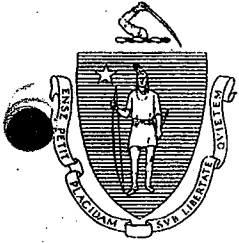


2010-29



The Commonwealth of Massachusetts

Executive Office of Health & Human Services

Department of Developmental Services

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Boston, MA 02118-2439

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Timothy P. Murray
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JudyAnn Bigby, M.D.
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,

Handwritten signature of Elin M. Howe in cursive.

Elin M. Howe
Commissioner

EMH/ecw

cc: Marcia Hudgins, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Cynthia Gagne, Assistant General Counsel
Damien Arthur, Regional Eligibility Manager
Bradley Crenshaw, Psychologist
Richard Costigan, 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, formerly the Department of Mental Retardation (hereinafter "DDS") (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. Hearings were held on [REDACTED] 2009 and [REDACTED] 2010 at DDS' [REDACTED] Office in [REDACTED], Massachusetts

Those present for all or part of the proceedings were:



Psy. D.

Bradley J. Crenshaw, Ph.D.
Richard P. Costigan, Psy.D.
C.J. Gange

Appellant's Father
Appellant's Brother
Appellant's Sister
Licensed Psychologist
Care Provider, Director of Placement Agency
Attorney for the Appellant
Attorney for the Appellant
DDS Psychologist
DDS Psychologist
Attorney for DDS

The evidence consists of documents submitted by DDS numbered 1-12 and approximately six hours of oral testimony.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DDS supports by reason of mental retardation as set out in 115 CMR 6.03(1). Specifically, is the Appellant a person with sub-average intellectual functioning as defined by the American Association on Mental Retardation.¹

HISTORY OF THE APPEAL

The Appellant applied for services from the Department of in [REDACTED] 1998 and was deemed not eligible in [REDACTED] 1999. This denial of eligibility was based on a Full Scale IQ score of 77 which the Appellant obtained on the WAIS-III when he was 40 years of age. He was retested using the WAIS-III in 2000 when he was 41 years [REDACTED] and received a Full Scale IQ score of 71.

On [REDACTED] 2001, a hearing was held to find if the determination that the Appellant was not eligible for services was consistent with the Department's regulations. At that

¹ At the hearing on [REDACTED] 2009, the Appellant's Motion to Frame the Issue for Hearing was allowed.

hearing the parties stipulated that the Appellant was a resident of Massachusetts, had substantial limitations in more than two adaptive skill areas and that his impairments manifested prior to age 18.

According to the Hearing Officer's Decision, the only element of the regulatory definition in controversy is "significant sub-average intellectual functioning". In order to conclusively answer the question of the Appellant's intellectual capacity, the Hearing Officer ordered the Department to meet with the Appellant and/or his representative and to select a mutually acceptable forensic psychologist to arrange for additional testing of the Appellant. The matter was to be kept open to receive additional information.

The Commissioner at the time, Gerald J. Morrissey, Jr. adopted the Hearing Officer's findings of fact. He also adopted her conclusions of law in part and made some modifications. He found that because the Hearing Officer determined that the psychological evidence presented did not establish convincingly that the Appellant is a person with mental retardation, as that term is defined in the Department's regulations that the Appellant failed to establish his eligibility for services.

The Commissioner declined to adopt the Hearing Officer's order requiring the Department to perform an additional independent evaluation of the Appellant stating that such an order exceeds the Hearing Officer's authority. The Commissioner found it in the public interest to remand the eligibility decision pending a reevaluation of the Appellant by a psychologist employed by the Department.

In [REDACTED] 2008, Richard Costigan, Psy.D., a psychologist employed by DDS performed a record review and authored an Eligibility Report. Dr. Costigan found that the Appellant did not meet criteria for DMR Adult Services.

After the remand hearing held on [REDACTED] 2009, I ruled that the Department's psychologist had failed to perform a reevaluation of the Appellant but had simply reviewed the two test reports that were put into evidence at the initial eligibility hearing. I therefore ordered that a reevaluation of the Appellant be performed in accordance with Commissioner Morrissey's remand.

In [REDACTED] 2009, Bradley J. Crenshaw, Ph.D., a psychologist employed by the Department performed the reevaluation and set out his findings in a report.

Both Dr. Costigan and Dr. Crenshaw testified as expert witnesses at the hearing held in May of 2010.

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DDS services. (6, 7, 10)
2. The Appellant is a 51-year-old male who resides in [REDACTED], MA. (6)

3. Four evaluations of the Appellant's intellectual functioning after the age of 18 were entered into evidence. (1,4,11,12)
4. An Addendum to Dr. [REDACTED]'s evaluation was entered into evidence. (5)
5. Two Eligibility Reports were entered into evidence. (7, 10)
6. Testimony was given by Bradley J. Crenshaw, Ph.D. and Richard Costigan, Psy.D relative to the Appellant's level of cognitive functioning.
7. The report of an evaluation of the Appellant at age 40 performed by [REDACTED], Ph.D. stated that the result of her examination of the Appellant is consistent with severe learning disabilities in an individual with cognitive functioning ranging from average to mentally deficient. She pointed out the disparity in the Appellant's Index scores ranging from a 94 in Verbal Comprehension to 69 in Working Memory and 63 in Processing Speed. On the administration of the Wechsler Adult Intelligence Scale-III (WAIS-III), the Appellant achieved a Verbal IQ score of 82, a Performance IQ score of 76 and a Full Scale Score of 77 which according to [REDACTED] placed him in the borderline range of intellectual functioning. (1)
8. The report of the evaluation of the Appellant at age 41 years [REDACTED] performed by [REDACTED], Ph.D. stated that the Appellant's overall performance is classified in the lower end of the borderline range and is ranked only at the 3rd percentile. Dr. [REDACTED] reported that the tests appear to be a reliable and valid indication of the Appellant's current levels of functioning. On this administration of the WAIS-III, the Appellant received a Verbal IQ score of 78, a Performance IQ score of 68 and a Full Scale IQ score of 71. Dr. [REDACTED] also reported that the Appellant's Verbal Comprehension Index score was 94 in contrast to his Perceptual Organization Index score of 74 and pointed out that the significant differences in the Appellant's Verbal and Performance abilities are usually indicative of severe learning disability and neurological deficits. Dr. [REDACTED]'s report states that a developmental history was not obtained. (4)
9. Dr. [REDACTED] administered the Adaptive Behavior Assessment System (ABAS) to the Appellant's parents and his residential care-takers when the Appellant was 42 years [REDACTED] of age. Dr. [REDACTED] concluded that the Appellant fully met the criteria for a diagnosis of mental retardation as specified by a variety of authoritative sources including the American Association on Mental Retardation (AAMR) based on his sub-average intellectual functioning and his limitations in at least four adaptive skill areas. (5)
10. [REDACTED], Psy.D. evaluated the Appellant on [REDACTED] 2008 when the Appellant was 49 years [REDACTED] of age. On this administration of the WAIS-III, the Appellant achieved a Verbal IQ score of 77, a Performance IQ score of 72, and a Full Scale IQ score of 72. The Appellant's Verbal Comprehension Index was 91 in contrast to his Perpetual Organization Index score of 69, his Working Memory Index

score of 67 and his Processing Speed Index score of 68. Dr. [REDACTED] stated in her Summary that the Appellant is performing overall in the mild mental retardation range basing her opinion on the DSM IV-R regulations. According to Dr. [REDACTED] the DSM-IV-R states that it is possible to diagnose mental retardation in individuals with IQ scores between 70-75 who also exhibit significant deficits in adaptive behavior. (12)

11. Dr. Richard Costigan's Eligibility Report dated [REDACTED] 2008 found that based on his review of the evaluations submitted at the hearing held in [REDACTED] 2001 (the [REDACTED] and [REDACTED] reports), the Appellant did not meet the criteria for adult services. Dr. Costigan based his opinion on the Appellant's intellectual functioning at the time of the Appellant's evaluation in 1998 in that it was significantly above regulatory criteria and clinical criteria for a diagnosis of mental retardation. He also stated that the Appellant had not provided data regarding his adaptive functioning during his developmental years and therefore did not meet the criteria for adult eligibility. (10)
12. Dr. Costigan testified on behalf of DDS at the remand hearing held on [REDACTED] 2009. At the hearing, Dr. Costigan stated that he had performed a record review in accordance with the remand ordered by Commissioner Morrissey. He stated that he did not believe that the reevaluation ordered by the Commissioner required that he perform a psychological examination of the Appellant. He stated that he had not met the Appellant and believed that he had enough information available to him to perform the reevaluation of the Appellant. It continued to be his opinion that the Appellant did not qualify for services from the Department. (10)
13. On [REDACTED] 2009 in accordance with my order to perform a reevaluation, Bradley J. Crenshaw, Ph.D. evaluated the Appellant. Dr Crenshaw's report of the evaluation states that he conducted clinical interviews with the Appellant's father, his sister and the director of his residential placement. He reviewed the prior psychological evaluations of the Appellant contained within the DDS file as well as further clinical information provided by the Appellant's father. He met the Appellant and administered a series of tests. On the Wechsler Adult Intelligence Scale-IV (WAIS IV), the Appellant obtained a Full Scale IQ score of 64. His Verbal Comprehension Index score was 72, His Perceptual Reasoning Index score was 69 and his Processing Speed Index score was 62 Dr. Crenshaw's report indicates that he spoke with the Appellant's father who told him that the Appellant had been in Special Education though all his school years and had been evaluated as having PDD with retardation. The Appellant's father supplied Dr. Crenshaw with some early school records, including a Stanford Achievement Test but because the test results contained the Appellant's age but did not indicate what grade he was in, Dr Crenshaw did not it useful. His report notes that there were no other formal evaluations offered beyond what was already in the DDS chart. Dr. Crenshaw also talked to the Appellant's sister who related that the Appellant graduated from high school without really knowing how to read or do basic math. Dr. Crenshaw noted in his report that the director of the Appellant's residential placement told him that the Appellant needs prompts in all aspects of daily living and needs structure around food or he will eat

until he becomes sick. She stated that he is very anxious and that his anxiety still escalates at times even with the use of Risperdal. Dr. Crenshaw's report states the Appellant's intellectual power is notably depressed and formally within the range of mild mental retardation. (11)

14. At the hearing held on [REDACTED] 2010, Dr. Crenshaw testified as an expert witness on behalf of DDS. Dr. Crenshaw stated that in evaluating the Appellant for purposes of determining his intellectual capacity, he reviewed three clinical reports: [REDACTED], [REDACTED] and [REDACTED], had phone conversations with the Appellant's father and sister and conversations with the Appellant's [REDACTED]. He stated that he administered the WAIS-IV as well as other tests to the Appellant. He testified that he believes that the Appellant has considerable deficits including deficits in memory. Dr. Crenshaw stated that the Appellant's IQ scores on the test that he administered reveal a fairly flat profile. He noted that the Appellant was fairly anxious when taking the test and that it was difficult for him to focus and to pursue the tasks but pointed out that the Appellant was invested in the testing. Dr. Crenshaw reviewed the Appellant's previous IQ test results. He noted that the [REDACTED] report showed a split between the Appellant's cognitive abilities and his attention and speed. He stated that the Appellant's Verbal Comprehension Index of 94 was within average limits but that his Processing Speed Index of 63 was deficient. Dr. Crenshaw testified that the [REDACTED] test report shows consistency with the [REDACTED] report and noted that on both IQ tests the Appellant's Verbal Comprehension Index was 94. He pointed out that these tests were administered 2 ½ decades after the developmental period. He stated that the Appellant did not appear to have a global delay. Dr. Crenshaw reviewed his testing of the Appellant and opined that the more than 20 point drop in the Appellant's Verbal Comprehension score was caused by anxiety. He did not believe that the Appellant had experienced a neurological change since prior testing nor did he believe that the Appellant was malingering. He stated that he did not consider the Appellant to be mentally retarded because the Appellant's earlier Verbal Comprehension Index score of 94 would not be seen in someone with mental retardation. He explained that individuals with mental retardation are globally suppressed. (1, 4, 11, 12)

On cross-examination, Dr. Crenshaw stated that he was not familiar with the Department's regulations that were in effect in 2001. He stated that he did not consider the regulations when doing his evaluation. Dr. Crenshaw stated that he agreed to perform the evaluation with respect to conducting psychological testing, not to make a determination as to whether the Appellant met the criteria for DDS eligibility.

15. At the [REDACTED] 2010 hearing, Dr. Costigan also testified as an expert witness for DDS. He stated that he was not the eligibility psychologist in 2001 when the Appellant was found ineligible for services and explained that at that time all eligibility determinations were done at the Area Office. He stated that was asked to review the Appellant's documents in accordance with Commissioner Morrissey's remand. After his review of the Appellant's documents, he found that the Appellant did not meet the eligibility

criteria and wrote an Eligibility Report documenting his findings. He testified that he had since reviewed all four of the reports of the Appellant's psychological testing that were submitted to DDS. In reviewing the test reports, Dr. Costigan stated that he gave the most weight to Dr. [REDACTED]'s test results obtained when the Appellant was 40 years of age because this testing was performed closest to age 18. On this test the Appellant had a Full Scale IQ score of 77 and a Verbal Index of 94. Dr. Costigan commented on the [REDACTED] and [REDACTED] test scores and stated that Verbal Comprehension Index scores of 94 or 91 are not consistent with the profile of someone who is mentally retarded. Dr. Costigan stated that he saw a much different picture when reviewing the test results obtained by Dr. Crenshaw in that the Appellant at age 50 is exhibiting global deficits. He explained that despite the Appellant's Full Scale IQ score of 64 and a Verbal Comprehension Index of 72 on the test administered by Dr. Crenshaw, he did not find the Appellant to be mentally retarded. Dr. Costigan explained that it is standard practice to look at scores closest to the developmental period and that the Appellant's earliest reported Full Scale IQ score of 77 and his Verbal Comprehension Index score of 94 were not consistent with a diagnosis of mental retardation. He pointed out that many factors can contribute to a decrease in an individual's intellectual functioning. (1, 4, 10-12)

On cross-examination, Dr. Costigan testified that he did believe that it made sense to re-test the Appellant at age 49 because he was well beyond the developmental period. He stated that when the Index scores are much different from the IQ scores, he would not assign a Full Scale IQ score, but if he did he would qualify it. He stated that in the case of the last test administered to the Appellant, it was appropriate to assign a Full Scale IQ score. He testified that one cannot presume that the Appellant's deficits existed before the age of 18 and that environmental factors may have played a part in the Appellant's lower IQ scores at age 50. (11)

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his need for supports, I find that the Appellant 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 DDS 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 2.01², 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.

² DDS changed its definition of "mental retardation" and incorporated the definition of "significantly sub-average intellectual functioning" effective June 2, 2006. Because the Appellant's application for DDS supports was filed before June 2, 2006, the earlier definition employing the standards of the AAMR applies to this matter.

The parties stipulated that the Appellant is a resident of Massachusetts (Decision of Hearing Officer Byrne adopted by Commissioner Morrissey)

I find that he meets the first criteria of being domiciled in the Commonwealth.

The parties also stipulated that the Appellant has substantial limitations in more than two adaptive skill areas and that his impairments manifested prior to age 18. (Decision of Hearing Officer Byrne adopted by Commissioner Morrissey)

I find that the Appellant has substantial limitations in more than two adaptive skill areas and that his impairments manifested prior to age 18.

The only issue before me is whether the Appellant has significantly sub-average intellectual functioning as defined by the American Association on Mental Retardation.

Consistent with its statutory mandate, DMR adopted the American Association on Mental Retardation (AAMR) 1992 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 the criteria (a) and (b) before the age of 18.

I find that the Appellant is not a person with sub-average intellectual functioning as defined by the AAMR. Although he has been found to have significantly sub-average intellectual functioning on a number of occasions, none of examiners were able to establish his level of functioning prior to age 18, a necessary component of the AAMR definition. Even though the parties stipulated that the Appellant's impairments were present prior to age 18 and there was evidence of his attending special education and vocational classes and having difficulty with reading and basic math, I find that the best evidence of his diminished functioning at that time is the testing performed closest to age 18 when he received a Full Scale IQ score of 77.

I did give consideration to the opinions of the two examiners who found the Appellant to be mentally retarded based on Full Scale IQ scores of 71 and 72 and according to some of the authorities cited in their respective reports, they may be correct. However, I find that Dr. [REDACTED] improperly applied that AAMR definition of mental retardation as he did not include the requirement that the individual's intellectual impairments and deficits in adaptive functioning must have manifested before the age of 18. I also find that Dr. [REDACTED]'s determination that the Appellant meets the criteria for a diagnosis of mental retardation not to be relevant in the instant case. She based her diagnosis on the DSM IV-R regulations, not the AAMR standards as required by DDS regulations.

Finally, I gave consideration to the Dr. Crenshaw's examination of the Appellant but did not find it helpful in assisting me to determine the level of the Appellant's intellectual functioning prior to age 18. Although Dr. Crenshaw was provided with some of the Appellant's records including a Stanford Achievement Test given prior to age 18, he did not find them useful due to their lack of specificity. Dr. Crenshaw's report indicates that the Appellant's intellectual power falls formally within the range of mental retardation, but he testified that he did not believe the Appellant to be mentally retarded due to the Verbal scores that he had received in on earlier IQ tests.

I believe that it was the former Hearing Officer's hope that by securing additional reliable information, she would be able to reach a more supportable decision relative to the Appellant's eligibility. The Commissioner's order for a reevaluation was not limited to the record at that time and allowed for additional information to be considered. Unfortunately, no additional information surfaced during the reevaluation to assist in determining the Appellant's level of intellectual impairment prior to age 18.

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