 66. Both his Verbal IQ score and his Full Scale IQ scale were in the extremely low range. Dr. [redacted] performed a neuropsychological screen using the AST and found that the Appellant's overall literacy is marginal at best. He also noted some evidence of underlying organic impairment. Dr. [redacted] noted the Appellant's psychiatric conditions including an underlying thought disorder and depression. When discussing the Appellant, Dr. [redacted] notes among other things that the Appellant has a significant history of cognitive limitation. He finds the Appellant to have significant cognitive limitations which places him in the mentally retarded range. He concludes that both significant cognitive limitations as well as psychiatric problems interfere with the Appellant's capacity to function independently. He offers an Axis II diagnosis of mild to moderate mental retardation. Dr. [redacted] suggested that due to the Appellant's psychiatric concerns and cognitive limitations, the appointment of a guardian be considered. (16)

13. In [redacted] 2009 when the Appellant was 19 years of age, he was re-evaluated by Dr. [redacted] On this occasion, the Appellant was given the Wechsler Adult Intelligence Scale-Fourth edition (WAIS-IV) as well as the Rorschach and the TAT. Dr. [redacted] noted in his report that the Appellant continues to report auditory hallucinations. Dr. [redacted] noted that the Appellant's mood was variable from settled to mildly agitated and that his motivation was variable. Dr. [redacted] stated that the Appellant's attention was spotty and his stamina adequate. Again Dr. [redacted] found the Appellant's intellectual abilities to be in the extremely low range. On the WAIS-IV, the Appellant received a Full Scale IQ score of 66 which is in the extremely low range. His Verbal Comprehension score was 72 – borderline, his Perceptual Reasoning score – 84 was low average, his Working Memory score was 66 – extremely low and his Processing Speed was 65- extremely low. Dr. [redacted] explained the results of the Rorschach in his report. He noted that the findings pointed to a major psychiatric

disorder. He also stated that as in the past the Appellant's responses were very relatively concrete and consistent with limited cognition. He opined that the Appellant's morbid preoccupations are suggestive of depression. Dr. [redacted] made mention of his findings on the TAT. He noted that the Appellant exhibits significant social anxiety and frustration over his lack of achievement, which he finds is frequently seen in individuals with limited cognition. Dr. [redacted] states that the Appellant suffers from depression, PSTD, and schizoaffective disorder and notes that his symptoms are mediated by the fact that he takes antipsychotic medication. . Dr. [redacted] believes that the Appellant's limited cognition and his psychiatric condition make it impossible for him to live independently. He offers an Axis II diagnosis of mild mental retardation (17)

14. An IEP developed in 2008 when the Appellant was 18 years of age and in the 11th grade indicates that based on his most recent test results, he tested at the following Grade Equivalencies (GE): Math Vocabulary - GE-4.2, Computation – GE-1.0, General Information – GE-6, Story Problems – GE-5. His overall Math Quotient was 48 with 100 being average. The Appellant's written language skills were tested at the same time. His writing scores ranged from a GE of less than 2.0 to 5.7. The Woodcock Reading Mastery was also administered. On this test, the Appellant was found to have a Total Cluster grade equivalency of 2.7. (18)

15. A Treatment Plan Document developed by [redacted] for the Appellant in [redacted] 2008 when he was 18 years of age indicates that he has significant mental health issues and cognitive impairments and continues to require 24/7 supervision. It also states that he underwent a competency evaluation which found him to be not competent and in need of a guardian. (19)

16. The Appellant is under a Permanent Guardianship having been found incapable of taking care of himself by reason of mental illness. DCF is acting as his guardian. (14)

17. A Vineland-II Adaptive Behavior Scales Score Summary sets out the Appellant's adaptive behavior scores in three areas. The standard scores are: Communication – 61-low, Daily Living Skills – 54-low, Socialization – 64-low. His Adaptive Behavior Composite is 58 which is low – less than the 1st percentile. (A1)

18. Madalyn Salvaggio, a DCF social worker testified on behalf of the Appellant. Ms. Salvaggio stated that the Appellant had previously been in full-time residential treatment at [redacted] but was currently living in a [redacted]. She stated that the Appellant had been in DCF custody since 1995, had been in foster care and had been hospitalized a few times. She stated that the Appellant suffered from PSTD, mild mental retardation, abuse and neglect. Ms. Salvaggio testified that the Appellant can't manage his finances or his medications. She stated that an application for adult services had been made to the Department of Mental Health (DMH) but that he had been found not to be mentally ill. She stated that there had been a finding by a Dr. [redacted] that the Appellant's mental illness was a side effect of his mental retardation. She explained that recently the Appellant had deteriorated somewhat as evidenced by an increase in his angry outbursts. She stated that it was

unclear if the outbursts were due to the Appellant's mental health issues or his mental retardation. Ms. Salvaggio agreed that the Appellant's guardianship was granted on the basis of mental illness, not mental retardation. She stated that she did not have a written report from Dr. [redacted] (14)

19. [redacted] for [redacted] stated that the Appellant has a major depressive disorder, mild mental retardation and PTSD. She stated that insight therapy has not been successful and that the Appellant becomes overwhelmed, anxious and has angry outbursts. She stated that recently he had been walking out of school and that there had been an escalation of outbursts. Ms. [redacted] testified that the Appellant does nothing independently. He currently has one to one staffing and needs close supervision when taking the bus to school. She stated that the Appellant currently is in a vocational placement where he is working one to one [redacted] but that he has a great deal of trouble processing information and is basically shadowing the [redacted]. Ms. [redacted] stated that the Appellant is on several medications, one of which is an antipsychotic.

20. Patricia Shook, Ph.D., testified as an expert witness for DDS. She stated that she has been employed as an eligibility psychologist for DDS for four and one-half years and that in her position she performs eligibility determinations for both children and adults. Dr. Shook testified that the Appellant is over the age of 18 and domiciled in Massachusetts. She stated that in order to qualify for adult DDS services an individual must have both significant sub-average intelligence and significant adaptive function deficits. She stated that the DDS definition of significant sub-average intelligence requires a valid Full Scale IQ score of 70 or below. She disputed the notion that mental illness is a side effect of mental retardation as stated by one of the Appellant's witnesses. Dr. Shook reviewed the three psychological evaluations in evidence. She stated that the 2003 test report raises the issue of the impact of the Appellant's psychiatric illness on his cognitive functioning. She stated that an individual's psychosis can impact their IQ score and in order to find an individual eligible for DDS services they must have a valid IQ score of 70 or below. She stated that she gave light weight to the Appellant's Full Scale IQ score of 58 due to her belief that it was influenced by his psychosis. Dr. Shook reviewed that test given to the Appellant in [redacted] 2008 and stated that the there was a significant discrepancy between the Appellant's Verbal IQ score of 64 and his Performance IQ score of 76 - borderline calling into question the validity of the Full Scale IQ score of 66. She also stated that the results of the Rorschach make the Appellant's aggregate scores difficult to rely on. She explained that if someone is actively psychotic it impacts on how they perform on an IQ test. She stated that she gave this IQ test about the same weight as she gave the previous test. Dr. Shook reviewed the IQ test given to the Appellant in [redacted] 2009. She pointed out that the Appellant's General Ability Index was 76 and raised the issue of problems with his working memory and his processing speed as reasons for his lower Full Scale IQ score of 68. Dr. Shook stated that the 2008 IEP's statement that the Appellant hopes to learn [redacted] and work [redacted] as some evidence of his higher cognitive abilities. She also stated that his [redacted] Treatment Plan is consistent with the Appellant's goal of working as [redacted]. Dr. Shook stated that it was her opinion that the diagnosis of borderline cognitive functioning as opposed to mental retardation would be more consistent with the Appellant's condition. Dr. Shook stated that in

making her decision of ineligibility, she did not consider the Appellant's adaptive deficits because he did not meet the cognitive component of the definition of mental retardation. (1, 15-19)

On cross-examination, Dr. Shook agreed that she had not independently tested the Appellant. She stated that she had observed him working with a teacher and at lunch. She stated that he was working with the teacher on the driver's education manual and that the teacher was asking him questions. She further testified that the teacher stated that the Appellant was making some progress. Dr. Shook testified that she spoke to the Appellant about President Obama and that his comments were appropriate. Dr. Shook stated that an individual's cognitive functioning is usually about the same beginning at age 7. She stated that the Axis II diagnosis given to the Appellant in 2003 was borderline – rule out mild mental retardation. She felt that Dr. [redacted] was wrong about the Axis II definition of mild mental retardation given to the Appellant in 2008. Dr. Shook agreed that auditory hallucinations can be present in individuals with mental retardation and that cognitive limitations and psychiatric issues can overlap. Dr. Shook testified that someone with a Perceptual Organization Index of 76 which the Appellant obtained on the WISC-III administered in 2003 does not have significant cognitive limitations. Dr. Shook testified that she must use the DDS regulations when making her determination and that in her opinion the Appellant does not meet the criteria for eligibility for DDS adult services. (15-16)

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 DDS eligibility criteria. My specific reasons are as follows:

In order to be eligible for DDS supports, an individual who is 18 years of age or older must meet the two criteria set forth at 115 CMR 6.04: (a) he must be domiciled in the Commonwealth, (b) he must be a person with Mental Retardation as 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, the Department has promulgated regulations which define mental retardation. The Department's regulations define mental retardation as significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. Significantly sub-average intellectual functioning is defined as an intelligence score that is indicated by a score of 70 or below as determined from the findings of an assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners. Significant limitations in adaptive functioning is defined as an overall composite adaptive functioning limitation that is two

standard deviations below the mean or adaptive functioning limitations in two out of three domains at 1.5 standard deviations below the mean of the appropriate norming sample determined from the findings of an assessment using a comprehensive, standardized measure of adaptive behavior, interpreted by a qualified practitioner. The domains of adaptive functioning that are assessed shall be: (a) areas of independent living/practical skills; (b) cognitive, communication, and academic/conceptual skills, and (c) social competence/social skills. There is no dispute that the Appellant meets the first criterion and I specifically find that he meets that criterion. There is also no dispute that the Appellant has significant limitations in his adaptive functioning.

I find that because of the Appellant's psychiatric issues, it is difficult to ascertain his innate cognitive ability. All of the test reports point out that his difficulty with attention and concentration impact on his ability to perform on IQ tests as well as on his academic performance. DDS's expert witness testified to this fact as well. I find that such difficulties are likely the result of his thought disorder and his depression. All of the Appellant's Full Scale IQ scores are below 70; however, based on the issues raised by the examiners and DDS's expert witness, I find that the validity of these scores is questionable. Because the validity of these test scores is questionable, I find that the Appellant has failed to meet his burden of showing that he meets the DDS definition of significant sub-average intellectual functioning. Although the Appellant has significant adaptive deficits and in all likelihood cannot function without a great deal of support, I do not find that he is mentally retarded as defined in the DDS regulations.

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: _____

_____
Marcia A. Hudgins
Hearing Officer