2010-24

The Commonwealth of Massachusetts

Executive Office of Health & Human Services
Department of Developmental Services
500 Harrison Avenue
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Secretary

Elin M. Howe
Commissioner

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2010

MA

Re: Appeal of - Final Decision

Dear :

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: Sara Mackiernan, Hearing Officer
Richard O'Meara, Regional Director
Marianne Meacham, General Counsel
Allegra Munson, Assistant General Counsel
Elizabeth Moran Liuzzo, Regional Eligibility Manager
Frederick Johnson, Psychologist
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF DEVELOPMENTAL DISABILITIES

In Re: Appeal of [redacted]

This decision is issued pursuant to the regulations of the Department of Developmental Disabilities (DDS)(115 CMR 6.30 – 6.34) and M.G.L. Chapter 30A. A hearing was held on [redacted] 2010 at the Department's Office in [redacted]. At the close of the hearing, counsel for the appellant requested twenty-five days to submit a written closing. (due [redacted] 2010) Counsel for the Department requested an additional ten days to submit a written closing. (due [redacted] 2010)

Those present for all or part of the proceedings were:

[redacted]	Appellant's sister
[redacted]	Appellant
[redacted]	Psychologist
[redacted]	Social Worker
[redacted], Esq.	Counsel for Appellant
Allegra Munson, Esq.	Counsel for Department of Developmental Disabilities
Frederick Johnson, Psy.D.	Psychologist for Department of Developmental Disabilities

The evidence consists of documents submitted by the Appellant numbered A 1 – A 2, documents submitted by the Department of Developmental Disabilities numbered D 1 – D18 and approximately five hours of oral testimony. Both attorneys also submitted written Closing Arguments.

APPELLANT'S DOCUMENTS

No.	Date	Description	Author
A – 1		Curriculum Vitae	[redacted], Ph.D.
A – 2	[redacted]10	Neuropsychological Evaluation	[redacted], Ph.D.

DEPARTMENT OF DEVELOPMENTAL DISABILITIES DOCUMENTS

No.	Date	Description	Author
D – 1	[redacted] – [redacted]05	Neuropsychological Assessment	[redacted], Ph.D. [redacted], Ph.D.
D – 2	[redacted]08	Application for DDS Eligibility	
D – 3	[redacted]08	DDS Adult Intake Form	[redacted] & DDS
D – 4	[redacted]08	Eligibility Presentation	DDS Eligibility Specialist
D – 5	[redacted]08	Letter Denying Eligibility	Beth Moran Liuzzo, DDS
D – 6	[redacted]08	Request for Informal Conference	[redacted]
D – 7	[redacted]09	Informal Conference Scheduled	[redacted], DDS
D – 8	[redacted]09	Eligibility Report	Frederick Johnson, Psy.D.
D – 9	[redacted]09	Attendance Sheet	Informal Conference
D – 10	[redacted]09	Denial of Eligibility	Beth Moran Liuzzion, DDS
D – 11	[redacted]09	Request for Fair Hearing	[redacted]
D – 12	[redacted]09	Psychological Assessment	[redacted], MS
D – 13	[redacted]09	Receipt of Request for Fair Hrg.	E. Wolfgang, Hearing Coordinator
D – 14	[redacted]10	Discovery Order	Hearing Officer
D – 15	[redacted]10	Notice of Fair Hearing	E. Wolfgang, Hearing Coordinator
D – 16	[redacted]10	Order allowing Appellant's	

		Request for Continuance	Hearing Officer
D – 17	[redacted]10	Reminder Notice of Hearing Date	E. Wolfgang, Hearing Coordinator
D – 18	[redacted]10	Addendum to Eligibility Report	Frederick Johnson, Psy.D.

ISSUE PRESENTED

Whether the applicant 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

[redacted] is a now twenty – two year old young man. He attended the [redacted] in [redacted] as a day student from 2005 until his twenty – second birthday [redacted].

[redacted] attended [redacted] in [redacted] New Hampshire for grades kindergarten through eight. He attended [redacted] because [redacted]. He never had an Individualized Educational Plan or received formal special educational services. His mother reports that this was a [redacted] where students were given individual instruction commensurate with their abilities. (D - 1)

Following eighth grade, [redacted] attended a small community school for several months. Mrs. [redacted] reported that the teachers at this school were concerned that [redacted] was unable to be independent and that the teachers felt that it was not a good fit for him. [redacted] mother took a job at [redacted] and the principal agreed to let [redacted] take some courses there. He did this from [redacted] 2002 through [redacted] 2003. (D – 1)

From [redacted] 2003 until he was admitted to [redacted] in 2005, [redacted] was home schooled. (D - 1) No evidence was provided relative to what curriculum was used or which school department supervised this home schooling.

[redacted] first Neuropsychological Assessment was done in [redacted] 2005 when he was seventeen years [redacted] of age. The Evaluation was done at [redacted] in [redacted] New Hampshire. The evaluation was conducted by [redacted], Ph.D. and [redacted], Ph.D. The report of the results of the evaluation was authored by Dr. [redacted] and Dr. [redacted]. (D – 1)

At the time of the [redacted] 2005 evaluation, [redacted] was being treated with Zoloft and a small dose of Risperdal. According to his parents, [redacted] had had little success in social situations since leaving his grammar school. His difficulties with verbal expression and understanding of nonverbal cues from others and his being developmentally and cognitively behind his peers contributed to his social difficulties. (D – 1)

This [redacted] 2005 evaluation consisted of twenty (20) standardized tests plus parent and child interviews. The examiner stated that the results of this evaluation were thought to be an accurate reflection of [redacted] current functioning. Throughout the evaluation, [redacted] was distracted by concerns about his height and weight and expressed concern [redacted]. [redacted] also exhibited significant anxiety. [redacted] appeared anxious and his affect was constricted. His level of self-confidence was significantly reduced and he constantly sought reassurance. The evaluator postulated that because of his cognitive disability, [redacted] had more difficulty identifying

irrational thoughts and had more difficulty learning coping skills to deal with these thoughts. Further, it appeared that [redacted] ability to learn in an academic setting was adversely affected by his anxiety and obsessive compulsive thoughts and behaviors.

The evaluator recommended that [redacted] psychiatric symptoms be addressed while acknowledging [redacted] brain-based impairments. (D -1) On the Weschler Adult Intelligence Scale [redacted] attained a Full Scale IQ score of 63, a Performance IQ score of 60 and a Verbal IQ score of 70. There was no significant variation between [redacted] verbal and performance scores.

[redacted] was re-evaluated again in 2009 and in 2010. These evaluations were done when [redacted] was twenty-one years of age and beyond the developmental period. They are addressed here because the appellant relied on these reports as evidence of [redacted] ongoing cognitive difficulties. The Appellant further suggests that these scores are evidence that even after nearly five years at [redacted] IQ scores were lower than in 2005.

On [redacted] 2009 [redacted] was evaluated by [redacted], MS/CAGS. (D – 12) This evaluation was done for the [redacted] as part of [redacted] three year re-evaluation. The evaluator noted that [redacted] primary educational disability has been identified as "Intellectual Impairment". She referred the reader to the [redacted] 2005 evaluation for history but noted that there were minimal concerns regarding [redacted] early development but his milestones were inconsistent. Mrs. [redacted] also informed the evaluator that since being on anticonvulsant medication, [redacted] behavior and interactions with others had improved. At the time of this evaluation, [redacted] diagnoses included: Global Developmental Delays, Obsessive Compulsive Disorder and Anxiety Disorder.

[redacted] earned a Full Scale IQ score of 52, a Performance IQ score of 56 and a Verbal IQ score of 57 on the WAIS III given by Ms. [redacted]. On the Scales of Independent Behavior – Revised, [redacted] scores in Broad Independence, Motor Skills, Social Interaction/Communication Skills, Personal Living Skills and Community Living Skills were all in the 0.1st percentile.

Ms. [redacted] noted that [redacted] was anxious and perseverated on certain ideas throughout the evaluation. She also noted that [redacted] repeatedly verbalized strategies he had learned to deal with his anxiety such as "I just try my best and let it go" and "I just have to let it go, right?" (D – 12, p. 1,2) Ms. [redacted] noted that after four years at [redacted], "the management of his mental health issues does not appear to have had any positive impact on his underlying Intellectual Impairment." (D – 12, p.4) Although I find Ms. [redacted] credible, I do not find that four years at [redacted] with no improvement in [redacted] Intellectual Impairment justifies a conclusion that he must be mentally retarded.

Dr. [redacted] conducted a Neuropsychological Evaluation of [redacted] in [redacted] 2010. (A – 2) Dr. [redacted] also testified at the hearing as the appellant's expert. Dr. [redacted] records information from [redacted] mother about his early development as follows: "[redacted] was the product of a full term pregnancy, for some period of time the cord was wrapped around [redacted] neck, early language milestones were met within age expectations but he always had difficulty with "wh" questions, his gross and fine motor skills were delayed." [redacted] has had [redacted], one in [redacted] 2006 which was thought to be related to his medications, and another in [redacted] 2009 for which there has been no explanation. Mrs. [redacted] also expressed concern about [redacted] anxiety, obsessive thinking and rigidity. He was also reported to be highly active, recently sad and irritable and having more trouble getting along with other people.

Dr. [redacted] evaluation consisted of seven (7) standardized tests, an interview with Mrs. [redacted] and a review of records. He does not say in his report what records he reviewed. He testified that he did not review any mental health records. There is no evidence that mental health records that may exist were withheld from Dr. [redacted] or the Department of Developmental Disabilities.

Dr. [redacted] described [redacted] as cooperative, motivated and highly endearing. He was also anxious, chattered during the testing, struggled with maintaining attention but despite these difficulties, [redacted] was highly motivated and did his best on the tests. Dr. [redacted] opined that the results of the evaluation were a valid measure of [redacted] neuropsychological functioning at the time of the evaluation. (A – 2)

[redacted] IQ scores, as measured by the Weschler Adult Intelligence Scale fourth edition, were as follows: Verbal IQ 56, Perceptual IQ 58, Working Memory IQ 60 and Processing Speed IQ 71. Dr. [redacted] testified that the omission, in the report, of a Full Scale IQ score for [redacted] was an oversight and that [redacted]'s Full Scale IQ was calculated to be 55. Dr. [redacted] found that [redacted] presented with global cortical dysfunction manifested as Mild Mental Retardation, impaired memory function, weakness in visual-spatial and visual-motor processing, language deficits and executive impairment. Dr. [redacted] diagnosed [redacted] as suffering from Obsessive Compulsive Disorder, Generalized Anxiety Disorder and Mild Mental Retardation. (A – 2)

On the Vineland Adaptive Behavior Scale, using mother's report, [redacted] scores in Communication Skills, Daily Living Skills and Socialization were all below the first percentile. Dr. [redacted] did not know whether or not [redacted] was under guardianship and he accepted [redacted] signature on a Release of Information. (Testimony of Dr. [redacted])

Dr. Frederick Johnson authored two reports relative to [redacted] eligibility for Adult Services from the Department of Developmental Disabilities. The first was on [redacted] 2009 (D-8) and the second on [redacted] 2010 (D-18). The first report is brief and states that since there was no IQ information prior to age seventeen in a person with significant psychiatric symptoms, it was not possible to make a determination that [redacted] was a mentally retarded person. (D – 8)

In the second report, Dr. Johnson opines that the absence of IQ testing before age seventeen likely indicates that there was no concern that [redacted] was mentally retarded. Dr. Johnson points to the [redacted] 2005 evaluation which states that there was no significant medical history and also describes the panic attacks that [redacted] had in [redacted] 2004 and a second episode prior to [redacted] 2005. The evaluators in the [redacted] 2005 report further state that "we anticipate that [redacted] psychiatric status will dictate the extent to which he is able to work towards his optimal level of independence in the future, regardless of his neurological profile." (D – 1, p.9) Dr. Johnson also noted that when tested at age twenty-one, [redacted] IQ had dropped eleven points since age seventeen. His opinion was that such a drop in IQ was consistent with a person whose mental illness was impacting his intellectual functioning. (D – 18)

Dr. Johnson testified at the Hearing as an expert witness for the Department. Dr. Johnson has had many years experience in reviewing documents and making determinations relative to an applicant for DDS' services. He is expert at determining the presence of mental retardation or some other process which impacts an applicant's intellectual functioning. At the Informal Conference, only the [redacted] 2005 evaluation was available.

Dr. Johnson testified that after reviewing the other evaluations and hearing Dr. [redacted] testimony, his opinion remained the same; that [redacted] is not a person with mental retardation but suffers from a psychiatric condition which is adversely affecting his cognitive Functioning. I find Dr. Johnson's testimony to be credible and I give his opinion significant weight. Dr. [redacted] explanation for [redacted] drop in IQ scores was that the samples [redacted] was compared to had changed as the subjects aged. (Testimony of Dr. [redacted])

CONCLUSIONS AND FINDINGS

In order to be eligible for DDS supports, an individual who is eighteen (18) years of age or older must meet the three criteria set forth at 115 CMR 6.04. The person must be (a) domiciled in the Commonwealth, (b) a person with mental retardation as defined in 115 CMR 2.01 and (c) 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.

> Mental Retardation means significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. A person with mental retardation may be considered to be mentally ill as defined in 104 CMR (Department of Mental Health), provided that no person with mental retardation shall be considered to be mentally ill solely by reason of his or her mental retardation.
>
> Significant Limitations in Adaptive Functioning means 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 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.
>
> Significantly Sub-average Intellectual Functioning means an intelligence test score that is indicated by a score of 70 or below as determined from the findings of assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners.

[redacted] is twenty-two years of age. There is no argument relative to his domicile. [redacted] has been diagnosed with a mental illness which does not by definition exclude him from being considered to be a person with mental retardation.

The Issue here is whether [redacted] low scores on IQ tests at age seventeen are the result of his being a person with mental retardation or a person whose mental illness interferes with his cognitive functioning. [redacted] cognitive functioning was never evaluated until he was seventeen years old. (D - 1) [redacted] was never tested or screened as being a student with significant cognitive delays. His difficulties were apparently not sufficient to trigger any evaluation.

All of the evidence of [redacted] cognitive functioning during the developmental period (prior to age eighteen), comes from information provided by one or both of [redacted] parents and quoted or repeated in subsequent evaluation reports. (D – 12, D – 1, A – 2) Neither of [redacted] parents attended the Hearing or submitted any evidence. [redacted] sister was present at the Hearing but she did not testify.

While I do not doubt the veracity of [redacted] parents, without any documentation from school, such as teachers reports or progress reports or even grades, I give very little weight to their statements about [redacted] difficulties in school such as [redacted] was "never at grade level and was not ready to graduate from eighth grade when age appropriate". (D – 1)

FINDINGS

1. I find that [redacted], with the exception of trouble listening and paying attention in preschool and some social difficulties with peers, was functioning within the normal range for his age until he developed obsessive compulsive disorder during adolescence. (reported information obtained from parents), (D – 1)
2. I find that [redacted] has been diagnosed as having obsessive – compulsive disorder and an anxiety disorder.
3. I find that [redacted] is being treated with antipsychotic and other medication.
4. I find that [redacted] mental illness continues to impact his ability to perform academically and on standardized tests.
5. ! find that [redacted] is over eight-teen years of age.
6. I find that [redacted] is domiciled in Massachusetts.
7. I find that [redacted] does not meet the criteria set out in 115 CMR 6.04.
8. I find that [redacted] is not a person with mental retardation.

After a careful review of all the evidence presented, I find that [redacted] has failed to show by the preponderance of the evidence that he is eligible for adult services from the Department of Developmental Disabilities.

The determination that [redacted] does not meet the criteria set out in 115 CMR 6.04 is correct.

APPEAL

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L. c30A (115 CMR 6.34[5]).

Date:_____

_____
Sara Mackiernan
Hearing Officer