



The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
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Boston, MA 02118

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Timothy P. Murray
Lieutenant Governor

JudyAnn Bigby, M.D.
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Commissioner

October 22, 2007

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Mr. Richard Lyons
688 DSS Specialist/Referring Party
AND

Ms. Antoinette Costa
Case Manager - Swansea Woods School
DSS Coastal Area Office
541 Main Street
South Weymouth, MA 02190

Re: Appeal of [REDACTED] Final Decision

Dear Mr. Lyons and Ms. Costa:

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 approved.

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,

Elin M. Howe
Commissioner

EMH/ecw

cc: Marcia Hudgins, Hearing Officer
Richard O'Meara, Regional Director
Marianne Meacham, General Counsel
Elizabeth Moran Liuzzo, Regional Eligibility Manager
Allegra Munson, Assistant General Counsel
Frederick Johnson, Psychologist
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 scheduled for August, 2007, at DMR's Wrentham Developmental Center in Wrentham, Massachusetts. At that time the parties agreed to submit documents to the Hearing Officer in lieu of a hearing. The parties were also permitted by the Hearing Officer to file briefs in support of their respective positions. DMR filed a brief on September 28, 2007. The Appellant did not file a brief.

The evidence consists of documents submitted by DMR numbered D1-21. It appears that the majority of the documents submitted were presented to DMR by the Appellant as part of his application for eligibility.

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 (D16-17)
2. The Appellant is a 19-year old man who currently resides at Swansea Woods located at 789 Stevens Street in Swansea, Massachusetts, (D12-13)
3. He applied for DMR services on March 23, 2006. (D12)
4. One evaluation of the Appellant's intellectual functioning before the age of 18 was entered into evidence. Test scores for testing done in 2000 were reported in a document authored by John Knight, M.D. dated June 20, 2001 but there was no test report indicating who administered the test, the conditions under which the test was administered or other information accompanying these scores so I did not consider them in making my decision. (D1-2)
5. One evaluation of the Appellant's intellectual functioning after the age of 18 was entered into evidence. (D15)
6. Two assessments of the Appellant's adaptive behavior were entered into evidence. (D11, D14)

7. There were a number of other documents entered into evidence. The documents were evaluations and reports that gave me information relative to the Appellant's educational profile, his family and foster care history, his alleged sexual offenses and his psychiatric history but were not central to my determination of his level of intellectual and adaptive functioning. (D1 – pages missing, D3-9, D11-12)

8. In December of 2003, when the Appellant was 15 years 11 months of age, he was evaluated by Joel Silver Ph.D., a licensed psychologist. On this occasion, he was given the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). The test results were as follows: Verbal Comprehension Index – 77, Perceptual Reasoning Index – 79, Working Memory Index – 71, Processing Speed Index – 50 and Full Scale IQ – 64. Dr. Silver noted in his report that the Appellant achieved an extremely low Full Scale IQ score. The majority of the Appellant's scaled subtest scores were 5 or below with two subtest scores of 6. In the Summary and Conclusion section of his report, Dr. Silver stated that the Appellant evidenced highly significantly below average overall cognitive skills. He pointed out that the Appellant demonstrated highly significant below average sustained attention and response control to auditory and visual stimuli and concluded that the Appellant appears to have some highly significant behavioral, emotional and thought disorders. He stated that the Appellant's general intelligence is extremely low albeit borderline in most areas and offered a diagnosis of ADHD, combined type. (D2)

9. In August of 2006 when the Appellant was 18 years 8 months of age, he was evaluated by Norman E. Weitzberg, Ph.D., a licensed psychologist. Dr. Weitzberg noted in his report that his evaluation was requested by DMR. He stated that on the Appellant's last evaluation, he scored in the mild range of mental retardation which was lower than the score of 76 that he received in 2000.¹ On this occasion, the Appellant was given the Wechsler Adult Intelligence Scales – 3rd Edition (WAIS-III). The test results were as follows: Verbal IQ Score – 81, Performance IQ Score – 70, Full Scale IQ Score – 74. Dr. Weitzberg pointed out in his report that the Appellant's slow responses coupled with lots of errors is a distinctly problematic pattern that cannot be easily explained by response style and is generally felt to be a strong indicator of an attention-related deficit. In the Summary and Recommendations section of his report, Dr. Weitzberg concluded that the evaluation reflects an individual who continues to function in the borderline range with a Full Scale IQ of 74. He notes that the Appellant's Verbal skills place him in the low average range and are significantly more impressive than visual-spatial or fluid reasoning skills, which are in the borderline range. He again points out that the Appellant's Working Memory Index and Processing Speed Index place him in the extremely low range of ability. He suggests a very strong likelihood of a nonverbal learning disability and the combined form of ADHD. (D15)

10. In March of 2006, the Boston Public Schools developed an Individual Education Program (IEP) for the Appellant. In the Section labeled Vocational, it was noted that the Appellant is able to look up employment opportunities in the newspaper and on line with some help. He is able to read a basic bus or train schedule and figure out where and at

¹ There is no test report accompanying this score.

what time to pick up the bus that he has to take to get to a certain destination with a little help. It is noted that he needs some direction to stay on task when performing his job as part of a cleaning crew. It is also noted that when working as a volunteer at a local food bank the Appellant can go off task at times. The IEP indicates that the Appellant has a job coach. (D11)

11. In May of 2006, Antoinette Costa, a social worker rated the Appellant's adaptive behaviors using the Adaptive Behavior Assessment System-Second Edition (ABAS-II). This instrument is used to rate adaptive behaviors in adults from age 16-89. The Appellant's GAC Composite Score on this assessment was a 69 which placed him in the 2nd percentile. He received Scaled Scores of 4 in the areas of Communication, Health and Safety and Self-Care. He received Scaled Scores of 5 in Leisure, Social and Work. (D16)

12. On December 20, 2006 Frederick V. Johnson, Psy.D. determined that the Appellant did not meet the eligibility requirements for DMR adult services. He based his determination on the test administered by Dr. Weitzberg in August of 2006 whereby the Appellant received a Full Scale IQ Score of 74. He dismissed the test results of the testing done by Dr. Silver in 2003 stating that the results appear to be erroneously reported as a Full Scale IQ score of 64 but offered no reasons for that conclusion. He stated that the Appellant has a history of scoring in the borderline range of intellectual functioning but failed to present evidence of such a history. (D16)

After a careful review of all of the evidence, I find that the Appellant has shown 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.²

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) 1992 standards as the clinical authority to which it refers in determining whether an individual

² DMR 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 DMR supports was filed before June 2, 2006, the earlier standard applies.

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 despite the lack of a diagnosis of mental retardation by the psychologists that administered IQ tests to the Appellant, he has inadequately developed or impaired intelligence in that he has significantly sub average intellectual functioning as set out in the 1992 AAMR standards and adopted by DMR.

I find that the Appellant's IQ Full Scale IQ score of 64 reported by Joel Silver, Ph.D. as the result of testing done when the Appellant was 15 years 11 months of age falls within the 1992 AAMR definition of significantly sub average intellectual functioning. Although Dr. Johnson's Eligibility Report dismissed that score as erroneous, it does not appear that DMR made any attempt to determine if that was the case. This score is the only IQ score obtained prior to age 18 that was accompanied by a report explaining the test results. Although Dr. Silver offers a diagnosis of ADHD, combined type, he noted that the Appellant's general intelligence is extremely low and raised no questions about the validity of the score.

There was a Full Scale IQ Score of 76 mentioned in Dr. John R. Knight's report, but there was no indication as to who gave the test and under what conditions, nor was there a report accompanying the test score. Without such information, I cannot consider this score.

I find that the Appellant's Full Scale IQ score of 74 obtained at age 18 years 8 months as reported by Norman Weitzberg, Ph.D. falls within the 1992 AAMR definition of significantly sub average intellectual functioning. Dr. Weitzberg's report noted that the Appellant's last evaluation produced a score in the mild range of mental retardation. He did not raise any questions about the validity of that score.

Dr. Johnson's Eligibility Report states that the Appellant is a young man with psychiatric and behavioral issues. DMR's definition of mental retardation recognizes that a person with mental retardation may be considered to be mentally ill. Being mentally ill, however does not preclude an individual from also being mentally retarded. Dr. Johnson's report also states that the Appellant has a reported history of sexually inappropriate behavior. Sexually inappropriate behavior does not preclude an individual from also being mentally retarded.

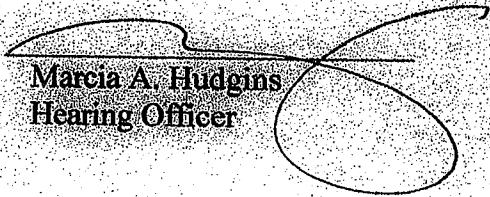
Based on the Appellant's current IEP and the results of the ABAS, I find that the Appellant has related limitations in at least two or more adaptive skill areas, namely in

the areas of communication, health and safety and self care. I also find that he has related limitations in the area of work and currently makes use of a job coach. I find that the Appellant is a complex individual with a number of issues that may cause him to have adaptive skill deficits; however, I find that these deficits are in part related to his significantly sub average intellectual functioning. Although he can perform well in many areas, I find that he needs help in order to complete many tasks. Due to his limitations in these areas, I find that he is in need of specialized supports.

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 16, 2007


Marcia A. Hudgins
Hearing Officer