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August 17, 2005

Pamela S. Gemme M.P.A, Social Worker
Executive Office of Health and Human Services
Dept. of Social Services
Worcester Area Office, Suite 525
340 Main Street
Worcester, MA 01608

Re: Appeal of J[redacted] P[redacted]
Final Decision

Dear Ms. Gemme:

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

Enclosures

cc: Marcia Hudgins, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Damien Arthur, Regional Eligibility Manager
John Geenty, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project Manager
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of A___ P___

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 11, 2005 at the Department of Mental Retardation's Worcester Area Office in Worcester, Massachusetts. Those present for all or part of the proceedings were:

Pamela S. Gemme	DSS Social Worker
Shannon Carlson	YOU, Inc.
Richard P. Costigan, Psy.D.	DMR Psychologist
John C. Geenty, Jr.	Attorney for DMR

The evidence consists of documents submitted by the Appellant numbered A1-2, documents submitted by DMR numbered D1-6, and approximately one hour of oral testimony. 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 6.03(1).

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services.(D2)

2. The Appellant is a 21-year old man who is in the custody of the Massachusetts Department of Social Services (DSS). (D1)

3. Two evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. (D4-5)

4. One Educational Assessment was entered into evidence. (D6)

5. One evaluation of the Appellant's adaptive functioning after the age of 18 was entered into evidence. (D5)

6. Two Risk Assessments were entered into evidence. These documents assess risk and do not directly relate to the Appellant's cognitive limitations. I therefore did not give consideration to these assessments when reaching my decision. (A1-2)

7. In 2000 when the Appellant was 16 years 5 months of age, he was evaluated by Dan Chapelle, Ph.D. of YOU, Inc. He was referred for psychological testing to help assess his cognitive, emotional and behavioral functioning. At that time, Dr. Chapelle administered the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). The results were a Verbal IQ score of 57, a Performance IQ score of 77 and a Full Scale IQ score of 64. Dr. Chapelle stated in his report that the test results were considered valid. He also stated that the Appellant's overall level of functioning appears to be in the range of mild mental retardation. He noted that his verbal skills were considerably weaker than his nonverbal skills. He summarized the test results by stating that the Appellant presents with severe limitations in his intellectual and cognitive functioning, which have very significant negative impact not only on his educational functioning but also his psychological, emotional, social, and behavioral development and functioning, and on his ability to reap the maximum potential benefits from treatment. (D4)

8. In 2001 when the Appellant was 17 years 5 months of age, he was evaluated by Mary LeCaptain, Ed.D./ABPP of Lexington Neuropsychology. He was referred for neuropsychological testing due to a question of mental retardation and fetal alcohol syndrome. Dr. Le Captain's report notes that the Appellant had been previously diagnosed with mental retardation apparently without measures of adaptive behavior. Dr. LeCaptain administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). The results were a Verbal IQ score of 73, a Performance IQ score of 86 and a Full Scale IQ score of 76. She stated that the Appellant's attention and concentration were fair. She reported that he always seemed to be putting forth appropriate effort, and the results were considered valid for interpretation. In her report, Dr. LeCaptain stated that the Appellant's Verbal score was in the borderline range and the Performance score was in the low average range of intellectual functioning. She noted that his scores in the nonverbal area could be somewhat inflated due to a practice effect. However, Dr. LeCaptain went on to say that the Appellant's score on a matrix reasoning test was comparable to low average and that this type of a task was not familiar to him. She concluded that the Appellant's current intellectual functioning was in the borderline range. She stated that he did not appear to meet the criteria for mental retardation, a previous diagnosis. She noted that he would be informally described as having mild developmental and cognitive delays, although this is not an official diagnostic category. She pointed out that the Appellant's strengths are clearly in the nonverbal area and that he has very poor vocabulary development. In the Recommendation section of her report Dr. LeCaptain stated that the Appellant is a young man who is very much at risk for "falling through the cracks" She stated that he should continue to receive services under the "Turning 22" provision of the law. (D3)

9. In 2004 when the Appellant was 20 years of age, An Adaptive Behavior Assessment System (ABAS) was completed. The ABAS was completed by the Appellant. The subtest scores ranged from a low of 7 to a high of 14. According to the Eligibility Report completed by Dr. Costigan, the Appellant's composite score on the ABAS was 103 placing him solidly in the average range. (D2, D5)

10. Richard P. Costigan, Psy.D., Eligibility Psychologist for the Central West Region of DMR testified as an expert for DMR. He stated that he reviewed the Neuropsychological Evaluation of the Appellant performed by Mary LeCaptain in 2001, the Psychological Evaluation of the Appellant completed by Dan Chapelle in 2000, and the ABAS completed by the Appellant in 2004. He testified that Dr. LeCaptain's evaluation was for the purpose of determining whether the Appellant was mentally retarded. He noted that a previous diagnosis had concluded that the Appellant was mentally retarded, but that the diagnosis did not consider the Appellant's adaptive functioning. He stated that in order to make a diagnosis of mental retardation, both cognitive deficits and adaptive deficits must be considered. He also stated that according to Dr. LeCaptain's report the Appellant is functioning in the low average range in the nonverbal area (86). His Verbal score (73) is just above the 3rd percentile, the percentile that would be considered to be in the mentally retarded range. Dr. Costigan testified that Dr. LeCaptain clearly rules out mental retardation. (D1, D3)

Dr. Costigan also reviewed the test administered by Dr. Chapelle. He stated that on that test there was a 20 point difference between the Appellant's Verbal IQ score (57) and his Performance IQ score (77). He stated that usually when there is more than a 15 point difference between Verbal and Performance IQ scores, the Wechsler manual states that the Full Scale IQ score should not be reported because it is not an accurate representation of the person's functioning. (D4)

Dr. Costigan testified that he believed that an individual's obtained score on a Wechsler scale represents an accurate picture of how the person is doing at that time. He stated that both of the IQ tests given to the Appellant could be considered valid measures of his IQ. He went on to explain that there are a number of variables that can lower and impact a score such as attention, mood, concentration, and/or psychiatric issues. There are very few issues that can raise a score. An individual who does not have the skills cannot manufacture them. When there is a significant difference in IQ scores such as the difference between the test administered by Dr. Chapelle and Dr. LeCaptain, psychologists usually look to the higher IQ based on the idea that it is really difficult for a person to "fake good". He also explained that there is something known as a practice effect which is usually seen on the nonverbal scores. This means that if someone is administered several IQ tests, they get used to the nonverbal measures and remember nonverbal tasks. Dr. Costigan stated that to his knowledge, the Appellant had taken only two IQ tests so that the practice effect would be minimal. He also stated that because the Appellant took two different tests the practice effect would be even less. (D3, D4)

Dr. Costigan testified relative to an Educational Assessment dated November 20, 2003. He stated that the Educational Assessment shows the Appellant's scores to be in the low average to borderline range. He stated that although an Educational Assessment is not used as evidence in making a determination of eligibility, it is used to see if it correlates with an individual's IQ scores. He went on to say that the Appellant's achievement scores of 73-84 were actually pretty high given his Verbal IQ. (D6)

Dr. Costigan testified relative to the ABAS that was completed on May 14, 2004. He explained that in making the diagnosis of mental retardation for eligibility for DMR services, there are 7 areas of adaptive functioning that DMR considers. In order to be found eligible one must be found to have deficits in 3 out the 7 areas. Such deficits must be 2 or more standard deviations below the mean. He explained that the ABAS was completed by the Appellant and that there were no other adaptive functioning assessments completed. Dr. Costigan stated that the Appellant's scores on almost all of the subtests were in the solidly average range. Dr. Costigan pointed out that these scores were attained by the Appellant's self-assessment. He explained that in order to meet the criteria for eligibility, subtest scores would have to be 4 or below. He again stated that based on the Appellant's assessment of his adaptive skills, his scores are solidly in the average range with no scores meeting the criteria of 2 standard deviations below the mean. Dr. Costigan was not able to form an opinion as to the reliability of this assessment. He stated that he had not met the Appellant. (D5)

Dr. Costigan testified relative to the Appellant's Eligibility Report dated May 18, 2004 in which he stated that the Appellant does not meet the criteria for DMR Adult Services in that his cognitive assessments are not consistent with profiles commonly seen in individuals with mental retardation and his adaptive functioning is within the average range. (D2)

On cross-examination Pamela Gemme, DSS Social Worker asked Dr. Costigan why he gave more weight to the higher IQ score obtained by the Appellant on the test given in 2001. Dr. Costigan testified that that with the exception of scores attained during the early developmental period, it is impossible to get a higher score on an IQ test by all of a sudden obtaining new knowledge. Therefore he stated that for whatever reason, the Appellant performed better on the test given in 2001 than he did on the one given in 2000. Ms. Gemme also asked if there were studies that looked at how accurate an assessment is when based on self-reporting. Dr. Costigan stated that the standard error of measurement is greater when one self reports, but that this is taken into consideration when the scoring is done. (D3-5)

Pamela Gemme testified on behalf of the Appellant. She stated that she was familiar with the Appellant having worked with him for some period of time and that she believed that many of the answers the Appellant gave on the ABAS were not correct. She testified relative to his adaptive skills in the area of Home Living, and stated that he needed verbal prompts to carry out each item on the list. In the area of Health and Safety, she testified that he needs assistance in carrying out many of the items. In the area of Self Care, she stated that he would need prompts in every area. She testified that he has constant hygiene problems. Ms. Gemme stated that in the area of Self Direction, he needs a great deal of staff direction and intervention. She testified that the Appellant doesn't necessarily look at others while talking to them and doesn't end conversations appropriately. (D5)

The Hearing Officer asked Dr. Costigan whether he would change his opinion relative to the Appellant's eligibility if someone who knew the Appellant completed the ABAS, and the scores were significantly lower that those attained on the ABAS completed by the Appellant. Dr. Costigan's answer was no. He stated that DMR's criteria require that the adaptive functioning must be related to cognitive deficits, not to other factors that may be present.

12. Shannon Carlton, Clinical Coordinator for YOU, Inc. testified on behalf of the Appellant. She stated that had worked with the Appellant in her present capacity for the past two years and had worked with him previously in a residential facility. She testified that the Appellant was unable to maintain a part-time job in the community and was fired because he couldn't manage the basic tasks of the job. She stated that he reported that he was overwhelmed. She testified that she believes that his inability to perform the basic tasks of the job were a result of his cognitive limitations. She concurred with the Ms. Gemme's testimony relative to the Appellant's inaccurate self-reporting of his adaptive functioning. She stated that even with a great deal of structure, he has difficulty maintaining good personal hygiene and in making good decisions. She stated that although he had been given grounds privileges in his current program, those privileges had to be curtailed due to safety issues. She testified that he is now at the bottom level of skills. She testified that she is very worried about how he will function without supports. He has been in residential treatment for a long time and has not progressed. Ms. Carlton opined that this is because of his cognitive limitations. She stated that he has been unable to retain and internalize the clinical treatment that he has received. (D5)

On cross-examination, the attorney for DMR asked Ms. Carlton if some of the reasons for concerns about the Appellant had to do with his history of sexual abuse and alcohol abuse She stated that the issue of sexual abuse was of concern, and pointed out that he has not been able to internalize some of the treatment that he has received and put it into practice. She also stated that his alcohol abuse was not currently an issue and opined that this may be because he has been in residential treatment for a long time and has not had access to alcohol. (A1-2)

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 Appellant's most recent psychological testing produced a Full Scale IQ score of 76 which is in the borderline range of functioning. Although earlier testing produced an IQ score of 64, there was expert testimony explaining that it is very difficult for an individual to "fake good". In other words when looking at IQ scores, the higher score is more likely to be closer to the individual's true score. Factors such as attention, mood, concentration, and/or psychiatric issues may have influenced the Appellant's lower score. Furthermore according to expert testimony, the 20 point discrepancy between the Verbal and the Performance IQ score suggests the Full Scale score of 64 is not an accurate representation of the individual's functioning. Although a witness for the Appellant testified that she believed that the Appellant has not progressed while in residential treatment due to his cognitive limitations, the appellant offered no expert testimony relative to the Appellant's cognitive functioning.

While there was conflicting evidence presented relative to the Appellant's adaptive behaviors, I did not give consideration to the evidence in reaching my decision because I found that the weight of the evidence presented relative to the Appellant's intellectual functioning showed that the Appellant did not manifest significant sub-average intellectual functioning prior to the age of 18.

The evidence demonstrates that the Appellant has disabilities and is in need of supports, however, I find that he is not "mentally retarded" as that term is used in statute and 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: August 3, 2005

Marcia A. Hudgins
Hearing Officer