



The Commonwealth of Massachusetts
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March 14, 2005

Department of Social Services
Haverhill Area Office
3 Ferry Street, 2nd Floor
Bradford, MA 01835
Attn: Jody Picone, LSWA

Re: Appeals of G [redacted] & A [redacted] S [redacted]
Final Decisions

Dear Ms. Picone:

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 decisions made findings of fact, proposed conclusions of law and recommended denial of your appeals. After reviewing the hearing officer's recommended decisions, I find that it is in accordance with the law and with DMR regulations and therefore adopt the findings of fact, conclusions of law and reasoning as my own. Your appeals are 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
Amanda Chalmers, Regional Director
Marianne Meacham, General Counsel
Veronica Wolfe, Regional Eligibility Manager
George Casey, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project Manager

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of A [REDACTED] St [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 December 7, 2004 at DMR's Central Office in Boston, Massachusetts. Those present for all or part of the proceedings were:

Jody Picone, LSWA
Elina Wayrynen, Ph.D
George Casey

DSS Social Worker
DMR Psychologist
Attorney for DMR

The evidence consists of documents submitted by the Appellant numbered A1-4, documents submitted by DMR numbered D-1-9 and approximately 30 minutes of oral testimony.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DMR supports by reason of developmental disability as set out in 115 CMR 6.05.

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services dated April June 1, 2003. (D-1)
2. The parties agree that the Appellant is a young woman, age 17 who is the custody of the Massachusetts Department of Social Services (DSS). (Uncontested Facts)
4. The parties agree that the Appellant receives services at the [REDACTED] in [REDACTED]. (Uncontested Facts)
5. Four evaluations of the Appellant's intellectual functioning were entered into evidence. (A2, D5, D7, D8)
6. One assessment of the Appellant's adaptive functioning was entered into evidence. (D3)
7. Two speech and language evaluations were entered into evidence. (A1, D6)
8. Two academic achievement assessments were entered into evidence. (A3, D4))
9. An Eligibility Report dated May 20, 2003 authored by Elina Wayrynen, Ph.D., DMR's Region 3, Eligibility Team Psychologist was entered into evidence. (D2)

10. The Appellant offered no expert testimony.

11. In 1997 when the Appellant was 9 years 8 months of age, she was tested at the Family Counseling Center using the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). On that test, the Appellant had a Verbal IQ score of 65, a Performance IQ score of 81 and a Full Scale IQ score of 71. The tester, Caroline W. Simons, Ph.D. found the Appellant's true score to be in the mildly retarded to borderline range. She noted a 16-point difference between the Verbal and the Performance scores suggestive of a learning disability. Dr. Simons opined that the results of the test appeared to be valid, except that the Appellant's cognitive scores appear lower than her actual ability and, likely, than her functioning in situations that seem safe to her. She did not offer a diagnosis of developmental disability. (D8)

12. In 1999 when the Appellant was 11 years 1 month of age, she was tested at the North Shore Counseling Center using the WISC-III. On that test, the Appellant had a Verbal IQ score of 76, a Performance IQ score of 89 and a Full Scale IQ score of 81. The tester, Newton von Sander, Ed.D. stated in his report that the Appellant was functioning in within the low average range of intelligence. His diagnosis on Axis I of the DSM-IV was Pervasive Developmental Disorder, NOS. (D7)

13. In 2000 when the Appellant was 12 years 10 months of age, she was tested by the Pentucket Regional School District using the WISC-III. On that test the Appellant had a Verbal IQ score of 89, a Performance IQ score of 96 and a Full Scale IQ score of 92. The tester, Ami K. Slejzer, M.Ed., C.A.G.S. stated in her report that the Appellant's cognitive ability was within the average range of intellectual functioning. Ms. Slejzer opined that the Appellant's earlier test scores which were lower than the scores on this test were likely due to emotional factors. (D5)

14. In 2004 when the Appellant was 16 years 5 months of age, she was tested by the [redacted] Public Schools using the WISC-IV. On that test the Appellant's Verbal Comprehension Index was 77 (borderline range), her Perceptual Reasoning Index was 104 (well within the average range), her Working Memory Index was 88 (low average range) and her Processing Speed Index was 83 (low average range). Her Full Scale IQ score was 85 (low average range). The tester, Mr. Stolfors a school psychologist reported that the results of the assessment indicate that the Appellant's overall cognitive abilities fall within the average to borderline range. Her weaknesses appear to center on her verbal comprehension skills. Her cognitive strengths center on her perceptual skills. (A2)

15. In 2003 when the Appellant was 15 years 2 months of age, her adaptive skills were assessed by her foster mother using the Adaptive Behavior System (ABAS). Mark Weiner, C.A.G.S., M.C., interpreted the results of the assessment. He stated that the Appellant had substantially sub-average skills in four of the seven skill domains recognized by DMR in determining eligibility. The four areas were Community Use, Functional Academics, Health and Safety and Self-Care. He reported that these results were consistent with statements by educators and the Appellant's DSS worker. He stated

that there appears to be a pattern of social isolation, misperception and impulsivity that adversely affects the Appellant's ability to profit from natural learning opportunities. (D3)

16. In 2000 when the Appellant was 12 years 11 months of age, she was evaluated in the areas of speech and language by the [REDACTED] School District. Kathy Katin, speech and language pathologist gave the Appellant a series of tests. She stated that the Appellant's language profile is characterized by average receptive and expressive vocabulary skills with the presence of word retrieval errors. She had some language processing deficits. Relative strengths were noted for determining word relationships. The tester concluded that the Appellant should continue receiving language support. (D6)

17. In 2004 when the Appellant was 16 years 5 months of age she was evaluated in the areas of speech and language by the [REDACTED] Public Schools. Joan O'Meara, M.S., CC/SLP, a speech and language pathologist gave the Appellant a series of tests. She concluded that the Appellant was in the low to below average range in the areas of receptive and expressive language. She noted that the Appellant's written language reflected reduced skills in writing complete sentences and accurate use of punctuation and grammar. (A1)

18. In 1988 when the Appellant was 12 years 11 months of age she was evaluated using the Woodcock-Johnson Educational Battery-Revised Tests of Achievement. The tester, Julie A. Cross, M.Ed. concluded that the Appellant presented with average skills in Broad Reading, while Broad Knowledge, Math Reasoning and Writing Skills were in the low average range. She went on to say the Appellant's documented language deficits impact on her success in all academic areas. (D4)

19. In 2004 when the Appellant was 16 years 6 months of age, her academic achievement was tested using the Wechsler Individual Achievement Test-Second Edition (WIAT-II). Her Total Composite score on that test was a 75. The examiner, John Stewart, Special Education Liaison stated in his report that the score of 75 indicates the Appellant's overall academic achievement is in the borderline range of functioning. (A3)

20. Dr. Elina Wayrynen's Eligibility Report dated April 20 2003 states that the available information does not indicate that the Appellant has a developmental disability. Rather, she appears to have some language processing deficits and some difficulty with math. She states that the Appellant's intellectual functioning is within the average range, and her communication and socialization are not indicative of a pervasive developmental disorder. She stated that the Appellant has often been described as depressed and anxious. She noted that the Appellant's low scores on many adaptive areas are inconsistent with other test results, and opined that these scores are either an exaggeration of deficits or possibly due to emotional factors. (D2)

21. Elina Wayrynen, Ph.D. testified as an expert witness for DMR. Dr. Wayrynen testified that she had reviewed all of the documents entered into evidence including the ones provided at the hearing by DSS. Dr. Wayrynen testified that after reviewing all of the material, it was her opinion that the Appellant does not have a developmental

disability. She stated that in her opinion the Appellant has learning disabilities. She went on to say that she believed that the Appellant may have an emotional disability along with language processing problems. Dr. Wayrynen stated that the origin of the Appellant's math learning disability was unknown. She testified that in order to be diagnosed with Pervasive Developmental Disorder one must have a very substantial language disorder. She saw no evidence of such a substantial disorder in her review of the Appellant's records. She noted that while the Appellant was shy and withdrawn, she could engage in conversation and was interested in relationships. She believed that some of her lower IQ scores reflected emotional issues. She testified that the Appellant's latest psychological testing performed by the [REDACTED] Public Schools in 2004 showed no evidence of severe impairments. (A1-3, D3-9)

On cross-examination the Appellant's DSS Case Manager asked if the diagnosis of fetal alcohol syndrome comes under the definition of developmental disability. Dr. Wayrynen stated the diagnosis itself does not fall under developmental disability. She stated that it is certainly a risk factor, but it would have to have the functional and cognitive deficits along with it that the Appellant does not have. She went on to say that she recalled only one psychological report that raised the issue of fetal alcohol syndrome relative to the Appellant. (D7)

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 she meets the DMR eligibility criteria. My specific reasons are as follows:

In order to be eligible for DMR supports, an individual who is under the age of 18 must meet the two criteria set forth at 115 CMR 6.05 (a) she must be domiciled in the Commonwealth, (b) she must be a person with a developmental disability as defined in 115 CMR 6.05 (2). There is no dispute that the Appellant meets the first criteria and I specifically find that she meets that criterion. I do not find that she has a developmental disability as set out in the DMR regulations.

By regulation, 115 CMR 6.05(2) a developmental disability means a severe, chronic, disability of a person five years of age or older that: (a) is attributable to a mental or physical impairment or combination of mental or physical impairments; (b) that is likely to continue indefinitely, (c) results in substantial functional limitations in three or more of the following areas of major life activity, self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, economic self-sufficiency; and (d) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic services, supports, or other assistance that is of lifelong or extended duration and is individually planned and coordinated.

I find that the Appellant does not have a developmental disability in that the evidence

failed to show that she has a severe, chronic mental and/or physical disability that results in substantial functional limitations. Her psychological, speech and language and academic achievement test scores do not show a severe disability. Her psychological testing resulted in findings of borderline to low average intelligence. Her speech and language evaluations resulted in findings that she was within the below average to average range in most areas with some language processing deficits. Her academic achievement was found to be in the borderline to average range. There was no evidence to support the diagnosis of Pervasive Developmental Disorder given by one of the testers. Although the Appellant showed limitations in four adaptive skill areas, the limitations could be somewhat exaggerated by the reporter or could be due to emotional factors. The evidence does not support a finding that such limitations are due to a severe chronic mental and/or physical disability. The Appellant's latest psychological report showed no evidence of severe impairments. Although the Appellant may have been diagnosed with fetal alcohol syndrome, that diagnosis in and of itself does not mean the Appellant has a developmental disability.

I find that the Appellant is not "developmentally disabled" as that term is used in regulation for the determination of eligibility for DMR 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:

Dec. 27, 2004


Marcia A. Hudgins
Hearing Officer

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of G [REDACTED] & S [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 December 7, 2004 at DMR's Central Office in Boston, Massachusetts. Those present for all or part of the proceedings were:

Jody Picone, LSWA
Elina Wayrynen, Ph.D
George Casey

DSS Social Worker
DMR Psychologist
Attorney for DMR

The evidence consists of documents submitted by the Appellant numbered A1-4, documents submitted by DMR numbered D1-6 and approximately 45 minutes of oral testimony.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DMR supports by reason of developmental disability as set out in 115 CMR 6.05.

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services dated April 23, 2003. (D-1)
2. The parties agree that the Appellant is a young woman, age 17 who is the custody of the Massachusetts Department of Social Services (DSS). (Uncontested Facts)
4. The parties agree that she receives services at the [REDACTED] t. (Uncontested Facts)
5. Two evaluations of the Appellant's intellectual functioning were entered into evidence. (A3, D4)
6. One assessment of the Appellant's adaptive functioning was entered into evidence. (D3)
7. One speech and language evaluation was entered into evidence. (A1)
8. One academic achievement assessment was entered into evidence. (A2)
9. An Eligibility Report dated April 22, 2003 authored by Elina Wayrynen, Ph.D.; DMR's Region 3, Eligibility Team Psychologist was entered into evidence. (D2)

10. The Appellant offered no expert testimony.

11. In 1999 when the Appellant was 11 years 6 months of age, she was tested at the North Shore Counseling Center using the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). On that test, the Appellant had a Verbal IQ score of 90, a Performance IQ score of 89 and a Full Scale IQ score of 88. The tester, Newton von Sander, Ed.D. found her to be in the low average range of intelligence. His diagnosis on Axis I of the DSM-IV was Pervasive Developmental Disorder NOS. (D4)

12. In 2004 when the Appellant was 16 years 5 months of age, she was tested by the [REDACTED] Public Schools using the WISC-III. On that test, the Appellant's Full Scale IQ score was 81 which Stephen Stolfors, School Psychologist determined to be within the low average range of intellectual functioning. He did not offer a diagnosis. (A3)

13. In 2003 when the Appellant was 15 years 2 months of age, her adaptive skills were assessed by her foster mother using the Adaptive Behavior System (ABAS). Mark Weiner, C.A.G.S., M.C., interpreted the results of the assessment. He stated in his assessment that a scaled score of 4 or below is considered indicative of substantial sub-average ability. The Appellant's lowest score on the ABAS was a 7. (D3)

14. When the Appellant was 16 years 5 months of age she was evaluated in the areas of speech and language by the [REDACTED] Public Schools. Joan O'Meara, M.S., CC/SLP, a speech and language pathologist gave the Appellant a series of tests. She concluded that the Appellant was in the moderately low average in most areas with the exception of reading comprehension which fell within the below average range. She noted that the Appellant's written language showed difficulty with sentence construction, grammar, spelling and punctuation. (A1)

15. In 2004 when the Appellant was 16 years 6 months of age, her academic achievement was tested using the Wechsler Individual Achievement Test-Second Edition (WIAT-III). Her Total Composite score on that test was a 75. The examiner, John Stewart, Special Education Liaison stated in his report that the score of 75 indicates the Appellant's overall academic achievement is in the borderline range of functioning. (A-3)

16. Dr. Elina Wayrynen's Eligibility Report dated April 22, 2003 states that in reviewing the report of the psychological testing done in July 1999, she did not find any information within the report to substantiate a diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS). In reviewing the Appellant's adaptive functioning scores on the ABAS, Dr. Wayrynen stated that all of the Appellant's scores were in the average range. She went on to say that the available information does not indicate that the Appellant has a developmental disability. Some of the information she reviewed stated that the Appellant has oppositional/antisocial behaviors, ADHD, specific learning disabilities and emotional problems, none of which are developmental disabilities. (D2)

17. Elina Wayrynen, Ph.D. testified as an expert witness for DMR. Dr. Wayrynen testified that she had reviewed the stipulations of the parties, the Appellant's IEP, the

Application for Children's Services as well as the 1999 Psychological Report, the Adaptive Assessment and the four documents provided by the Appellant at the hearing. Dr. Wayrynen testified that after reviewing all of the material, it was her opinion that the Appellant does not have a developmental disability. She stated that she saw no evidence of substantial impairment and no evidence of functional limitations. She went on to say that there was no support for a diagnosis of Pervasive Developmental Disorder. She testified that she saw no severe impairment in the Appellant's language. She noted that the Appellant does have problems in school and concluded that this is due to a learning disability. Dr. Wayrynen testified that the Appellant does not meet the criteria for eligibility based on a developmental disability. (A1-4, D3-D-4, D-6)

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 she meets the DMR eligibility criteria. My specific reasons are as follows:

In order to be eligible for DMR supports, an individual who is under the age of 18 must meet the two criteria set forth at 115-CMR 6.05 (a) she must be domiciled in the Commonwealth and (b) she must be a person with a developmental disability as defined in 115-CMR 6.05 (2). There is no dispute that the Appellant meets the first criteria and I specifically find that she meets that criterion. I do not find that she has a developmental disability as set out in the DMR regulations.

By regulation, 115-CMR 6.05(2) a developmental disability means a severe, chronic, disability of a person five years of age or older that: (a) is attributable to a mental or physical impairment or combination of mental or physical impairments; (b) that is likely to continue indefinitely; (c) results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, economic self-sufficiency; and (d) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic services, supports, or other assistance that is of lifelong or extended duration and is individually planned and coordinated.

I find that the Appellant does not have a developmental disability in that the evidence failed to show that she has a severe, chronic mental and/or physical disability that results in substantial functional limitations. Her psychological testing resulted in findings of low average intelligence. Her speech and language evaluation resulted in a finding that she was in the moderately low average range in most areas with the exception of reading comprehension which fell within the below average range. Her academic achievement was found to be in the borderline range of functioning. Although one tester diagnosed the Appellant with a Pervasive Developmental Disorder, the report did not contain evidence that would lead to that conclusion as was pointed out by DMR's expert witness. The Appellant's adaptive behavior assessment revealed no substantial functional limitations.

I find that the Appellant is not "developmentally disabled" as that term is used in regulation for the determination of eligibility for DMR 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: December 27, 2004



Marcia A. Hudgins
Hearing Officer