

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

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Lieutenant Governor

Judy Ann Bigby, M.D.
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Commissioner

November 26, 2007

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Ms. Elaine W. Cockroft, Esq.
Attorney At Law
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Re: Appeal of [REDACTED] - Final Decision


Dear Attorney Cockroft:

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: Deirdre Rosenberg, Hearing Officer
Amanda Chalmers, Regional Director
Marianne Meacham, General Counsel
Veronica Wolfe, Regional Eligibility Manager
Douglas White, Assistant General Counsel
Patricia Shook, Psychologist
Victor Hernandez, Field Operations Senior Project Manager
File

ISSUE

Whether the Appellant meets the eligibility for DMR services by reason of mental retardation as defined in 115 CMR 6.03(1).

BACKGROUND

The Appellant is a 20 year old man with a diagnosis of Pervasive Developmental Disorder-NOS and Attention Deficit Hyperactivity Disorder who lives with his family in Arlington, Massachusetts. He has received special education services in the Arlington Public Schools and the LABBB Collaborative Programs since entering school. He is currently placed in a self-contained classroom. In addition to academic support and vocational training, he participates in group counseling, adaptive physical education, speech and language development therapy, and social skills development training. Mr. [REDACTED] has worked one day a week for the past three years at a local Whole Foods Supermarket performing food prep tasks and packaging food bags for charity donation. He participates in two other supported work placements through the LABBB Cooperative Program. By letter dated August 24, 2006 (Exhibit #7) his application for DMR supports was denied. He timely appealed the Department's decision.

SUMMARY OF THE EVIDENCE

The first psychological evaluation in the record was conducted on May 20 and 21, 1997, when the Appellant was ten years old (Exhibit #4). The assessment was conducted by Johanna D. Sagarin, M.A., of the Franciscan Children's Hospital, in Boston Massachusetts. Ms. Sagarin attempted to administer the Wechsler Intelligence Scale for Children, Third Edition (WISC-III), with limited success. According to Ms. Sagarin, she did not consider [REDACTED] performance to be a valid measure of his cognitive skills, and thus did not report his results. Instead, she administered the Stanford-Binet, Fourth Edition. As documented in the record, he received the following scores:

Verbal Reasoning	
Vocabulary	29
Comprehension	25
Absurdities	23
Abstract/Visual Reasoning	
Pattern Analysis	50
Copying	42
Quantitative Reasoning	
Quantitative	35
Short-Term Memory	

This clinician observed that the Appellant demonstrated wide variability in his cognitive skills, with strengths in the area of visual reasoning, and weaknesses in the verbal domain. She concluded that "he seems to be functioning in the mild range of mental retardation" (Exhibit #4, p. 4).

The second cognitive assessment in the record was that of Cheryl Flynn, School Psychologist with the special education department of the Arlington Public Schools (Exhibit #5). The evaluation took place on September 23, 2005, when the Appellant was 18 years and 9 months old. Ms. Flynn administered the Woodcock Johnson Tests of Cognitive Abilities-Third Edition (WJIII-COG), and, as a supplement to it, the Test of Nonverbal Intelligence-Third Edition (TONI-3), among others. [REDACTED] achieved the following scores on the WJIII-COG:

General Intellectual Ability (GIA)	65
Broad Clusters:	
Verbal Ability	64
Thinking Ability	76
Cognitive Efficiency	72

Ms. Flynn described the Appellant's GIA as being in the mildly retarded range, as was his Verbal Ability score, while both his Thinking Ability and Cognitive Efficiency were in the borderline range. [REDACTED] highest standard scores varied widely, from 64 to 96 (which is in the average range). In addition to the Woodcock-Johnson, the TONI-3 was given because it does not require language in its administration (and therefore reduces the effect of his weakness in the verbal domain). He earned a score of 80, which is at the lower limit of the low average range. This clinician stated that [REDACTED] score of 80 on the TONI suggested that "his non-verbal reasoning abilities are somewhat stronger than they appear to be at first glance." According to Ms. Flynn, because of the Appellant's effort, motivation, attention and concentration, and the positive conditions under which the testing was conducted, she considered the test results to be "a valid and reliable estimate of his abilities in the areas tested" (Exhibit #5).

The last Psychological Evaluation in the record took place on July 11, 2006, when the Appellant was nineteen and one-half years old (Exhibit #6). The Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) was administered by Cheryl Flynn, who also performed the 2005 evaluation. His scores were as follows:

Full Scale IQ	69
Verbal IQ	66

To the extent that they can be compared, the results are consistent with previous test scores, in that they indicate that [REDACTED] verbal abilities are very weak, his non-verbal reasoning skills are significantly stronger, and his overall IQ puts him in the mildly mentally retarded range of intelligence.

Dr. Patricia Shook, who is the Eligibility Psychologist for the Department's Northeast Region, appeared as DMR's expert witness. She testified that she had made her determination that the Appellant's IQ was not "significantly sub average" based upon the overall pattern of his scores rather than his full scale IQ, which in each evaluation was under 70. At the time of [REDACTED]'s application for DMR supports, the standard for determining whether an applicant's IQ was significantly sub average was an IQ score of "approximately 70 to 75 or below."¹ According to Dr. Shook, where, as here, there is a significant discrepancy between an individual's verbal and performance abilities, a full scale IQ does not give an accurate picture of that person's intellectual abilities. Rather, she stated, one should look at subtest and component scores. Specifically, she referred to the "enormous" range seen in his performance on the Stanford-Binet testing of 1997 (Exhibit #4), where [REDACTED] received a score of 45 on verbal reasoning, and a score of 91 on abstract/visual reasoning, which, she stated, is not typically seen with mental retardation. However, it was also her testimony that she did not give great weight to this evaluation, and indeed it was not part of her formal eligibility determination (Exhibit #8). I, too, gave Exhibit #4 little weight in reaching my decision.

In regard to the 2005 evaluation (Exhibit #5), she noted that the Appellant received scores in the borderline to average range on all but two subtests (verbal comprehension and concept formation), and scores in the borderline range in two of the three broad clusters (thinking ability and cognitive efficiency). Regarding the 2006 evaluation (Exhibit #6), she stated that because of the twelve point difference between [REDACTED] performance and verbal scores (78 versus 66), the full scale IQ (69) was of limited validity. Rather, she looked to his index scores, where he received scores ranging from extremely low to low average.

While Dr. Shook makes valid points regarding the difficulty of coming up with an accurate picture of this Appellant's cognitive abilities, if I accepted her determination that his IQ is not "significantly sub average," I would have to ignore the fact that in the two assessments that reported a full scale IQ for [REDACTED] (Exhibits #5 and 6), those scores were in the extremely low range, and that all three reports unambiguously stated that he is functioning in the mild range of mental retardation. Furthermore, if I were to put aside every evaluator's conclusion, and the full scale numbers, it would ignore, and therefore make meaningless, the Department's own standard of "significantly sub average" intelligence, which at the time of [REDACTED] application was "approximately 70

¹ Effective June 2, 2006, DMR changed its definition of mental retardation to "significant sub-average intellectual function" as defined by "intelligence indicated by a score of 70 or below..." See 115 CMR 2.00. [REDACTED] filed his appeal before the new definition was adopted.

to 75 or below." Thus, I have concluded that the Appellant's IQ is "significantly sub average."

In addition to a "significantly sub average" IQ, to qualify for DMR reports the Appellant must have 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. In her Eligibility Determination (Exhibit #8), Dr. Shook reported that [REDACTED] received scores which were two standard deviations below the norm on the Adaptive Behavior Assessment System, Second Edition (ABAS-II) in the categories of community use, home living, and social. This meets DMR's criteria in determining eligibility in the adaptive skill prong of the test.

Also, based on the report of Annmarie Linehan (Exhibit #3), a vocational counselor for the LABBB Collaborative Program, I have concluded that [REDACTED] has limitations in the work category severe enough to meet the Department's criteria. Exhibit #3 was dated May 16, 2007. At that time she had worked with the Appellant for four years. Her report reflects her assessment of his performance at three separate work sites. She wrote as follows:

"At each of these (3) locations, [REDACTED] requires continual supervision and a structured environment with clear expectations. He is capable of performing varied tasks, but is unable to complete them due to a rigid, inflexible nature and an inability to work cooperatively with others. He is easily frustrated and becomes angry at co-workers easily. He cannot work without complaint in environments that have noise of any sort, in particular when others converse. He wants preferential seating in all workplaces (to be seated as far away from others as he can). He also has preferred tasks, and is often unwilling to perform non-preferred tasks. [REDACTED] frequently screams at co-workers when, for example, he feels they are annoying him, making noise, or sitting in a seat that he prefers to sit in. He does not work well in a group setting and has never been a strong team member for work tasks

[REDACTED] does not initiate familiar tasks or set up his work area unless cued to do so. Without continual prompts throughout the day, he would complete very little work. With the current support he does receive, his production rate is only approximately 30 per cent at each of his work settings."

Based on his ABAS scores discussed by Dr. Shook in her Eligibility Determination (Exhibit #8), and the assessment of his work skills by Ms. Linehan (Exhibit #3), I have concluded that in addition to having an IQ that is "significantly sub average", he has related limitation in the adaptive skill areas of community use, home living, social, and work. Therefore, I find that he is eligible for DMR services.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, I find that the Department's determination that the Appellant did not have "significantly sub average intelligence" was incorrect. 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.


At the time [REDACTED] applied for DMR services, DMR had adopted the American Association on Mental Retardation (AAMR) standards as the clinical authority to which it referred 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 include 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 criteria (a) and (b) before the age of 18.

There is no dispute that the Appellant meets the first criterion and I specifically find that he meets that criterion. In addition, for the reasons discussed above, I find that he meets the second and third criteria as set forth at 115 CMR 6.03.

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: 11/13/07


Deirdre Rosenberg
Hearing Officer