2010-3

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

Leanne Bellerose
Social Worker
DCF/ Area Office

MA

Re: Appeal of - Final Decision

Dear Ms. Bellerose:

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 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[1]

In Re: Appeal of [redacted]

This decision is issued pursuant to the regulations of the Department of Developmental Services (DDS) (115 CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on [redacted], 2009 at DDS's [redacted] in [redacted], Massachusetts. Those present for the proceedings were:

[redacted]	Appellant
	Appellant's foster parent
	Appellant's sister
	CCI Executive Director
	Life Long Family Connections
Mark Theberge	DCF Supervisor
Leanne Bellerose	DCF Social Worker
Patricia Shook, Ph.D.	Eligibility Psychologist, DDS
Barbara Green Whitbeck	Assistant General Counsel, DDS

The evidence consists of documents jointly submitted by the Appellant and DDS numbered 2-15, a document submitted by DDS numbered 1, a document submitted by the Appellant numbered 16 and approximately two 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 6.04(1).

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DDS services. (4, 6)

2. The Appellant is a 21-year old man who currently resides in the Commonwealth of Massachusetts.

3. Two evaluations of the Appellant's intellectual functioning before the age of 18 (11, 12)

[1]The name of the Department of Mental Retardation (DMR) changed to the Massachusetts Department of Developmental Services (DDS) on June 30, 2009. As the fair hearing was held on [redacted], 2009 the new name of the agency will be used.

4. Two evaluations of the Appellant's intellectual functioning after the age of 18 (13, 14)

5. One Quarterly Review of the Appellant's Treatment Plan (15)

6. One Functional Life Skills Assessment (16)

7. A Medical Certificate – Guardianship (10)

8. A Eligibility Determination dated [redacted], 2009 (4)

9. The Curriculum Vita of Dr. Patricia Shook (1)

10. Notices, correspondence and DDS regulations (2, 3, 5-9)

11. In [redacted] of 2001 when the Appellant was 13 years [redacted] of age, he was evaluated by [redacted], Ph.D., a Clinical Neruopsychologist at the [redacted] Hospital. At the time of the evaluation, the Appellant was residing at the Residential Assessment Program (RAP). Dr. [redacted]'s report noted that the Appellant had a history of physical abuse, multiple foster home placements and disruptions of the placements. It stated that he was born with a positive toxic screen for cocaine and experienced a CVA in [redacted] of 1995. According to the report, this was followed by a hemiparesis and two seizures. An arterial venous malformation in the posterior frontal parietal lobe was resected in 1996 or 1997. The report states that a CT scan of the Appellant's head in 2000 was read as normal. Dr. [redacted] also notes that the Appellant was hospitalized at [redacted] for approximately 3 months in 2000 for behavioral dyscontrol. He was also admitted to the [redacted] from September – November of 2001. During that hospitalization, the Appellant was diagnosed with Bipolar Disorder II, Oppositional Defiant Disorder, Post Traumatic Stress Disorder (PTSD) and ADHD. There was also mention made of a diagnosis of Reactive Attachment Disorder. Dr. [redacted] stated that the Appellant presented as quite immature and as tasks became more challenging, his initial cooperation diminished markedly. After about an hour, the Appellant began to reject all tasks. At another time Dr. [redacted] tried to continue the evaluation, but the Appellant refused. Due to the Appellant's non-compliance a complete neuropsychological evaluation was not possible. The test results reported were obtained during the initial period of cooperation and Dr. [redacted] considered them to be valid measures of the Appellant's functioning at that time. The Appellant was given the Wechsler Intelligence Scale for Children –III (WISC-III). On this test, the Appellant obtained a Verbal IQ score of 74, a Performance IQ score of 80 and a Full Scale IQ score of 75. Dr. [redacted] stated that the Appellant's Full Scale score of 75 fell in the borderline classification of intelligence. (11)

12. During a hospitalization at [redacted] between [redacted] 2004 and [redacted] 2005, the Appellant was given a psychological test. He was 16 years [redacted] old at the time of the admission. The only information available relative to this test is found in the discharge summary. It states that the testing indicates the following: Appellant's verbal comprehension score - 65, his perceptual reasoning score - 69, his working memory score - 62, and his processing speed – 68. [redacted], M.D. noted in the summary that the Appellant's intellectual ability appeared to be in the borderline range with intellectual potential at the borderline to low average range. Dr. [redacted] deferred a diagnosis on Axis II. (12)

13. In [redacted] of 2008, when the Appellant was almost 20 years of age, he was referred to [redacted], Ph.D. for an evaluation of his intellectual functioning. DR. [redacted] noted in his report that the Appellant carried diagnoses of PTSD and possible Reactive Attachment Disorder along with ADHD and Bipolar Disorder. Dr. [redacted] gave the Appellant the Wechsler Adult Intelligence Scale – 3rd Edition (WAIS-III). Dr. [redacted] stated that the Appellant was cooperative and seemed to participate with the testing to the best of his ability. He noted that the test results were thought to provide a valid estimate of the Appellant's current functioning. On this test the Appellant received a Verbal IQ score of 71, a Performance IQ score of 69 and a Full Scale IQ score of 67. Dr. [redacted] stated that this placed the Appellant in the extremely low range and is consistent with a diagnosis of mental retardation. Dr. [redacted] pointed out that the Appellant's working memory skills appear to be seriously compromised and opined that this was possibly due to his brain injury. (13)

14. When the Appellant was 21 years of age, he was tested by [redacted], Ed.D., A.B.P.P. On this occasion the Appellant was given the Wechsler Adult Intelligence Scale – 4th Edition (WAIS-IV). In this test, the Appellant received a Full Scale IQ score of 67. Dr. [redacted] stated that the Appellant's intellectual abilities were in the extremely low range. Dr. [redacted] noted that the Appellant memory was assessed through the WRAML-2 and that his performance was quite weak. A review of his Verbal Memory Index revealed that the Appellant was functioning in the extremely low range. Tests of attention and concentration were in the extremely low range. When given the CPT-II, a computer-driven test of sustained visual attention, it was clear that the Appellant has problems with inattentiveness. Dr. [redacted] opined that this suggests pervasive attention types of problems, which probably goes beyond the diagnosis of ADHD and is more consistent with overall low cognitive functioning. Dr. [redacted] reported that the Appellant's academic achievement was generally consistent with the rest of his profile, falling into the borderline to extremely low range. His sentence comprehension was extremely low. DR. [redacted] concluded that the Appellant presents with a complicated developmental history, which has many factors that could contribute to a diagnosis of mental retardation. He noted that the Appellant was born drug addicted and that he suffered from a seizure disorder. He also pointed out that all of the Appellant's Full Scale IQ scores fall below a 70. Dr. [redacted] also noted the consistency between his low level of functioning, his academic achievement and his overall memory

scores. Dr. [redacted] rendered a diagnosis of mild mental retardation on Axis II. (14)

15. A Quarterly Review of Treatment Plan from [redacted] 2008 indicated that the Appellant came to the [redacted] School with a diagnosis of Psychotic Disorder, PTSD, Hypothyroidism and Borderline Intellectual Functioning. No test results were included in this document and no IQ scores were given. (15)

16. A Functional Life Skills Assessment from [redacted] 2009 indicates that the Appellant needs maximum assistance in a number of areas. (16)

17. A Medical Certificate dated [redacted], 2006 states that the Appellant is a mentally ill person to the degree that he is incapable of caring for his personal and/or financial affairs. (10)

18. The Eligibility Determination indicated that the Appellant obtained and Adaptive Behavior Composite of 45 (low) on the Vineland-II. (4)

19. [redacted], the executive director of Communities Collaborative (CCI) testified on behalf of the Appellant. He stated that the Appellant's test results along with the high level of support that he requires makes him very similar to individuals served by his agency who have been found eligible for DDS services. He stated that 85% of the individuals that the agency serves have cognitive impairments. He stated that the Appellant's mental health issues are under control. It is the Appellant's cognitive impairments and his processing inabilities that are what the agency is focusing on relative to the Appellant. He stated that the structure and support that the Appellant is receiving are based on the agency's experience with the cognitively impaired. He also noted that the program is working for the Appellant.

20. [redacted] from Life Long Connections testified on behalf of the Appellant. She stated that she had known the Appellant for 10 years. She stated that he needs a great deal of structure. She stated that even in the presence of two 24 hour staff, he has great difficulties. She stated that he has no financial sense and no realistic view of the future. She stated that he attends the [redacted] School. She stated that she adopted the Appellant's sister and had hoped to adopt the Appellant but that was not possible. She stated that the Appellant had a partial lobotomy and that she could not believe that he would not qualify for DSS services. Ms. [redacted] stated that she understood that the Appellant's mental health issues were under control and that the focus of further work with the Appellant would be with in the area of mental retardation. She stated that he had been stable for a little more than a year.

21. Mark Theberge, the Appellant's DCF case supervisor testified on behalf of the Appellant. He stated that he had been in this role for 10 years. He stated that in stepping the Appellant down from the [redacted] School to Community Connections that it was DCF's belief that the Appellant was mentally retarded. He

testified that the Appellant's issues are not primarily mental health and that he believes that the documentation supports a finding that the Appellant is most appropriately served by DDS.

22. [redacted], the Appellant's sister testified on behalf of the Appellant. She stated that in the past the Appellant had exhibited serious violence. He experienced seizures when he was younger and had a lobotomy when he was eight years old. She stated that she is worried about him and wants him to get appropriate services.

23. Leanne Bellerose, the Appellant's DCF social worker testified on behalf of the Appellant. She stated that she had known the Appellant for approximately 10 years. She stated that it was difficult to get the Appellant's medical records because he was born in Rhode Island. She stated that the Appellant had been in residential placements for most of the time since he was 12. She stated that he had been a bit higher functioning but that over the years he decompensated, became hospitalized, had many placements and then became institutionalized. She stated that many of the reports speak about the Appellant's mental health because of his psychiatric hospitalizations. She testified that with medication he is mentally stable. She stated that she is extremely concerned about his ability to function on a day to day basis and believes he needs a great deal of support. She stated that although he does have mental health issues, his cognitive deficits make it difficult for him to function.

24. [redacted], the Appellant's foster parent testified on behalf of the Appellant. He stated that he has known the Appellant since [redacted] of 2009. He stated that the Appellant needs constant supervision 24 hours a day, 7 days a week in all areas. He needs assistance with everything in the house. He stated that the Appellant has short term memory problems and doesn't know what's going on around him. He stated that the Appellant doesn't think about anything over the long term.

25. Patricia Shook, Ph.D. testified as an expert witness for DDS. Dr. Shook stated that she is employed by DDS as an Eligibility Psychologist. She stated that as the Eligibility Psychologist, she reviewed the Appellant's materials as they came in and that it was her determination that he was not eligible for DDS services. When asked for the regulatory definition of mental retardation, Dr. Shook stated that an individual must be 18 years of age or older, domiciled in Massachusetts and have an intellectual disability as set out in the regulations. She stated the significantly sub-average intellectual functioning is part of the definition of intellectual disability which states that an individual must have an IQ score of 70 or below on individually administered IQ tests given and interpreted by qualified practitioners. She stated that an applicant must meet both the cognitive and the adaptive components of the definition of mental retardation in order to be found eligible for DDS services. She agreed that the primary determination is whether the person has sub-average intellectual functioning. Dr. Shook stated that in making determinations of eligibility the intellectual disability must be present before the

age of 18. She testified that in making eligibility determinations she primarily looks at cognitive testing, preferably more than test. She stated that tests after the age of 18 are of some use but need to be put in perspective. She stated that the DSM- IV allows for somewhat more flexibility than the DDS regulations. She agreed that there are individuals who have scored 70 or below on an IQ test that are not mentally retarded. Dr Shook testified that it is more than the test score, one must be comfortable that it is a valid test. She also pointed out that someone with higher adaptive behaviors may not be eligible even if they have an IQ score of 70 or below. She stated that the Appellant's adaptive functioning did not play a role in her determination of the Appellant's eligibility because the primary focus was his cognitive ability; however she did agree that his adaptive functioning was in the range. She stated that one must be convinced that the individual's cognitive functioning is the cause of low adaptive functioning as there can be many reasons for such low functioning. She stated that the Appellant scored 70 or below on some of the tests that she considered but that there were a number of issues which may have contributed to his low scores. She stated that there were problems with some of the testing which made it difficult to obtain a valid score. She stated that one has to look at all the factors to determine if the tests are good indications of the individual's level of cognitive functioning.. Dr. Shook stated that mental health, behavioral, attention and concentration issues may have impacted the Appellant's scores on the IQ tests. She stated that there were some variations which raised questions. She testified that it would seem that the Appellant falls more within the borderline range of intellectual functioning. (1-3)

Dr. Shook reviewed the testing done when the Appellant was 13 years [redacted] of age at the [redacted] Hospital. She stated that it was not possible to get a complete neuropsychological evaluation done due to the Appellant's lack of focus and cooperation. Dr. Shook stated that never the less the tester was able to administer a full IQ test to the Appellant. She stated that at that time the Appellant had a Full Scale IQ score of 75 as well as a number of scores in the borderline to low average range. She noted that this was prior to his being diagnosed with a psychotic disorder. She stated that she did not have this test report when she made her original decision but that this result supported her original decision that the Appellant was functioning in the borderline range. (11)

Dr. Shook reviewed the [redacted] Discharge Summary completed when the Appellant was 16 years of age. She stated that at this time there was evidence of psychosis. He was tested during the hospitalization but Dr. Shook did not have access to the test or the test report although the scores are mentioned in the summary. She stated that although his scores on the test were reported as below 70, the summary states that his intellectual ability appears to be in the borderline range with intellectual potential at borderline to low average range. She stated that the implication is that they did not see these scores as representative of the Appellant's overall cognitive ability. She stated that there may have been other factors that were interfering. She also noted that they deferred a diagnosis on Axis II where they could have given a definition of mental retardation based on his low

scores. Dr. Shook stated that she did not have this document available when she made her eligibility determination. She testified that this document did not change her determination. (12)

Dr. Shook reviewed Dr. [redacted]'s test results. At the time of the testing the Appellant was 19 years [redacted] of age. She stated that there were a number of psychiatric factors set out in the report that could have influenced the Appellant's performance on the IQ test as well as a reference made to the testing done while the Appellant was at [redacted]. That reference suggests that despite the Appellant's low score (Full Scale IQ score -58) and uniformly deficient subtest scaled scores, it was felt that the scores were possibly suppressed to some degree by motivational factors. Again there were suggestions that the Appellant's intellectual potential fell in the borderline range. Dr. Shook stated that there was evidence of lack of focus and concentration on the part of the Appellant when taking the IQ test administered by Dr. [redacted]. She stated that the Appellant's Full Scale IQ score on this test was 67 but pointed out that his Verbal Comprehension Index was 80 which would place him in the low average ability range. She noted that he had some points on the testing where he was functioning at a higher range than would be suggested by the Full Scale IQ score and if someone was having trouble with attention and concentration the tests where he scored higher would be less affected by some of these things. She stated that there are issues that affect the Appellant's test taking abilities. She stated that the fact that he is able to achieve a score in the low average range on the Verbal Comprehension Index and well as on Vocabulary and Similarities is likely due to the fact that they are less impacted by other things that are impacting his functioning. She testified that it helps to determine where he might be functioning underneath the rest of the issues. This was the test that she had when she made her decision. She stated that this was a key test and was supported by the rest of the materials that came in later. (13)

Dr. Shook reviewed Dr. [redacted]'s test report. This testing was done in [redacted] of 2009 when the Appellant was 21 years of age. This testing was done in the hope that the Appellant could be tested without any interfering issues. Dr. Shook explained that even though this was beyond the developmental period such testing was thought to be helpful in determining the Appellant's level of cognitive functioning. Dr. Shook testified that unfortunately the Appellant's problems of inattention and poor concentration were not resolved. She stated that this makes it difficult to determine his level of cognitive functioning. Since there was no improvement relative to earlier tests, Dr. Shook testified that she had to fall back on the earlier test results. She stated his Full Scale IQ score of 67 is very similar to earlier testing. She noted that there was a decrease in his Verbal Comprehension score, but explained that the earlier test given when he was 19 years 11 months has more relevance because it is nearer the developmental period. (14)

Dr. Shook testified that after reviewing all of the materials, she does not believe

that the Appellant is eligible for DDS services. She did note that she is not contesting that he does have significant adaptive behavior deficits.

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 DMR 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. 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. I also find that he has significant limitations in adaptive functioning, however I do not find that he is mentally retarded based on the evidence presented.

In the instant case although four IQ test reports were presented, I considered only the tests administered by Dr. [redacted], Dr. [redacted] and Dr. [redacted]. The IQ test report contained within the [redacted] was not considered because I was unable to determine who administered the test or the test conditions under which it was administered. I also gave very little weight to the diagnosis set out in the [redacted] Quarterly Review of Treatment Plan as there was no information relative to how that diagnosis was reached.

There was only one test presented that was administered before the Appellant was 18. According to the test report, that test which was obtained during a period of cooperation on the part of the Appellant was considered to be a valid measure of his functioning at that time. The test report stated that the Appellant's Full Scale IQ score was 75 placing

him in the borderline range of cognitive abilities. The other two tests that I considered were administered to the Appellant when he was almost 20 years of age and when he was 21 years of age. Both of those tests produced Full Scale IQ scores of 67. These scores are within the extremely low range. However on the earlier of those tests, the Appellant's Verbal Comprehension Index was 80 placing him in the low average range and calls into question the reason for his low Full Scale IQ score on that test. DDS's expert witness testified that a number of psychiatric factors could have influenced the Appellant's performance and noted that the report indicated a lack of focus and concentration on the part of the Appellant when taking the IQ test. The final test report that I considered also indicated that the Appellant had problems of inattention and poor concentration which DDS's expert witness testified makes it difficult to determine the Appellant's actual level of cognitive functioning.

I find that the Appellant is a very complex individual who has suffered a series of traumas and difficulties throughout his life. It appears that he has both psychiatric and cognitive issues and that each contribute to his low adaptive functioning. He has received numerous interventions and has had the benefit of the assistance of many individuals who continue to advocate for him. The evidence showed that there is no question that the Appellant has adaptive deficits that pose significant challenges for him; however, I find that the weight of the evidence does not support a finding of sub-average intellectual functioning as needed to meet the DDS criteria for eligibility for adult 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: _____

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Marcia A. Hudgins
Hearing Officer