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September 6, 2007

Ms. [redacted]

[redacted]

Re: Appeal of [redacted] - Final Decision

Dear 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,

Elin M. Howe

Elin M. Howe
Commissioner

EMH/ecw
cc: Marcia Hudgins, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Damien Arthur, Regional Eligibility Manager
John C. Geenty, Jr., Assistant General Counsel
Katrin Weir, 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 July 20, 2007, at DMR's Central Regional Office in Worcester, Massachusetts. Those present for the proceedings were:

[redacted]	Appellant's Mother and Legal Co-Guardian
Katrin Weir, Ed.D.	DMR Psychologist
John C. Geenty, Jr.	Attorney for DMR

The evidence consists of documents submitted by DMR numbered D1-21 and approximately one and one half hours of oral testimony. Most of the documents submitted were given to DMR by the Appellant as part of his application for eligibility. The Appellant offered no expert testimony.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DMR supports by reason of mental retardation as set out in 115 CMR 6.04(1).

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services (D21)

2. The Appellant is a 19-year old man who currently resides at the Eagleton School in Great Barrington, Massachusetts. (D21, testimony of Appellant's mother)

3. Three evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. (D3, D6, D13-14)

4. One assessment of the Appellant's adaptive behavior was entered into evidence. (D16)

5. 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 genetic disorder, his hearing loss, his psychiatric history and his difficulties in school but were not central to my determination of his level of intellectual and adaptive functioning. (D2, D4-5, D7-12, D15, D17-18, D20)

6. In August and September of 1996, when the Appellant was 8 years of age, he was evaluated by Alan E. Cusher Ph.D. On that occasion he was given the Wechsler Intelligence Scale for Children-Revised (WISC-R). The test results yielded a Verbal IQ score of 81, a Performance IQ score of 91 and a Full Scale IQ score of 85 which according to Dr. Cusher's report placed the Appellant's intellectual functioning in the low average range. The doctor noted that the Appellant's behavior during the evaluation was quite consistent with that which is typical for children with attention deficit disorder. He noted that the Appellant put forth a great deal of effort and tried hard to participate cooperatively with the evaluation process. Dr. Cusher's report noted that the Appellant has some significant difficulties with receptive auditory language. He stated that it is unclear to what extent these are due to compromised attention and to what extent they may be due to impaired auditory processing. He went on to say that the Appellant's expressive language is relatively superior to his receptive language. Dr. Cusher tested the Appellant's academic achievement using the Wide Range Achievement Test-Third Edition (WRAT-III). The doctor concluded that the Appellant's scores were lower than expected for his age (1st and 2nd grade level) but consistent with his intellectual capabilities. Dr. Cusher concluded that the Appellant is a child of at least low average intelligence who presents with rather striking impairments related to complex attention and behavioral regulation. He stated that these impairments compromise the Appellant's performance in a number of areas, including learning and memory. He noted that the results of his evaluation are consistent with the suspected Attention Deficit Hyperactivity Disorder (ADHD), but that the cause for this difficulty is unclear. Dr. Cusher raised the possibility that the Appellant's genetic abnormality – XYY has caused him to be prone to learning and developmental difficulties. He also suggests that the Appellant's history of early ear infections may be related to subsequent, decreased auditory processing abilities. He did not offer a diagnosis of mental retardation. (D3)

7. In July of 2001 when the Appellant was 13 years 2 months of age, he was evaluated by Marilyn F. Engelman, Ph.D., an Educational Psychologist and Learning Disabilities Specialist and Eileen Antalek, M.A., a Psychoeducational Clinician and Learning Disabilities Specialist. At that time the Appellant was a entering the 8th grade at the Developmental Learning Center, a special needs school. The Appellant was tested using the WISC-III. The results yielded a Verbal IQ score of 72, a Performance IQ score of 87 and a Full Scale IQ score of 73. The report of this evaluation states that the Appellant's cognitive scores fall in the below average range. It goes on to say that a single score does not adequately describe his strengths and weaknesses as much fluctuation is noted in his profile with Verbal scores falling in the below average range and Performance scores falling in the low average range. The testers noted that the results of this evaluation, as in other evaluations may be an underestimate of the Appellant's abilities due to his anger, defensiveness and difficulty understanding expectations. They went on to say that this evaluation is a valid indicator of the Appellant's present cognitive and emotional abilities. They did not offer a diagnosis on mental retardation. (D6)

8. In March of 2005, when the Appellant was 16 years 9 months of age, he was evaluated by Juliana Reiss, Psy. D., a Licensed Psychologist. On that occasion, the Appellant was tested using the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). The results yielded a Full Scale IQ score of 63 – extremely low. No Verbal or Performance IQ scores were given. In her report, Dr. Reiss pointed out that the Appellant was reluctant to engage in testing and was highly sensitive about his cognitive weaknesses. He had limited frustration tolerance and usually gave up on test measures when he encountered difficulty. Dr. Reiss noted that she modified and abbreviated procedures in order to temper the Appellant's frustration. The doctor's diagnostic impression was that of a Cognitive Disorder secondary to XYY Chromosomal Disorder. She did not offer a diagnosis of mental retardation. (D13-14)

9. In September of 2006, the Appellant's mother, [redacted] rated his 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 78 which placed him in the 7th percentile. According to the chart accompanying the Scaled Scores to Composite Score Conversions, he is in the borderline range. His Conceptual (82), Social (86) and Practical (84) Composites are listed as below average. (D16)

10. [redacted] the Appellant's mother and co-legal guardian testified on his behalf. She stated that the Appellant is 19 years of age and currently attends the Eagleton School in Great Barrington. She stated that he has been receiving services from the Department of Mental Health (DMH) since 2002 and will continue to do so until he turns 22. She stated that DMH and the Worcester School Department share the costs for his placement at the Eagleton School. Mrs. [redacted] stated that the Appellant has had problems since he was 7 and began receiving services from Children's Friends at that time. She explained that after being referred for DMH adult services under Chapter 688, he was denied eligibility. She stated that the Appellant is 6 feet 7 inches tall and weighs 230 pounds. She also stated that he has the mind of a 10 or 11 year old and explained that he cannot do multiple tasks. She testified that his latest Full Scale IQ score was obtained in 2005 and was a 63. She explained that the Appellant doesn't know how to express himself and will lash out when he becomes frustrated. She said that although he does pretty good academically, he is not working at a 12th grade level. He is currently is a vocational program at the Eagleton School and does well in woodworking and gardening but needs constant supervision. She explained that the Appellant has been diagnosed as having Asperger's and XYY disorder. Mrs. [redacted] testified that the Appellant was hospitalized 5 times during 2002-2003. She stated that he threatened suicide and had been thrown out of school on a number of occasions. She testified that he has no social skills and cannot maintain friendships. Mrs. [redacted] said that when the Appellant needs transportation, the school or the family transports him. He does not drive and she does not want him to do so. (D14, D17-18, D20)

11. Katrin Weir, Ed.D., testified as an expert for DMR. Dr. Weir stated that she has conducted approximately 1000 psychological evaluations during her career. She has worked for DMR for 2 years performing eligibility intakes and determinations. (D1)

Dr. Weir testified that in the instant case, DMH made a C. 688 referral to DMR on June 26, 2006. She stated that DMR's regulations that govern this case require that the individual seeking eligibility have an IQ of 70 or below and adaptive functioning that is 2 standard deviations below the mean -70 or below.

Dr. Weir reviewed the Appellant's history stating that his attention and distractibility came to the attention of his family and his school in 1996 when he was 7 years of age and in the second grade. She did point out that although the Appellant's developmental milestones were normal, he had temper tantrums beginning at 18 months of age.

Dr. Weir reviewed the Neuropsychological Evaluation Report authored by Alan E. Cusher, Ph.D. Dr. Weir pointed out that Dr. Cusher felt that the results of the IQ testing that he performed in 1996 underestimated the Appellant's the intellectual functioning. She also reviewed a Behavioral Neurology report authored by David K. Urion, M.D. of Children's Hospital in Boston. In that report, Dr. Urion recommended using long lasting Ritalin for the management of the Appellant's attention deficit disorder. (D3-4)

Dr. Weir went on to explain that genetic testing performed when the Appellant was 8 years of age was consistent with XYY syndrome. She stated that this syndrome results in individuals who are very large with very large hands. She testified that studies done in the 1950's suggest that individuals with XYY syndrome are more aggressive than average and often end up in correctional facilities. (D2)

Dr. Weir reviewed a Neuropsychological Report of testing done in 2001 when the Appellant was 13 months 2 months of age. On that administration of the WISC-III, the Appellant received a Verbal IQ score of 72, a Performance IQ score of 87 and a Full Scale IQ score of 73. Dr. Weir noted that on this test, the Appellant demonstrated notable deficits in his verbal skills. She stated that an Audiology evaluation performed in the same year pointed out that the Appellant has language processing difficulties perhaps as a result of a hearing deficit. Dr. Weir pointed out that the report of this evaluation suggests that the Appellant has possible processing difficulties rather than poor cognitive abilities. (D6-7)

Dr. Weir also reviewed the report of a Neuropsychological Consultation authored by Michael S. Sefton, Ph.D. She noted that no IQ testing was done, no diagnosis of mental retardation was made, and Dr. Sefton did not confirmed a diagnosis of Asperger's disorder. (D8)

Dr. Weir reviewed a number of psychiatric records and pointed out that the Appellant had been hospitalized 5 times during 2003. She testified that no diagnosis of mental retardation was made in any of these records or reports. (D9)

Dr. Weir stated that as a result of the Appellant's psychiatric hospitalizations, he was found eligible for DMH services at age 14. She stated that the basis for the Appellant's eligibility for DMR services was severe emotional disturbance. (D17)

Dr. Weir reviewed the Psychological Evaluation performed when the Appellant was 16 years 9 months of age. She stated that the tester reported that the Appellant's behavior during the testing limited the reliability of her findings. She noted that in the past it was thought that the Appellant's IQ scores were an underestimate of his cognitive abilities due to his behavior. (D12-14)

Dr. Weir reviewed the Psychiatric Consultation/Clinical Review performed by John H. Bachman, M.D. and stated that she disagreed with Dr. Bachman's statement that DMR would be a better fit for the Appellant and explained that Dr. Bachman did not take into consideration the limitations that were present in the IQ testing done in 2005. She explained that the Appellant's adaptive limitations are not based on low intellectual functioning in that it is known that he can be responsible and independent pointing to the ABAS which resulted in a Global Adaptive Composite of 78. She also noted that there was no area in which the Appellant was really weak. (D16-D17)

Dr. Weir reviewed the Appellant's Eligibility Report that she prepared in October of 2006 and stated that at the time, she reported the most recent valid IQ scores. She testified that she had not changed her opinion of the Appellant's ineligibility following the informal conference, and continues to believe him to be ineligible for DMR services. (D21)

After a careful review of all of the evidence and despite his obvious need for an ongoing support system, 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 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.[1] 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, 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

[1] DMR changed its definition of "mental retardation" and the incorporated the definition of "significantly sub-average intellectual functioning" effective June 2, 2006. Because the Appellant's application for DMR supports was filed after June 2, 2006, the most recent standard applies.

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. However, I find that he is not mentally retarded as that term is defined in 115 CMR 2.01.

There were three IQ test reports presented, only one of which came within the current DMR definition of mental retardation. That test resulted in a Full Scale IQ score of 63; however, the tester noted in her report that she modified and abbreviated procedures in order to temper the Appellant's frustration calling into question the reliability of that score. Other psychological test reports suggested that the results of the Appellant's IQ testing may be an underestimate of his intellectual functioning. Even if I were to consider the IQ score of 63, the Appellant's composite adaptive functioning score of 78 is not two standard deviations below the mean, nor are any of his domains of adaptive functioning 1.5 standard deviations below the mean.

While the Appellant has a number of impairments and is in need of supports, I find that he is not "mentally retarded" as that term is used in statute and regulation for the purpose of determining 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: August 13, 2007

Marcia A. Hudgins
Hearing Officer