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Department of Mental Retardation
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November 15, 2004

Re: Appeal of [REDACTED]
Final Decision

Dear Mr. & Ms. [REDACTED]

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: Susan Kelledy, Protestant Learning Center
Kim LaDue, Regional Attorney
Marcia Hudgins, Hearing Officer
Gail Gillespie, Regional Director
Susanna Chan, Regional Eligibility Manager
Randine Parry, 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 held on October 22, 2004 at the Department's Fernald Center in Waltham, Massachusetts. Those present for all or part of the proceedings were.

[REDACTED]
Sue Kelledy

Radine Parry, Ph.D.
Susanna Chan
Kim LaDue

Appellant's Father and Guardian
Appellant's Mother
Student Service Coordinator, Protestant
Guild Learning Center
DMR Psychologist
DMR Regional Eligibility Specialist
Attorney for DMR

The evidence consists of documents submitted by DMR numbered 1-14, documents submitted by the Appellant numbered A1-4 and approximately four 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.
2. The Appellant is a 19-year old man who currently resides at [REDACTED] a group home located in [REDACTED] Massachusetts.
3. Two evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. (D2, D7)
4. One evaluation of the Appellant's intellectual functioning after the age of 18 was entered into evidence. I gave less weight to this report than I did to other two evaluations due to questions raised by DMR's expert witness as to the validity of the testing. (D13)
5. Two evaluations of the Appellant's Adaptive Behavior were entered into evidence. (D11, D13)
6. Three reports of the Appellant's Adaptive Behavior were entered into evidence. (D9a, D9d, D10)

7. A Clinical Team Report and Permanent Decree of Guardianship were entered into evidence. Although the report indicated that the Appellant was in need of a guardian based on his mental retardation and the guardianship was granted based on a finding of mental retardation, I did not consider these documents because neither applied the criteria DMR uses to determine mental retardation for the purpose of eligibility. (A1)

8. When the Appellant was 15 years 1 month of age, his intellectual functioning was tested using the Kaufman Brief Intelligence Test (K-Bit). On this test, he scored a 100 on Vocabulary which the report indicates is in the average range, a 73 on Matrices which the report indicates is well below average, and a total of 85 which the report indicates is in the borderline range. There was no diagnosis of mental retardation offered in this evaluation. (D2)

9. When the Appellant was 16 years 6 months of age, his intellectual functioning was evaluated by Mary Calabrese, Ph.D. and Janice E. Schwartz, Ed.D. of the Neuropsychology Service located in Beverly, Massachusetts. On that occasion, the Appellant was given the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). His Verbal IQ score was 69, his Performance IQ score was 89 and his Full Scale IQ score was 76. The testers noted that the results of the testing indicated that the Appellant is functioning in the low range overall. They stated that the 20-point difference between his Verbal and Performance IQ is significant, demonstrating stronger non-verbal/visual-motor abilities than language based abilities. They went on to say that diagnostically, the Appellant demonstrates attentional difficulties often associated with ADHD including impulsivity and disorganization. They did not offer a diagnosis of mental retardation.

10. When the Appellant was 18 years of age his intellectual functioning was evaluated by Michael Shaps, M.Ed., C.A.G.S., a School Psychologist employed by the [REDACTED] Public Schools. On that occasion, the Appellant was given the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). His Verbal IQ score was 68, his Performance Score was 78 and his Full Scale IQ score was 70. The tester noted that the results of the test placed the Appellant in the below average range of cognitive ability. He also stated that the Appellant's performance indicated a level of thinking that may be higher than his testing has shown as indicated by his performance on the concrete and abstract thinking subtests. He did not offer a diagnosis of mental retardation. (D13)

11. 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 at the time completed the survey. The sum of the Appellant's Scaled Scores on this measurement was 45. His General Adaptive Composite was 65. (D11)

12. When he was 18 years of age, the Appellant's adaptive skills were also evaluated using the Vineland Adult Behavior Scale. Michael Shaps, M.Ed., C.A.G.S. concluded that the Appellant showed deficits in the areas of communication, daily living skills and socialization. (D13)

13. Susanna Chan, the Regional Eligibility Manager testified on behalf of DMR. She testified that she oversees the Regional Eligibility Team. She coordinates the activities of the team and sends out the letter regarding eligibility after all of the relevant documents have been reviewed and the Regional Psychologist has made a clinical determination as to whether the individual is mentally retarded. She stated that in this case the Appellant did not fulfill the criteria required to be eligible for DMR adult services. She stated that in order to be eligible for adult services from DMR an individual must be found to have mental retardation. Mental retardation for purposes of eligibility means that the individual must have significant sub-average intellectual functioning as demonstrated by having a Full Scale IQ score of 70-75 or below and have deficits in 2 out of 10 areas of adaptive functioning.

14. Radine Parry, Ph.D. testified as an expert for DMR. She testified that she reviewed the documents contained in the Appellant's file. She said that she met the Appellant. She testified that based on her review of the records and her meeting with the Appellant she did not find him to be mentally retarded. (D14)

Dr. Parry testified relative to the report done by the Commonwealth of Massachusetts Department of Education when the Appellant was 15 years 1 month of age. She stated that although the Summary stated that the Appellant was functioning in the borderline range, it was her opinion that a score of 85 on the K-Bit placed the Appellant in the low average range. She explained that on average the K-Bit scores are usually about 4 points higher than the scores on the Wechsler-III. The average population's score is 100. Dr. Parry testified the designation of borderline in the Summary was not accurate if one compares the score of 85 with the Wechsler. Dr. Parry stated that based on the report, she was unable to say if the Appellant's diagnosis of Klinefelter's Syndrome affected the outcome of this test. (D2)

Dr. Parry testified that individuals with Klinefelter's Syndrome have a chromosome disorder; instead of an xy they have an xxy. The xxy chromosome configuration is not related to mental retardation. Usually individuals with the xxy chromosome configuration do not have IQ scores above 110. These individuals usually develop speech slower, have a language disability which can lead to frustration, negative social interaction and all the problems that go along with them. Receptive language is usually much better than expressive language. Auditory instructions should be given with visual cues. These individuals do better with structure. Sometimes individuals with this condition have emotional problems. Sometimes individuals with Klinefelter's Syndrome do not know they have this condition until adolescence. Dr. Parry stated that the fact that the Appellant has Klinefelter's Syndrome may interfere with his performance.

Dr. Parry testified relative to the Neuropsychological Service's testing of the Appellant performed when he was 16 years 6 months of age. Dr. Parry stated that the Appellant's Full Scale IQ score of 76 was in the borderline range. She said that it was notable that his Performance IQ score of 89 was in the very top of the low average range. She pointed out that when asked to define the word "brave", he stated, "Stand up to a tiger". She

explained that this shows that although he has an idea of what the word means, he has difficulty with expressive language and if given the chance to choose a synonym, he would likely do better. She stated that this is consistent with Klinefelter's Syndrome. On The Wechsler Individual Achievement Test (WIAT), the Appellant's reading was in the low average range, his spelling was in the average range and his reading comprehension was in the borderline range. His reading comprehension on this test was in contrast to previous testing where his reading comprehension had been in the average range. Dr. Parry pointed out that the Appellant seems to do much better on a multiple choice type test. His listening comprehension was in the borderline range. This measures his ability to take in verbal information without visual cues. She stated that the Appellant does much better with repetition. She testified that the report did not state that the Appellant was mentally retarded but did say that he had ADHD associated with impulsivity and disorganization. When the Hearing Officer questioned the Dr. Parry about the statement in the report indicating that the Appellant is functioning in the "low range" overall, Dr. Parry stated that on this test the Appellant's score was in the in the borderline range. She stated that the 20-point difference between the Verbal and the Performance IQ scores was significant. Dr. Parry stated that even with the large discrepancy between the Verbal and Performance scores, a person with these scores would not be a person with mental retardation. She explained that this is because there are some scores in the average range and the scores are not uniformly low. (D7)

Dr. Parry reviewed the testing report authored by Michael Shaps, M.Ed., C.A.G.S. Mr. Shaps performed the testing when the Appellant was 18 years of age. Dr. Parry testified that the behaviors and observations relative to the Appellant were very different than those noted by other testers. She also pointed out that the report was not as complete as one would like it to be because it contained no Index Scores. Dr. Parry called into question the validity of this report due to incompleteness and inconsistencies contained in the report. (D13)

Dr. Parry concluded her testimony by stating that in her opinion the Appellant's IQ scores indicate that he has borderline to low average intelligence. She stated that he has Klinefelter's Syndrome and ADHD, but that he is not mentally retarded.

15. [REDACTED] the Appellant's father and guardian testified on behalf of the Appellant. He stated that the Appellant is not good at expressing himself and that this causes frustration. Mr. [REDACTED] went on to say that although the Appellant has some computer skills, those skills are not as good as his own skills. He said that the Appellant uses the computer to play games and to access the weather channel. He testified that the Appellant displays improper touching and that he likes to aggravate his parents. Mr. [REDACTED] gave some examples of the Appellant's difficult behaviors: He pulls his father's hair. He put nails in his father's tires. He threw cans out of a window. He started a small fire at McDonald's. He threw bricks at a car. Mr. [REDACTED] testified that he believes that the Appellant is mentally retarded in some sense. He stated that the Appellant is impulsive and has poor communication and math skills.

16. Susan Kelledy, LCSW testified on behalf of the Appellant. Ms. Kelledy is the Appellant's Student Service Coordinator. She stated that based on the latest IQ testing, the Appellant had a Full Scale IQ score of 70. She believed that this was a valid IQ score and should not be discounted on the basis of typographical errors in the report. She stated that the Appellant has limited grooming skills, limited travel skills and limited cooking skills. He can do simple math but has no experience with money management. (D13)

Ms. Kelledy went on to review the Clinical Team Report dated March 12, 2003. She pointed out that the report stated that the Appellant could not do division and had no banking skills. The report stated that the Appellant did not have good skills when it came to personal safety including fire evacuation. He has difficulty functioning in the community. She drew attention to the fact that the Guardianship Decree issued on the basis of the Clinical Team Report found the Appellant to be incompetent and unable to make informed decisions. (A1)

Ms. Kelledy pointed out that the Appellant's Learning Center Behavior Plan dated March 5, 2004 shows that he needs a great deal of structure. (A2)

She also noted that a report from Massachusetts Mental Health Services for Youth dated February 28, 2001 states that the Appellant is developmentally delayed (A3)

Finally, she pointed out that a Discharge Summary from the Vinfen Crisis Stabilization Unit dated September 10, 2001 states that the Appellant may have a pervasive developmental disorder. (A4)

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite his obvious need for continuing 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 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. The results of three psychological tests were entered into evidence. Due to expert testimony which raised concerns about the validity of the test given when the Appellant was 18 years of age (Full Scale IQ score of 70), I gave the most weight to the results of the testing done when the Appellant was 15 years 1 month of age and 16 years 6 months of age. The result of the first test was a total score of 85. The Summary of the results of this test states that the Appellant is in the borderline range. DMR's expert witness testified that a score of 85 means that the Appellant is in the low average range. The result of the second test was a Full Scale IQ score of 76. The report of the results of the second test found that the Appellant's Performance IQ was significantly higher than his Verbal IQ score. The testers concluded that the Appellant was functioning in the low range overall. They did not offer a diagnosis of mental retardation, but stated that he demonstrated attentional difficulties often associated with ADHD including impulsivity and disorganization. DMR's expert witness stated that the result of this test indicated that the Appellant was functioning intellectually in the borderline range. Other than a Clinical Team Report and Decree of Guardianship stating that the Appellant is mentally retarded, the Appellant offered no other evidence of mental retardation. The criteria used by the Probate and Family Court in determining mental retardation is not the same as is used by DMR. There was testimony by witnesses for the Appellant and documents presented by the Appellant stating that the Appellant has poor communication skills, is impulsive, needs a great deal of structure, is developmentally delayed and may have a pervasive developmental disorder. None of these things necessarily leads to a diagnosis of mental retardation for purposes of eligibility for DMR services. The Appellant offered no expert testimony to refute DMR's opinion as to the validity of the testing done when the Appellant was 18 years of age or expert testimony relative to a diagnosis of mental retardation.

While there was 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 Appellant failed to show by a preponderance of the evidence that he met the requirement of having 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: _____

11/8/04

Marcia A. Hudgins
Hearing Officer