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Executive Office of Health & Human Services
Department of Mental Retardation
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October 26, 2004

Erica Spruilo, Social Worker
Department of Social Services
Coastal Area Office
541 Main Street
South Weymouth, MA 02190

Re: Appeal of [REDACTED]
Final Decision

Dear Ms. Spruilo:

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

The hearing officer's recommended decision made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DMR regulations and therefore adopt its findings of fact, conclusions of law and reasoning as my own. Your appeal is therefore denied.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with G.L. c. 30A. The regulations governing the appeal process are 115 CMR 6.30-6.34 and 801 CMR 1.01-1.04.

Sincerely,


Gerald J. Morrissey, Jr.
Commissioner

cc: Marcia Hudgins, Hearing Officer
Gail Gillespie, Regional Director
Marianne Meacham, General Counsel
Susanna Chan, Regional Eligibility Manager
Randine Parry, Psychologist
Kim LaDue, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project Manager
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of [REDACTED]

This decision is issued pursuant to the regulations of the Department of Mental Retardation (DMR) (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on September 14, 2004 at the Department's Fernald Center in Waltham, Massachusetts. Those present for all or part of the proceedings were.

[REDACTED]
Margaret Bradley
Cristina Kettell

Erica Spruill
Radine Parry, Ph.D.
Susanna Chan
Deirdre Rosenberg
Kim LaDue

Appellant
Educational Surrogate
Student Service Coordinator, [REDACTED]
[REDACTED]
DSS Social Worker
DMR Psychologist
DMR Regional Eligibility Specialist
Hearing Officer - observer
Attorney for DMR

The evidence consists of documents submitted by DMR numbered 1-20 and approximately one and a half-hours of oral testimony.

ISSUE PRESENTED

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

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services. (D18)
2. The Appellant is a 19-year old man who currently resides at [REDACTED] in [REDACTED] MA, a group home at the [REDACTED] (D19)
3. Five evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. I did not give great weight to D3, a report authored by Andrew Vaccari because it did not contain IQ scores and because the findings were somewhat vague. I did not give great weight to D6c-d, parts of a report from the Franciscan Children's Hospital because several pages of the report were missing. (D1, 3, 6c-d, 8, 16)
4. One evaluation of the Appellant's Adaptive Behavior was entered into evidence. (D17)

5. A Clinical Team Report and supporting documentation was entered into evidence. Although this report indicated that the Appellant was in need of a guardian based on his mental retardation, I did not consider this report or the supporting documentation because neither applied the criteria used by DMR to determine eligibility. (D18)

6. When the Appellant was 3 years 7 months of age, he was evaluated by Paul J. Rhudick, Ph.D. Dr. Rhudick administered the McCarthy Scales of Children's Abilities to the Appellant. The scaled scores on that test were a Verbal Scale Index of 50, a Perceptual-Performance Scale Index of 32, a Quantitative Scale Index of 37 and a General Cognitive Index Scale of 88. Dr. Rhudick concluded that at that time the Appellant was functioning intellectually within the low average range. He noted that there was a significant discrepancy between the Verbal Scale Index, which was in the average range, and the Perceptual-Performance Scale Index which was at the borderline range. He opined that such a discrepancy is significant and shows the impact of emotional factors. He also stated that the discrepancy suggested that the Appellant was slow in developing selected psychomotor tasks and recommended that a pediatric neurological evaluation be performed. (D2)

7. When the Appellant was 5 years 7 months of age, the Wechsler Preschool and Primary Scale of Intelligence - Revised (WPPSI) was administered to the Appellant at Franciscan Children's Hospital. The tester's summary stated that the Appellant's cognitive functioning fell in the average range with no significant differences between verbal skills and visual motor coordination and perceptual organization skills. (D6c)

8. When the Appellant was 7 years 9 months of age he was tested while hospitalized for psychiatric reasons at the Westwood Lodge. The Wechsler Intelligence Scale for Children - III (WISC-III) was administered. The results were a Verbal IQ score of 92, a Performance IQ score of 112 and a Full Scale IQ score of 101. The tester, Carmen Tozzo-Julian, Ph.D. concluded that the 20 point difference between the Verbal and Performance IQ's suggested a specific learning disability. Dr. Tozzo-Julian also stated that the Appellant's overall intellectual functioning was in the average range. (D8)

9. In 1999, when the Appellant was 15 years 5 months of age years, he was tested by John M. Connolly, Jr., a School Psychologist employed by the [REDACTED] Public Schools. The Appellant was given (WISC-III). Although the test did not record Verbal, Performance or Full-Scale IQ scores, the scaled subtest scores were given. The scores ranged from a low of 3 to a high of 13 with most of the scores in the 8-13 range. Mr. Connolly stated in his report that the Appellant's cognitive functioning appeared to be within the average range for his age both verbally and in performance. In the Summary Section of the report, the tester noted that the Appellant had been diagnosed with Asperger's Syndrome and had participated in the Asperger's Program at the League School since its inception. He went on to say that the Appellant seemed to be progressing academically at his current program. (D16)

10. When the Appellant was 18 years of age, his adaptive skills were evaluated using the Adaptive Behavior Assessment System (ABAS). Christina Kettell, the Appellant's Student Services Coordinator completed the survey. The sum of the Appellant's Scaled Scores on this measurement was 62. His General Adaptive Composite was 76. Dr. Renee Briggs, Ph.D. noted on the ABAS Summary Page that the Appellant had significant deficits in the areas of Health and Safety and Social. She also noted that the Appellant's adaptive skills in the area of Work were not assessed. (D17)

11. Susanna Chan, the Regional Eligibility Manager testified on behalf of DMR. She testified that she oversees a Regional Eligibility Team comprised of 4 Eligibility Specialists, an Eligibility Coordinator and a Licensed Psychologist. She went on to say that when the Appellant applied for DMR services, his case was assigned to a Specialist who prepared the Eligibility Packet which was reviewed by the Coordinator as well as reviewed in depth by the Regional Psychologist. The determination of ineligibility was based on DMR criteria which uses the American Association for Mental Retardation (AAMR) definition for mental retardation. The first criterion is that the applicant must present significantly sub-average intellectual functioning. This is a prerequisite that must exist concurrently with at least 2 or more deficits in adaptive functioning out of a total of 10 areas. Significantly sub-average intellectual functioning is generally characterized by IQ scores of 70-75 or below. Such testing results must be obtained prior to the age of 18. The IQ is comprised of Verbal IQ, Performance IQ and Full Scale IQ. The witness explained that in the Appellant's case, the psychologist did not feel that the Appellant's intellectual functioning was significantly sub-average. (D18)

On cross-examination, one of the Appellant's advocates, Cristina Kettell asked if IQ scores between the ages of 18-22 had any significance to the process. The witness replied that DMR generally does not ask for testing between the ages of 19-22, but that there are times when that could occur. She explained that the guidelines require that they pay close attention to those findings from testing done prior to age 18. Whatever findings come after that would require that DMR try to understand them. She pointed out that at age 18 intellectual functioning is relatively stable, and if someone were developmentally disabled, such disability would likely manifest itself before the age of 18.

During further questioning, the advocate indicated that it appeared that the Appellant had been found eligible for DMR services in 1998. (He would have been 14 at that time.) The advocate also questioned the DMR eligibility criteria for a child under the age of 18 versus the criteria for someone over the age of 18. The witness testified that a child under the age of 18 does not need to necessarily exhibit evidence of mental retardation because DMR provides services for those who are considered eligible due to evidence of developmental disability. She went on to explain that to be found developmentally disabled does not require such stringent criteria as is required for a finding of mental retardation. To be found eligible for DMR services, children must have deficits in 3 areas of adaptive functioning. In adults, one must have significantly sub-average intellectual functioning along with deficits in 2 areas of adaptive functioning. By regulation DMR must provide services for children with developmental disabilities. Not all of these

children will qualify for adult services from DMR.

12. Radine Perry, Ph.D. testified as an expert for DMR. She testified that she reviewed the Appellant's file. She said that she met the Appellant. She testified that he was very a verbal, very bright young man. He seemed to be very aware of his school program, where he'd like to be, his past diagnoses and what some of his shortcomings are. He seemed to be quite knowledgeable, but that he pointed out there were areas where he did not have strengths, areas that were difficult for him. (D20)

Dr. Perry testified relative to the report done by the [REDACTED] Public Schools when the Appellant was 5 years 4 months. She indicated that the report showed that they did a number of tests at that time, and that generally they concluded that the Appellant possessed close to average academic potential. The report indicated that the Appellant was diagnosed with ADHD. She concluded from this report that the Appellant's intellectual functioning was generally in the average range. (D3)

Dr. Perry testified that the psychological report written by the Franciscan Children's Hospital indicated that when the Appellant was 5 years 7 months his intellectual functioning fell in the average range. (D6c-6d)

Dr. Perry testified relative to the Psychological Test Report authored by Carmen Tozzo-Julian, Ph.D. dated March 11, 1992. The testing reported in this document was given when the Appellant was 7 years, 9 months of age. She testified that at that time the Appellant again had average IQ scores. His Verbal IQ score was 92, his Performance IQ score was 112 and his Full Scale IQ score was 101. She stated that his Full Scale IQ score was right in average range. On some of the subtests, the Appellant scored in the superior range. Most test scores fell in the average range. She stated that these test results are consistent with previous testing. She also stated that in follow-up neuropsychological testing the Appellant was diagnosed with a moderate to severe attention deficit disorder. That testing indicated there was no evidence of a specific learning disability. (D8, D10)

Dr. Perry reviewed the testing done by the [REDACTED] Public Schools when the Appellant was 15 years, 5 months of age. She stated that the report of this testing indicated that the Appellant's Verbal IQ score was 97, his Performance IQ score was 99 and his Full Scale IQ score was 97. She stated that all of these scores are within the average range. When questioned by the Hearing Officer about the hand written scores above the Sub-test scores, Dr. Perry testified that school psychologists often do not calculate the IQ scores. Dr. Perry testified that Dr. Briggs had calculated the IQ scores and written them in above the sub-test scores. (D16)

Dr. Perry testified relative to additional test results contained in the same report. These test results showed the Appellant's academic ability. She stated that his scores on the Wide Range Achievement Test - III (WRAT-3) were at the post high school level in the area of Word Reading and Pronunciation, average in Spelling and low average in

Arithmetic. She testified that the report states that the Appellant is diagnosed with Asperger's Syndrome and that he exhibits intellectual ability at least within the average range. She testified that Asperger's Syndrome is not mental retardation. (D16)

Dr. Perry stated that in reviewing all of the documentation there was nothing inconsistent with the conclusion that the Appellant is of at least average intelligence. She stated that the Appellant does not have mental retardation.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his need for continuing supports in some areas as shown by the results of the ABAS, 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 DMR supports, an individual who is 18 years of age or older must meet the three criteria set forth at 115 CMR 6.03: (a) he must be domiciled in the Commonwealth, (b) he must be a person with Mental Retardation as defined in 115 CMR 2.01, and (c) he must be in need of specialized supports in three or more of the following seven adaptive skill areas: communication, self-care, home living, community use, health and safety, functional academics and work. There is no dispute that the Appellant meets the first criteria and I specifically find that he meets that criterion. However, I find that he is not mentally retarded as that term is 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, DMR has adopted the American Association on Mental Retardation (AAMR) 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 includes 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 "mentally retarded" as that term is used in statute and regulation for the determination of eligibility for DMR supports. None of the evidence suggested that the Appellant has significantly sub-average intellectual functioning. All of

the test reports and the testimony of the expert witness indicated that the Appellant is functioning in the average range of intellectual functioning. The only evidence presented suggesting that the Appellant was mentally retarded was the Clinical Team Report. The authors of that report did not apply the AAMR definition used by DMR for determining whether an individual is mentally retarded. There was a question raised as to why the Appellant was found eligible for DMR services in 1998 when he was 14 years of age, yet found ineligible for adult services when he was 19 years of age. It was explained that the criteria required for eligibility for children's services from DMR are different from the criteria required for eligibility for adult services.

While there was some evidence presented relative to the Appellant's functional limitations and his need for continuing supports, I did not give consideration to such evidence in reaching my determination because I found that the weight of the evidence presented relative to the Appellant's intellectual functioning showed that the Appellant does not have significantly sub-average intellectual functioning. Because the Appellant failed to show by a preponderance of the evidence that he met the criteria of the first prong of the three pronged AAMR definition of mental retardation, I did not find it necessary to consider the Appellant's functional limitations in reaching my decision. Functional limitations can result from a variety of conditions. Unless the weight of the evidence shows that an individual has significantly sub-average intellectual functioning, it is not necessary to give consideration to such functional limitations.

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: October 13, 2004



Marcia A. Hudgins
Hearing Officer